

CANADA / JUDGMENT

McAllister v. McAllister

2011 BCSC 353

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Supreme Court of British Columbia

DECIDED

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2011 BCSC 353 McAllister v. McAllister IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: McAllister v. McAllister, 2011 BCSC 353 Date: 20110324 Docket: E052421 Registry:

Vancouver Between: Doris June McAllister Plaintiff And: Dale William McAllister Defendant

Before: The Honourable Mr. Justice D.M. Masuhara Reasons for Judgment In Chambers Counsel for the Plaintiff: S.A. Schwartz Counsel for the Defendant: M. Menkes Place and Date of Hearing: Vancouver, B.C. February 17, 2011, February 21, 2011 and March 8, 2011 Place and Date of Judgment: Vancouver, B.C. March 24, 2011

Introduction

- [1] There are several matters before me arising from the continuing dispute between these former spouses whose relationship dissolved several years ago.
- [2] The first is to deal with the findings and recommendations of Registrar Blok (as he then was) regarding the quantification of spousal and child support arrears owing, if any, by Mr. McAllister. The reference to the registrar was pursuant to my order of November 8, 2007.
- [3] The second set are those of Mr. McAllister who applies for the following:
- (a) to have T, the son of the parties, declared that he is no longer a child of the marriage in the sense that he is not entitled to child support. Mr. McAllister seeks to have such a declaration made retroactive to June 16, 2008 when the application was first filed, or, alternatively, adjusting child maintenance to an amount which takes into consideration T's ability to contribute to his own financial needs.
 - (b) a credit against arrears from March 1, 2009 to September 3, 2009 and any further payments made since.
 - (c) to have his spousal support obligation reduced to \$250 per month.
- [4] The third set are those of Ms. McAllister, now Ms. Watson, who applies for the following :

- (a) spousal support based on her being unemployable with no annual income and an annual income imputed to Mr. McAllister of \$72,000. She also seeks spousal support retroactive to March 2009.
 - (b) child support on a retroactive and continuing basis.
 - (c) the payment by Mr. McAllister of dental expenses incurred by their son of \$7,045.
 - (d) the payment of a medical services plan outstanding account of \$1,188 from Mr. McAllister.
 - (e) proof that Mr. McAllister has named as equal irrevocable beneficiaries, the two children of the marriage, T and E, until they reach the age of twenty-five, under his CIBC Life Insurance Policy pursuant to the consent order made by Master Baker on March 20, 2006; and if not to have Mr. McAllister comply with the order.
- [5] She says that Mr. McAllister should also be found to be in contempt for failing to pay spousal and child support pursuant to consent orders.

Background

- [6] The parties began cohabiting in about 1986 and married on June 8, 1987. The marriage produced two children, T and E. Ms. Watson brought two children into the marriage from a former relationship, a daughter and son.
- [7] The parties separated on June 7, 2005.
- [8] An order for divorce was granted November 8, 2007.
- [9] Mr. McAllister has since remarried. His spouse has recently moved from full-time to part-time work while she awaits knee surgery.
- [10] Mr. McAllister is a millwright and works in Vernon. He is presently 47 years old.
- [11] Ms. Watson cared for the children of the marriage and the children from her previous relationship full-time. It appears that the marriage was traditional in the sense that Mr. McAllister worked and generated income for the family and Ms. Watson took on the responsibility for raising the children and being a homemaker. She is presently 58 years old.
- [12] Mr. McAllister during the course of the marriage was able to obtain the training and experience to become a qualified millwright.
- [13] T is the son of the marriage. He is presently 21 years old. He works full-time and has done so since September 2007.
- [14] There have been various appearances over the years to deal with matters arising from the breakdown of the marriage. The majority have been over finances. Three key orders has arisen as a result:
- (a) Consent order of Curtis J. on October 13, 2005;

(b) Consent order of Master Baker on March 20, 2006; and

(c) My Order on November 8, 2007.

[15] The parties have had a continuing dispute over spousal and child support.

[16] In November 2007 I directed a reference to the Registrar to determine the quantum of child and spousal support arrears owed by Mr. McAllister.

[17] On January 12, 2010, Ms. Watson filed an application which included the payment of spousal support retroactive to March 2009.

[18] On August 19, 2010, the parties appeared before Registrar Blok (as he then was).

