

CANADA / JUDGMENT

Fabian v. Estrada

2015 BCSC 2359

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 2359 Fabian v. Estrada IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Fabian v. Estrada, 2015 BCSC 2359 Date: 20151215 Docket: E150351 Registry: Vancouver Between: Aimee Danielle Fabian Claimant And Kevin James Estrada, Donald Raymond Estrada Respondents Before: Master Baker Reasons for Judgment Counsel for the Claimant: M. Huberman Counsel for the Respondents: K. Mundstock Place and Date of Hearing: Vancouver, B.C. October 6, 2015 November 12, 2015 Place and Date of Judgment: Vancouver, B.C. December 15, 2015 Table of Contents ISSUES. 3 BACKGROUND. 3 PARTIES' POSITIONS. 6 The Claimant 6 Support 6 Varying the restraining order 8 The Respondent 9 Support 9 Varying the restraining order 10 ANALYSIS. 10 Support 10 Restraining order 13 Other matters. 13 Costs. 14

ISSUES

- [1] These are matrimonial proceedings in which Ms. Fabian, the claimant, seeks
- an order that Mr. Kevin Estrada make disclosure as required by a consent order given at the parties' Judicial Case Conference (JCC) April 16, 2015;
 - spousal support, both retroactive and prospective;
 - an order varying property restraining orders given February 13 and April 16, 2015 so that Mr. Estrada's access to or use of funds or investments would be more strictly limited;
 - in the alternative to the above, an order vesting property or funds in Mr. Estrada's possession or control in trust for Ms. Fabian;
 - ongoing monthly disclosure by Mr. Estrada of all bank accounts and credit card statements;
 - a fine against Mr. Estrada pursuant to s. 230 of the Family Law Act[1] (the "Act") of \$5,000 and security to be posted; and
 - costs.

BACKGROUND

- [2] The parties have had a relatively short relationship. They began cohabitation in February 2009, married in July 2014, and separated October 19, 2014. They have no children. Ms. Fabian is 26 years old and Mr. Estrada is 33. Both have health issues related to injuries as will be discussed below.
- [3] When they first met in 2008, Ms. Fabian was a first year student at the University of Lethbridge, Alberta, studying for a degree in marketing and art history. Her marks were good and she worked part-time in retail sales to help meet expenses. Mr. Estrada was a professional hockey player, playing in the minor leagues. While cohabiting together, Mr. Estrada played in Slovakia, Switzerland, and California. For three successive years Ms. Fabian lived with Mr. Estrada for the hockey seasons at these locales. Mr. Estrada played a second season in California, but Ms. Fabian remained at the parties' home in Chilliwack working with Valley Helicopters. Since cohabiting with Mr. Estrada and travelling as described, Ms. Fabian has not returned to university.
- [4] As I said, both parties have been injured. Ms. Fabian was injured in a motor vehicle accident in December 2011. I understand her claim for damages in that matter are pending. A medical examination indicated that, as at September 2014, she had numerous symptoms remaining, mild thoracic outlet syndrome, and emotional or psychological injuries. She was in a second accident, in January 2015, and suffered two broken ribs. She still experiences symptoms from the second accident.
- [5] Mr. Estrada has been injured at least twice in his hockey career sufficiently that he required three surgeries (in particular for a hernia) but was also injured in an airplane crash in 2009. His injuries contributed to the end of his hockey career following the 2012-13 hockey season. He received \$294,000 in June 2014 to settle his claims resulting from the plane crash and for a period received \$1,000.00 (U.S.) per week insurance payments respecting his hockey injuries. He has pending claims for further insurance payments from his California hockey team, requiring, I gather, occasional trips to California.
- [6] Since ending his hockey career, his only income has come from two companies that Mr. Estrada began in 2009. The first, Sturgeon Slayers Ltd. ("Sturgeon"), is a fishing guide business of which he is the sole shareholder. The second, Fly Fishing Film Tour Ltd. is owned with a partner; Mr. Estrada owns 51% of the shares and the partner 49%. I gather the business of the second company involves publishing two magazines a year and showing films at sportsmen's shows.
- [7] During the years Ms. Fabian travelled with Mr. Estrada she had, in practical terms, no gainful employment. Sturgeon was (and is) a seasonal business, July to November, and I gather that accommodated Mr. Estrada's hockey schedule. Ms. Fabian's evidence is that she assisted with Sturgeon in all non-guiding roles: cleaning boats; booking tours; doing banking and invoicing; purchasing and preparing food for clients; and occasionally accommodating clients who stayed at the parties' home for multi-day engagements. She was

