

CANADA / JUDGMENT

Parastoo v. Chrustie

2020 BCSC 668

COURT

Supreme Court of British Columbia

DECIDED

30 April 2020

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2020 BCSC 668 Parastoo v. Chrustie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Parastoo v. Chrustie ,

2020 BCSC 668

Date: 20200430

Docket: E181848

Registry: Vancouver

Between:

Shirazi Parastoo also known as Parastoo Shirazi

Claimant

And

Calvin William Chrustie

Respondent

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Claimant:

L. Branson

Counsel for the Respondent:

S. Parhar

Place and Date of Hearing:

Vancouver, B.C.

March 5, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2020

- [1] These reasons address a notice of application filed by the respondent, Calvin Chrustie ("Respondent"), in this family law matter. The application seeks an order of divorce under s. 12 of the Divorce Act, R.S.C., 1985, c. 3.

I. Introduction

- [2] The claimant, Shirazi Parastoo ("Claimant"), filed her Notice of Family Claim on July 6, 2018 ("NFC").
- [3] The parties married on September 4, 2010, and separated on September 30, 2016. Theirs was the second marriage for both.
- [4] Ms. Parastoo has a daughter from her first marriage, Roz Khalizadeh ("Roz"), born December 29, 2000. While the parties were together, Roz lived in part with them in their family home and in part with her biological father, Keyvan Khalizadeh, and/or his parents.
- [5] The NFC seeks a divorce, child support for Roz, spousal support and various determinations in relation to family property and family debt. Child support payments and special or extraordinary expenses are sought in accordance with the child support guidelines, retroactive to the date of separation. The child support claim is made under both the Divorce Act and the Family Law Act, S.B.C. 2011, c. 25.
- [6] A judicial case conference was held in the matter on September 13, 2018. It was agreed that a trial would be set for hearing in the late spring of 2019. The Claimant's lawyer omitted to file a notice of trial. It is undisputed that the omission was inadvertent. On May 8, 2019, a notice of trial was filed for a five day hearing to start May 11, 2020.
- [7] The matter at hand is the Respondent's February 18, 2020, summary trial application, brought under R. 11-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009, seeking judgment on an issue. The substantive relief sought is an order of divorce, leaving the corollary issues under the NFC to be determined at trial.

- [8] The application is said to be urgent as the Respondent intends to remarry and is concerned that his elderly parents be able to attend the ceremony. The Respondent's mother is 88 years old and has serious health issues, although she was stabilized at time of the hearing. His father is 93 years old and suffers from severe dementia. The Respondent attests that both parents have indicated to him their desire to attend the wedding. The Respondent wishes to be able to commit to wedding arrangements for a date to be set in "this late summer or fall".
- [9] The application is opposed by the Claimant. She asserts that s. 11(b) of the Divorce Act presents a bar that cannot be overcome on the evidence before the Court:

Duty of court -- bars

11 (1) In a divorce proceeding, it is the duty of the court

- (b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made;

- [10] The Respondent concedes for purposes of this application (but not for trial), that he stood in the place of a parent to Roz during the parties' marriage and that Roz, although 19, continues to be a "child of marriage" while pursuing a four year Motion Film Arts Degree through Capilano University ("Film Program").
- [11] Thus, as noted by counsel for the Claimant, the threshold question here is whether I am satisfied on the evidence that there are reasonable arrangements in place for Roz's support as required under s. 11(b) of the Divorce Act.

II. The Evidence Before the Court

A. Respondent

- [12] The Respondent says that at the outset of his relationship with the Claimant, Mr. Khalizadeh expressly indicated to him that Roz was his (Mr. Khalizadeh's) daughter and financial responsibility. The Respondent says Mr. Khalizadeh asked him to respect that fact. The Respondent attests that Mr. Khalizadeh, the Claimant and Roz "all supported this approach and definition of roles and financial responsibilities," and that throughout the parties' marriage, Mr. Khalizadeh exercised parenting time, paid child support, and was actively involved in Roz's life.
- [13] The Respondent says he has sought financial and other information from the Claimant regarding Roz, including the amount of support paid by Mr. Khalizadeh, but has only been provided the Claimant's 2008 separation agreement with Mr. Khalizadeh ("KK Agreement") and some basic information about the Film Program. The KK Agreement set Mr. Khalizadeh's child support at \$749 per month as of 2008.

