
CANADA / JUDGMENT

Leitch v. Leitch

2020 BCSC 1061

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Supreme Court of British Columbia

DECIDED

17 July 2020

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2020 BCSC 1061 Leitch v. Leitch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leitch v. Leitch,

2020 BCSC 1061

Date: 20200717

Docket: E092206

Registry: Vancouver

Between:

Michelle Lorraine Leitch

Claimant

And

Bruce Thomas Leitch

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

In Chambers

Counsel for the Claimant:

M. Hoseini

Counsel for the Respondent:

D.P. Kuhn

Place and Dates of Hearing:

New Westminster, B.C.

October 2 and November 12, 2019

Place and Date of Judgment:

Vancouver, B.C.

July 17, 2020

Introduction

- [1] Following a Notice of Application filed by the respondent, Mr. Leitch, in May of 2019, hearings were held before me on October 2 and November 12, 2019.
- [2] Mr. Leitch was seeking the following orders:
1. An order cancelling all arrears of spousal support owed by the respondent to the claimant in the within matter;
 2. In the alternative, an order rescinding para. 13 of the Final Order;
 3. An order cancelling all arrears of child support owed by the respondent to the claimant in the within matter;
 4. In the alternative, an order varying paras. 5-8 of the Final Order of Mr. Justice Truscott dated August 31, 2012 ("the Final Order"), such that:
 - a. The respondent pay to the claimant child support in accordance with his income as set out in para. 14 of the Factual Basis herein;
 - b. The appropriate child support payment be determined therefrom, and retroactively adjusted;
 - c. The respondent's share of the special/extraordinary expenses be as determined by the parties' respective incomes; and
 - d. The respondent be relieved of the responsibility of paying for the extraordinary expenses as set out in paras. 7(a), (b) and (e) of the Final Order.
 5. A declaration that Brandon Booker Thomas Leitch is no longer a child of the marriage;
 6. An order varying the Final Order such that commencing June 1, 2019 the respondent pay to the claimant child support in the amount of \$279 per month for the benefit of Peyton Maceo Parker Leitch until Peyton is no longer a child of the marriage;
 7. A declaration that as of July 1, 2019, there are no arrears of spousal support or child support;

8. A declaration that the fine under para. 26 of the Final Order has been paid;
 9. An order cancelling any and all penalties, interest or default fees owed by the [respondent] with respect to the support arrears; and
 10. Costs.
- [3] Regarding the application that Brandon is no longer a child of the marriage, Ms. Leitch agrees he was no longer a child of the marriage as of April 2019. Prior to that date, Brandon had been attending Vancouver Island University on a full-time basis after turning nineteen years of age.
- [4] Regarding all other orders sought by Mr. Leitch, I dismissed all of those orders with brief oral reasons for judgment on November 2, 2019, advising the parties that if they wished more detailed reasons, they may make application for written reasons for judgment. I received an application for reasons from counsel for Mr. Leitch on November 18, 2019 which I deliver herewith.

Summary of Facts

- [5] The parties were in a 20 year relationship, including marriage, and separated in 2009. There were two children of the marriage, Brandon, 21 years old as of July 2020 and Peyton, who is currently 18 years old, turning 19 years old in September.
- [6] Ms. Leitch commenced this proceeding in July 2009 and Mr. Leitch filed a Statement of Defence in August 2009.
- [7] A summary trial was scheduled to be heard on August 31, 2012 and Mr. Leitch was served with materials in support of the summary trial. Mr. Leitch did not respond in any way to the application for a summary trial nor did he appear at the hearing on August 31, 2012 before Mr. Justice Truscott. In the absence of Mr. Leitch, Mr. Justice Truscott pronounced a lengthy and detailed Final Order, the terms of which included:
- 1) An income of Ms. Leitch of \$81,000 and an income imputed to Mr. Leitch of \$136,281;
 - 2) Sole custody of the children to Ms. Leitch,
 - 3) Joint guardianship;
 - 4) A detailed arrangement for parenting time for both parents;
 - 5) Child support payable by Mr. Leitch of "\$1,936 per month for so long as the Children remain children of the marriage as defined by the Divorce Act (Canada) or further court order";
 - 6) An order that Mr. Leitch pay 63% of the Children's special and extraordinary expenses of \$33,075.48 per annum with details of those expenditures;
 - 7) An order for payment of a lump sum payment of \$11,425.88 to Ms. Leitch for retroactive special and extraordinary expenses;

