
CANADA / JUDGMENT

Ratnam v. Priyanthan

2017 BCCA 343

COURT

British Columbia Court of Appeal

DECIDED

4 October 2017

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2017 BCCA 343 Ratnam v. Priyanthan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ratnam v. Priyanthan,

2017 BCCA 343

Date: 20171004

Docket: CA44307

Between:

Paula Yogarani Ratnam

Appellant

(Plaintiff)

And

Ajit Priyanthan

Respondent

(Defendant)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Hunter

The Honourable Madam Justice Fisher

On appeal from: an order of the Supreme Court of British Columbia, dated

March 6, 2017 (Ratnam v. Priyanthan, Vancouver Registry No. E100597)

Oral Reasons for Judgment

Appellant appearing In Person:

Respondent appearing In Person:

Place and Date of Hearing:

Vancouver, British Columbia

October 4, 2017

Place and Date of Judgment:

Vancouver, British Columbia

October 4, 2017

Summary:

The appellant mother sought to overturn an order requiring her to continue to pay child support for the parties' younger son, who was about to turn 19, and to adduce fresh and new evidence affecting the issuance of that order. She submitted that the chambers judge erred (1) by not following a prior order declaring the parties' older son to cease to be a child of the marriage after age 19; (2) by not ordering child support for the younger son to cease on the basis of his withdrawal from his relationship with the appellant; and (3) by not considering the full financial disclosure of the total and combined household income of the respondent father and both sons. Held: Appeal dismissed. The fresh evidence will not be adduced, as it cannot reasonably be expected to have affected the result. The new evidence is more appropriately dealt with by way of an application to vary the child support order. Whether a child remains a child of the marriage is a question of fact related to each child's particular circumstances. There was ample evidence to support the chambers judge's conclusion that the younger son remained in charge of his parents and he properly applied the Federal Child Support Guidelines to issue an order tailored to the parties' financial circumstances.

- [1] FISHER J.A.: This is an appeal from an order that requires the appellant Paula Yogarani Ratnam to continue to pay child support in respect of the parties' 19 year-old son, Jacob, until August 31, 2018. The order was based on the chambers judge's finding that Jacob would remain a charge of his parents while he was attending school at Capilano University.
- [2] The appellant also seeks leave to adduce "fresh and new" evidence, the first in the form of an affidavit that includes a copy of the transcript of the proceedings before the chambers judge on March 6, 2017 and several documents that were not before the chambers judge, and the second in the form of a further affidavit that includes evidence that Jacob subsequently paid fees at another educational institution.

Background

- [3] Before I address these issues I will briefly describe the factual background. The parties separated in 2010 and divorced in 2012. They have two sons, Isaac, born in 1994, and Jacob, born in 1998. Both of the boys have lived with the respondent father since separation and the appellant mother has been paying child support to the respondent since April 18, 2012. On December 20, 2013, after Isaac had turned 19, a court order confirmed that he was no longer a child of the marriage as of November 1, 2013. In March 2014, the appellant applied for an order declaring that Jacob was no longer a child of the marriage and an order ceasing her child support obligations on the grounds that she had been denied access and was estranged from her son. On April 25, 2014, Dickson J. (as she then was) dismissed these applications but made an order that Jacob should attend counseling with the appellant at an Employee Assistance Program. It appears that Jacob never did attend counselling with the appellant.
- [4] On February 10, 2017, the appellant applied for another order ceasing her child support obligations in respect of Jacob on the basis that she had been denied any relationship with him. She also sought a number of orders to either commit or fine the respondent for contempt of court for "virtually disobeying and denying parental access" in respect of orders in 2010, 2012 and 2014. This was the matter before the chambers judge that is before us today.

Chambers judgment

- [5] The chambers judge reviewed this background as well as the current financial situation of the parties. At the time of the hearing in March, the appellant was working, earning approximately \$45,000 per year. Due to medical issues, the respondent was working on a casual basis, earning approximately \$26,000 to \$28,000 per year. On the basis of those incomes, the appellant had been paying child support for Jacob in the amount of \$418 per month. However, Jacob was to turn 19 on May 15, 2017 and the appellant was planning to retire on June 1, 2017.
- [6] Jacob was studying music at Capilano University and working part time. Because of this, the judge concluded that Jacob was in the charge of his parents and would continue to be so past his 19th birthday.
- [7] The chambers judge accepted the respondent's assertion that he had been supporting both sons at considerable expense and was satisfied that the respondent had cooperated in the previous court orders with respect to counselling for Jacob.