- [14] The Respondent says he had virtually no financial responsibility for Roz during the marriage. He agrees he made the payments associated with ownership and occupation of the family home, but says this was part of a broader financial arrangement between the parties regarding various real estate properties held. The Respondent agrees that he paid or contributed to the cost of Roz's participation in family travel and vacations while the parties were together.
- [15] The Respondent also relies on the following admissions obtained in his February 12, 2020, examination for discovery of the Claimant:
- a) The Claimant has not pursued Mr. Khalizadeh for arrears in child support, through the Family Maintenance Enforcement Program or otherwise;
 - b) The Claimant "more recently" received about \$14,000 from Mr. Khalizadeh in the form of two cheques (dates of receipt are unknown; no copies of the cheques have been disclosed);
 - c) Roz is in her second year of the Film Program; and
 - d) Roz works part-time as a swimming instructor/ lifeguard, mainly during summer and spring breaks from the Film Program.
- [16] The Respondent also relies on the Claimant's sworn F8 Financial Statement, dated February 12, 2020, which indicates she holds the following in trust for Roz: a TD Bank savings account with \$37,414; a Registered Education Savings Plan at TD Bank with \$21,244 ("RESP"); and, a Tax Free Savings Account with TD Bank with \$12,274.
- [17] The Respondent says he does not believe Roz has any debts.
- [18] Finally, the Respondent asserts that despite his efforts to continue their relationship, Roz has not spoken with him since the separation.
- [19] The Respondent asserts the Claimant has made a number of choices that have delayed the resolution of their dispute. That said, it is conceded that earlier trial dates were not obtained solely due to inadvertence. The Notice of Trial was filed in May of 2019, and examination for discoveries only took place in February of 2020. Some time was taken up with efforts towards settlement.

B. The Claimant

- [20] With regard to current child support arrangements, the NFC states:

The respondent is not providing any child support. The Child's biological father is currently in arrears of child support. ...

- [21] The Claimant filed a sparse affidavit in support of her response. She attests that Mr. Khalizadeh is in arrears on his child support. She states that her own income, as a real estate agent, has become less reliable due to market conditions. She indicates that Roz's standard of living declined following the separation. She denies being party to any understanding that Mr. Khalizadeh and his family would bear financial responsibility for Roz to the exclusion of the Respondent.

C. Unknowns

- [22] There is a general lack of specific information before the Court. There is next to no evidence about Roz's standard of living while the parties were together. There is no evidence of Mr. Khalizadeh's current income or current child support obligation. There is no indication when Mr. Khalizadeh fell into arrears on child support nor the extent of the arrears. There is no other information about the \$14,000 payment. There is no evidence indicating Mr. Khalizadeh's parents have either intent or ability to support Roz's post-secondary education.
- [23] The Claimant has provided her F8 Financial Statement information, but has asserted that her future income is uncertain.
- [24] To the extent that the Claimant's F8 Financial Statement indicates that she holds funds in trust for Roz, there is no evidence regarding the terms of those trusts, beyond the bare fact that one is acknowledged to be an RESP account.

III. Positions

- [25] The Respondent relies on the following sections of the Federal Child Support Guidelines [Guidelines] in particular:

Presumptive rule

3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

Child the age of majority or over

- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
 - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

Spouse in place of a parent

5 Where the spouse 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 spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

- [26] The Respondent asserts that the Claimant and Mr. Khalizedah bear the primary obligation for Roz's support: *H.(U.V.) v. H.(M.W.)*, 2008 BCCA 177. He relies on Justice Kelleher's review of the Court's discretion in determining child support payable by a stepparent in *Struck v. Sullivan*, 2017 BCSC 816, at paragraphs 17-20.
- [27] Relying on the pre-separation status quo, the alleged understanding regarding his role in supporting Roz, and the primary obligation of biological parents, the Respondent asserts there are reasonable arrangements in place for Roz's support. Under those arrangements, his present support obligation is zero. He submits the existing arrangements should only be altered if it is established, on the evidence, that the arrangements have ceased to be reasonable.
- [28] The Claimant's response is straightforward. She says there is no evidence before the Court to satisfy me that reasonable arrangements are in place.
- [29] Citing *Chartier v. Chartier*, [1999] 1 S.C.R. 242, the Claimant submits that a step-parent cannot unilaterally determine whether to pay support (para. 32), and that child support obligations are joint and several between all of the "parents" the child is entitled to look to for support (para. 42).

IV. Analysis & Decision

- [30] The Respondent asserts the pre-separation status quo: continues to exist, amounts to an "arrangement", and, is presumptively "reasonable". He also asserts that the Claimant bears an evidentiary burden to displace that presumption. On this basis, he submits s. 11(b) of the Divorce Act presents no bar to his application.
- [31] Relying on his assertion of evidentiary burden, the Respondent seeks to have a number of adverse inferences drawn against the Claimant. For example, he argues that the fact that her F8 Financial Statement does not indicate substantial debt post-separation, warrants an inference that Claimant has adequate funds to support Roz.