- 8) Spousal support by a lump sum amount of \$50,000;
 - 9) A division of family assets and liabilities; and
 - 10) An order for payment of a fine of \$5,000 by Mr. Leitch pursuant to s. 92(1) of the Family Relations Act, and costs of the summary trial.
- [8] Based upon correspondence attached to affidavits of Ms. Leitch in support of the summary trial, Mr. Leitch was provided with notice of the summary trial on several occasions. He did not appear at the Judicial Case Conference scheduled early in this proceeding and he did not respond to requests for documents in support of his income and other matters.
- [9] Following the summary trial and notice of the order of Mr. Justice Truscott being sent to Mr. Leitch, Mr. Leitch failed to pay any child support. In December 2012, Ms. Leitch enrolled the Final Order with the Family Maintenance Enforcement Program ("FMEP"). Following enrollment with FMEP, in the following four and one-half years, Mr. Leitch made only one payment of \$302.29 in 2013.
- [10] On October 3, 2016, Mr. Leitch appeared in the Provincial Court of B.C. on an application by FMEP which resulted in orders for Mr. Leitch to make two payments of \$500 plus \$313 per month "towards his maintenance obligation, with the balance owing towards the arrears, to provide updated financial information to FMEP, leave to apply to vary his child support and special expenses obligation and that if he defaults on any one payment set out in the order, he be imprisoned for three days saving his ability to show cause".
- [11] Subsequently, Mr. Leitch paid a lump sum payment in February 2017 of \$15,100 at a point in time when he was in arrears of support amounting to \$84,588. The payment of \$15,100 was made by Mr. Leitch in order to gain his release from incarceration for failing to pay support.
- [12] On January 18, 2018, Mr. Leitch applied to this court to vary the order of Mr. Justice Truscott. That application came for hearing before Justice Gropper who gave oral reasons for judgment on that day. I quote from portions of the Oral Reasons for Judgment of Justice Gropper:
-
- [5] There have been a series of enforcement proceedings before the British Columbia Provincial Court involving the Family Maintenance Enforcement Program ("FMEP"). The current arrears as calculated by FMEP are \$284,780.66, which includes spousal and child support, interest and penalties.
- [6] Mr. Leitch says that he cannot afford to pay arrears or the continuing obligation regarding child support. In October 2017 and in his material before me he provides two financial statements. They are incomplete. Neither have been filed. The first claims he has no income whatsoever and the second provides income tax records that show his income between \$2,000 and \$10,000 per year.

[7] Mr. Leitch describes himself as self-employed. He says he provides advice to start-up companies. He says he works full time but does not receive payment or remuneration. That [is] entirely dependent on the success of the start-up companies, and up to now, there has been no success. This has been Mr. Leitch's employment pursuit for some time, even before the 2012 order.

....

[9] Dealing with the threshold test, that is a material change in circumstances, Mr. Leitch has not argued that. His argument is that the court order that imputed his income as it did, was not reflective [of] his circumstances. Again, Mr. Leitch chose not to disclose any material or to attend court when the matter of child support was adjudicated.

[10] I cannot find that there has been a material change in circumstances. It appears Mr. Leitch has engaged in his line of work for some time, although I do not know because the financial statements are inadequate.

[11] I find that his lack of employment is long-lasting in that he has engaged in work that does not pay. That is his choice, but cannot be the basis of reducing or cancelling arrears or varying an existing order for child support. I have no evidence about efforts Mr. Leitch made to earn money since 2012, over five years ago.

