
CANADA / JUDGMENT

Dutrisac v. Ulm

2000 BCCA 334

COURT

British Columbia Court of Appeal

DECIDED

31 May 2000

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2000 BCCA 334

Citation:

Dutrisac v. Ulm

Date: 20000531

2000 BCCA 334

Docket:

V03439

Registry: Victoria

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

CARL GARY DUTRISAC

APPELLANT

AND:

KELLY ANN ULM

RESPONDENT

Before:

The Honourable Chief Justice McEachern

The Honourable Mr. Justice Esson

The Honourable Mr. Justice Hall

A. Atwood-Brewka

Counsel for the Appellant

S.J. Loney

Counsel for the Respondent

Place and Date of Hearing:

Victoria, British Columbia

April 11, 2000

Place and Date of Judgment:

Vancouver, British Columbia

May 31, 2000

Written Reasons by:

The Honourable Mr. Justice Esson

Concurred in by:

The Honourable Chief Justice McEachern

The Honourable Mr. Justice Hall Reasons for Judgment of the Honourable Mr. Justice Esson:

- [1] Mr. Dutrisac appeals an order of a appeal court judge made 25 February 1999, dismissing an appeal from a decision of a provincial court judge who had ordered him to pay a total of \$415 per month in child support to his two stepchildren. The decision under appeal is reported as *Dutrisac v. Ulm* (1999), 45 R.F.L. (4th) 225.
- [2] Ms. Ulm is the mother of two children, a daughter born 4 June 1983 and a son born 11 February 1986. Their biological father is a Mr. Charron. During the whole of that marriage, which ended in divorce in 1992, the family lived in Ottawa. Mr. Charron, who earns about \$28,000 per year as a janitor, continues to live in Ottawa. He pays \$200 per month in child support and a further \$100 on account of maintenance arrears.
- [3] The parties, both of whom are members of the Canadian Armed Forces, met in Ontario in 1990. They began to live together in September 1991 and married on 8 August 1992. They separated on 9 August 1995 and, we are told, were later divorced on the petition of Ms. Ulm. No order in respect of maintenance was sought in the divorce proceeding.
- [4] During the marriage Mr. Dutrisac fathered a son by another woman, an event which may have triggered the breakdown of the marriage. In 1995, Ms. Ulm applied in the Ontario Provincial Court for maintenance for her two children. The mother of Mr. Dutrisac's son applied in the same court for child support at about the same time.

- [5] On 15 November 1995, more than three years after the separation and after a contested hearing, Mr. Dutrisac was ordered to pay a total of \$300 per month in child support for the two stepchildren. The order provided that his obligation would cease after 46 months. Within days after that order being made, the parties consented to a different order which was written out in longhand by Ms. Ulm which raised the child support obligation to \$600 per month without provision for termination. That order was entered in December, 1995. As will appear, that curious step was agreed on by the parties as a device to make things "look better" for Mr. Dutrisac in the child support hearing regarding his son which was to be heard shortly thereafter. It appears that the actual payments made by Mr. Dutrisac to Ms. Ulm were, for a very long time, \$300 per month. Within a month of the consent order, an order was made that Mr. Dutrisac pay \$300 per month in child support for his son. At about the same time, Ms. Ulm was posted to British Columbia and as a result she and her children moved to the Courtenay area where she formed a relationship with a Mr. Schrowen. She and the children have lived with him in one household since the fall of 1997.
- [6] Mr. Dutrisac was also transferred to this province in 1996. Before that, in response to threats by Ms. Ulm to enforce the consent order, he had begun proceedings in Ontario to vary the December, 1995 order to conform to the contested order of November, 1995. On 31 July 1996, the Ontario Provincial Court provisionally granted that order and as a result the matter came before the Provincial Court of British Columbia on an application to confirm it. By the time that application was heard, the Ontario order had been "registered" here. At that point there ceased to be any connection with the Ontario proceedings.
- [7] Mr. Dutrisac's application to confirm the Ontario order came on for hearing before Lazar P.C.J. on 14 April 1998, which was the day upon which the Child Support Guidelines Regulation enacted under the Family Relations Act, R.S.B.C. 1996, c.128 came into effect. That Regulation effectively incorporated the Federal Child Support Guidelines into the Family Relations Act although with a number of changes in wording to conform with certain terminology and provisions of the Family Relations Act which differ from those in the Divorce Act. The method of incorporating those differences is an awkward one which requires the reader to go through the federal guidelines substituting the requisite provincial language for that in the guidelines. As one example, the word "spouse" must be deleted and replaced with the word "parent". Counsel have provided us with a "translation" of the two relevant paragraphs of the federal guidelines. They read as follows:

