
CANADA / JUDGMENT

Fawcett v. Read

2015 BCSC 2492

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Supreme Court of British Columbia

DECIDED

15 December 2015

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2015 BCSC 2492 Fawcett v. Read

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fawcett v. Read,

2015 BCSC 2492

Date: 20151215

Docket: E151972

Registry: Vancouver

Between:

Tyler Vincent Fawcett

Claimant

And

Jamie Renee Read

Respondent

Before: Master Harper

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

M. Selinger

Counsel for the Respondent:

K.F. Nordlinger, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

December 10, 2015

Place and Date of Judgment:

Vancouver, B.C.

December 15, 2015

- [1] THE COURT: Mr. Fawcett applies for an order respecting contact with Ms. Read's daughter, Amelia, who was born June 26, 2006.

background

- [2] The parties have known each other for a long time. They met at about age 12. Mr. Fawcett is now aged 38 and Ms. Read is 37. They had a romantic relationship from 1997 until 2000, and then went their separate ways.
- [3] Ms. Read married and had Amelia. Amelia's father died of cancer when Amelia was two years old. Mr. Fawcett and Ms. Read reconnected and started dating in 2010. They lived together from February 2012 until June 2013. After the parties separated, Mr. Fawcett saw Amelia with the agreement of Ms. Read. At first, Ms. Read was present at the visits. Later on, Mr. Fawcett would see Amelia without Ms. Read being present. Mr. Fawcett and Amelia saw each other about 100 times post-separation, including eight overnights.
- [4] Ms. Read cut off contact between Mr. Fawcett and Amelia in April of this year. Ms. Read's stated reason is that she did not want to expose Amelia to, in her words, "a tense and sometimes hostile relationship".
- [5] Since that time, Mr. Fawcett has attempted to persuade Ms. Read to allow contact but with no success. These legal proceedings are the result. Mr. Fawcett seeks contact with Amelia once per month from Friday after school until Sunday evening. He also seeks regular contact by phone or other electronic means unrestricted by Ms. Read.

analysis

Legal Principles

- [6] Mr. Fawcett is not a "step-parent" within the meaning of the Family Law Act, S.B.C. 2011, c. 25 ("FLA") because he was not the spouse of Ms. Read. Under s. 146 of the FLA, a "step-parent" is defined as a person who is a spouse of the child's parent and lives with the child's parent and the child. Under s. 3 of the FLA, "spouse" is defined as a person who has lived with another person in a marriage-like relationship for a continuous period of at least two years. In this case, the parties lived together for less than two years.
- [7] The relationship between Amelia and Mr. Fawcett is not specifically defined, or named, in the legislation. Mr. Fawcett falls within the general category of persons applying under s. 59 of the FLA for contact with a child. Mr. Fawcett says that he has been in a parent-like relationship with Amelia, that he loves her, and she loves him. He says that it would be in Amelia's best interests for him to have contact with her.
- [8] Ms. Read minimizes the role Mr. Fawcett has played in Amelia's life. Her counsel submits that Ms. Read and Mr. Fawcett had a transitory relationship. She submits that Mr. Fawcett has not met the onus of proving that contact would be in Amelia's best interests.
- [9] She further submits that the potential for conflict between the adults, including potential conflict between Ms. Read's parents and Mr. Fawcett, would be harmful for Amelia and contrary to her best interests.
- [10] The issue to be decided on this application is whether contact with Mr. Fawcett is in Amelia's best interests. The answer to this question involves an analysis of the relationship between Mr. Fawcett and Ms. Read, and between Mr. Fawcett and Amelia, both before and after the parties separated.
- [11] The application is governed by s. 59(2) of the FLA, which provides that the court may make an order granting contact with a child to any person who is not a guardian. In making an order respecting contact with a child, the parties and the court must consider the best interests of the child only (s. 37(1)). The application, therefore, requires consideration the factors set out in s. 37(2) of the FLA. These are the factors to be taken into account in assessing the best interests of the child.
- [12] Part 2 of the FLA deals with resolution of family law disputes. Section 4(c) sets out one of the purposes of Part 2 as being to encourage parents and guardians to create arrangements respecting contact with the child that is in the best interests of the child.
- [13] A family justice counsellor may provide assistance to resolve a family dispute, including contact with a child.

