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CANADA / JUDGMENT

## Moore v. McLachlan

2016 BCSC 2234

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COURT

Supreme Court of British Columbia

DECIDED

30 November 2016

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2016 BCSC 2234 Moore v. McLachlan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moore v. McLachlan,

2016 BCSC 2234

Date: 20161130

Docket: E090606

Registry: Vancouver

Between:

Travis Alexander Moore

Claimant

And

Stacey McLachlan

Respondent

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Claimant:

In person assisted by his mother

Rebecca McDiarmid

Counsel for the Respondent:

In person

Place and Date of Hearing:

Vancouver, B.C.

October 31, 2016

Place and Date of Judgment:

Vancouver, B.C.

November 30, 2016

## Introduction

- [1] The parties engaged in what they refer to as a common law relationship from 2003 to 2006.
- [2] The parties' daughter to whom I will refer to as "MRM" was born on November 2, 2005.
- [3] In October 2010, Mr. Justice Curtis heard a nine-day trial with respect to the custody and guardianship of MRM, and access to her by whomever was not found to be the custodial parent. Rebecca McDiarmid was a respondent by counterclaim at that trial. Curtis J. also heard issues concerning ongoing child support, extraordinary expenses, and arrears of child support. In reasons for judgment indexed at 2010 BCSC 1525, Curtis J. made findings of fact and determined those issues as follows:
  - [4] Travis Moore and Stacey McLachlan met when they were attending high school in Maple Ridge when they were about 14 years old. They began living together in a room in Ms. McLachlan's parents' basement about 2004 when Mr. Moore was about 21 and Ms. McLachlan, about 20. At that time, they were both using drugs such as, cocaine, ecstasy, marihuana and alcohol, and spent a lot of time in bars. Mr. Moore, in addition to his employment, was a drug dealer with connections to the Hells Angels with many people working in the drug business under his control. The relationship was volatile and ended with a final separation in the summer of 2006 when [MRM] was about eight months old. Mr. Moore, at that time was employed as a deck hand with Hodder Tugs and worked a two week on and two weeks off schedule. He had at that point lost his driver's licence for impaired driving. During his two weeks off, he continued his drug dealing business and the associated lifestyle.
  - [6] Mr. Moore had significant access to his daughter in the early period of separation despite Ms. McLachlan's allegations concerning his lifestyle. He lived in an apartment building near Ms. McLachlan's brother and [MRM] would spend three or more nights with him on his weeks off. Mr. Moore and Ms. McLachlan agreed that he would pay \$500 per month for [MRM]'s support and this continued for some time.

- [10] On June 20th, 2007, Judge Steinberg of Provincial Court made an interim order granting sole custody and guardianship of [MRM] to her mother, imputed to Mr. Moore an income of \$60,000 per year on the basis of which child support of \$561 per month was ordered commencing July 1, 2007 and granted Mr. Moore reasonable access. Mr. Moore never paid any of the child support ordered, and as of April of 2009 when [MRM] came into his care owed arrears of \$11,414.68.
- [11] On June 25, 2007, Mr. Moore applied for DNA comparison for paternity, drug testing for both parties, an order changing the custody arrangement and an order to adjust support to reflect his correct income. On August 8, 2007, an order was made reducing child support to \$503 per month on an imputed income of \$54,000 to commence July 1, 2007. On October 9, 2007, the result of the paternity testing having been received, an order was made declaring Mr. Moore the father of [MRM].
- [20] Stacey McLachlan took her daughter [MRM] to Ontario without any notice to Mr. Moore February 22, 2009. She testified that her initial intention was only to go for a vacation. However that may be, she telephoned Rebecca McDiarmid on February 24, 2009, the day Mr. Moore's next access visit was scheduled for and told her that she was in Ontario and would not be coming back. She also testified that she told Rebecca McDiarmid she wanted [MRM] to have a relationship with her father and that she would bring her back regularly to see him. She did not however give Ms. McDiarmid the address where she was staying and Ms. McDiarmid had to hire a private detective, at considerable expense to find her granddaughter in Ontario.
- [22] Mr. Moore commenced the present family law proceeding in the Supreme Court March 2, 2009. Master Bishop of this court heard an application to grant Mr. Moore interim sole custody of [MRM] on March 11, 2009. No order was entered from that proceeding but the clerks' notes record: "Direction: Return to Provincial Court or have Provincial Court file transferred to SCBC; serve the defendant with notice of application." There is no evidence that Stacey McLachlan actually received any notice of any court proceedings prior to the date [MRM] was apprehended from her in April 2009. What did occur was that Mr. Moore obtained, with the assistance of counsel, an order dated March 17, 2009 in the Provincial Court of British Columbia in which it was ordered that Stacey McLachlan should immediately return [MRM] to British Columbia, Travis Moore would have interim sole custody, that [MRM] should reside in Rebecca McDiarmid's home, and spend every night at her residence, and that Stacey McLachlan be served substitutionally at her hotmail e-mail address. There is no evidence whether or not this was done or that the matter was brought to her attention by e-mail.
- [23] On April 24, 2009, Mr. Moore obtained an order from the Ontario Supreme Court of Justice, Family Civil Branch, Dundas, Ontario without notice to Stacey McLachlan stating that his daughter had been wrongfully removed from the Province of British Columbia, that Stacey McLachlan return [MRM] to Rebecca McDiarmid for immediate transport back to British Columbia, that Ms. McLachlan pay \$2,025 in travel costs and that Travis Alexander Moore