[19] On September 15, 2010 the Registrar's report and recommendations were issued. The periods he reviewed were October 1, 2005 to March 1, 2006; April 1, 2006 to November 8, 2007; November 8, 2007 to March 26, 2010; and March 26, 2010 to August 19, 2010. He found that the total amount of spousal and child support arrears owing by Mr. McAllister to Ms. Watson, calculated to August 19, 2010, exclusive of interest was \$20,891.24. He further recommended that the additional payments totalling \$8,160 paid by Mr. McAllister to Ms. Watson's daughter, K, who was caring for Ms. Watson in 2005 and 2006, be considered in Mr. McAllister's favour in any application for reduction in arrears. Discussion

[20] I will address the issues in this order:

(a) the Registrar's findings and recommendations regarding arrears.

(b) whether T remains a child of the marriage.

(c) the level of spousal support to which Ms. Watson should be entitled.

(d) dental, medical expenses and other matters.

1. Registrar's Report

[21] I see no reason to divert from the Registrar's findings and recommendations. Accordingly, I find that the arrears as calculated to August 19, 2010, taking into consideration the payments made by Mr. McAllister to Kellie Sherritt, is \$12,731.24.

2. Is T a child of the marriage?

[22] T turned 19 years old in June 2008. The person asserting a person is still a child of the marriage has the onus of proof.

[23] Mr. McAllister application to have T declared that he is no longer a child of the marriage is dated September 2009. He had withdrawn an earlier application dated November 2007 for such a declaration.

- [24] The evidence that supports the assertion that he is a child of the marriage for child support purposes is Ms. Watson's statement that T has had to postpone school to pay his dental bills. There is also T's statement contained in his affidavit that: During the time I was laid off [from February 27, 2009], I considered possible options for my future, such as going back to school. I was very interested in the Veterinarian Program. However, due to the fact that I had incurred the cost of my braces, and was not receiving any money for that from my father, those plans have been put on hold. I found myself in financial hardship and my eldest brother...gave me a part time job.... Now that I have my driver's license I am working full time.
- [25] I also note that Mr. McAllister has deposed that T was working full-time since about September 2007. Presently T works full-time and earns an annual income of approximately \$28,300 per year.
- [26] In my view the evidence is not sufficient to establish that T is still a child of the marriage. I say this having regard to the limited evidence to support the proposition. There no evidence of a specified plan for post-secondary education, just thoughts of possible options. No application materials or even information of a course of study has been identified. There is reference only to a Veterinarian Program. There are no school transcripts that would demonstrate that he is qualified to attend a post-secondary course of study. Further, in the circumstances, T would be expected to make some contribution to his education. There is no evidence as to student loans, scholarships, or bursaries which T would seek to obtain or the savings and other resources that he may have available to help fund a post-secondary education.
- [27] I also find that it unfortunate that there is an estrangement between son and father which T says in his affidavit of February 2010 has existed for four years. One consideration in awarding support is the nature of the relationship between the parent from which support is sought and by the person seeking support.
- [28] In the circumstances, I am of the view that at this point, T is not a child of marriage. However, if he is able to demonstrate at some future point greater specifics, that application can be brought on by T.
- [29] Mr. McAllister seeks to have my finding retroactive to June 16, 2008, T's 19th birthday. However, by virtue of my order on November 8, 2007, Mr. McAllister consented to pay child support beyond March 1, 2009. His application for the subject declaration was made in September 2009. Accordingly, Mr. McAllister is entitled to credit for child support payments made from September 2009.

3. Spousal Support

- [30] Mr. McAllister submits that Ms. Watson is capable of working. He notes that the there are only two passages in her affidavits that deal with her circumstances. The first is her statement in her affidavit that says: "I am 57 years of age and have no skills whatsoever.

There is no work for a woman of 57 with no skills." and the second is her statement that she has cancer but does not provide any details as to its severity or to the extent that it affects her ability to find employment. In one affidavit sworn December 11, 2009, Ms. Watson deposes that "I have a history of skin cancer and, at present, my health is in question." In the same affidavit, Ms. Watson does not speak of being unable to work because of her cancer; rather, she refers to her age as the barrier to finding employment.

