

CANADA / JUDGMENT

Chesley v. Chesley

2002 BCSC 579

COURT

Supreme Court of British Columbia

DECIDED

19 April 2002

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2002 BCSC 579

Citation:

Chesley v. Chesley

Date: 20020419

2002 BCSC 579

Docket:

11097

Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LANA HOPE CHESLEY

PLAINTIFF

AND:

WILLIAM SHANE CHESLEY

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HUNTER

Counsel for Plaintiff

D. Komori

Counsel for Defendant

J. H. O'Fee

Date and Place of Hearing/Trial:

April 15, 2002

Kamloops, BC

- [1] The defendant, Mr. Chesley, applies to vary child support claiming that the two children of the marriage reside with him for more than 40 percent or more of the year. The plaintiff, Ms. Chesley, seeks an order changing her surname from Chesley to Rachev and an order that Mr. Chesley pay his proportionate share of the cost of orthodontic work for their two children. Both parties seek their costs on these applications.
- [2] The parties entered into a common-law relationship in 1985 and married on July 3, 1989. They have two children, Shannon Hope Chesley, born November 21, 1989, and Julie Taya Chesley, born February 28, 1991. The parties separated in the summer of 1995 and an order for divorce was made on August 9, 1996. That order provided that the parties have joint custody of the children with the primary residence to be with their mother, and their father to have liberal and generous access. By consent on January 6, 1997, Mr. Chesley was ordered to pay child support of \$200 per month per child, commencing September 1, 1996.
- [3] On July 3, 2001, Mr. Chesley, not having responded to Ms. Chesley's application, the court imputed an income of \$65,000 a year to Mr. Chesley and ordered that he pay the guideline amount of \$865 per month child maintenance commencing July 1, 2001.
- [4] Mr. Chesley applies under s. 9 of the Guidelines for an order reducing the amount of child support he must pay to \$400 per month.
- [5] Section 9 of the Guidelines provides:

Shared Custody

- 9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 percent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [6] Mr. Chesley applies in the alternative for an order that his child support payments to the mother be reduced to reflect child support payments made to the mother of another child of his, born of a later relationship, which monthly payment is in the amount of \$351. This child, Shaelyn Chesley-Steves was born June 8, 1998, and lives with her mother.

- [7] Mr. Chesley claims that he did not appear on the chambers application when his income was imputed because he believed that his former legal counsel was attending to that matter. I am not sure that anything turns on that explanation and it is not necessary, in the circumstances, for me to reach any conclusion on that issue. I note with some interest that the parties agree that Mr. Chesley's present annual income is \$65,000.
- [8] Mr. Chesley is a logging truck driver. His work commences each day at 4:00 a.m. and he is usually finished work by 2:00 p.m., although this can vary. He is of course off work during spring breakup. His counsel submits that the evidence discloses that he sees his children frequently both during the week and on the weekends and that his time with them through the year is 40 percent or more.
- [9] Ms. Chesley works for the Kamloops Thompson District Teachers' Association as a staff person. Her employment at that position is .6 or .7 of a full-time position. On the weekends she works in the housekeeping department at Royal Inland Hospital which often involves working into the evening on Saturdays and Sundays.
- [10] She works for the Teachers' Association from 8:45 a.m. to 2:00 p.m., Monday through Friday. She works at the hospital from 11:30 a.m. to 7:30 p.m. every Saturday and Sunday and on statutory holidays. In addition she works at the hospital five shifts per month from 3:30 p.m. to 11:30 p.m. These five shifts fall on either a Monday or a Friday, but she anticipates that she will lose these five extra shifts soon because of anticipated cutbacks at the hospital.
- [11] Ms. Chesley states that she picks up the children from school every Tuesday, Wednesday and Thursday and so she denies the evidence of Mr. Chesley that the children are at his home as early as 3:00 p.m. on school days. She states also that the maternal grandmother, who lives nearby, picks up the children on Monday afternoons in the event that Ms. Chesley is engaged in one of the five shift days per month which occur on Mondays and Fridays at the Royal Inland Hospital. The parties live within one block of each other.
- [12] Ms. Chesley states as well that her activities with the children include piano lessons for Julie on Mondays between 3:30 and 4:00 p.m., swimming on Wednesday evenings, and that the children attend the 4-H club on two Fridays a month and on those days do not go to their father until 8:00 p.m. The oldest child, Shannon, is enrolled in soccer which involves one practice a week between 4:30 and 5:30 p.m., and two games a week between 6:00 p.m. and 7:00 p.m. The other child will commence soccer this year.
- [13] Either Ms. Chesley or her mother takes Julie to her piano lessons. Ms. Chesley says that Mr. Chesley does not take the child to piano lessons. Ms. Chesley or one of the other neighbourhood parents take the children to swimming events in the evening. Ms. Chesley says that Mr. Chesley does not participate in the swimming activities. Apparently only Julie is involved in the 4-H club proceedings, but both children attend. Shannon has been involved in soccer for approximately six years and Julie commences that activity this year, although Julie attends Shannon's soccer practices because Ms. Chesley is the practice coach. Ms. Chesley agrees that Mr. Chesley has taken the children to soccer games when they occur

