

File # 5134/97

ONTARIO COURT OF JUSTICE

(PROVINCIAL DIVISION)

THE MOTHER

-Applicant

and

THE FATHER

-Respondent

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WRITTEN  
JUDGMENT

Given by the HONOURABLE JUDGE SHERRILL M. ROGERS

AT THE TOWN OF NEWMARKET  
RELEASED – August 7, 1997

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MATRIMONIAL CASE HEARD UNDER THE CHILDREN'S LAW  
REFORM

ACT AND THE FAMILY LAW ACT

Appearances:

Counsel For Applicant

Steven D. Benmor

Counsel for Respondent

Michael J. Polisuk

The mother and father had a relationship of varying degrees of intimacy over several years. There is a child of that relationship, born (DOB). By the time of the child's conception the relationship was no longer thriving and when the pregnancy was discovered by both parties were quite clear that they could not marry and jointly parent the child. The child has therefore never resided with her father.

The issues before the court are essentially the form of access and support.

### **ACCESS**

The father has until recent times been very ambivalent about his role in the child's life. He did not seem to be able to come to terms with this responsibility either as an access parent or a support payer. His contact with the child up until about two months prior to this trial was quite sporadic. Visiting has been more consistent recently.

The Court was quite concerned about the intentions of the father. It would not be in the child's best interests to have the father show some interest for a while and then drop out of her life after she had begun to bond with him. The Court put the question quite specifically to the father and asked him to declare his true interest without fear that this would concern the Court. He was told that if he did not feel he could participate in the child's life it would be better to say so now, so a

relationship that was not fruitful would not commence. The father, however, indicated that he wished to see his child and did desire to have a role in her life.

The child and her mother rent a small portion of a home from a friend of the mother's. The accommodation is the best the mother feels she can do at this time and she is looking for other accommodation in the near future. The father has been visiting his child at this home with the mother present. The mother feels that the father is not particularly experienced with respect to children's needs and the evidence at the trial bore this out. It is clear that for a period of time the father does need some assistance in understanding the needs of this child.

The father is engaged to be married and there is a wedding planned for September. His fiancé, is a young women who impressed the Court as being fairly energetic and sensible. Although she is understandably uncomfortable about interaction with the mother, she is prepared to meet with the mother, to get to know the child and to be a part of this child's life. The Court feels that the fiancé, has a lot to offer to this situation and is supportive of the involvement of fiancé, in the child's life and as a help mate to the father. Both the fiancé, and the father were unclear as to where they would be living after their wedding but the Court is concerned that the child have a primary relationship with the father in his new home with the fiancé's assistance. The Court is concerned it would be confusing for the child to get to know her father in a particular residence which

might change after the wedding. The access is therefore going to be elsewhere than the father's residence until he and his fiancé, marry. The Court is satisfied that the fiancé, is a sufficient help mate to the father in caring for the child and that he need not to be tied to his parent's home.

The times that the father felt he could baby sit had a great deal to do with his somewhat unclear needs rather than the child's. The Court accepts the evidence of the mother that the mornings would be better for the child. While the father indicated that she did not nap while he was there, this does not mean that she should not nap. The child is reaching an age where there will be one longish nap in the day and as she is in a daycare situation while her mother works the nap will likely be in the afternoon. The father as a parent will have to prioritize the child's needs over his.

The father also had a strange reluctance to exercise access on Saturdays. There was a real need for this as the mother must work some Saturdays. The mother is able to give considerable notice of which Saturdays and the Court was not persuaded that whatever matters the father feels he needs to attend to on Saturdays are a priority over caring for the child. If the child's mother cannot be available because of work commitments, then the child's father who is not employed Saturday ought to be.

The father was also concerned about seeing the child in the morning because he goes to church at 12:00 noon. The mother is Jewish and the father Catholic. As the mother is clearly the primary parent and as she will have the bulk of responsibility for the care of this child and her upbringing, the Court feels that the issue of religious instruction ought to be in the hands of the mother. It is therefore not reasonable that the child be taken to the Catholic Church until she is old enough to understand the multiplicity of religious experience in her background. The Court will therefore arrange access so that the father can see her Sunday mornings but still leave and attend church without the child.