[12] There is no legal or factual basis upon which I can reduce or vary the ongoing child support, nor cancel or vary the arrears. The application is dismissed.

[13] Since the decision of Justice Gropper, the arrears have continued to accumulate. The only payments made by Mr. Leitch for support were nine payments of \$313 each in 2018, two lump sum payments of \$5,000 each and one payment of \$490.32, all in 2018.

[14] Payments of \$339 per month were made from October 2018 to February 2019 with one further payment of \$116.62 being made in March 2019.

[15] Currently, Mr. Leitch is in arrears of support in an amount exceeding \$300,000.

Analysis

The Legal Test for an Order Cancelling Arrears or Amending Child Support

[16] Mr. Leitch relies on s. 17 of the Divorce Act, R.S.C. 1985, c. 3, in the legal basis of his application:

Order for variation, rescission or suspension

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

Factors for child support order

- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Factors for spousal support order

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

- [17] The onus is on Mr. Leitch to establish a change in circumstances, and that the change is material. As set out in *L.M.P. v. L.S.*, 2011 SCC 64:
- [30] In our view, the proper approach under s. 17 to the variation of existing orders is found in *Willick v. Willick*, [1994] 3 S.C.R. 670, and *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370. Like the order at issue in this case, *Willick* (dealing with child support) and *G. (L.)* (dealing with spousal support) involved court orders which had incorporated provisions of separation agreements. Both cases were decided under s. 17(4) of the Divorce Act, the predecessor provision to s. 17(4.1).
- [31] *Willick* described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.
- [32] That "change of circumstances", the majority of the Court concluded in *Willick*, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688)
- [18] Mr. Leitch also refers to s. 174 of the Family Law Act, S.B.C. 2011, c. 25, which governs the reduction or cancellation of arrears:

Reducing or cancelling arrears

174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

- (2) For the purposes of this section, the court may consider

- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.
- [19] The leading case relating to reduction or cancellation of child and spousal support arrears which has been referred to on multiple occasions is *Earle v. Earle*, 1999 BCSC 283, 3 B.C.T.C. 334. In *Earle*, Justice Martinson reviewed and commented on the most common arguments made by parties seeking to cancel or reduce arrears.
- [20] In *P.L. v. J.D.L.*, 2013 BCSC 1492, Justice Fleming had this to say:
- [21] The legal principles applicable to any application regarding child support and cancellation or reduction of child support arrears were discussed by Madam Justice Martinson in *Earle* With respect to child support generally, those principles are: parents have a joint and ongoing legal obligation to support their children; it is the child, not the parent, who has the right to support; and the payment of child support is based on the ability of the parent to pay, not only what the parent earns. The result of this last principle is that parents have a legal obligation to earn as much as they are reasonably capable of earning to meet their obligation to support their children (*Earle and G.(S.) v. W.(G.)*, 2006 BCSC 991 (CanLII).
- [22] With respect to variation applications, the applicant must establish a material change of circumstances since the original order was made. The change must be significant and long lasting. A change to the Guidelines amount is not automatic: *Earle*.
- [23] The cancellation or reduction of arrears is a form of variation. Madam Justice Martinson in *Earle* found the test under the Family Relations Act, R.S.B.C. 1996, c. 128 [which was the legislation in effect at the time this order was made] which required that arrears not be reduced or cancelled unless it would be grossly unfair not to do so, is similar to the one to be applied under the Divorce Act. The "grossly unfair" test has been found appropriate for consideration on a variation application under the Divorce Act [in certain cases].

[24] In Earle, Madam Justice Martinson clarified there is a heavy onus on those arguing they cannot pay because their financial circumstances have changed. Arrears will only be cancelled or reduced where detailed and full financial disclosure under oath is presented that shows:

- i. The change was significant and long lasting;
- ii. The change was real and not one of choice; and
- iii. Every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.