- [32] The Respondent submits the following points support his assertion that the Claimant bears an evidentiary burden to demonstrate the pre-separation status quo has ceased to be a "reasonable arrangement": (1) it operated successfully pre-separation; (2) his is a secondary child support obligation; and (3) the Claimant is the party with access to the relevant evidence.
- [33] I am unable to accept the Respondent's position for a number of reasons.
- [34] First, Roz's circumstances and living arrangements changed on separation. As noted in H. (U.V.), whether a child has a lesser standard of living post-separation is a significant consideration in claims against step-parents (para. 41). Further, the court must be satisfied reasonable arrangements "have been made" (i.e., are in place) at the time the divorce order is granted: *Szarapka v. Szarapka*, 84 A.C.W.S. (3d) 722, 1998 CarswellBC 2746 (SC), see esp. paras. 18-20; *F.(R.D.) v. F.(S.L.)*, 12 B.C.L.R. (2d) 1, 1987 CarswellBC 44 (SC) (cited to Carswell), at paras. 18, 19 and 22.
- [35] In order to conclude that there is a reasonable arrangement (under which the Respondent pays no support) currently in place, I would have to determine it is appropriate for him to pay no child support at this time. That would amount to a finding on the merits of the child support application. The summary trial application does not seek such a determination, nor is there any evidence before me on which it could possibly be determined.
- [36] It is impossible to evaluate the reasonableness of a support arrangement in the absence of material facts: *F.(R.D.)* at para. 25. That this remains so where the support claim involves a step-parent is illustrated in Justice Newbury's reasons in *H.(U.V.)*:
- [38] As should be clear from the foregoing, although the broad principles of law relating to the existence of child support obligations on the part of stepparents are clear, Canadian courts have differed as to how those obligations, as stated in the Guidelines, are to be determined in practice. I read s. 5 as requiring that the legal duties of support of the "other parent(s)" - in this case, the natural parents - be considered when support is sought from a stepparent. If such duties are to be considered, it seems obvious that they must be quantified if possible. For this purpose, the "other parent(s)" should be before the court, or other evidence satisfactory to the court relating to that parent's status should be adduced, as occurred in *Dutrisac and Kobe* (but not in *Chartier*). Unless that other parent is a stepparent, s. 3 requires that his or her support be the applicable table amount unless custody is being shared, the child is over age 19, or one of the other 'discretionary' provisions applies. (In the case at bar, the daughter had reached 19 by the time of the hearing below, but was still dependant on parental support, and no argument was advanced invoking s. 3(2)(b) of the Regulation. None of the other discretionary provisions applied.) At this stage, the process is not one of "balancing" or even "apportionment": it appears that the natural parent's obligation can be determined only in accordance with the non-discretionary "presumptive rule" of s. 3.

[39] Thus the chambers judge below did err, in my respectful view, in failing to determine whether the father was in fact contributing an amount at least equal to what he would have been required to pay under s. 3 had he been making regular monthly payments in accordance with the Guidelines. Whether or not the father was doing so, the chambers judge should then have ordered him to pay his table amount - although if the mother was content to accept support in the form of the payment of tuition fees or other expenses, she could enter an agreement with him to that effect. She could not, however, choose to give the father a "pass" in favour of pursuing the stepfather for all the support the children required.

[40] Once the duty of the "other parent" had been determined, the chambers judge could proceed to determine the stepfather's obligation, "having regard to" that duty and "these Guidelines". I agree with the Court in *Kobe* that the chambers judge's discretion under s. 5 was not "unfettered", but certainly the phrase "these Guidelines" would include the objectives stated in s. 1, which I repeat here for convenience:

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both parents after separation;
- (b) to reduce conflict and tension between parents by making the calculation of maintenance orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of maintenance orders and encouraging settlement; and
- (d) to ensure consistent treatment of parents and children who are in similar circumstances.

Thus a "fair standard of support", objectivity of calculation, and reduction of conflict between parents are relevant to the determination of "appropriate" support by the stepparent. On the other hand, s. 5 does not, in my view, confer a discretion that is so broad as to encompass "all" the circumstances of a case (as was suggested in *Russenberger*) or "fairness" to the father arising from a kind of promissory estoppel against the stepparent (as was suggested by the chambers judge in this case).

[41] Given the "children-first" perspective of the Guidelines (see *D.B.S.*, *supra*, at para. 43), primacy should be given to the children's standard of living. Where for example the stepparent provided a standard to the children during the period of cohabitation that was materially higher than that which the natural parents can provide by means of their Guidelines amounts, a court might find it appropriate to make an order against the stepparent that is designed to provide the higher standard, or something approximating it, "on top of" the other parents' support. However, where the 'piling' of Guidelines amounts would result in a standard beyond one that is reasonable in the context of the standard the children have previously enjoyed, such a 'windfall' or "wealth transfer" (see *Francis v. Baker*, *supra*, at para. 41) is unlikely to be "appropriate". At the other end of the spectrum, where the three (or more) parents' Guidelines "contributions" together are needed to provide the children with a reasonable standard of living, then both the stepparent and the non-

custodial parent(s) may well be required to pay full Guidelines amounts. Or, where one of the natural or adoptive parents is not present or is unable to pay any support, the stepparent may well have to pay his or her full table amount. The Legislature has left it to the judgment of trial and chambers judges in the first instance to fashion orders that are "appropriate" under s. 5. At the same time, the Guidelines system is not thereby jettisoned in favour of a 'wide open' discretion. The inquiry must, like the Guidelines themselves, focus on the children and their needs.