Access for the father is therefore as follows:

- 1) each and every Sunday from 8:30 a.m. to 11:30 a.m. commencing August 1, 1997 and continuing until the wedding of the father and his fiancé. Said access is to be exercised at the child's home or in the community but not at any residence of the father. The fiancé, is permitted to attend on any visits;
- 2) from the first Sunday after the father's wedding; each and every alternate Sunday from 9:00 a.m. to until 2:00 p.m.;
- 3) one Saturday per month, notice of the times and dates to be given by the mother one month in advance. If the father declines to exercise said access he shall pay the reasonable child care costs incurred by the mother for that day;
- 4) each and every Christmas from 9:00 a.m. to 2:00 p.m.;

- 5) each and every Easter Sunday from 9:00 a.m. to 2: 00 p.m.;
- 6) commencing July 1, 1998 for two weekends of each month from 9:00 a.m. Saturday to 4:00 p.m. Sunday with two months notice by the mother;
- 7) in the summer of 1999 and each summer thereafter for two one week periods with notice by the mother by April 30<sup>th</sup> of each and every year.

The father is to provide his own child care restraint system when transporting the child. He is to give seventy-two hours notice of any access he is unable to attend. Until the child is twelve years old the father shall not expose her to the Roman Catholic religion and if he wishes to attend church while the child is in his care he must make appropriate child care arrangements for the child in his residence.

### **SUPPORT**

The mother works for a retail clothier, Esprit de Corp. She earns from that position the sum of \$3,076.92 on a monthly basis. She also receives the Child Tax Credit in the amount of \$86.68. There is the additional possibility of bonuses which she is not enjoying at this point but hopes to obtain in the near future. Prior to the birth of the child, when she was able to work more hours, she could receive a bonus of up to \$500.00 per month. In addition to this, the mother is a beneficiary of a discretionary trust. The only evidence with respect to this trust is that it is totally discretionary on the part of the trustees who considers the needs of various family members and may or may not prioritize the situation of the mother as being worthy of funds being disbursed. In any event, this is not income

that the mother can rely on. Her income is therefore between \$3,500 and \$3,600 per month. The father filed a financial statement indicating he makes just under \$1,600 per month. The father works twenty-nine hours at the Canadian Imperial Bank of Commerce. It is clear, however, that the respondent's income as calculated by the bank for his pension summary shows an average annual salary of \$20,763.00.

The father has been employed in the same position with no efforts at advancement, no educational improvements and seemingly no career aspirations for about decade. He still lives at home with his parents where little responsibility for expenses that arise out of his room and board. Indeed, very little has happened to the father in terms of maturation and career development over the past ten years. His life style is more that of a twenty year old than that of a twenty-nine year old. The father seems to be making some efforts to make monies from an A.D. but for the past several years he claims there has been no profit. He most certainly aids his father who has a very successful AMW business. The father runs errands for his father, arranges meetings and is generally useful to his father in this business. There appears to be no remuneration for such efforts although it is clear that a great many of the father's expenses are taken care of by his family.

It was clear from the father's evidence that he has done little to improve his position over the years. Perhaps this is because he has had no responsibilities

but it is also clear that he has not set about improving his situation since the birth of his child a year ago. The father does not appear to have a plan to improve his situation other than to make greater efforts at the AMW business. Given that he has had nine years to improve this situation it seems unlikely that this will put him in a position to properly care for his child or indeed be a responsible spouse. The father failed to give disclosure with respect to his AMW business. The Court is unclear as to why disclosure was not made.

If the father's AMW business did not take up the time which would be devoted to a regular work week then he would have the possibility of working more hours. It is clear that he has not sought advancement although he has many unsubstantiated suggestions as to why this is. It is, however, clear that if the father were to seriously devote himself to his career, in the bank, he could work more. The Court is prepared to impute income to him for a forty-hour week which would bring his income to between \$30,000 and \$32,000 per year. If indeed the father can earn more than this through a second line of endeavour such as AMW that is appropriate, however, he must maximize his income in one way or the other. While the father is lacking in ambition and drive he is otherwise a personable man with a reasonable skill level and the Court is prepared to impute to him commencing in 1999 an income of \$35,000 per year.

As the support guideline legislation has not been passed in the Province of Ontario, the Court must look to the needs of the child as outlined in the Family



Law Act. The child's mother has filed a financial statement putting the child's needs to the Court. The Court has some concern about some overstating of the needs. The Court does not feel that this stems from any desires to mislead the Court on the mother's behalf, but rather from the fact that prior to the birth of the child, the mother enjoyed the life of a successful career women with no responsibilities. She has become used to a more expensive life style and while she has clearly made significant adjustments since her enforced poverty during her maternity leave and since, the Court feels that there are some reductions called for in her child care budget.