on days when she is working. She states as well that on some weekends the children have pre-arranged activities and they choose to stay home with her for part of the day on which that activity occurs, although she concedes that much of her weekends are spent at work. As I understand her position on this issue, it is that she concedes that the children spend most but not all weekends with their father.

- [14] With regard to summer holidays, she states that the children spend many of their summer weekends at the mother's aunt's cabin on North Barriere Lake and says as well that Mr. Chesley does not exercise extended summertime access.
- [15] It is urged on behalf of Mr. Chesley that the children spend 40 percent or more of their time each year with him. The onus of proving that, of course, lies upon Mr. Chesley. He has provided a rather elaborate description in a schedule to his affidavit dated March 5, 2002, of time that the children spent with him, although that is restricted to the months of September through December of last year. Mr. Chesley has not attempted to outline a description of time spent by the children with him during the months of January, February and March of this year, nor with regard to the other eight months of 2001. I am not satisfied on the evidence that Mr. Chesley has established that the children have spent 40 percent or more of their time over the course of the year with him. In reaching that conclusion, I found it unnecessary to consider the impact of *de Goede v. de Goede*, [1999] B.C.J. No. 330. Even if I were inclined to accept the submission made by counsel for Mr. Chesley (and I express no opinion on that) as to the interpretation of *de Goede*, I am not satisfied that it would be appropriate to make a ruling on the 40 percent factor on the basis of a four month time frame.
- [16] As to Ms. Chesley's claim that Mr. Chesley should contribute to the orthodontic expenses of the children, I note that Ms. Chesley has incurred orthodontic expenses in the amount of \$946 for braces for Shannon, and \$32.92 for a retainer for Julie. Both of these procedures have been performed without notice to Mr. Chesley with a request that he share in those expenses. There is some obligation upon a parent to apprise the other parent of such an expense before it is incurred if sharing of that cost is sought.
- [17] The mother's income is presently \$46,000 per year. The father's income, as stated, is \$65,000 a year. In those circumstances it would be appropriate for Mr. Chesley to pay 59 percent of the dental expenses. I make an order that he do so but on the following conditions, namely, that in the event that he is denied this claim by his medical/dental plan because of a delay in providing that information, and to the extent of his being able to recover those monies from the plan, there shall be no obligation upon him to reimburse Ms. Chesley. He shall apply for coverage under his medical/dental plan and pay whatever amount is recovered to Ms. Chesley and in the event that the medical/dental plan does not cover his entire share, for reasons other than the plan's denial of coverage, then he shall make up the difference by way of payment to Ms. Chesley.

- [18] Mr. Chesley's evidence was that he was supporting three children, the two children who are the subject matter of this application, and Shaelyn Chesley-Steves who was born of a later relationship with Ms. Steves. Shaelyn lives with her mother. Mr. Chesley states that he is paying child maintenance for Shaelyn in the amount of \$351 per month. Mr. Chesley's Guideline income is \$65,000 a year and accordingly his child support obligation for three children living together is \$1,133 per month. Mr. Chesley seeks, in the alternative to his 40 percent shared custody claim, to have his child support obligation to Ms. Chesley reduced to \$782 per month to reflect approximately two-thirds of his child support obligation to Ms. Chesley in the context of his evidence that he is also paying \$351 per month to Shaelyn's mother for child support. This is an application which should be made under section 10 of the Guidelines and requires that the applicant satisfy the court that he would suffer undue hardship using the test set forth in section 10. That relief is not sought on this application and accordingly I decline to make any order in that regard.
- [19] By way of summary, Mr. Chesley's application for a reduction of the amount of child support payments based on section 9 of the Guidelines fails. His application to reduce the amount of his child support obligations to Ms. Chesley to reflect his obligation to pay child support for three children fails as well for the reasons already described. Ms. Chesley's application for an order that Mr. Chesley share in the special expenses, the orthodontic expenses, is granted subject to the conditions to which I have referred.
- [20] There will be an order that Ms. Chesley's surname be changed to "Rachey".
- [21] In the circumstances Ms. Chesley will have her costs in defending against the application of Mr. Chesley. I make no order as to costs with regard to Ms. Chesley's application.

"R.B. Hunter, J."

The Honourable Mr. Justice R.B. Hunter

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