[21] The Court of Appeal has broken these considerations into a two-part test. Per MacCarthy v. MacCarthy, 2015 BCCA 496:

[54] The factors to be considered in granting an order cancelling arrears are set out in Burgie v. Argent, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": Semancik v. Saunders, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".

Discussion and Conclusion

[22] So, the starting question, both relative to the application to reduce or cancel arrears and the application to vary child support, is whether there has been a material change in circumstances since the original order was made in 2012. As stated in my oral reasons, I have no doubt that the applicant, Mr. Leitch, has not met the threshold of a material change in circumstances since the date of the original order.

[23] Mr. Leitch deposed in his affidavit #3 dated May 17, 2019 that "I did not complete my taxes from about 2000 to 2013".

[24] Justice Gropper was abundantly clear in her reasons of January 18, 2018 that there had been no change of circumstances from 2012 to January 2018, so it was up to Mr. Leitch in this application to establish a material change in circumstances since January 2018 from the circumstances as they were in 2012.

[25] Based upon the evidence before me, Mr. Leitch continues as a consultant to start up companies, sometimes referred to as "penny stock" companies. He deposes to having earned a basic, almost nominal salary of \$29,980 in an F8 Financial Statement made May 17, 2019 but has not provided a copy of his T1 Income Tax return for 2018. In an affidavit made by Rebecca Morris, a legal assistant in the law firm representing Mr. Leitch, a Notice of Assessment for 2018 dated June 25, 2019 assessed his income at \$30,395 and found income taxes owing of \$7,023.27. Mr. Leitch deposes that in the years 2014 to 2016 his income was

\$10,000, \$8,000 and \$18,913 respectively.

- [26] Between 2014 and May 2018, Mr. Leitch has failed to disclose any bank accounts into which he would be presumed to have deposited payroll cheques. He admitted that he had no bank accounts in that period and opened his current bank account at the Royal Bank in May of 2018 into which he deposited cheques of \$8,000 on June 8, 2018 and \$4,000 in July 2018. Since that time, he deposed to having been paid \$3,000 per month less expenses.
- [27] Mr. Leitch has deposed that for some of the companies he has worked with over many years, including Citadel LED Lighting Inc., the company "tried" to pay him \$1,500 per month. He added that when he was paid, he received cash because he had no bank account and for many months, Citadel had no money to pay him.
- [28] Regarding other employment, Mr. Leitch deposes that when Citadel was struggling financially, he "discovered" a beverage company in Arizona called Alkaline 88 and took on a non-paying position, referring to himself as an "independent contractor". He stated, at para. 37 of his 3rd affidavit made May 17, 2019:

... My role may become paid if they set up in operations in Canada and I am hopeful that will happen in the future. My role is to help Alkaline break in to the Canadian market. Right now, they have no operations in Canada. I am putting in approximately 10 hours per month into my work for Alkaline for no compensation.

Mr. Leitch also deposed to being a director of Alkaline.

- [29] Mr. Leitch deposed in the same affidavit (paras. 38 and 39) that in April 2018 he "took on a role" with a company called Nanopeak Solutions Inc., a California company, where he earns \$3,000 per month less expenses as a management consultant. He deposed that on joining Nanopeak, he received 750,000 shares valued at \$.005 each but adds there is not yet a market for the company shares.
- [30] What Mr. Leitch failed to disclose in his 3rd affidavit was that he was reported to be the president of Nanopeak and spokesman for the company which he admitted in his 5th affidavit after publications were attached to an affidavit filed on behalf of the claimant. In his F8 Financial Statement he admitted to being a shareholder in Nanopeak and attaches "nominal" value to the same.
- [31] Attached to an affidavit of Doris Nadan made September 20, 2019 are several documents obtained by the claimant and her solicitors online which purport to relate to shareholdings and financial dealings of Mr. Leitch with several companies over many years. Exhibit "B" to that affidavit is a copy of a press release from the Globe and Mail dated September 6, 2019 relating to the future profitability of public companies in the legal cannabis ("CBD") market and includes, at p. 3 a report by Mr. Leitch as President of NanoPeak Solutions Inc. referring to "the significant emerging market opportunity of having the ability to deliver CBD in a form that allows for greater absorption and enhanced bioavailability. . . ." and continues to describe processes with which NanoPeak has "the ability to offer the highest quality

ingredients to be used in CBD products of all types".