not paid, she says, for that work. In 2012 she began work for Valley Helicopters as a dispatcher. She began as a full-time employee but later that changed to part-time for mutual reasons; the company was not busy enough to need a full-time dispatcher and part-time hours allowed her to work around the requirements of Sturgeon. When she worked at Valley Helicopters she earned \$17 per hour and had a total income in 2014 of approximately \$18,000. Her work there ended in December 2014. Since then she has had only occasional retail sales work.

[8] It is fair to say that the principal assets in this action are:

- the parties' previous matrimonial home on Siemens Road, Chilliwack, registered in Mr. Estrada's name;
- the two corporate entities; and
- Mr. Estrada's bank and investment accounts. Ms. Fabian also claims an interest in a 2.5 acre parcel of land transferred by Mr. Estrada in 2013 to his father, Donald Estrada. In November 2014, Mr. Estrada granted a mortgage to his father against the family home in the sum of \$500,000.00.

[9] When the parties separated Ms. Fabian left the Siemens Road home and has lived with her parents since. Soon after she left the residence Mr. Estrada changed the locks and, except for one opportunity, she has been effectively refused access to the residence since separation.

[10] There have been three previous orders in these proceedings:

- February 6, 2015: a without notice order under s. 91 of the Act restraining disposition of assets by Mr. Estrada;
- February 13, 2015: a consent order extending the February 6 order; and
- April 16, 2015: a consent order at a Judicial Case Conference requiring extensive and detailed disclosure and exchange of documents, records, and the like, permitting Ms. Fabian to attend at the home and "pick up her personal belongings" under specific terms, and, finally, varying the February 13 order to permit Mr. Estrada access to his RRSPs for "mortgage payments, utilities, and tax payments and reasonable living expenses".

[11] Since separation the extent of assistance Mr. Estrada has given Ms. Fabian consists of:

- a payment of \$5,000.00;
- a laptop computer;
- the use of a leased Mercedes auto until June 2015; and
- the use of a cell phone until the Spring of 2015. PARTIES' POSITIONS The Claimant Support