- [14] The court may appoint a person to assess the needs of the child, the views of the child, and the ability and willingness of a party to satisfy the needs of the child pursuant to s. 211 of the FLA. This is commonly called a s. 211 report.
- [15] Counsel for Ms. Read submits that s. 41 of the FLA applies to this application. Section 41 sets out parental responsibilities. These include decisions respecting with whom the child will associate. In support of the proposition that Ms. Read's decision to deny contact between Amelia and Mr. Fawcett should be given deference, she relies on *N.F. v. H.L.S.*, 1999 BCCA 398. In that case, a mother would not permit her own mother to see the child. The grandmother carried on a prostitution business. The case turned on the mother's ability and power to make decisions concerning the moral upbringing of the child. *N.F.* is not applicable to this application because the fact situation is entirely different from the facts of the present application and because the FLA has been enacted since *N.F.* was decided. Importantly, s. 37 provides that "the parties and the court must consider the best interests of the child only".
- [16] Parental responsibilities under s. 41 are not imported into an assessment of the best interests of the child in a s. 59 application. If s. 41 were applicable to a s. 59 application, the legislation would say so.
- [17] Further, even if s. 41 did apply (which it does not), s. 43 provides that the child's guardian must exercise his or her parental responsibilities in the best interests of the child. Therefore, we come full circle: the only issue on this application is Amelia's best interests.

Relationship between Mr. Fawcett and Amelia

- [18] I turn now to Amelia and Mr. Fawcett's relationship. Amelia and Mr. Fawcett have had a significant relationship. The relationship between the adults might have seemed short to Ms. Read, but from Amelia's perspective, the relationship between herself and Mr. Fawcett has lasted a large percentage of her life. Mr. Fawcett and Ms. Read continued to facilitate contact between Amelia and Mr. Fawcett post-separation. This is a significant fact. They both must have decided that continuing contact between Amelia and Mr. Fawcett post-separation was in Amelia's best interests, and they acted in accordance with that tacit agreement. Whether or not they knew at the time that they were adhering to the objectives of s. 4 of the FLA, they did "create arrangements respecting contact with the child that [was] in the best interests of the child."
- [19] I do not accept Ms. Read's claim that she agreed to continued contact as a transition. The post-separation contact, although it decreased in frequency, was never stated to be for transition purposes.

[20] I do not accept Ms. Read's assertion that she agreed to continued contact because she was afraid of how Mr. Fawcett might react if she terminated contact. After she did terminate contact, Mr. Fawcett acted appropriately. He asked Ms. Read to reconsider, then retained counsel and has pursued the appropriate remedies, and has taken the appropriate steps, with as much alacrity as our family justice system can accommodate.

[21] The parties communicated extensively by text message post-separation. The Court was told that the parties have exchanged 10,000 text messages. I am going to touch briefly on some of these text message exchanges.

[22] In August 2013 (post-separation), Ms. Read texted:

I would like you to be in our lives and spend time with her ["her" meaning Amelia].

[23] Amelia has told Mr. Fawcett, as evidenced by text messages, that she loves him and he has told her that he loves her.

[24] There is reference in the text messages to Amelia having some distress following separation and Amelia's teacher recommending counselling. Ms. Read downplays this and says that the counselling was because of a dead cat. I do not accept that explanation. It is much more likely that Amelia did experience some distress following separation, which, although unfortunate, is an indication of the close relationship she had with Mr. Fawcett.

[25] Ms. Read and Amelia seem to be a package deal from Ms. Read's perspective. In August 2013, Mr. Fawcett texted Ms. Read and said:

I am hoping for Amelia's sake we can keep my relationship with her separate from my relationship with you.

[26] Ms. Read texted:

Your relationship with Amelia cannot exist without me at this point.

[27] What has not happened from Ms. Read's perspective is that she has not yet acknowledged that Amelia has a separate relationship with Mr. Fawcett than Ms. Read has with Mr. Fawcett. Amelia has her own independent relationship with him.

[28] There is a text message from December 13, 2013, that I think is important. It is a quote from Amelia:

Tyler is like a parent to me. Too bad you guys broke up. Sometimes love does not last forever, but you have known each other since middle school so you must be pretty special friends.

[29] That is a very perceptive comment from a young child, and I think Amelia is bang on. Mr. Fawcett is like a parent to her. She knows that Mr. Fawcett and Ms. Read have broken up. She knows that their love did not last forever, but she acknowledges that they must be pretty special friends because they have known each other since middle school.

[30] I referred earlier to a reference to counselling. This is from the text exchange January 2014. Amelia's teacher recommended counselling for what Ms. Read called Amelia's emotional or behavioural problems. Ms. Read says in the text message that when she asked Amelia about it, Amelia said she wanted to talk about her feelings about the past and the parties breaking up. Again, I do not accept the characterization of the need for counselling as having anything to do with a cat that died.

[31] In the same exchange, Ms. Read says:

We were a family, weren't we?