- [32] Exhibit "C" of the Nadan affidavit attaches a further online printout from an organization called "Canadian Money" relating to NanoPeak Solutions and quotes from Mr. Leitch as president regarding positive future prospects for NanoPeak which was in the process of "currently raising gross proceeds of up to \$1,000,000 through a non-brokered private placement of up to 10,000,000 units at \$0.10 per unit".
- [33] In his affidavit #5, Mr. Leitch responded to the affidavit of Ms. Nadan and confirms some of the information contained in the attachments to the Nadan affidavit regarding companies known as The Alkaline Water Company and Aryon Holdings Corp. He deposed in his affidavit #5 that he has shares in neither company (which are public companies) that he has "continued on as an independent director of the merged company" (i.e. Alkaline Water Co.), which he deposes was losing over \$6 million in 2018. He further deposed he has served as an advisor and has given advice to Aryon and that he has received no income from either company in exchange for his efforts and advice.
- [34] It is acknowledged that the Globe and Mail press release and the many other documents attached to Ms. Nadan's affidavit regarding other companies in which Mr. Leitch has been or continues to be involved amount to hearsay in its raw state. The documents attached to Ms. Nadan's affidavit and other affidavits filed by Ms. Leitch represent research which purports to proffer evidence conflicting with statements of Mr. Leitch as to his involvement in several public companies located in Canada and the United States and contradict statements by Mr. Leitch or include relevant information on Mr. Leitch's financial activities not disclosed in his affidavits.
- [35] The principled approach to the hearsay rule permits evidence which would previously have been excluded to be admitted if the evidence is necessary to a hearing and is reliable. I also refer to R. 10-4(12) and (13) of the Supreme Court Family Rules, B.C. Reg. 169/2009, and my power to grant leave in this regard. In this case, as Mr. Leitch has been less than truthful in disclosing his financial dealings. Searching out evidence as has been done by Ms. Leitch is necessary to assess the credibility of Mr. Leitch and based upon my review of those documents, they appear to be reliable. The need to search the internet for such information is made necessary due to the lack of disclosure both past and present by Mr. Leitch. Regardless, I reiterate that the onus to establish a material change in circumstances remains on Mr. Leitch. Even considering only Mr. Leitch's evidence, and ignoring the evidence tendered by Ms. Leitch, I conclude he has not met this onus.
- [36] I conclude that Mr. Leitch has been grossly underemployed and indicates no intention of changing his occupation as a consultant to start-up public companies. He stated, at para. 40 of his affidavit #3 of May 21, 2019:

I have worked almost exclusively as a consultant for "start-up" companies my entire working life. I have no plans to do any other job than the consulting work that I have always done. However, I have always loved what I do. I am passionate about start-ups and working with people who have great ideas but need guidance and support. Unfortunately, the pay has never been that good.

[37] Considering the lack of effort on the part of Mr. Leitch to use his talents (he agrees he is often sought out for advice on start-up companies) and his reluctance to disclose his remuneration, whether in the form of salary, consulting fees or the sale of shares, I see no material change in circumstances which would justify the orders sought by Mr. Leitch, save that his sons are no longer children of the marriage as referenced earlier in these reasons. All other applications are dismissed.

[38] Even if I am wrong and there has been a material change in circumstances, I find Mr. Leitch has not been forthcoming in disclosing the fruits of his labour with several companies over many years, is underemployed in that he continues in the same business for no or minimal payment and has consistently failed to disclose particulars of his financial situation.

[39] Costs of this application go to Ms. Leitch on an average degree of difficulty under the Supreme Court Family Rules.

"Jenkins J."

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