- [12] Ms. Huberman submits that Ms. Fabian is entitled to a sum in excess of what the Spousal Support Advisory Guidelines (SAGG) would indicate and that her entitlement is justified on both a compensatory and a needs basis. Ms. Fabian, in agreeing to travel with Mr. Estrada during his hockey career effectively gave up her university years, she argues, and that that choice has left her with minimal employment skills or qualifications. She is reduced, she says, to very occasional retail sales work at \$12.00 per hour, and had to sell her engagement ring for \$4,500 to meet her needs.
- [13] On a needs basis she submits that during the relationship all assets and wealth were accumulated in the respondent's name, but with Ms. Fabian's support and contribution. Nevertheless, the separation has left her without employment, vehicle, savings or investments, or even a cell phone. She cannot afford the most basic needs, Ms. Huberman argues, and is in practical terms entirely reliant on her parents to meet those needs. She uses her parents' phone and vehicle, for example. In addition, Ms. Fabian requires treatment and counselling as a consequence of her motor vehicle accidents and cannot afford them.
- [14] Until fairly late in the process, Mr. Estrada, Ms. Huberman argues, had not made appropriate or adequate financial disclosure so that assessment of his income from his companies was not possible. Once he did provide financial statements she submitted that they were not reliable: they were the consequence solely of information provided by Mr. Estrada and were not prepared contemporaneously with the business activity i.e. several years' statements were prepared together last summer. She argues that his income can be reliably inferred from other sources, including a disclosure statement prepared by the parties in consultation with a financial advisor (proximate in time to his plane crash settlement) that indicates monthly income for Mr. Estrada of \$7,000.00.
- [15] Moreover, Ms. Huberman submits that Mr. Estrada has a propensity for arranging his financial matters to suit his purposes and points to dealings between him and his father respecting the Siemens Road property. She says there was no basis for his transfer of 2.5 acres of the property to his father in 2013, for example, nor is there a basis for the \$500,000 mortgage he granted his father against the home. These events, she submits, are simply collusive efforts between Mr. Estrada and his father to accommodate or enhance their positions in their respective separations or divorce proceedings. In 2014, Mr. Estrada lent his father \$30,000 which his father repaid; this loan, Ms. Huberman submits, confirms that Mr. Estrada has liquidity when and if he needs it and that he could manage his affairs to assist Ms. Fabian if he wished.
- [16] Mr. Estrada's expenditures belie his professed income, Ms. Huberman says. This point relates to her accompanying application to vary the JCC order, para. 1 above, and will be discussed further below. Mr. Estrada has acknowledged either higher incomes than he now admits to, or greater business success than his statements indicate, all to third parties in the recent past, she says. In any event if he does not have income he has wealth, she argues, and points to his \$294,000 settlement arising from the plane crash.

- [17] In short Ms. Huberman argues that Mr. Estrada has money when he needs it and that his stated perspective on his financial affairs shifts to suit his purposes.
- [18] Applying the SSAG, Ms. Huberman calculates that if Mr. Estrada's income is \$84,000 per annum and Ms. Fabian's is \$20,500 the support in the mid-range would be \$556. If Ms. Fabian's income is \$15,000 the mid-range is \$604. Neither number is submitted as appropriate, she says. As I indicated above, Ms. Huberman argues that this is a case for departure from the SSAG, and that support should be fixed at \$1,000 monthly. Varying the restraining order
- [19] The order consented-to at the parties' JCC February 13, 2015, prohibited Mr. Estrada from dealing with the assets in issue and particularized that to include the family home, RRSPs, investments, shares in his companies, and proceeds of the mortgages against the home except that he was permitted access to his "stocks, mutual funds, accounts and investments at financial institutions" for "mortgage payments, utilities and tax payments and reasonable living expenses". He was permitted access to the companies' property "in the ordinary course of business". It is these terms i.e. "reasonable living expenses" and "ordinary course of business", particularly the former, that have given rise to contention.
- [20] Ms. Huberman submits that Mr. Estrada has, for all practical purposes, ignored the restrictions imposed by s. 91 of the Act and the consent order and has either continued or enhanced a life style that is significantly beyond "reasonable" or one that would meet his normal day to day needs. His property and financial statement list personal expenses of \$125,736, she points out[2], and his credit card records and other financial documents demonstrate a spending pattern heedless of any need for restraint; he has typically used hotels, for example, costing \$300 and more per night.
- [21] The claimant sees Mr. Estrada's spending pattern as either dismissive of the restraints imposed by the order or, possibly, an attempt to erode capital in advance of any trial. The consequence is, Ms. Huberman argues, Mr. Estrada cannot be trusted to abide by a reasonable and flexible standard so that the court must make the order more specific and, in effect, more restrictive. The Respondent Support
- [22] Mr. Estrada's response to Ms. Fabian's claim for support is fairly blunt: he says she is "young, healthy, and fit for work". She has not shown that work is unavailable to her, or that she has made reasonable efforts to find that work. He says she quit her job with Valley Helicopters without good reason or at least that she should have "taken a medical leave of absence". Moreover he argues that his businesses do not generate significant income to meet his own expenses and that he is and has been, basically, living off of his damages award and, until they ended in 2014, hockey insurance payments. He disputes Ms. Fabian's allegations respecting the success and profitability of Sturgeon and says that it is far less busy than she indicates; he also refers clients and tours to a central agency, BC Sport Fishing Group, and that in those cases his share of the income is substantially reduced.