- [31] I accept that a person of her age has greater hurdles in obtaining employment; however, the bold statement that there is no work for a person of her age is not so. I also find difficulty with her statement that she has "no skills whatsoever." The evidence in the proceeding before me that led to my rulings in 2007 as reflected in my reasons of November 8, 2007 was that Ms. Watson had obtained employment as a baker for IGA in 2006 or 2007 but gave it up to care for a grandchild. Further, the evidence of Mr. McAllister is that Ms. Watson at the time of marriage had owned and operated her own strata property maintenance business.
- [32] There is also no evidence of efforts on the part of Ms. Watson to obtain employment counselling or to seek some form of training. There are various programs available for people such as Ms. Watson. Ms. Watson also put forth in the most recent affidavit (after all evidence was received except for Mr. McAllister's income) a list of employers that she has applied to for employment. However, there is little behind this list, such as the dates of the applications, copies of applications, or the name of the contact person, or communications back from the employers.
- [33] There is only one recent document that Ms. Watson has put forth in support that there is some medical evidence that she is not able to work. It is a one sentence hand written note that from her physician which states: "Doris was evaluated and found not to be for [sic] to work" dated July 6, 2010. The meaning and context of this note is not explained. The only evaluation that is in the materials is that written by her physician dated October 2005, to Ms. Watson's then counsel, that says that she has been under stress and suffers from depression. The doctor notes vertigo and high blood pressure but states that these conditions have improved considerably. The physician opines that she expects full recovery from depression and that once her medical condition improves that Ms. Watson could be trained for the work force.
- [34] It is submitted that the evidence is not sufficient to relieve her of the obligation of becoming self sufficient and that some level of income needs to be imputed to Ms. Watson. It is further submitted that Ms. Watson at a minimum can generate income through "home stays" for students, as she has done so for several years in the past.

- [35] Though I can understand that Ms. Watson has suffered as a result of the failure of the marriage and has had health challenges, I am of the view that the evidence does not demonstrate that she has taken adequate steps to become employable and find employment. Ms. Watson should focus more attention on becoming self-sufficient. I find that a reason level of annual income taking into consideration the information that I have of Ms. Watson is \$21,000.
- [36] Mr. McAllister's reported annual employment income has been as follows: Year Amount 2007 \$71,881.61 2008 \$79,572.47 2009 \$72,580.17 (Mr. McAllister disabled due to hockey December 2009) 2010 \$50,390.26 (does not include short term and long term disability benefits) 2011 \$13,281.20 to February 12, 2011 (which includes overtime)
- [37] Ms. Watson submits that his annual income should be determined to be \$72,000 for spousal support purposes. I agree.
- [38] The Spousal Support Advisory Guidelines indicates for a marriage having the duration of the parties and at the income levels that I have found the range is as follows: low \$1,148; mid \$1,339; and high \$1,530; and that such support would be indefinite.
- [39] In my view, the mid range is reasonable. Accordingly, Mr. McAllister will pay as spousal support the monthly amount of \$1,400.
- [40] In terms of the retroactive effect of the spousal support, Ms. Watson seeks that the order for support should extend back to March 2009.
- [41] However, the consent order from the proceeding before me in November 2007 specified that spousal support would cease on March 1, 2009, subject to further court order on application made by Ms. Watson. The application was to be delivered by Ms. Watson on or before February 1, 2009. She says that she did not seek a review of spousal support then because she did not have the funds to retain counsel to conduct the review and was only able to take further action as a result of the involvement of Mr. Schwartz who is acting pro bono. Her application for review was only filed January 12, 2010.
- [42] On March 26, 2010, the parties appeared before me. The order arising included an interim order that the Mr. McAllister pay child maintenance of \$575 on April 1, 2010 and May 1, 2010, and to pay spousal support of \$900 on the 15th of each month for six months commencing April 15, 2010. It appears that several of these payments were not made by Mr. McAllister and that his counsel candidly stated that he can make no submission as to a lawful excuse on behalf of Mr. McAllister.
- [43] Given the circumstances, I am of the view that Ms. Watson was able to make her application earlier than she did. Though Mr. Schwartz's involvement is helpful and laudable, Ms. Watson should have taken earlier action. Mr. McAllister's spousal support should be effective as of January 1, 2010. He became disabled through a hockey injury in 2010 and that his employment income is stated to be approximately \$50,400, this amount does not include his disability benefits. As a result, for the period February 1, 2010 through December 31, 2010,

Mr. McAllister's income for 2010 should be imputed to be \$60,000. Ms. Watson's income is to be imputed to be \$21,000. Mr. McAllister returned to full-time work about September 2010. Effective January 1, 2011, monthly spousal support will be set at \$1,340.