[32] And then Mr. Fawcett texts:

I love both you and Amelia and feel fortunate that you are in my life.

[33] Then Ms. Read says:

We love you too and are glad you are in our lives.

Caselaw

[34] I turn now to the caselaw. There are very few reported cases that have considered applications by non-guardians for contact with a child pursuant to s. 59 of the FLA. One such case is *Kalafchi v. Yao*, 2015 BCSC 1152. In that case, a master made an interim order that a non-guardian have contact with a child. The mother denied that she had lived with the applicant and denied that the applicant and the child had had a close relationship. The master found that there had been a significant relationship between the child and the applicant.

[35] A Supreme Court judge set aside the master's decision. She found that there was doubt as to whether the claimant had resided with the child's mother. (In the present case, there is no disagreement between the parties as to the length of time they lived together.) She questioned the claimant's motives. She further considered it fatal to the application that the child's biological father had not been served with notice of the application. A justice of the Court of Appeal granted leave to appeal the Supreme Court's judge's order on September 23, 2015, even though the trial is set for February 2016. Coincidentally, the hearing of the appeal is set for today.

[36] The facts of *Kalafchi* are distinguishable from those of the present case.

[37] The few cases that have considered s. 59 hold that the onus of establishing that contact with a child is in her best interests is on the applicant. In *Chapman v. Chapman*, [1993] B.C.J. No. 316 (S.C.) at para. 24, the court emphasizes the significant role of the custodial parent and that the courts should be reluctant to interfere with a custodial parent's decision and should do so only if satisfied that it is in the child's best interests.

[38] Chapman was decided before the advent of the FLA. Section 37 of the FLA provides that the only consideration is the child's best interests. The custodial parent's views may be consistent with, or alternatively, inconsistent with, the child's best interests. The portion of Chapman that emphasizes the custodial parent's decision should no longer be considered relevant on an application for contact under s. 59 of the FLA.

[39] Paragraph 24(3) of Chapman is also problematic. It says:

It is not in the best interests of a child to be placed into circumstances of real conflict between the custodial parent and a non-parent. While the court must be vigilant to prevent custodial parents from alleging imagined or hypothetical conflicts as a basis for denying access to non-parents, in cases of real conflict and hostility, the child's best interests will rarely, if ever, be well served by granting access.

[40] At para. 29, however, the court goes on to say:

As set out above, the court must be careful not to allow custodial parents to advance the argument of conflict or potential conflict to defeat an otherwise worthy application for non-parental access.

[41] It must be remembered that Chapman was decided 22 years ago. The FLA specifically sets out in its opening sections the value of the reduction of conflict. It is important in the present case for the court not to allow Ms. Read's argument of conflict or potential conflict to defeat Mr. Fawcett's application for contact with Amelia if his application is otherwise worthy.

[42] In my view, the conflict between Mr. Fawcett and Ms. Read is not intractable. They had a friendly, courteous relationship post-separation and can restore that relationship with some effort. In short, I do not find that there is such intractable conflict that it would be not in the best interests of Amelia to allow contact.

[43] Finally, I want to deal with one further case, which is *Branconnier v. Branconnier*, 2006 BCSC 2020 referred to by counsel for Ms. Read. In that case, grandparents applied for more time with their grandchild than the child's mother was willing to allow. The application was denied.

[44] That case is distinguishable from the present case, however, because the mother was willing to allow some contact. If Ms. Read were to agree to Mr. Fawcett having some contact, even if it was less than Mr. Fawcett was hoping for, this application may not have been brought.

[45] Since the FLA does not define the relationship between Mr. Fawcett and Amelia, all of the circumstances of their relationship must be considered in order to assess whether it is in Amelia's best interests for her to have contact with him.