shall have temporary custody of the child, who as ordered in the Provincial Court of British Columbia should reside and spend every night in her grandmother's home.

- [4] After reviewing the evidence and determining MRM's best interests, Curtis J. gave sole custody and guardianship to Mr. Moore, so long as he continued to reside with Ms. McDiarmid, until otherwise ordered. He also found as follows with respect to Mr. Moore's support claim for MRM:
- [49] Mr. Moore never made any of the support payments ordered. As of April 1, 2009, he was in arrears for \$11,414.68 for accumulated payment, defaults and interest. He has of course been unemployed since September 15, 2007 [when he suffered a gunshot wound to the head], and for part of the subsequent time, been in receipt of long term disability payments and CPP. I think it appropriate to fix Mr. Moore's Guideline income from October 1, 2007 to April 1, 2009 at what he is now receiving in CPP and disability payments, namely \$37,000. Mr. Moore's arrears from July 1, 2007 to September 1, 2007 at \$503/month are (3 x \$503) \$1,509, and from October 1, 2007 to April 1, 2009 on a Guideline income of \$37,000 per year with a payment of \$343 are (19 x \$343) \$6,517 for a total of \$8,026. I fix Mr. Moore's arrears of child support to the date his daughter was placed in his care at \$8,026. The order that Mr. Moore pay child support is cancelled as of May 1, 2009.
- [50] Stacey McLachlan has not paid any child support since [MRM] was placed in Mr. Moore's care. She has however, only made \$5,757 from that time to October 2010 and in addition has been paying \$40 an hour to see [MRM]. In those circumstances, I find that there should be no arrears of child support to the present time. She is now earning \$10.40 per hour for a 40-hour week. That amounts to an annual income of about \$22,000 per year, which is what I find her Guideline income to be. Ms. McLachlan shall pay child support of \$200 per month commencing November 1, 2010.
- [51] With respect to special expenses qualifying as such they shall be shared in proportion to the parties' Guideline income as I have determined them from November 1, 2010 onward until otherwise agreed or ordered. Payment for a special expense is due upon production of an appropriate receipt for that expense and shall only be a proportion of the net expense if partial reimbursement of the expense can be recovered from another source.
- [53] The parties may address the issue of the costs of this action. I order that the \$8,026 in arrears I have found owing by Mr. Moore shall not be paid or otherwise enforced until the issue of the costs of this action has been decided.

#### The Present Application

- [5] The respondent now applies for orders that:
1. Order 15 of the judgement of the Honourable Mr. Justice Curtis made on November 1, 2010 that child support owed by Travis Alexander Moore "shall not be paid or otherwise enforced until the issue of costs of this action has been decided" be varied.

2. Arrears of child support owed by Travis Alexander Moore to Stacey McLachlan, in the amount of \$8,026.00, shall be paid within 7 days of being served with this order.
3. No costs hearing shall take place with regards to the Family Law Case, of which judgement was pronounced on November 1, 2010;
4. Alternatively to Order [sic] #3, all parties to the Order made by the Honourable Mr. Justice Curtis made on November 1, 2010, shall bear their own costs.
5. Stacey McLachlan be awarded costs for this application, payable forthwith by Travis Alexander Moore.