- [8] The chambers judge denied the orders sought to commit or fine the respondent for contempt of court and refused to order that child support for Jacob cease on the basis that the appellant was denied shared parenting time. He concluded that child support should continue while Jacob was in school but he also recognized that the appellant had a right to retire. On that basis, he ordered that
- (a) each party prepare, file and deliver a Form 8 Financial Statement on May 1, 2017 and again on May 1, 2018 on the basis of their income tax returns;
 - (b) the appellant prepare, file and deliver an affidavit setting out her financial circumstances in relation to her imminent retirement, on or before October 1, 2017; and
 - (c) the current child support payable by the appellant at \$418 per month continue until December 31, 2017, and thereafter at an amount based on the incomes of the parties as set out in their respective Form 8 Financial Statements.
- [9] The parties appeared before the chambers judge again on April 3, 2017, where the judge confirmed that child support would continue until August 31, 2018; and if Jacob did not attend school, the parties would have to return to the court.
- [10] The order that is the subject of this appeal incorporates the matters determined at both the March 6, 2017 and April 3, 2017 hearings.

Fresh or new evidence applications

- [11] There is a difference between fresh evidence and new evidence. Fresh evidence is evidence that existed at the time of the trial or hearing, but for some reason was not put before the court below. New evidence is evidence of matters that occurred subsequent to the order appealed from: *Fotsch v. Begin*, 2015 BCCA 403 at paras. 18-20.
- [12] In the appellant's first application, the transcript of the proceedings before the chambers judge is neither fresh nor new evidence. The remaining evidence in the first application appears to be new and fresh evidence: the respondent's 2016 income tax return, and several documents relating to the respondent's assets.
- [13] In the second application, the evidence sought to be adduced is clearly new evidence, not in existence at the time of the hearings before the chambers judge. It consists primarily of receipts for payments in September 2017 to Summit Pacific College on behalf of Jacob.
- [14] Rule 31 of the Court of Appeal Rules permits a party to seek leave to adduce fresh evidence that was not before the court below. In considering whether or not to grant leave, the court has adopted the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. Normally, fresh evidence should not be admitted if, by due diligence, it could have been adduced at trial. Further, the evidence that is proposed to be adduced must be relevant in that it bears upon a potentially decisive issue in the case, and it must be credible. Finally, the fresh evidence, when considered along with the evidence that was adduced in the court below, must be of

such significance that it could reasonably be expected to have affected the result.

- [15] The Court does, however, have a discretion to allow fresh evidence to be adduced even when the due diligence aspect of the Palmer test is not met, where the interests of justice demand it: *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263 at paras. 33-37.
- [16] New evidence is generally not admissible on appeal absent exceptional circumstances. In family law cases, where the best interests of a child are at issue, this Court has taken a slightly more elastic approach to the admission of both fresh and new evidence: *Henderson v. Henderson*, 2005 BCCA 277 at para. 27; *Fotsch* at para. 20. Importantly, where a child support order is challenged on the basis of subsequent events, the proper course is usually an application to vary the order.
- [17] My view is that none of the fresh or new evidence sought to be adduced by the appellant in the first application is relevant to a decisive issue, nor would it have affected the result. The respondent's 2016 income tax return is a document that the chambers judge expressly contemplated would be used to form the basis for the Form 8 Financial Statement that was to be prepared on May 1, 2017. It appears that the appellant seeks to introduce the documents about the respondent's assets for the purpose of supporting a submission that the respondent did not make full disclosure of his household income, but the entire issue of financial disclosure was addressed by the order for both parties to prepare Form 8 Financial Statements.
- [18] In the second application, the new evidence that Jacob paid fees to a different educational institution is a matter which should be addressed through an application to vary the chambers judge's order. The judge clearly contemplated such an application if Jacob's education plan changed. In the course of making the order that the parties attend to the court if Jacob does not attend school, the judge stated, "...it is not as simple as him being out of school. There are some other things that might have to be considered. And we will not know that until they actually happen."
- [19] Therefore, I would not grant leave to the appellant to adduce fresh or new evidence. I would, however, grant leave to the appellant to adduce the transcript of proceedings of March 6, 2017, as it has assisted this Court in assessing the context in which the chambers judge made the orders that are now being appealed.

Alleged errors

- [20] As I understand the appellant's submission, her main assertions are that the chambers judge erred by not following the precedent of a previous order declaring that Isaac ceased being a child of the marriage after he reached the age of 19; by not ordering child support for Jacob to cease on the basis that he had withdrawn from his relationship with the appellant; and by not considering full financial disclosure of the total and combined household income of the respondent, including the incomes of both sons.