- [46] As I said earlier, in the post-separation period, Amelia saw Mr. Fawcett 100 times. Mr. Fawcett says he feels like her father. Ms. Read gave him a Valentine's Day card that said "the three of us are a family now." Even in 2014, well past the separation, Amelia made Mr. Fawcett a Father's Day card.
- [47] Ms. Read downplays the relationship amongst the three of them and says that the characterization should be that they tried to be a family, but not that they were a family.
- [48] Mr. Fawcett says he bears Ms. Read no ill will. Unfortunately, however, Ms. Read's affidavits contain unduly harsh and unjustified criticisms of Mr. Fawcett. Counsel for Ms. Read submits that events from a distant past paint Mr. Fawcett in a bad light.
- [49] Affidavits of Ms. Read's parents express concerns about Mr. Fawcett's character. These concerns are exaggerated and I do not put much weight on them.
- [50] Further s. 37(4) of the FLA specifically provides that:
- 37(4) In making an order under this part, a court may consider a person's conduct only if it substantially affects the factors set out in subsection (2), and only to the extent that it affects that factor.
- [51] I find that no conduct alleged against Mr. Fawcett affects the factors set out in section 37(2).
- [52] While the time with Amelia did decrease after the first year or so post-separation, Mr. Fawcett did see her about once a month until April of this year. Ms. Read was upset in July 2014 when Mr. Fawcett came back to Vancouver from a trip to Nanaimo with Amelia on a later ferry than they should have been on. Counsel for Ms. Read characterizes this as Mr. Fawcett showing a lack of respect for Ms. Read.
- [53] I think although Mr. Fawcett could have done a better job getting Amelia back on time, that is not such a serious offence, if I can put it that way, to be taken into serious account on this application.
- [54] Also in November 2014, Mr. Fawcett was to take Amelia to a singing lesson and he forgot. Ms. Read says that Mr. Fawcett was not sufficiently apologetic. Again, I find that, although it is unfortunate that Mr. Fawcett made that mistake, I do not find that it is so substantial as to be a major influence on my decision on this application.
- [55] There is the matter of Ms. Read's unexpected pregnancy to consider. Mr. Fawcett did not want to have a child with Ms. Read given that the relationship between them was coming to an end. This was around May 2013. Ms. Read questions how Mr. Fawcett could seek a parental relationship with Amelia but not wish to have his own child with Ms. Read. In my view, these are separate issues. I do not think Mr. Fawcett's opposition to having a child with Ms. Read is a factor that comes into play in the assessment of whether contact with Amelia is in her best interests.

- [56] Ms. Read says that she seeks consistency for Amelia. However, I note that there was consistent contact for two years following separation, although on a decreasing frequency.
- [57] Ms. Read makes vague allegations of being worried about Mr. Fawcett, but I do not find that those vague allegations have any substance. What really happened is that Ms. Read came to the conclusion that she could not be friends with Mr. Fawcett and cut off contact between him and Amelia. Ms. Read could have accepted that the friendship between her and Mr. Fawcett had come to an end but that she supported the relationship between Amelia and Mr. Fawcett. However, she did not do so. She cut Mr. Fawcett out of Amelia's life. Ms. Read says that Amelia accepts that her mother has the final say and has moved on. It is understandable that Amelia defers to her mother's wishes. Amelia by all accounts is a perceptive, intelligent and sensitive child and I do not think she would want to displease her mother.
- [58] Ms. Read is a single parent and is used to exercising all parental responsibilities without input from another parent. However, Ms. Read's view that she has the final say is not correct at law. Section 59 of the FLA exists for a reason. It is to provide a means by which a child who has a significant relationship with another person who is not a guardian can be assured of that continued relationship.

Factors to consider under s. 37(2) of the FLA

- [59] I turn now to the factors that the Court is obligated to consider under s. 37(2) of the FLA. To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered.
- [60] Subsection (a): the child's health and emotional well-being. Amelia is healthy and well adjusted. She did have some emotional problems post-separation, which I am not on the basis of the affidavit material able to assess.
- [61] Subsection (b): the child's views. These views have not been canvassed, and appropriately so at this stage in my view.
- [62] Subsection (c): the nature and strength of the relationships between the child and significant persons in the child's life. This subsection is about Amelia's relationship with Mr. Fawcett. She is clearly attached to Mr. Fawcett, or certainly was before her contact with Mr. Fawcett was unilaterally cut off.
- [63] Of course Amelia has significant relationships with other people in her life, but those relationships are not particularly relevant on this application. I acknowledge, of course, that Amelia has strong relationships with her grandparents, her uncles and other family friends. That does not displace the nature and strength of the relationship between Amelia and Mr. Fawcett. Amelia seems to be an independent young girl, and she has told Mr. Fawcett often that she loves him.

- [64] Subsection (d): the history of child's care. Amelia has been in Ms. Read's care since birth. Mr. Fawcett did share some important parental responsibilities with Ms. Read while they lived together, such as getting her ready for bed and reading to her. He also attended school concerts.
- [65] There is no question, of course, that Ms. Read is Amelia's only parent. Amelia was quite correct when she said Mr. Fawcett is "not my dad". Her natural father is her dad, but s. 59 has to do with applications by persons who are not technically the parents of the child.
- [66] Subsection (e): the child's need for stability given the child's age and stage of development. Stability was provided by both these parties following the separation. In my view, that stability should be restored.
- [67] Subsection (f): the ability of Mr. Fawcett to exercise his responsibilities. Mr. Fawcett is capable. He forgot a singing lesson, but that is not fatal. If Ms. Read wishes more information about visits that he proposes to have with Amelia, he will provide it.
- [68] Subsections (g) and (h) are about family violence, and they are not applicable.
- [69] Subsection (i): the requirement of cooperation between the child's guardians. Mr. Fawcett is not a guardian, so this subsection does not apply. To the extent the subsection should be read as the requirement for cooperation between the parties, Ms. Read and Mr. Fawcett are capable of cooperating and have done so in the past.

