

CANADA / JUDGMENT

Waters v. Taylor

2021 BCSC 1572

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1572 Waters v. Taylor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Waters v. Taylor,

2021 BCSC 1572

Date: 20210708

Docket: E-3292

Registry: Courtenay

Between:

Allyson Christine Waters

Claimant

And

Jesse Glenn Taylor

Respondent

Before: The Honourable Mr. Justice A. Saunders

(Appearance via teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant

appearing by teleconference:

Q. Fuglestveit

Counsel for the Respondent

appearing by teleconference:

P. Cote

Place and Date of Hearing:

Courtenay, B.C.

July 2, 2021

Place and Date of Judgment:

Courtenay, B.C.

July 8, 2021

- [1] THE COURT: These reasons are being delivered orally. In the event a transcript of these reasons is prepared, I am reserving my right to edit for grammar and syntax. There will, of course, be no change in the result.
- [2] The respondent, Mr. Taylor, and the claimant, Ms. Waters, agreed to the terms of a consent order entered December 18, 2018, which, among other things, included provision for Mr. Taylor, who was then living in Northern Alberta, to have parenting time with their two daughters. In the published copy of these reasons, I will anonymize the children, to protect their privacy. The elder, "A.", was then just shy of her eighth birthday and the younger, "B.", was age six. The schedule was detailed and included the children being with their father for nine days of every spring break and for the first 14 days of August, as well as for Christmastime.
- [3] Mr. Taylor was denied parenting time with the children last August. On this application, he seeks a finding that the denial of parenting time was wrongful; two weeks of compensatory parenting time; reimbursement of travel expenses and lost wages; payment by Ms. Waters of a penalty of \$2,000; and, variation of the consent order to include a police enforcement clause.
- [4] The notice of application also sought variation of the amount of Mr. Taylor's current support obligation to reflect changes in his income and a retroactive adjustment in respect of same. The child support orders sought by Mr. Taylor were not substantively opposed. Ms. Waters' application response stated her opposition to all of the relief sought in the notice of application, but did not disclose any factual or legal basis for opposing the child support variation orders. In the course of the hearing, I ordered that the child support payments would be varied as of February 1, 2021, the first date on which a support payment was due following the January 6, 2021, filing of the notice of application, to reflect his 2019 income of \$54,102. The new amount of monthly support payable as of that date is \$841.

- [5] The materials before me did not disclose the date of Mr. Taylor having given Ms. Waters notice of his changes of income and of his intent to have the child support amount adjusted. Retroactive variation orders may normally only be made back to the date of effective notice. I adjourned the application for retroactive variation.
- [6] With the notice of application materials having been prepared late last year, then filed in January 2021, and not heard until the available date on June 21, 2021, Courtenay assize, the materials before me did not disclose what Mr. Taylor's 2020 income was, nor what steps the parties had taken pursuant to the consent order to exchange their income information by May 31st of this year, that is, prior to this application having been heard. The parties must continue to disclose their incomes annually as provided for in the consent order and to make necessary adjustments to be effective as of July 1st each year. To be clear, the order I made is without prejudice to any variation of child support as a consequences of changes in the parties' incomes during the 2020 tax year.
- [7] As regards the denial of parenting time last August, Mr. Taylor had last had parenting time during the March 2020 spring break. Ms. Waters says in her affidavit filed April 7, 2021, that she picked up the children from the respondent and that, while on the ferry from Horseshoe Bay to Langdale, they told her that while at their father's, he and his fiancée had fought frequently with yelling and screaming, swearing, slamming doors, and the sound of thrown or smashed glasses. They also complained of an incident where they, their father, and his fiancée had gone into the forest for a campfire and the girls were left alone unattended at the campfire for half an hour. She says that the children expressed that they were frightened by the fighting and did not want to go back to their father's. She said that she decided to withhold the children from the August visit because of their exposure to family violence and because of her concern with the children's safety while in their father's care.
- [8] Ms. Waters' concerns regarding supposed family violence should be seen in the context of a s. 211 report prepared by Dr. Michael Elterman dated October 9, 2018, which preceded the consent order. Dr. Elterman reports asking Ms. Waters about her concerns with Mr. Taylor, and her replying that she had been told that Mr. Taylor and his fiancée argue. However, Dr. Elterman says that he spoke with Brooklyn about this and she denied it was true. A. spoke positively to Dr. Elterman about both parents and said that neither gets angry quickly. Similarly, B. told him that nobody yells. She also told Dr. Elterman that her father said mean things to her mother. Asked how she knew this to be so, B. said that it was something she had been told. Dr. Elterman's report discusses Ms. Waters' anxiety and the potential for her anxiety to impact the children. He notes at one point:

