

CANADA / JUDGMENT

Claus v. Claus

2009 BCSC 1893

COURT

Supreme Court of British Columbia

DECIDED

4 May 2009

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2009 BCSC 1893 Claus v. Claus IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Claus v. Claus, 2009 BCSC 1893 Date: 20090504 Docket: 03 1570 Registry: Victoria Between: Roxanne Patricia Claus also known as Roxanne Patricia Helme Plaintiff And: Robert Clair Claus Defendant Before: The Honourable Madam Justice Adair Oral Reasons for Judgment Corrected Judgment: The text of the judgment was corrected in the citation on August 31, 2010. In Chambers May 4, 2009 Counsel for Plaintiff: B. Kitzke Counsel for Defendant: P. Freeman, Q.C. Place of Trial/ Hearing: Place and Date of Hearing: Victoria, B.C. Victoria, B.C. May 4, 2009

- [1] THE COURT: The plaintiff, Ms. Helme, who is divorced from the defendant, Mr. Claus, seeks an order requiring Mr. Claus to pay a one-half share of fees that Ms. Helme paid to send their son, Richard, who was born in April 1993, to private school in the years 2005/2006 which was grade 7, 2006/2007 which was grade 8, and 2007/2008 which was grade 9.
- [2] Ms. Helme makes this application relying on the terms of the parties' separation agreement, which I will describe in more detail shortly.
- [3] Grade 9 was the last year that Richard attended the private school, and as a result, a \$4,500 bond paid by Ms. Helme was refunded to her. That left the amount being claimed for the grade 7 and 8 years as \$12,010. I have got that right, have I not?
- [4] MR. KITZKE: Yes, My Lady.
- [5] THE COURT: Thank you.
- [6] I have not been given the amount for the grade 9 year; however, counsel for Ms. Helme does not anticipate any difficulty in having that amount paid if the court makes the order she is seeking.
- [7] Ms. Helme and Mr. Claus are parties to a separation agreement dated November 21, 2003. On December 10, 2003, the court made an order which, in addition to divorcing Ms. Helme and Mr. Claus, incorporated that settlement agreement. As a result, the terms of that agreement take on the status of a court order and so an application can be brought to enforce it.

- [8] Among other things, that agreement provided in paragraph 5: Joint guardianship, for the purposes of this Agreement, means: . . .
- (c) each party will inform the other party of any matters of a significant nature affecting Rachel and Richard;
 - (d) the parties will consult with each other about any important decisions that must be made concerning health (except emergency decisions), education, religious instruction, and general welfare of Rachel and Richard; and
 - (e) both parties must try to reach agreement concerning these important decisions.
- [9] Paragraph 6 provides: The parties shall each put the interests of Rachel and Richard before their own interests and do everything necessary to ensure that Rachel and Richard are disrupted as little as possible by their separation.
- [10] The November 2003 agreement was amended in November 2004. Paragraph 20 of the original agreement, which dealt with "special or extraordinary expenses," was modified pursuant to para. 3 of the November 2004 agreement, which provided, among other things: It is agreed that clause 20 of the separation agreement will be rescinded and that Special or Extraordinary Expenses be dealt with as follows: . . .
- d) the Mother will pay for anything in which she enrolls Rachel or Richard; . . .
 - i) the parties will pay equally for education costs including school trips, post-secondary education costs and field trips costing in excess of \$75.00;
 - j) the parties will pay equally for whatever other specials are agreed between them from time to time for Rachel and Richard.
- [11] As I mentioned, the plaintiff, Ms. Helme, relies on para. 3(i) in support of her application.
- [12] Ms. Helme's application originally came on for hearing before Mr. Justice Williams in October 2008. At that time, counsel for Mr. Claus raised a preliminary objection which touched on the interpretation of the phrase education costs in para. 3(i) of the November 2004 agreement which, he argued, should be given a restricted interpretation.
- [13] Mr. Justice Williams ruled on the preliminary objection in reasons indexed at 2008 BCSC 1523 and, in dismissing the objection, concluded, at para. 26: In the result, it is my conclusion that the term education costs, as found in the separation agreement, and by adoption, the court order of December 10, 2003 is of sufficient breadth to include the private school fees.

- [14] Counsel for Ms. Helme argues, essentially, that Mr. Justice Williams has determined the question of the interpretation of s. 3(i). Since "education costs" has been interpreted to be of sufficient breadth to include private school fees, he argues that Ms. Helme is entitled to enforcement of the agreement and an order that Mr. Claus is obligated to share the amounts paid equally.
- [15] Counsel for Mr. Claus, on the other hand, argues that Mr. Justice Williams' ruling is not the end of the matter. He argues further that the court must now go on to consider whether these private school fees properly fall within para. 3 in view of the background to the November 2004 agreement, the parties' conduct during the time in late 2004 and 2005 that they were communicating about Richard's schooling, Ms. Helme's statements to Mr. Claus that she would pay the fees if he was not prepared to (suggesting, Mr. Freeman argues, that this issue should be decided on the basis of para. 3(d) of the November 2004 agreement), and the lack of any agreement on Mr. Claus's part to pay (invoking para. 3(j) of the November 2004 agreement).
- [16] If the issue falls under para. 3(d), then Ms. Helme is not entitled to anything since she is the one who enrolled Richard in private school.
- [17] Based on the evidence, Mr. Claus went along with private school only if he did not have to pay. Therefore, if the issue falls under para. 3(j), in the absence of agreement (and there is none), Mr. Freeman argues that Ms. Helme must satisfy the criteria set out in s. 7(1) and (1.1) of the Child Support Guidelines, which she utterly failed to do.
- [18] I agree with Mr. Freeman that if this application had relied on the provisions of s. 7(1) and (1.1) of the Guidelines, it would fail. However, in my view, the application has been properly brought as one to enforce the provisions of para. 3(i) of the November 2004 agreement, and in that light, Ms. Helme does not have to satisfy the criteria under the Guidelines.
- [19] I agree with Mr. Justice Williams that the term "education costs" is sufficiently broad as to include private school fees and, specifically, to include the private school fees that were incurred for Richard's attendance at Glenlyon Norfolk School. Subsections (d) and (j) of para. 3 of the November 2004 agreement would not apply because the parties have specifically addressed in para. 3(i) how matters of "education costs" will be allocated. That Ms. Helme and Mr. Claus consulted with one another concerning where Richard would attend for middle school is a neutral fact because they were obligated to consult pursuant to the terms of the November 2003 agreement.
- [20] In the result, Ms. Helme's application is granted and Mr. Claus is ordered to pay the sum of \$12,010 plus one-half the amount of fees for the last year of Richard's attendance at Glenlyon.
- [21] MR. KITZKE: Costs, My Lady?
- [22] THE COURT: Did you seek costs in your motion?

[23] MR. KITZKE: Yes.

[24] THE COURT: Do you have any submissions on costs, Mr. Freeman?

[25] MR. FREEMAN: No, My Lady.

[26] THE COURT: Ms. Helme will recover her costs of this motion. "The Honourable Madam Justice E.J. Adair"

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