[44] I will expect counsel to calculate then the spousal support payable for 2010. Mr. McAllister is to receive no credit for payments made in 2010 due to his failure to make all payments required pursuant to my order.

4. Dental and Medical Expenses

[45] Ms. Watson seeks an order that Mr. McAllister reimburse T for \$7,045 related orthodontic expenses that he incurred. The initial exam for this dental work was in September 2008. The treatment was estimated to be over twenty-two months.

[46] Mr. McAllister submitted this claim to his health insurer; however, the claim was denied as a result of his age.

[47] Ms. Watson says that T has had to work and forgo a post-secondary education as a result of his dental expenses. As per the evidence discussed regarding whether T remained a child of the marriage, the evidence does not support this conclusion.

[48] It is apparent that Mr. McAllister knew that T was making the commitment for the dental treatment. There is no evidence that Mr. McAllister cautioned his son that he would not be paying the dental expenses. The October 13, 2005 consent order specifies that Mr. McAllister is to maintain Ms. Watson and T on medical and dental insurance until further order of the court. The March 23, 2006 consent order specifies that Mr. McAllister is to pay for the medical and dental costs for T not covered by insurance. Mr. McAllister was provided the information regarding T's course of treatment at latest in September 2008 and submitted his claim to his dental insurer. This last order further specified that spousal and child maintenance would be reviewable on March 13, 2009. Further, my order of November 8, 2007 states in paragraph 11 that the order "only varies the terms of the Consent Order as to manner of payment of spousal and child maintenance as specified...and that all terms of the Interim Order and Consent Order remain in place."

[49] Given the circumstances, Mr. McAllister should be responsible for the dental expenses incurred by T and is required to pay him directly the amount of \$7,400. Mr. McAllister is to pay T this amount over the next twenty-four months plus interest.

[50] In my March 26, 2010 order, I also required Mr. McAllister to pay the medical services plan arrears of Ms. Watson up to the date of the order on such schedule and terms as may be negotiated between the Medical Service Plan and the parties. For some reason it appears that negotiations have not occurred. It would appear to me that Ms. Watson has the direct responsibility to deal with the Medical Services administrators and that she has not done so. She needs to do this. When the result is known, then Mr. McAllister will be required to make the payments on the terms as negotiated by Ms. Watson, whatever that result may be.

Conclusion

- [51] The Registrar's recommendations are accepted. There is an outstanding amount for arrears of \$12,731.24 plus interest.
- [52] Mr. McAllister is required to pay the amount outstanding for arrears less any credits arising from this ruling to Ms. Watson in equal monthly amounts over the next twelve months. The first of such payments is to start April 1, 2011.
- [53] Mr. McAllister is ordered to pay monthly spousal support to Ms. Watson of \$1,340 effective January 1, 2011.
- [54] I also find that monthly spousal support to Ms. Watson effective January 1, 2010 to December 31, 2010, should be based on annual income of \$60,000 attributable to Mr. McAllister and an annual income of \$21,000 attributable to Mr. Watson.
- [55] T is declared to no longer be a child of the marriage for support purposes from September 2009. However, he is not precluded from bringing a further application for support. Mr. McAllister is entitled to a credit against arrears for child support payments made from September 2009.
- [56] Mr. McAllister is ordered to reimburse T for his orthodontic expenses of \$7,045 to T. The payments will be made over twenty-four monthly equal payments. The payments will commence the first of April 2011.
- [57] Ms. Watson is to negotiate with the Medical Services Plan administrators a schedule to pay the arrears sufficient to be eligible for service under the plan. Mr. McAllister will be required to make the payments as negotiated.
- [58] Mr. McAllister is ordered to provide proof that the two children of the marriage, T and E, have been made irrevocable beneficiaries of his CIBC Life Insurance Policy as per the terms of the order of Master Baker within 10 days of this ruling. If this has not been done, then Mr. McAllister is required to do so immediately with proof of having done so being provided to Ms. Watson.
- [59] The parties are directed to exchange financial information (including income tax returns and notices of assessment) annually not later than May 31st.
- [60] Failure on the part of Mr. McAllister to meet his obligations as set out in this ruling will result in consequences which will take into consideration Mr. McAllister's less than satisfactory past performance in meeting his obligations under previous orders of this court. "The Honourable Mr. Justice Masuhara"

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