[Emphasis added.]

- [37] Second, the Claimant denies being a party to any "understanding" regarding the Respondent's obligations for Roz. Even if she did not, the understanding would be nothing more than an agreement between private parties.
- [38] Section 11(b) requires the court to be independently satisfied that reasonable arrangements are in place. As noted by Chief Justice McEachern in *F.(R.D.)*, reasonableness for purposes of s. 11(b) does not involve deference, either to the parties or others:
- [26] In this case the arrangements for the support of this child are essentially the agreement made by the spouses under the auspices of the Provincial Court. I have not had the benefit of argument by counsel and I would be glad to furnish such an opportunity but, in the context of dealing with this application without oral hearing, I have the view that agreements reached by the parties privately, or orders of the Provincial Court, and also in some cases orders made by this court, bind the parties but do not bind the court in the discharge of its positive duty under s. 11(1)(b). This is because many such arrangements or consent orders are compromises reached under circumstances of great stress for the purpose of resolving a practical problem often in the early stages of marriage breakdown. Also, the parties or courts in such circumstances do not labour under the positive duty similar to the one imposed upon this court by s. 11(1)(b). Even orders of this court are not conclusive on this question if there has been any material change of circumstances. The overriding principle is that agreements, orders or even principles of law or evidence which bind the parties do not necessarily bind the conscience of the court in matters of divorce. ...
- [39] Third, without saying it would never be appropriate to draw an adverse inference in relation to a dispute that engages s. 11(b) of the Divorce Act, the adverse inferences sought here could clearly result in a holding that is inconsistent with Roz's actual best interests.
- [40] It is well-established that parties cannot impair a child's statutory right to support by agreement. As noted by Justice Williams in *Bradshaw v. Bradshaw*, 2011 BCSC 1103:
- [121] The existence of a separation agreement does not stand as a bar with respect to an originating application of child support; therefore, either party may still seek an order and the court is not bound by the terms of the parties' agreement: *B.M.D. v. C.N.D.*, 2010 BCSC 1785 at paras. 176-178 and 186, [2010] B.C.J. No. 2507 (QL).

[122] It is trite law that parents cannot waive or bargain away their child's rights; that children are statutorily entitled to receive the basic level of support; and that the right to financial support is the right of the child, not the right of the parent. I note the legislation nonetheless provides that the court is not required to apply the Guidelines table amounts where (1) the parties consent to an order of child support and the court is satisfied that "reasonable arrangements" have been made for the support of the children (Divorce Act, s. 15.1(7); Family Relations Act, s. 93.1); or (2) "special provisions" in an order, a judgment or a written agreement have been made for the benefit of the children (Divorce Act, s. 15.1(5); Family Relations Act, s. 93(2)). What is "reasonable" is usually determined by reference to the Guidelines.

[Emphasis added.]

[41] To conclude a reasonable arrangement existed because there was no evidence to the contrary would be inconsistent with the positive duty imposed by s. 11(b), and with the court's primary obligation to safeguard the interests of the child. I note McEachern C.J.'s observation that "even principles of law or evidence which bind the parties do not necessarily bind the conscience of the court": F.(R.D.) at para. 26.

[42] Fourth, this is a summary trial application by the Respondent. The Claimant takes the position that s. 11(b) of the Divorce Act stands as a bar. She bears no evidentiary burden in so asserting. Her position is that the Respondent has failed to put in a case capable of meeting a mandatory criterion. She could have taken that position without filing any evidence at all.

[43] Fifth, Mr. Khalizadeh is the Claimant's ex-spouse. Nothing in the evidence indicates he is not a witness available to both parties: *Singh v. Reddy*, 2019 BCCA 79. The Rules provide for pre-trial examination of witnesses: R. 9-4.

[44] Finally, whatever the Respondent's reasons for seeking a divorce order at this point in time, the standard under s. 11(b) does not fluctuate. It is the duty of the Court to safeguard the interests of the child, and that necessarily means the child's interests take precedence.

[45] In conclusion, I am not satisfied that reasonable arrangements have been made for purposes of s. 11(b) of the Divorce Act.

V. Order and Costs

[46] The Respondent's application is dismissed with costs to the Claimant in any event of the cause.

"Tucker J."

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