- [21] The circumstances in which the order respecting Isaac was made are not before this Court, nor were they before the court below. In any event, whether or not a child remains in charge of his parents is a question of fact for each child in his particular circumstances. The chambers judge committed no error in failing to consider the prior order respecting Isaac as some kind of precedent to be followed in respect of Jacob.
- [22] The chambers judge refused to order that child support for Jacob cease on the basis that the appellant was denied shared parenting time or that Jacob had withdrawn from the relationship. He refused to do so because he was satisfied, based on evidence before him that included emails and text messages, that the respondent had cooperated in respect of the previous orders for counselling and that Jacob did not want to spend substantial periods of time with the appellant. I see no basis to interfere with this finding, especially considering that the appellant's 2014 application to cease child support for Jacob, on the same basis, was dismissed. In my view, the chambers judge properly considered the most pertinent issues that were raised before him: whether Jacob would continue to be in the charge of his parents, and therefore a child of the marriage, after his 19th birthday, and whether child support should be reduced after the appellant retired. These two issues were raised by the appellant in the course of the proceedings before the chambers judge, as revealed in the transcript.
- [23] In determining whether a child's educational pursuits justify retaining the status of a child of the marriage, this Court has adopted, in *Darlington v. Darlington* [1997] B.C.J. No. 2534 (C.A.), the following series of factors to be considered:
- (1) whether the child is in fact enrolled in a course of studies and whether it is a full time or part time course of studies;
 - (2) whether or not the child has applied for, or is eligible for, student loans or other financial assistance;
 - (3) the career plans of the child, i.e., whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
 - (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
 - (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

- [24] Although the burden of establishing that an adult child attending post-secondary education is a child of the marriage is on the recipient-parent, these are not a "set of iron-clad requirements" and it is not necessary for that parent to adduce evidence on all of these points: *Shaw v. Arndt*, 2016 BCCA 78 at para. 25.
- [25] In addressing this, the chambers judge considered the evidence that Jacob was enrolled in a music program and was also working part time. He did not expressly address the reasonableness of Jacob's educational plan, but he was not prepared to continue support for the entire length of the program. Implicit in the judge's brief reasons is that he did not consider the estranged relationship between Jacob and the appellant to be a factor that would render Jacob to no longer be a child of the marriage. The evidence was that Jacob did not see his mother often, not that he had completely terminated his relationship with her. There was evidence that Jacob's part time earnings in 2016 - \$6,208 from his job delivering pizza and a further \$2,000 from temporary work as a film extra - were not sufficient to support him through his studies. Ultimately, the judge's conclusion that Jacob remained in the charge of his parents is amply supported by the evidence.
- [26] With respect to the financial circumstances of the parties, the judge was alert to the fact that the appellant's income would be reduced after retirement. As the only evidence about what that income would actually be was a one-page document showing a pension option selection, he ordered that, prior to her retirement, the appellant prepare an affidavit setting out her financial circumstances. He also ordered each party to file Form 8 Financial statements. He thus put into place a process by which the parties would be able to properly determine the amount of child support the appellant would be required to pay under the Federal Child Support Guidelines. He ordered that child support be reduced on that basis, although the reduction would not be effective until January 1, 2018. This is consistent with the practice of determining child support under the Guidelines based on a party's previous year's income and I see no basis to interfere.
- [27] Finally, with respect to the household income of the respondent, the chambers judge considered Jacob's ability to contribute to his own support and clearly concluded that his part time income was not sufficient to allow him to withdraw from this parents' charge. He made no error in failing to consider the income of Isaac. The issues here involve only Jacob.
- [28] Under s. 3(2) of the Guidelines, the amount of a child support order in respect of a child who is over the age of majority is either (a) the amount determined by applying the Guidelines as if the child were under the age of majority, or (b) if this is considered inappropriate, the amount the court considers appropriate having regard to the conditions, means, needs and other circumstances of the child and the financial ability of each spouse to contribute.

- [29] The reasons of the chambers judge are brief, but it is apparent that he did not consider it inappropriate in the circumstances before him to determine the amount of child support payable for Jacob to be determined by applying the Guidelines. The transcript shows that he expressed concern about the financial ability of the parties to continue to contribute to Jacob's support, which he addressed by placing an end date on the appellant's obligation to continue paying support.
- [30] The appellant raised a number of concerns about the respondent's lack of financial disclosure and asserted that he provided false information before the court below. The chambers judge made no such findings, and in any event issues about financial disclosure are not relevant to the order under appeal given the provision for both parties to prepare Form 8 Financial Statements.
- [31] For all of these reasons, I see no basis to interfere with the orders made by the chambers judge and I would dismiss the appeal.
- [32] BAUMAN C.J.B.C.: I agree.
- [33] HUNTER J.A.: I agree.
- [34] BAUMAN C.J.B.C.: The appeal is dismissed.

"The Honourable Madam Justice Fisher"

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