

CANADA / JUDGMENT

Parker v. Parker

2001 BCSC 1031

COURT

Supreme Court of British Columbia

DECIDED

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Citation: Parker v. Parker Date:

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2001 BCSC 1031 Docket:

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Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DENA MARIAM PARKER
PETITIONER

AND:

ROBERT STEVEN PARKER
RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE GILL

Counsel for the Petitioner: W.J. Baker

Counsel for the Respondent: M.M. Patton

Date and Place of Hearing: June 6 & 12, 2001

Vancouver, BC

- [1] The respondent brings application for a number of orders. First, he seeks an order that the child of the marriage, Mattaya, born September 23, 1995, reside with him 50 percent of the time or alternatively, that his access be significantly increased. Second, he seeks an order that:

Pursuant to s. 17 of the Divorce Act, Canada and s. 96 of the Family Relations Act supra, an Order varying the Order of Mr. Justice Curtis dated November 10, 1997 such that, further to the Minutes of Settlement between the parties and pursuant to the verbal agreement between the Petitioner and the Respondent in March, 2000, the Respondent no longer be required to make child support payments to the Petitioner from his quarterly bonuses in addition to his payment of monthly child support, for so long as he is paying the Child's school fees.

Finally, he seeks a declaration that in respect of three quarterly payments of \$600 each, he is not in arrears.

[2] The parties were divorced by order made November 10, 1997. They had settled all issues by way of Minutes of Settlement and thus, the order also reflected their agreement on issues of custody, guardianship, access and child maintenance. It provided that the parties would have joint custody and guardianship, with the primary residence of the child to be with the petitioner. Access was delineated. Mr. Parker has access every second weekend from Friday to Sunday evening, alternate Saturdays and every Wednesday evening. On the issue of child support, the order recites that the respondent has a guideline income of \$48,000 and the petitioner, \$31,524. The respondent was to pay \$550 per month as follows. Three hundred dollars was to be paid each month and each quarter, the respondent was to pay to the petitioner, from his bonus, the sum of \$750. The Minutes of Settlement agreed to by the parties contain the following provision:

The amount of child support paid by the respondent includes a contribution by the respondent to additional costs for the child such as extra expenses and day care expenses, with the exception of future educational expenses which remain to be determined.

[3] In May, 1999, the respondent obtained new employment at a higher salary. He began paying the petitioner \$350 per month and reduced the quarterly payment to \$600. His income in 2000 was slightly in excess of \$69,000, which included a taxable benefit of \$2,800 in respect of his company car.

[4] In June, 2000, the parties' daughter was enrolled in a private Jewish school, Talmud Torah. Mr. Parker has deposed that his former wife told him she wanted their daughter to attend that school. It is his evidence that they agreed he would pay the fees but would no longer make quarterly payments of \$600. In June, 2000, he paid a \$500 enrollment fee and since September, 2000, has paid the \$606 monthly fee. Because a portion of fees may be treated as a charitable contribution, the net annual fees are \$3,802. The petitioner denies that she agreed that quarterly payments would no longer be made and in late 2000, sought assistance from the Family Maintenance Enforcement Program.

- [5] Returning to the relief claimed, I will deal first with access. The respondent has deposed that in October, 1997, he did not feel he could take care of Mattaya 50 percent of the time. As a result of working extremely hard on a failing business venture in 1995, the separation of the parties in early 1996 and the fact that in June 1996 the business went into receivership, he had a breakdown. He is now steadily and well employed and happily married.
- [6] In his affidavit sworn March 9, 2001, which was the first affidavit prepared in respect of this application, the respondent set out what he described as concerns regarding the petitioner's lifestyle, including where she resided, which he described as "not a good area in which to bring up a child". The respondent also had a concern about what he believed to be the petitioner's failure to gradually introduce their daughter to the man with whom she was having a relationship. It is not necessary to address these concerns. The petitioner has moved and the respondent was in error in respect of certain of his beliefs regarding the petitioner's now fiancée.
- [7] The respondent also deposed that his daughter is frequently awake after 9:00 p.m. which he considers far too late for her to be up. He has further deposed that there have been numerous occasions when he has not been informed about events in his daughter's life, including school events and behavioural problems. These allegations are either explained or denied by the petitioner.
- [8] The question, of course, is what arrangement is best for this particular child. Although these parties are joint custodial parents, the picture that emerges from the totality of the affidavit evidence on this application is not of parents who are always able to work cooperatively. More importantly, however, I agree with Mr. Baker, counsel for the petitioner, that what the respondent proposes is a very significant change. To live with one parent in one area of the city for one week, then to live with the other for the next, is an arrangement which may not be in the best interest of a young child.
- [9] There is little in the materials which assists in deciding whether the arrangement proposed by the respondent would be in the child's best interest. The respondent believes that Mattaya would benefit greatly from a shared parenting arrangement. Not surprisingly, the petitioner does not accept that the proposed change would be beneficial to their daughter. The arrangement which has been in place for several years appears to be working well in the sense that Mattaya is thriving. As such, it is my view that those arrangements should not be disturbed simply because the respondent's personal circumstances have changed. The application of the respondent is therefore dismissed.
- [10] Turning next to the application to vary child maintenance, the respondent asserts a verbal agreement to pay school fees in lieu of quarterly payments and seeks an order which embodies that agreement. As already noted, the petitioner denies that she agreed that the respondent could pay the school fees in lieu of quarterly payments. It is her evidence that the respondent simply told her what he intended to do. She has also deposed that both parties wanted Mattaya to attend Talmud Torah. On this point, the respondent says he was

