

CANADA / JUDGMENT

Canning v. Fearn

2000 BCSC 362

COURT

Supreme Court of British Columbia

DECIDED

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Citation:

Canning v. Fearn

Date:20000228

2000 BCSC 362

Docket:

E24104

Registry: Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

William Patrick Canning

Plaintiff

AND:

helen fearn

defendant

REASONS FOR JUDGMENT

OF

master j. w. horn

Counsel for the Plaintiff:

Krishan Klear

Counsel for the Defendant:

Leonard Krog

Date and Place of Hearing/Trial:

January 6 and 13, 2000

Nanaimo, BC

- [1] This was an application by the defendant Helen Fearn for a variation of an order made by me on the 5th of August, 1999. The application was filed November 29, 1999 but did not get on for hearing until January. I ordered in August that Helen Fearn have interim sole custody of the children Mikhayla and Mallory with generous access to William Canning. I ordered that his access to the children include every weekend from Friday after work until Sunday at 9:00 am and every other weekend from Friday after work until Sunday at 6:00 pm. I also ordered that in the event that Helen Fearn were working and William Canning were off work for more than five hours between the hours of 9:00 and 5:00 pm he would have access to the children.
- [2] Helen Fearn asks that the court vary the order to allow her to have the children every second weekend and to allow William Canning to have access on only two or three days a week during the time that the plaintiff is not working as well as daily telephone access if he so desires. She also wishes to have the children returned from access visits no later than 5:30 pm.
- [3] Helen Fearn has three children by a former marriage who live with her.
- [4] The first question to be asked is whether there has been a change of circumstances since the order was made. The order was made under the provisions of section 35(1) of the Family Relations Act. While section 20 of the Family Relations Act does not, like section 17 of the Divorce Act, set out specific factors to be considered in determining whether to vary an order, but merely allows a court to do so where there has been a change of circumstances, it has been held, in many cases, but particularly in *Bruce v. Bruce* (1997) 29 BCLR (3rd) 378, that the change must represent a clear and distinct departure from what the court then knew of the circumstances or could reasonably have anticipated when making the order. The change must be a material change. Having determined that there has been such a change then the Family Relations Act requires the court to apply the factors set out in section 24(1). In particular the court must take into account the health and emotional well-being of the child.
- [5] Nothing is said in the materials to suggest that the emotional health or well-being of these children has been adversely affected by the present access order or that a change in the order will either improve or adversely affect their health or emotional well-being.
- [6] The concerns expressed by Helen Fearn are that despite the fact that she has been named as the custodial parent, she does not have any weekend time with these children except every alternate Sunday and, as to weekdays, considering that William Canning has the children from after school until 5:30 from Tuesdays to Fridays and she has the children from after school only on Monday, he is, in effect, seeing more of the children in their waking hours than she does, since their bed time is 8:00.

- [7] The answer to the concern about weekday visits is that if the children were not with their father from after school Tuesday to Friday they would be in day care. It is preferable that they be with their father.
- [8] The first change in circumstances referred to by Helen Fearn is that she no longer needs to work every Saturday and has arranged to work every second Saturday. She owns her own business and can adjust her hours. At the time the order was made, and for a considerable time before, she had been working Tuesdays through Saturdays. She gives as a reason for changing her schedule that she and her older children wish to see more of her younger children and to have more time together as a family on a weekend. Her older children frequently visit on weekends with their father, who lives on the mainland, and she can arrange these visits to coincide with the weekends on which William Canning has the children. By doing this, she says, she will then have all five children together at least every second weekend. I will return to this submission.
- [9] The second change in circumstances referred to is that, since the order was made, Mikhayla is attending kindergarten. She was attending half day kindergarten in the afternoon from September 1999 but from February 2000 she will be attending kindergarten in the morning. I do not consider that this is a change which materially affects the children's well-being. All that has happened is that Mikhayla will no longer spend four half days in daycare. She will spend them with her father.
- [10] The third change in circumstances relied upon is that Helen Fearn now receives a day care subsidy. This means that day care is more affordable than it was when the order was made. But the object of the order for weekday access was not to save money, but to provide that the children should spend time with their father when, due to their mother's working hours, they might otherwise have to be in day care. All that has changed is that he now works shifts that allow him to have the children every weekday except Monday. I conclude that this is not a change of circumstances which is material.
- [11] Returning to the question of weekend access. There have been two changes in circumstances. When the first order made, I assumed from the evidence that Helen Fearn was obliged to work every Saturday. I did not know then whether Mr. Canning would be able to change his shifts so that he was available during the day. For this reason I gave him access every Friday night and Saturday. The result of my order is that Ms. Fearn never has a weekend with all five children. I consider that it is in the interests of the children that she should have every second weekend with them. I accordingly make an order that William Canning have access from after school on Friday to Sunday evening, every second weekend. I reject her application to limit William Canning's weekday access. He will have access from after school (or day care) Tuesday through Friday.
- [12] My original order did not expressly state at what time the children should be returned home after the weekday afternoon visits and this has given rise to the problem as to who is to feed the children. Helen Fearn wishes to have that time set as 5:30 pm in order to ensure the

provision of a nutritious meal for the family. From the transcript of the tapes it appears that there was an arrangement that Mr. Canning would feed the children and return them at 6:00 but that the children were saying to Helen Fearn that they had not been fed and consequently she does not know whether to prepare supper for them or not.

- [13] In the circumstances it is I think desirable that only one person should be responsible for feeding the children in the evening and that should be Helen Fearn. Accordingly I will order that every weekday visit shall end at 5:30 pm, and that every weekend visit end at 6:00 pm, and that Mr. Canning will be responsible for feeding the children in the latter case.
- [14] There is evidence that this couple are still not getting along. At the request of counsel I have listened to some tape recordings of verbal exchanges between the parties both face to face and on the telephone and I have viewed one videotape of an exchange of the children.
- [15] In regard to the tapes it seems to me that their negotiations over who should attend which of the children's functions over Christmas were perfectly civilized and sensible though perhaps, inconclusive.
- [16] In regard to the videotape of the exchange of the children on October 29 I saw nothing in that video recording which would give me any concern. Mikhayla, who is a very young child, was refusing to go with her father for reasons, apparently, which had nothing to do with him but involved her sister. Both parties behaved very appropriately in persuading Mikhayla to leave the home and go with her father. Each was firm but gentle with the child. Mr. Canning did not force the child to do anything. In any event any difficulties in this exchange have nothing to do with the issue of the length of or frequency of access visits but only as to whether this sort of incident might be avoided if the point of exchange were at Helen Fearn's home or somewhere else. It was agreed at the last hearing that a different point of exchange would be arranged. I would not, myself, have ordered a neutral drop off and pick up point, but will make such order as the parties agree to.

"Master J. W. Horn"

March 3, 2000 -- Corrigendum to the Reasons for Judgment issued by Master Horn advising that the counsel for the defendant is Leonard Krog and not Ingrid Henning as previously submitted.

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Prepared on 27 October 2026 · Esheria