

CANADA / JUDGMENT

Moyna v. Moyna

2017 BCSC 1908

COURT

Supreme Court of British Columbia

DECIDED

24 October 2017

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2017 BCSC 1908 Moyna v. Moyna IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Moyna v. Moyna, 2017 BCSC 1908 Date: 20171024 Docket: 14-0599 Registry: Victoria Between: Michael Thomas Moyna Claimant And: Aura Helena Moyna Respondent Before: The Honourable Mr. Justice Crossin Reasons for Judgment The Claimant Appearing in Person: M. T. Moyna The Respondent Appearing in Person: A. H. Moyna Place and Date of Trial/Hearing: Victoria, B.C. October 17, 2017 Place and Date of Judgment: Victoria, B.C. October 24, 2017

- [1] Mr. and Ms. Moyna married on February 24, 2007. They divorced in March 2017. The application before me is an application brought by Ms. Moyna for the following orders:
1. Mr. Moyna pay to Ms. Moyna arrears of child maintenance in the sum of \$4,356 on or before the 15th day of October 2017.
 2. Costs.

Background

- [2] The parties are the parents of Sean Riley Moyna, born January 5, 2008 and Claire Siobhan Moyna, born June 17, 2010. On August 11, 2016, the parties entered into a consent order outlining their joint parenting responsibilities.
- [3] The salient portions for the purpose of this application are: Child support is based on a shared parenting arrangement with the parties setting off their respective Guideline amount of child support payable. Based on 2014 tax assessments, [Mr.]Moyna currently pays [Ms.] Moyna child support for the Children in the amount of \$729.00 per month by the first of every month.
- [4] Para. 4 of the consent order states: The parties shall exchange notices of assessment for the previous year's income tax return no later than June 30th of each year. Child support owing for the following 12 months will be based on the parties' Line 150 incomes and the adjusted amount will commence July 1 of each year for the following 12 months.
- [5] Para. 5 of the consent order states: The next review will take place on or before June 20th, 2016 and the adjusted child support will take effect July 1, 2016.

- [6] Mr. Moyna paid Ms. Moyna child support payments in the amount of \$729 per month as contemplated in the order up to the end of June 2016, at which time the order contemplated a review would occur.
- [7] Mr. Moyna says he attempted to contact Ms. Moyna eight times during the period between July 2016 and February 2017 in order to obtain her required tax information, but without success.
- [8] During the period between July 2016 and February 2017, Mr. Moyna continued to pay \$729 contemplated for the pre-review period.
- [9] Ms. Moyna did not provide her 2015 tax documents until June 7, 2017.
- [10] Ms. Moyna claims, in this application, that based upon her review of the tax information, Mr. Moyna should have been paying \$1,092 per month, and therefore he owes \$4,356 in child support.
- [11] In May 2017, Mr. Moyna deposited \$5,000 into a Registered Educational Savings Plan ("RESP") for the benefit of Sean and Claire.
- [12] Mr. Moyna currently pays \$932 in child support per month. He commenced paying this amount in July 2017. The Position of the Parties
- [13] Ms. Moyna seeks a retroactive support order covering the 12-month period between July 2016 and June 2017. This period comprises the time between when the order contemplated Mr. Moyna's support should have been recalculated, and the time in which Mr. Moyna actually began paying increased support. Ms. Moyna says he should have paid \$1,092 per month for the 12-month period between July 1, 2016 and June 30, 2017 (\$13,104). He paid only \$729 per month during this period (\$8,748). Ms. Moyna seeks the difference of \$4,356.
- [14] Mr. Moyna contends that because Ms. Moyna took no steps, or no timely steps, to provide her tax information as required in the consent order, he is not obliged to pay her retroactive payment.
- [15] In the alternative says Mr. Moyna, that if a retroactive support payment is ordered, the order should be made from the date that Ms. Moyna asked for it; namely, June 2017. This would mean a retroactive support payment for a period of one month (because Mr. Moyna began paying an increased support payment in July 2017).

Analysis

- [16] The leading authority on how courts should approach the issue of retroactive child support orders is *D.B.S. v. S.R.G.*, 2006 SCC 37. The factors to consider when determining whether retroactive child support should be granted are:
- 1) whether there is a reasonable excuse for why support was not sought earlier;