CHILD SUPPORT GUIDELINES Person in the Place of a Parent [5] Where the person against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that person, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

Undue hardship

10(1) On either parent's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the parent making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship. Circumstances that may cause undue hardship

- (2) Circumstances that may cause a parent or child to suffer undue hardship include the following: (a) the parent has responsibility for an unusually high level of debts reasonably incurred to support the parents and their children prior to the separation or to earn a living; (b) The parent has unusually high expenses in relation to exercising access to a child; (c) the parent has a legal duty under a judgment, order or written separation agreement to support any person; (d) the parent has a legal duty to support a child, other than a child of both of the parents who are the parties to the application, who is [1] under the age of majority, or [2] the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessities of life; and (e) the parent has a legal duty to support any person who is unable to obtain the necessities of life due to an illness or disability. Standards of living must be considered
- (3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the parent who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other parent. Standards of living test (4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison household standards of living test set out in Schedule II. Reasonable time (5) Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time. Reasons (6) Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so.

[8] The definition of "parent" in s.1(1) of the Family Relations Act reads:

"parent" includes [1] a guardian or guardian of the person of a child, or

[2] a stepparent of a child if

[1] the stepparent contributed to the support and maintenance of the child for at least one year, and [2] the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child.

Subsection (2) provides:

For the purpose of paragraph (b) of the definition of "parent" in subsection (1), a person is the stepparent of a child if the person and a parent of the child [1] are or were married, or

- [2] lived together in a marriage-like relationship for a period of at least 2 years and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender.
- [9] In the course of the hearing, Judge Lazar heard evidence from Mr. Dutrisac, Ms. Ulm and Mr. Schrowen. On the question of the reason for the original maintenance order having been varied by consent in December, 1995 the judge accepted that even on the evidence of Ms. Ulm it was clear that the consent order was a "ploy" and that Ms. Ulm had not expected to be paid more than \$300 per month. She therefore cancelled the arrears of \$7,800 which had accumulated on the basis that Mr. Dutrisac was required to pay \$600 per month. The judge heard extensive evidence as to the circumstances of the parties. Ms. Ulm and Mr. Schrowen had then been cohabiting for only six months. The evidence indicated that he was making no direct contribution to the children but was, by sharing the household expenses, making an indirect contribution. As the judge observed, he then had no legal duty to make a direct contribution. She rejected the submission that six months cohabitation was sufficient to establish that the relationship would endure and pointed out that Mr. Schrowen would not have an obligation to the children until two years had gone by.
- [10] The evidence indicated that Mr. Dutrisac, Ms. Ulm and Mr. Schrowen (also a member of the Armed Forces) each had a gross income of about \$45,000.00 so that, if the Ulm-Schrowen liaison were to be regarded as a household, the household income would be about double that of Mr. Dutrisac. The judge made reference to a number of matters which appeared from the evidence:
 - a) the extraordinary expenses of the two stepchildren, particularly their orthodontic expenses;
 - b) Mr. Dutrisac was paying child support for his son;
 - c) Mr. Schrowen did not have a legal duty to the children, since he and Ms. Ulm had only been living together for 6 months;
 - d) the payments of \$200 per month made by the biological father, Mr. Charron, were "about the most we are going to get out of him at this time"; and
 - e) the combined income in the Ulm-Schrowen household divided by 4 was considerably less than Mr. Dutrisac's income, even after deducting the child support payments.
- [11] The judge had regard to the child support guidelines and determined that, on the basis of Mr. Dutrisac's salary, the amount to be paid was a total of \$615 per month. She ordered him to pay commencing May 1, 1998 the sum of \$415 per month, i.e., the guideline figure reduced by the \$200 being paid by Mr. Charron.
- [12] The judge declined to set a termination date on the payments. She noted that Mr. Dutrisac could seek relief under the "undue hardship" clause of the guidelines if circumstances were to change in the future.
- [13] Mr. Dutrisac's appeal to the Supreme Court was based on three grounds:

- a) there was no termination date for the child support;
- b) the amount was not reduced by the contributions of Schrowen; and c) the provincial court judge erred in finding that Charron could not be expected to pay more child support.