- [23] Ms. Munstock argues that this is not a case for compensatory support, as no disability or income-limiting (as with children, for example) factors relate to the marriage. This is, at best, she submits, a case to be decided on means and needs, and that Mr. Estrada's means are seriously exaggerated by Ms. Fabian. He has been limited in his income-earning ability by his various injuries, which include shoulder, spine, and hernia injuries. The real income from Sturgeon, she submits, is on the order of \$18,200 per year. Ms. Munstock argues that Mr. Estrada's standard of living has not changed since the separation and that he continues to live off of his injury settlement. The income he posited with the financial advisor (para. 14 above) was "goal income", not actual income, she says. Varying the restraining order
- [24] Mr. Estrada says that he has, in fact, made the disclosure if not entirely then substantially in compliance with earlier orders. He has not flaunted the restrictions on the use of funds, he says, and explained that his trips to California (and the use of hotels as a consequence) is related to his ongoing insurance claims from his hockey career. He addressed other specific expenditures (wine purchases, for example) in detail. Ms. Munstock submits that the expenses that Ms. Fabian finds objectionable were incurred before the restraining order and that Mr. Estrada has not disregarded or breached the restraining order.

ANALYSIS

Support

- [25] As I said, it is clear that both parties, in the recent past, have suffered personal injuries that have limited their income earning capacity. I have no doubt, for example, that Mr. Estrada's professional hockey career is at an end. I also conclude, however, that he is reasonably healthy and able to pursue (as he is) other avenues for income. I do not accept that his injuries have prevented or seriously limited his guiding activity, for example.
- [26] I also accept that Ms. Fabian has been seriously affected by her motor vehicle accident and, moreover, that her current impecuniosity, which I accept without qualification, limits her access to medical or remedial resources that could aid in her recovery. I conclude that she is living with her parents out of financial necessity and that their rural context further limits her employment potential, at least for the present.
- [27] I also accept that Ms. Fabian did not unreasonably limit or end her employment with Valley Helicopters. Her explanation for the declining employment (i.e. lower need for her work as a dispatcher combined with assisting with Sturgeon) is likely credible.
- [28] Finally, and most important, between five and six of the most critical years of her life, from an educational perspective, were spent accompanying Mr. Estrada in his peripatetic hockey career. I accept her version of events i.e. that she was successful and happy in her university pursuits (albeit at an early stage) but that it was Mr. Estrada's wish that she accompany him instead as he travelled from team to team and country to country.