Hearing about her reactions and her fears about Mr Taylor, it is not surprising, then, that the children would have some anxiety about them either coming into contact or picking up their mother's extreme anxious and fearful reactions to contact with their father.

- [9] Given the substance of Dr. Elterman's report, there appears to be a real risk of the children's emotional state having become enmeshed in their mother's anxiety. Objectively, Ms. Waters ought to have at least entertained the possibility that the children's report to her in March 2020 may have been more a reflection of what the children believed their mother wanted to hear, than what was actually true.
- [10] Over the next four months, approximately, Ms. Waters did nothing to bring her concerns to Mr. Taylor's attention and she did nothing to address what she described as her understanding of there being unhealthy aspects of the children's relationship with their father. Indeed, there is no evidence of her having done anything to determine whether the children's alleged complaints were true.
- [11] Mr. Taylor says that he had several telephone conversations with the children leading up to the planned August visit, and the children said they were excited to be seeing him again. However, when he spoke to them on July 22, 2020, they were no longer excited. They told him that their mother had told them that her family was coming to visit them in Sechelt during the time they were scheduled to be with their father, and that they did not want to miss out on the visit with her family. The following day, July 23rd, Mr. Taylor sent Ms. Waters a short email advising that he would pick up the girls on August 1st, picking them up from the 8:40 sailing in Horseshoe Bay, and that he would drop them off back in Horseshoe Bay for the 4:45 sailing. Ms. Waters replied by email the next morning:

I won't be sending the girls for the August visit coming up. We really should have a conversation about visits moving forward as the girls have very strong opinions on the environment they are put in when they go to your house. They have been put in some extremely uncomfortable situations and I feel that they are well old enough to make this decision. I do not believe it is good for them to stop visits but I really hope that you are on the same page as me as far as having this conversation about why they are not welcome to go and working on this until they are comfortable and willing to go when it's time.

Ms. Waters appeared to have followed this up a short time later with a note pointing out:

The girls did tell you two days ago on the phone.

- [12] Mr. Taylor protested in a response later that morning, pointing out that it was not up to her, that the children were too young to be making these decisions themselves, and there was a court order in place. He protested that she had told the girls that there was family coming to Sechelt. Ms. Waters replied that:

This is 100 percent the girls' decision and I support it completely.

She suggested that they have a discussion through FaceTime "all together."