not and is not convinced that Mattaya needs to attend Jewish school but he did not wish her to attend school in the area in which the petitioner formerly resided and for that reason alone, agreed to private school.

- [11] There is no evidence confirming either version. As the petitioner submits, the minutes of settlement specifically exclude education expenses but, as the respondent argues, the school fees are significant given the incomes of the parties. This credibility issue cannot, in my view, be resolved without hearing the parties. I cannot conclude, as the respondent argues, that the petitioner's evidence is untrue and therefore, cannot make any findings in respect of the alleged verbal agreement. A variation to reflect such an agreement is therefore refused.
- [12] Counsel have agreed that notwithstanding its late delivery, it is appropriate to deal with the petitioner's application for a variation of the order for child support based on the change in the respondent's income.
- [13] The first issue relates to the respondent's income. He takes issue with determining his annual income by reference only to income earned in 2000. He has deposed that his basic income is \$43,610 and in addition, he receives commissions on sales. His belief is that his income will be less in 2001 as business has been slower. His commission for the last quarter of 2000 was \$4,700 and he has deposed that if his commission is similar in 2001, which he anticipates it will be, then his basic income plus commissions will total approximately \$62,410. There is no evidence to the contrary and as the materials were prepared months in advance of the hearing date, there is also no specific evidence regarding earnings in 2001. The respondent's estimate, however, does not include the benefit of a company car and the difference is therefore not large in a relative sense. In my view, it is appropriate to fix the respondent's income for guideline purposes at \$65,5000. The monthly amount payable pursuant to the Guidelines is therefore \$534. There will be an order that the respondent pay monthly maintenance in that amount commencing August 1, 2001.
- [14] The petitioner also seeks a contribution to special or extraordinary expenses. In addition to Talmud Torah fees of \$5,350 per year, it is alleged that such expenses include:

Ballet \$ 583.30

Jewish Community Membership 120.00

Swimming Lessons 200.00

Passover Camp 135.00

Summer Camp 500.00

In respect to the costs of a summer camp, the petitioner has deposed that if Mattaya did not attend camp, the daycare costs would be increased by more than the cost of the camp. For that reason, the respondent agrees that the expense falls within s. 7. However, the respondent's position is that the community centre membership, swimming lessons and passover camp, totalling \$435 per annum, ought not to be considered as falling within s. 7 of the Guidelines.

- [15] The approach to be used in determining whether expenses for any extracurricular activity are is set out in *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39 (B.C.C.A.). Having considered the various factors, I agree with the submission of the respondent.
- [16] The largest expenditure and disagreement is in respect of the cost of attendance at Talmud Torah. The petitioner says that it is important for Mattaya as a Jewish child to attend Talmud Torah. However, the questions which must be answered are whether this expense is necessary in relation to the child's best interests and the reasonableness of the expense having regard to the matters enumerated in s. 7. As to whether this expense is in Mattaya's best interest, that question cannot be answered on the basis of the limited evidence before the court. Both parties are Jewish. The respondent does not share the view of his former spouse that attendance at a Jewish school is of importance to their daughter and the petitioner does not offer any evidence about why it is in Mattaya's best interests. Even if there had been evidence upon which it could have been concluded that it was in her best interests, I question whether this expense is reasonable given the means of the parties. In my view, it has not been established that the private school fees are special or extraordinary expenses within s. 7.
- [17] To summarize, the respondent will pay his proportionate share of the cost of ballet and summer camp, totalling \$1,083.30.
- [18] The final issue relates to the three quarterly payments which have not been made. I have already addressed the issue of the alleged agreement between the parties. I would add that the respondent has been aware for many months that the petitioner expected to receive quarterly installments and denied any agreement obviating the need for payment. Further, although for a different reason than the petitioner, he wanted their daughter to attend private school in the 2000/2001 academic year. I do not agree that it would be unfair not to cancel the arrears. I decline to do so.
- [19] The only issue which remains is costs. Counsel for the petitioner wished to defer submissions until reasons were given. If the parties cannot agree, further submissions may be made.

"K.M. Gill, J."

The Honourable Madam Justice K.M. Gill

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