- [29] I agree with Ms. Huberman that this is a case, even on an interlocutory basis, for compensatory support and that the oft-cited reason of parental or child-rearing responsibilities by no means is the only basis for compensatory support. Abandoning or deferring one's education at the request of one's partner, together with the dislocation that Mr. Estrada's career entailed seem to me to clearly justify a compensatory approach. Moreover, from a needs basis the sum requested (\$1,000) is more than justified in Ms. Fabian's case.
- [30] Mr. Estrada has, I conclude, the ability to pay \$1,000 per month. This is interim and his ability will be more thoroughly examined at trial, but I conclude that Mr. Estrada has funds available to pay support. Ms. Huberman submits that Wedge J.'s decision in *M.K. v. R.A.S.*[3] establishes that damages for personal injury can be income for support purposes (in that case child support). That is true as far as it goes, but it is clear that Madam Justice Wedge took a cautious approach and found that, for example, streamed payments under a structured settlement would not be income if it incorporated sums for non-pecuniary loss or the cost of future care[4]. In *M.K. v. R.A.S.*, however, she found that portions of the structured settlement were clearly attributable to loss of future earning capacity were clearly broken out so that she was able to take from that a figure that was, in her view, income for support purposes.
- [31] Mr. Estrada's injury settlement was not structured. Moreover, of the \$294,000 he received in damages some \$120,000 went to reducing accumulated debts of the parties. Nevertheless, as Ms. Huberman points out, since Mr. Estrada has not to date produced the documents supporting or explaining the settlement it is not possible to conclude how much of the settlement addressed Mr. Estrada's loss of income or income capacity. Nevertheless it would be naïve to assume that some portion of the settlement did not address income.
- [32] I also conclude that disclosure so far has probably underestimated Mr. Estrada's income or income-earning capacity. It is curious that Sturgeon, for example, is reported as having gross income in 2013 of \$109,000, but only \$66,000 in 2014. I can accept that some of what Mr. Estrada has said[5] was in part puffery and self-aggrandizement, but I doubt that the figure he gave to the parties' financial advisor (para. 14 above) of \$84,000 per year income was purely aspirational. I conclude that it was based on a reasonable expectation by Mr. Estrada of his income in the near future. If he is not earning that sum he could if he wished.
- [33] Finally, Mr. Estrada has shown an ability to arrange his circumstances as needs or perceived needs require. I refer in this to the transfer 2.5 acres to his father, the recent mortgage registered against the family home, and the loan of \$30,000 to his father, since repaid. If necessary Mr. Estrada can use the same ability to meet his spousal obligation.
- [34] In the result I direct that Mr. Estrada pay spousal support to Ms. Fabian of \$1,000 per month commencing November 1, 2014 and payable on the first of each month thereafter. He will be credited with the sum of \$5,000.00 paid already to Ms. Fabian. Restraining order

- [35] I conclude that Mr. Estrada has not complied with the restraining order. He has evidenced a spending pattern that is, in my respectful view, almost dismissive of the intent of the order.
- [36] Ms. Huberman parsed his various financial records and statements down in admirable detail. They show, for example, golf fees of \$5,800 between February of this year and the date of the application. He has persisted in using expensive hotels and has continued to make personal purchases that, if not profligate, are excessive in the circumstances, whether those circumstances relate to a reasonable lifestyle at this time in his life or whether they relate to the restraint intended by the order.
- [37] The result is that further specificity in the terms of the restraining order are justified and necessary. The restraining order given February 13 as varied April 16 will therefore be varied on the terms of Part 1, para. 2 of Ms. Fabian's application dated September 14, 2015 and filed September 16[6]. Other matters
- [38] Ms. Huberman asked in the alternative that the assets in issue be vested in trust for the claimant; that relief is premature and, possibly, the proper province of a trial and not a chambers application. She also asked for an order for monthly disclosure by Mr. Estrada. I am not going to order that at this time; hopefully, as noted below, Mr. Estrada will improve his disclosure and understand that the obligation to disclose in matrimonial proceedings is ongoing.
- [39] Finally Ms. Huberman sought a fine under s. 230 of the Act for Mr. Estrada's lack of disclosure. By the time the matter was fully heard it was acknowledged that, by and large, Mr. Estrada had made the disclosure contemplated by previous orders, with the possible exception of details and corroboration of his travel expenses. In the circumstances I do not think that censure under s. 230 is required at this time. Costs
- [40] Ms. Fabian has been largely successful in her applications and is entitled to her costs in any event of the cause. "Master Baker"
- [1] S.B.C. 2011, c. 25
- [2] Increased, she says, to \$132,000 per annum in an updated Form 8.
- [3] 2004 BCSC 1798
- [4] Ibid at para. 35
- [5] In an online hockey-related interview, for example
- [6] with the exception of para 2(a) which seems to include a typo i.e. "except"

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