[14] The appeal was heard on 8 January 1999. On that hearing, the appellant introduced evidence as to changes of circumstances since the Provincial court hearing. They included the fact that Mr. Dutrisac in 1998 entered into a common-law relationship and that a child was born to that relationship in September, 1998. At the time of the Supreme Court hearing, Mr. Schrowen and Ms. Ulm continued to live together with her two children. The income figures remain about the same although there have been some raises.

[15] The appeal court judge reserved decision. While the decision was under reserve the decision of the Supreme Court of Canada in *Chartier v. Chartier*, [1999] 1 S.C.R. 242, S.C.J. No. 79 (Q.L.) was pronounced on 28 January 1999. Considering that that case might be on point, the appeal court judge invited written submissions which were delivered before he gave judgment dismissing the appeal. He based his decision almost entirely on *Chartier* and by so doing, in my respectful view, was led into error, if not in the final result, at least in the legal basis for his decision.

[16] *Chartier* arose in Manitoba. The parties agreed that the wife's claim against the husband, who was a stepfather to her children, should be dealt with under the Divorce Act. The wife sought a declaration that he stood "in the place of a parent" to the child. The significance of those words is that s.2(2) of the Divorce Act provides that a child of two spouses or former spouses includes:

- [2] any child of whom one is the parent and for whom the other stands in the place of a parent.

The Manitoba courts held that a spouse who stands in the place of parent is entitled to withdraw from that status at any time and therefore gave effect to Mr. Charter's unilateral repudiation of his obligation to the child "as a child of the marriage".

[17] Bastarache J. for the court said in the first paragraph of his reasons that:

In this appeal, the Court is asked to determine whether a person who stands in the place of a parent to a child within the meaning of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), can unilaterally give up that status and escape the obligation to provide support for that child after the breakdown of the marriage. The Court unanimously decided that a person cannot do so and allowed the appeal at the hearing held on November 12, 1998. The basis of the decision is that the doctrine of *loco parentis* which once prevailed cannot now be used as a guide for defining the words "in the place of a parent" in the Divorce Act, and so a stepfather cannot terminate his parental obligations to a stepchild by unilateral repudiation.

[18] The court set out a catalogue of factors which should be taken into account in determining whether a stepparent stands "in the place of a parent". The appeal court judge in this case gave extensive consideration to the question whether, on the basis of that catalogue, Mr.

Dutrisac at the time of his marriage to Ms. Ulm acquired the status of standing "in the place of a parent". The judge's consideration of that issue was, with respect, misconceived. Mr. Dutrisac did not purport to end his obligations to the stepchildren by a unilateral repudiation of that position. Nor did he dispute the fact that he had such obligations. His position was simply that the time had come to relieve him in whole or part of the obligation to pay child support for the stepchildren.

- [19] It should also be noted that Mr. Dutrisac's status as "parent" qua his stepchildren comes, for the purpose of this proceeding, from the definition of "parent" in the Family Relations Act. That statute differs from the Divorce Act in employing the more straightforward and perhaps more arbitrary approach of declaring a stepparent to be a parent once he or she has contributed to the support and maintenance of the child for at least one year.
- [20] The appeal court judge appeared to read Chartier as precluding the court from reducing the level of child support being paid by a stepparent. He referred to Chartier in para. 42 of his reasons as seeming to "overrule" the result in *Sharratt v. Green* (1995), 11 R.F.L. (4th) 386 (B.C.S.C.), *aff'd* (1997), 27 R.F.L. (4th) 38 (B.C.C.A.), a case in which this court upheld the decision of Mr. Justice Thackray holding that a stepfather who had paid substantial maintenance to a child for a number of years should no longer be required to contribute to her maintenance.
- [21] The appeal court judge also referred to the decision of this court in *Beatty v. Beatty* (1997), 33 B.C.L.R. (3d) 247 (B.C.C.A.). In that case, in ordering a reduction of child support to be paid by a stepfather, Southin J.A. for the court said:

The question of the extent to which someone who is not a parent either by blood or adoption should continue to be held responsible, perhaps for years, for children who may have no interest in him or her at all and whose natural parent may have acquired a new spouse, is a troubling one which appears to be arising more frequently and is deserving of more than cursory attention. It is not a question to be answered by the "blunt instrument" approach.

After quoting that passage, the appeal court judge said in para. 41 of his reasons that the Supreme Court of Canada had "... answered that the parent should continue to be held responsible".