### The Positions of the Parties

- [6] The applicant is a low income earner. She contends that as a result of the claimant's unwillingness to have costs assessed in this matter, triggering his obligations to pay her, she has fallen into financial hardship. This has caused great prejudice to her.
- [7] She asserts that she has fallen behind in her own Family Maintenance Enforcement Program ("FMEP") payments and that as a result, her driver's licence has been revoked and she is unable to obtain a passport. This has affected her ability to work.
- [8] The respondent contends that the claimant does not consult her when making decisions about special expenses for MRM, making such decisions unilaterally instead, including MRM's enrolment at the Sylvan Learning Centre, skating classes, and seminars. She further contends that the claimant does not allow her to attend MRM's skating activities, and still will not tell her when or where her extracurricular activities are taking place.
- [9] The claimant contends that his costs of the trial that ultimately took place before Curtis J. were exacerbated by the conduct of the respondent who had nine months' notice to prepare for trial, but refused all enquiries from the claimant and later his counsel regarding whether she was representing herself, or retaining counsel. He submits that the respondent did not provide a List of Documents, nor a List of Witnesses, nor Witness Summaries prior to the scheduled September 13, 2010 trial date. He contends that on that date, an order made by Madam Justice Loo adjourned the trial, set a new date for October 10, 2010, ordered the respondent and her counsel to provide all the respondent's documents and lists no later than October 5, 2010 to the claimant and his counsel, and adjourned the issue of costs of the adjournment to the trial judge.
- [10] The claimant further contends that the respondent owes him \$10,000.00 plus 4% interest accruing from the date of the order in 2009 based on a Registered Order of the Ontario Superior Court in London, Ontario for the costs associated with the respondent's removal of MRM to Ontario without notice or permission, together with the sum of \$2,025.00 to reimburse the claimant for travel expenses to retrieve MRM and return her to BC. This order has yet to be entered in this Court.

- [11] The claimant further contends that the respondent has refused to pay any child support for five years and is in arrears of \$10,820.56 to the FMEP. He says that she was warned in writing in 2013 that she would lose her driver's licence privileges and her passport if she continued to resist the FMEP's enforcement efforts.

## Discussion

- [12] What was referred to by the respondent as "Order 15 of the judgement of the Honourable Mr. Justice Curtis made on November 1, 2010" is in fact the portion of his order, made on November 1, 2010, stating that "[t]he arrears of child support owing by Travis Alexander Moore, fixed at \$8,026.00, shall not be paid or otherwise enforced until the issue of costs of this action has been decided."
- [13] At the date of the decision of Curtis J., subrules 14-1(9) and 14-1(12) of the British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009 provided:
- (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
  - (12) Unless the court hearing an application otherwise orders,
    - (a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and
    - (b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.
- [14] The same costs principles set out in R. 14-1(9) and 14-1(12) of the Supreme Court Civil Rules are also found respectively in R. 16-1(7) and 16-1(9) of the Supreme Court Family Rules, B.C. Reg. 169/2009, which were in effect at the date of the decision of Curtis J. Rule 16-1(7) and 16-1(9) applies to the determination of costs in a family matter.
- [15] It is unclear why Curtis J. did not award costs based upon what appears to be the parties' success, but he clearly intended that the parties, including Ms. McDiarmid, would make submissions with respect to the costs of the proceedings. None of the parties have done so, to date, and no appeal was taken from that or any other order made by Curtis J. The applicant has not identified any basis upon which that particular order was made which would justify its variation by me, and I decline to order such a variation.

- [16] In my view it was implicit in the order of Curtis J. with respect to costs, that one or more of the parties would set the matter for hearing before him within a reasonable time. That has not occurred, but that omission or failure cannot, in my opinion, justify the order sought by the respondent for payment of the amount of \$8,026.00 within 7 days, contrary to the order made by Curtis J. and I decline to make such an order.
- [17] I also decline to order that no costs hearing take place with regard to the proceedings before Curtis J. for the same reasons that I decline to set aside his order with respect thereto.
- [18] What the respondent referred to in the notice of application as "Order #3", I assume was meant to refer to what is set out above as the third relief sought. I am not prepared to grant an order that the parties bear their own costs of the proceedings up to and including those before Curtis J. at this stage. To do so would be to ignore the imbalance in the success of the parties, including Ms. McDiarmid.
- [19] But as I have already indicated, it was implicit in the order of Curtis J. that one or more of the parties would set the matter of costs for hearing before him within a reasonable time. As none did so, I do not consider that any should be able to take advantage of that omission or failure as yet.
- [20] Curtis J. has now retired from the Court. In the result, I order that unless one or more of the parties bring an application to resolve the matter of the costs of the proceedings up to and including the hearing before Curtis J. before a judge of this Court within one month of the date of these reasons for judgment, each of the parties will have to bear his or her own costs. That will resolve the issue of costs and commence the claimant's obligation to the respondent for arrears in the amount of \$8,026.00. For greater clarity, the application need not be heard within one month of the date of these reasons, but a hearing date must be set within that month, or the consequences I have set out will occur. Should no application be brought within the month, I order that the sum of \$8,026.00 be recognized by the FMEP to reduce the arrears owed by the respondent.
- [21] The parties will bear their own costs of the application before me.

"The Honourable Chief Justice Hinkson"

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