- [13] Mr. Taylor responded asking why the issue had not been brought up before and said she would be hearing from his lawyer. She replied that she had raised the issue with him and his fiancée fighting on a previous occasion, and his reaction had been to tell the children not to tell their mother.
- [14] I note that Ms. Waters' emails on that day did not refute Mr. Taylor's assertion that she had told the children her family would be visiting Sechelt during his parenting time. Further, in her affidavit, she does not deny having told the children this. I find Ms. Waters did say that to the children. Two different motives for her having done so can be inferred from the circumstances. First, it is possible that she did so simply so that the children would have an excuse to give their father for not wanting to come. That, however, would have implied there having been some inappropriate discussion between Ms. Waters and the children about the visit. Second, it is also possible that she told the children this to manipulate them into not wanting to go. Given Ms. Waters' lack of an explanation, I draw the adverse inference and find that she did have that discussion with the children in order to manipulate them and give her a pretext for interfering in Mr. Taylor's parenting time. I also note that Ms. Waters' emails did not mention any supposed safety concerns around the children having been left unattended on the previous visit in March.
- [15] The parties then communicated through their counsel: Mr. Taylor through Mr. Cote and Ms. Waters through her then counsel, Mr. Gable. Mr. Taylor swears, presumably on information and belief, although the affidavit is deficient as to Mr. Taylor's source of this particular information, that Mr. Gable advised Mr. Cote by telephone on July 24th that Ms. Waters had instructed him that the August visit would proceed. He further states in his affidavit that Mr. Cote wrote to Mr. Gable on July 27 asking him to confirm that the children would be at the Horseshoe Bay Ferry Terminal for pick-up on August 1st; and he says, on information and belief from Mr. Cote, that Mr. Gable advised Mr. Cote again that Ms. Waters would comply with the consent order.
- [16] Counsel then corresponded as to scheduling a mediation to be held on July 30th. Mr. Cote found a mediator who was prepared to act at short notice. Mr. Gable was unable to reach Ms. Waters in time to confirm the prehearing and hearing appointment schedule. Mr. Cote had to cancel the booking, incurring a cancellation fee.
- [17] Ms. Waters acknowledges having discussed mediation with Mr. Gable, but denies having given him instructions to proceed with the mediation.
- [18] Mr. Taylor and his father left Hinton, Alberta, on July 30th to drive to Horseshoe Bay and pick up the children. At 11:50 that morning, Mr. Gable sent Mr. Cote an email advising that he had filed a notice of intention to withdraw as Ms. Waters' lawyer.

- [19] Mr. Taylor arrived at Horseshoe Bay on the morning of August 1st. He expected the children to disembark from the ferry at 9:30 a.m. When they did not appear, he texted Ms. Waters. She did not respond. He phoned her. He says that she laughed at him, told him he should not have come because she had told him two weeks earlier she was denying his parenting time, and then hung up. Ms. Waters does not deny this version of the telephone call. Mr. Taylor then drove back to Hinton.
- [20] Ms. Waters denies having instructed Mr. Gable to tell Mr. Cote that the August visit would proceed. However, she presents no evidence from Mr. Gable to contradict Mr. Taylor's evidence.
- [21] I find that Mr. Gable, acting as Ms. Waters' agent, did communicate to Mr. Cote that the August visit would proceed.
- [22] I find that Ms. Waters' denial of parenting time was wrongful. First, it was wrong of Ms. Waters to cede to the children the decision over whether their father would have the scheduled parenting time. Children of that age - A. was then nine years old, B. was just seven - may be entitled to have their voice heard, but are far too young to be dictating the terms on which parenting takes place. Ultimately, it is the responsibility of the parents to ensure that the children's long-term best interests are being met through regular contact with both parents.
- [23] Second, it was wrong of Ms. Waters to have waited until the eve of Mr. Taylor's scheduled time to raise her concerns. Her delay in doing so and the manner in which she did so raise serious concerns as to her credibility, her judgment, and her good faith.
- [24] Third, the circumstances of conflict between Mr. Taylor and his fiancée that Ms. Waters says were recounted by the children were examples of anger being expressed. They do not amount to family violence within the meaning of the Family Law Act. Those circumstances may have been a legitimate cause for concern and given rise to the need for Ms. Waters to advise Mr. Taylor of the children's reaction, but the circumstances were not grounds for the withholding of parenting time, particularly where the children's time with their father was so limited and so precious to fostering a continued healthy relationship amongst the three of them.
- [25] Fourth, the parenting time had been structured and provided for under a court order. As so neatly stated by Mr. Justice Betton in *K.R. v. J.W.*, 2016 BCSC 225, at paragraph 57:

Parenting time that has been included in an agreement or that has been ordered must be respected. If not appealed or varied, compliance cannot be viewed as optional.

Consent orders have even greater moral force and a heavy burden is imposed on an applicant who seeks to avoid a consent order's terms. Here, the onus was on Ms. Waters, if she truly believed it necessary, to seek a court-ordered variation of the consent order's parenting time provisions. She was not entitled to take matters into her own hands.