- [22] In my view, Chartier has no effect on the issue dealt with in cases such as *Sharratt* and *Beatty*. In holding that a person who stands in the place of a parent cannot unilaterally terminate that status, the Supreme Court said nothing about the power of a court, under either the Divorce Act or provincial legislation, to grant a reduction of the amount of child support required to be paid by a stepparent. In my view, nothing in Chartier would preclude an order reducing the quantum of the obligation to zero if, in all the circumstances, that was found to be appropriate.
- [23] Perhaps because he viewed Chartier as a conclusive authority, the appeal court judge made no reference to the provincial guidelines which, in combination with the definition of "parent" in s.1 of the Family Relations Act, governs the issues in this case. Section 5 of the

guidelines (quoted *supra*) requires the court, in dealing with the obligation of a stepparent, to have regard to "any other parent's legal duty to support the child". At the time the matter came before the appeal court judge, Ms. Ulm and Mr. Schrowen had not lived together in a "marriage-like relationship" for two years and so Mr. Schrowen was still under no legal obligation to contribute.

- [24] I will digress here to note a potentially confusing aspect of the wording employed in s.5 of the provincial guidelines. The phrase "stands in the place of a parent" in the federal guidelines makes sense in that context because it is the defining language which renders a stepparent a "parent". It would, in my view, have been greatly preferable had the provincial version of s.5 employed language to the effect that "the person" to whom s.5 applies is a stepparent who, in the language of s.1 of the Act, became a "parent" by contributing to the support and maintenance of the child for at least one year. It cannot have been the legislative intention, by retaining the words "stands in the place of a parent" to require the court to have regard to the catalogue of criteria in *Chartier* rather than the straightforward test in s.1 of the Family Relations Act. I therefore conclude that a stepparent "stands in the place of a parent", for the purposes of s.5 of the provincial guidelines if he or she meets the test of having contributed for at least one year.
- [25] I said earlier that the decision of the appeal court judge may not be in error in the result. That result was the dismissal of the appeal from the provincial court. In my view, Judge Lazar did not err in fixing maintenance at \$415 per month. She was required to have regard to the guideline amount. She made an appropriate adjustment to reflect the fact that the natural father was paying \$200 in discharge of his legal duty to support the children. I see no error in her conclusion that there was no reason "at this time" to think that Mr. Charron could pay more. She correctly held that Mr. Schrowen at that time had no legal duty to the children.
- [26] However the appellant urges us to consider fresh evidence which was introduced before the appeal court judge and was supplemented to some extent in this court. From that, it appears that Mr. Schrowen has had a legal duty to the children since sometime in the fall of 1999 and is in a position to contribute to their maintenance and support. That factor alone might well justify a substantial reduction in the amount being paid by Mr. Dutrisac. Indeed, it appears from the fresh evidence that Mr. Dutrisac applied in the provincial court in September, 1999 and that Judge Graham, considering himself precluded by the appeal from dealing with the variation application, granted a stay for any amount in excess of \$300 per month pending the hearing of this appeal.
- [27] The fresh evidence also indicates that, since the provincial court hearing, Mr. Dutrisac's circumstances have changed substantially by reason of his common-law marriage and the birth of a child. Mr. Dutrisac's spouse, it appears, does not work outside the home. The present circumstances may well establish a case of undue hardship under s.10 of the guidelines which would justify reducing the amount to be paid by Mr. Dutrisac, perhaps to zero. I put it that way to emphasize that the question is not whether his status as stepparent

has come to an end. Even were his obligation to be reduced to zero, the status would continue so that, should circumstances change in the future, he might again be required to contribute.

[28] Sympathetic as I am to the submission that this court should deal with the fresh evidence as to change in circumstances rather than leaving the appellant to pursue his rights in the provincial court, I conclude that it would be inappropriate to do so. Virtually all of the fresh evidence comes from the appellant. The confusion which has beset this matter flows primarily from the appellant's election to appeal the decision of Judge Lazar rather than, as that judge suggested, applying in that court for a variation when the circumstances changed. If further proceedings are necessary, they should be in the trial court where both sides can be heard in the usual way.

[29] There should, however, be some recognition of the circumstance that this appeal was brought about by the erroneous application in the appeal court decision of Chartier. That being so, I would dismiss the appeal and remit the matter to the provincial court with each party to bear their own costs of this appeal.

"THE HONOURABLE MR. JUSTICE ESSON"

I AGREE:

"THE HONOURABLE CHIEF JUSTICE McEACHERN"

I AGREE:

"THE HONOURABLE MR. JUSTICE HALL"

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