conclusion

- [70] In conclusion, I have determined that it is in Amelia's best interests for her to have contact with Mr. Fawcett. Mr. Fawcett has been a significant person in her life and Amelia should be allowed to resume a relationship with him.
- [71] Mr. Justice Goepel in his chambers decision, *Kalafchi v. Yao*, 2015 BCCA 400, referred to para. 22 of *Fitzgibbon v. Fitzgibbon*, 2014 BCCA 403, which addressed the purpose of interim orders:
- [22] Interim orders are primarily designed to maintain the status quo and to provide short-term solutions until issues regarding the best interests of a child can be fully canvassed at trial
- [72] In my view, the Court on this application must determine what constitutes the status quo. The status quo before Ms. Read cut off contact was that Mr. Fawcett had contact with Amelia for about 22 months post-separation.
- [73] Therefore, I will make an interim order that from January 1, 2016, Amelia will have contact with Mr. Fawcett for up to 12 hours per month on no more than two separate occasions on days and times to be arranged between the parties. This is to provide maximum flexibility. It is important for Amelia's relationship with Mr. Fawcett to fit into the rhythm of her life in a natural way.

- [74] Until further order of the court or agreement between the parties, the arrangements will be made between counsel. Mr. Fawcett will provide Ms. Read with information about the activities planned for the visit and where the visit will take place. Ms. Read is entitled to have input about the activities that Amelia would enjoy with Mr. Fawcett on the visit.
- [75] The contact will not be overnight.
- [76] As for phone contact and contact by text or other electronic means, I have difficulty envisioning an order that would put appropriate boundaries around the type of electronic communication, especially text messaging, that Mr. Fawcett, Ms. Read, and Amelia herself participate in.
- [77] Although Amelia seems to be an avid user of text messaging, I do not think it is in Amelia's best interests, after some months of no communication with Mr. Fawcett, to dive into an unrestricted texting relationship. Therefore, Mr. Fawcett may communicate with Amelia three times per week by phone or text, not to commence until after the first visit has occurred.
- [78] Mr. Fawcett's notice of application cites s. 222 of the FLA, which sets out the purposes of a conduct order:

At any time during a proceeding or on the making of an order under this Act, the Court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (d) to facilitate arrangements pending final determination of a family law dispute.

[79] This last provision is important in that it specifically references arrangements that are interim and as the parties know, the only order I can make today is an interim order pending trial, or a negotiated or mediated agreement.

[80] I am going to make a conduct order under s. 222 of the FLA:

- a) that neither party will disparage the other in their communications with Amelia or in Amelia's presence; and
- b) that Ms. Read will instruct her parents not to disparage Mr. Fawcett in their communications with Amelia or in Amelia's presence.

[81] Finally, as I said earlier, the parties need to be aware that this is an interim order. Either party may set the matter for trial. Either party may also apply for a s. 211 report. I considered making an order for a s. 211 report as part of a corollary order arising out of this application but have decided that, since no formal application has been made and I have not heard the parties on that subject, it would not be appropriate to make a s. 211 order at this time.

[82] If the parties were to consider a s. 211 report, because the issues are so narrow I think the parties might be able to obtain a s. 211 report on a rather expedited basis. I will leave it to the parties and their counsel to consider whether they would find a s. 211 report helpful, especially if the parties decide to set the matter for trial.

[83] That concludes my decision in this matter.

[SUBMISSIONS RE STAY APPLICATION]

[84] THE COURT: I have heard now a stay application. I am not going to grant a stay of the order. However, having heard further submissions about Amelia going to Regina for Christmas, which unfortunately I did not hear about in submissions, I am going to simply revise my decision to have the contact start as of January 1, 2016. This is not in response to the application for a stay. It is simply a practical adjustment of the order given the Christmas plans.

[85] I urge the parties to set a trial date.

[86] I am going to, as I said, revise my reasons to simply have the order start January 1, 2016 and then reserve the right to make any other editorial changes, but the result will be the same.

[87] Just to clarify what I said, it is 12 hours in total per month, but it is not rigidly at six hours and six hours. It could be eventually one long outing for 12 hours. It could be something else. So it is just to be flexible to fit in with Amelia's life with input from her mother.

"Master Harper"

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