- [26] The consent order did provide that Mr. Taylor would travel back and forth with the children by air, and specifically provided for the flight to be booked at least 30 days in advance and for the itinerary to be provided at least 29 days in advance. There is evidence before me of the travel on at least one occasion prior to August 2020 having been by motor vehicle, and indeed I was told during the hearing that only the first regularly scheduled parenting time following the consent order involved air travel with all other travel since involving Mr. Taylor and the children travelling by vehicle. I will address variation of those provisions of the order at the end of pronouncing these reasons. At this point, I observe that during the hearing of this application, Ms. Waters submitted that Mr. Taylor should not be able to enforce his parenting time rights because he has been in breach of the court order requirement that he fly. That submission was not made in good faith. Ms. Waters had voiced no objection to Mr. Taylor's method of travel last summer, there is no evidence of her having raised any such objection previously, and that argument was not asserted in her application response.
- [27] I am making the order sought under s. 61(2) of the Family Law Act. I accept Mr. Taylor's evidence that he incurred fuel and food expenses of \$503.86 and lost wages of \$8,030. I order under s. 61(2)(d) that Ms. Waters will reimburse Mr. Taylor for those amounts. I also order, pursuant to s. 61(2)(g)(i), that Ms. Waters pay Mr. Taylor the amount of \$2,000 as compensation for his lost parenting time and inconvenience. Those payments will be deducted from the outstanding lump sum payment owed by Mr. Taylor to Ms. Waters under the consent order.
- [28] I further order that Mr. Taylor will have 14 additional days of parenting time with the children as compensatory parenting time in respect of the time lost in August 2020. This compensatory time, which need not be exercised over two continuous weeks, will be exercised on dates of Mr. Taylor's choosing on reasonable notice to Ms. Waters at any time over the next two years from the date of this order.
- [29] I am told that there was continuing denial of Mr. Taylor's parenting time at Christmas 2020, and at the 2021 spring break. Mr. Taylor alluded to anticipated loss at Christmastime in his affidavit filed December 21st and included emails in which Ms. Waters was continuing to assert that there were very serious issues that needed to be addressed and that the girls did not want to go to Alberta. Ms. Waters also said in those emails that she thought it best that the children not travel "as far as COVID goes." The nature of the COVID objections and any travel bans that were in place at those times are not in evidence before me. The Christmas and March 2021 parenting time issues were not addressed in the notice of application. I make no order in respect of same. Mr. Taylor is at liberty to apply for any relief he may seek including additional compensatory time. Hopefully, no application will be necessary.
- [30] I am not ordering a police enforcement clause. There has been a long gap since the children's last visit with their father. Ms. Waters' pattern of denial of parenting time is a concern which would normally lead to serious consideration of a police enforcement clause being included. However, I have no reliable evidence or information of any kind as to the

children's attitudes towards their father at present. It is natural that with such a long gap in personal contact, there may be some reluctance on their part to travel, and that would make police involvement counterproductive and possibly damaging.

- [31] Ms. Waters, however, needs to clearly understand this. She should be doing everything in her power to see that the children are encouraged and are favourably disposed to spending the court-ordered upcoming August 2021 parenting time with their father, and she should be doing everything in her power to physically put the children into their father's care. The long-term emotional health to the wellbeing of these girls has inevitably been damaged through the disruption of their relationship with their father. Both parties need to put aside their differences and work towards that relationship being repaired.
- [32] In respect of the consent order, to reflect the travel arrangements the parties were making prior to August 2020, I am varying the consent order as follows. In paragraph 10 of the of the consent order, the word "fly" shall be replaced in the four places in which it appears with the word "travel." In addition, paragraph 12 is deleted.

[DISCUSSIONS WITH COUNSEL]

- [33] Mr. Taylor will provide at least two weeks' advance notice in writing, including by email, of his intent to exercise his parenting time and will provide confirmation of the pick-up and drop-off times and locations.
- [34] Finally, Mr. Taylor has been substantially successful on this application and he is awarded costs and those, too, will be deductible from the outstanding lump sum payment.

"A. Saunders, J."

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