The amount of \$200 per month for clothing for the child is excessive. While it is clear that the mother must, for her career needs, spend considerable monies on her clothing, this is not true of the child. The mother could attend used clothing stores and take advantage of reduced prices. I have reduced the clothing budget to \$55 per month.

The mother has allocated \$195 for the food needs of the child. In the very near future if not already the child will be able to switch to homo milk rather than formula. The Court feels those needs could be satisfied by a budget of \$150 per month.

The mother has an entry of \$150 for toiletry articles. This includes a rather hefty amount for diapers. The Court feels that this is excessive given the price of diapers in bulk and that the amount could be reduced to \$100.

While the Court can appreciate the mother may wish to have a cushion of \$100 for miscellaneous items, the Court feels that under her current unfortunate circumstances this ought to be reduced to \$75 per month.

The significant expenditure for the child is for day care and baby-sitting. This is a total of \$769.59 per month which includes the day care during the week but also extra monies for babysitting on Saturdays when the mother must work. The access schedule will reduce that cost marginally to about \$740 but this is still a significant portion of the child's needs. These day care expenses are completely reasonable. The mother took considerable care to find good day care for her child as one would hope she would do. The particular day care provider meets the standards of quality that the mother rightfully requires and also has some greater flexibility which the mother needs. It is clear that such efforts should be applauded and supported by the father.

There is an entry of \$60 for entertainment and recreation for the child. While no doubt this could be spent without any difficulty in the mother's circumstances it ought to be reduced. I fix that amount at \$45.

I do not believe the child requires a haircut once a month. The amount allocated for that is reduced to \$4.00.

While the mother no doubt wishes to save for the future for the child, until her economic circumstances improve, this would not be possible. I eliminate this amount.

The other expenses are reasonable, although in many aspects not affordable at this time. This however leaves a reasonable child care budget for the child in excess of \$1,700. Clearly the mother needs assistance to provide for this child. As the father has not provided full disclosure, it is difficult to calculate his ability to pay. There was an interim order of \$435 per month. It is clear during the period of the interim order the father found funds to pay for a great many miscellaneous items such as books, saving plans, snack items and charities. While the Court does not dispute the validity of charitable contributions as such, they must give way to the needs of one's child. The sums of money expended for books, videos and a form of voice mail are for the AMW business and since the father says that that has not produced any income, it seems those expenses must be discounted as he must either make the business worthwhile or give it up. The interesting point is, however, that in spite of what the father considers an onerous child support order, in the month of March he was able to spend more than \$200 on snacks for himself. There is something amiss here and it must be that the father is able to find more funds than he has indicated to the Court.

The Court is mindful of the fact that there are considerable needs in the child, particularly as far as day care is concerned. The Court is also aware that the father must have resources that are undisclosed if he has the disposable income as indicated above. The Court therefore orders that commencing August 1, 1997, the father shall pay to the mother for support of the child the sum of \$540 per month payable on the first day of each month. The Court further orders that commencing January 1, 1999, the father shall pay to the mother for support of the child the sum of \$605 per month payable on the first day of each month thereafter. This amount is calculated on a imputed income of \$35,000 per year. The Court has therefore given the father one year to use his talents to produce a better salary. The amount is based on the guideline amount of \$305 for an income of that category and contribution of \$300 per month towards the day care cost.

The father is to provide a copy of his income tax return to the mother on July 1 of each and every year commencing July 1, 1998.

The evidence from the trial does not indicate that there are any changes in the father's income from the time of the birth of the child until the trial and of course from the time of the birth of the child until the interim motion on June 18, 1997. There ought to have been child support payable from the time of the birth of the child and it would seem that the father was in no different position at that time

than he is now. The support order of February 8, 1997 is therefore made retroactive to August 1, 1996. The father has agreed that he would cover the child on his medical and dental insurance plan. It is therefore ordered that he shall provide coverage for the child during the currency of this support order through any health care plans that are available to him through employment. Copies of such coverage shall be provided to the mother. Further, if the said plan permits, the father shall execute such documents as are necessary to allow the mother to deal directly with the plan.

The Court does not find the jurisdiction to make an order that the child shall be made a beneficiary of any insurance plans. This would be in contravention of Section 34 (i) of the Family Law Act. Although it might be that there would be extreme financial difficulties if the support was not payable through the death of the father, it is speculation as to whether the child would become a public charge.

The child support shall be indexed in accordance with all items in the Consumer Price Index for Canada as provided by Statistics Canada.

Counsels are to contract the trial co-ordinator to speak to the issue of costs if so desired.

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S.M. Rogers