- 2) the conduct of the payor parent;
 - 3) the circumstances of the child or recipient spouse; and
 - 4) any hardship occasioned by a retroactive award on the payor spouse. Whether there is a reasonable excuse for why support was not sought earlier
- [17] Ms. Moyna concedes she did not provide her tax information in a timely fashion. This delay unfolded notwithstanding Mr. Moyna attempting to solicit the required information from her on several occasions.
- [18] In her submissions to the court Ms. Moyna indicated that various difficult personal circumstances, including relocating, essentially paralyzed her for a period of time.
- [19] This delay is certainly a factor the court must weigh in these circumstances.
- [20] While the Supreme Court of Canada has made clear unreasonable delay by the recipient parent is a factor to consider, child support is also the right of the child and cannot be waived by the recipient (D.B.S. at para. 40). The conduct of the payor parent
- [21] In all the circumstances that were placed before me I cannot find Mr. Moyna guilty of blameworthy conduct in the sense required in this context. The circumstances of the children
- [22] Ms. Moyna submitted the quality of living of the children suffers when they are living at her home due to her much lower income.
- [23] Ms. Moyna points to the fact that the children share a room in a small home while staying with her. Mr. Moyna submits that the quality of life for the children is more or less the same in the two households.
- [24] While the parties did not offer a complete picture of the day-to-day circumstances of the children, it is clear Mr. Moyna enjoys a substantially greater income than Ms. Moyna. It appears to me to be a matter of common sense that the quality of life of the children while in the care of Ms. Moyna would suffer if a retroactive support payment is not made.
- [25] The law in British Columbia is that even in the absence of specific evidence demonstrating a loss of benefits arising from a failure to update child support payments, to a certain degree a loss of benefits can be presumed where support has not been updated to match the increased income of the payor: *Burchill v. Roberts*, 2013 BCCA 39 at paras. 49-52.
- [26] Mr. Moyna says he has met at least his moral responsibility by pointing to the fact he placed roughly an equivalent amount of money into an RESP.
- [27] Ms. Moyna submits he did this simply out of spite.

- [28] In any event, as noted by Justice Bastarache in D.B.S. at para. 109: ... the payor parent [does not have] the right to choose how the money that should be going to child support is to be spent; it is not for the payor parent to decide that his/her support obligation can be acquitted by buying his/her child a new bicycle.
- [29] It is for Ms. Moyna to determine how to allocate these funds, not Mr. Moyna. Any hardship occasioned by a retroactive award on the payor spouse
- [30] Mr. Moyna says a retroactive payment would cause hardship. He provided little evidence to support this.
- [31] Mr. Moyna did point to the fact he has contributed \$5,000 to an RESP and now having to pay both would create hardship. The decision to create an RESP does not relieve him of his obligations to pay support for the children. This is a course he took of his own making.

Conclusion

- [32] In all the circumstances it is my view the weight of the evidence favours an order for retroactive child support.
- [33] I find the third factor compelling. The agreement entered into between the parties contemplates the level of child support being adjusted in accordance with the varying income levels of the parents. This is the fundamental approach and should be respected.
- [34] In D.B.S. the court accepted the preferred date on which to base an award for retroactive support is the date when "effective notice" was given to the payor parent of the claim.
- [35] Mr. Moyna appears to suggest that in the case at bar, "effective notice" constitutes the moment Ms. Moyna presented him with a calculation for increased child support based on their respective 2015 incomes; namely, June 2017.
- [36] With respect, this approach to "effective notice" seems somewhat artificial. Mr. Moyna had effective notice of his obligation to pay adjusted child support from the moment he entered into the consent order.
- [37] Mr. Moyna's conduct supports this conclusion. He created an RESP for the children in an amount roughly equivalent to what he expected would be the shortfall between the amount he was paying and what he expected he would have to pay under the adjusted amount.
- [38] I have concluded the date on which to base an award for retroactive support is July 1, 2016.
The Amount
- [39] After Mr. Moyna and Ms. Moyna exchanged financial information on July 7, 2017, he began paying Ms. Moyna \$932 per month.

- [40] This amount appears to be based on Mr. and Ms. Moyna's 2016 tax returns. During the 2016 tax year, Mr. Moyna apparently suffered a decrease in Line 150 income. I cannot confirm whether the \$932 amount is appropriate, because the record only contains Mr. Moyna's 2016 income documentation. Ms. Moyna's tax information is not provided in the materials before me.
- [41] For the taxation year of 2015, Mr. Moyna's Line 150 income was \$125,686. Ms. Moyna's Line 150 income was \$47,152. It is the submission of Ms. Moyna that using the requisite software in these matters, assuming shared custody of two children aged 9 and 7, the guidelines suggest support in the amount of \$1,092 monthly.
- [42] I order the amount of \$4,356 in retroactive and adjusted child support be paid by Mr. Moyna to Ms. Moyna.
- [43] During the course of submissions, Mr. Moyna offered to pay half of this amount to Ms. Moyna by way of compromising her claim. He offered this payment in three installments beginning November 1, 2017.
- [44] It is clear the court has discretion to order periodic payments as a way to soften the blow of a lump sum order. I exercise that discretion and order the lump sum payment of \$4,356 to be paid in six equal monthly installments on the first of every month commencing November 1, 2017.
- [45] Ms. Moyna is entitled to costs of this application. "D. Crossin, J." The Honourable Mr. Justice Crossin

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