
CANADA / JUDGMENT

Foster v. Fikkert

2009 BCSC 157

COURT

Supreme Court of British Columbia

DECIDED

11 February 2009

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2009 BCSC 157 Foster v. Fikkert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Foster v. Fikkert,

2009 BCSC 157

Date: 20090211

Docket: E012145

Registry: Vancouver

Between:

Suzanne Ellen Foster

Plaintiff

And

Jan Frederik Fikkert

Defendant

Before: The Honourable Madam Justice Satanove

Reasons for Judgment

Counsel for the Plaintiff:

J.K. Wahid

Counsel for the Defendant:

G.K. Bains

Date and Place of Hearing:

January 27, 2009

Vancouver, B.C.

- [1] The plaintiff mother applies for an order suspending access to the two children of the marriage, H. and B., from the defendant father pending the completion of a Views of the Child Report.
- [2] The defendant applies for:
 - a. Retroactive variation of child support;
 - b. Deduction of arrears and interest;
 - c. Cancellation of Family Maintenance Enforcement Program ("FMEP") default charges;
 - d. Immediate, reasonable, scheduled access and counselling;
 - e. A finding of contempt of court against the plaintiff and consequential sanctions.
- [3] Let me say at the outset that the application for a finding of contempt of court does not seem to be a serious motion on the part of the defendant, as defendant's counsel made no mention of it in her oral submissions. It was an unreasonable motion in the circumstances and no doubt made in retaliation for the plaintiff's attempt to collect the arrears owing to her.

ACCESS

- [4] I would like to make the general comment that both parents seem to exhibit a surprising attitude towards access. The plaintiff seemed to leave it entirely in the children's hands, who are only now twelve and fourteen years old, as to whether they saw their father or not. Two years ago, the plaintiff seemed to accept that her ten year old son knew what was best concerning access. The defendant, in turn, spent his access time watching T.V. and playing on the computer, instead of interacting with his children. More recently, the defendant tried to bargain away access permanently in exchange for satisfaction of arrears and cancellation of future child support.
- [5] It is not surprising that the course of access of H. and B. to their father has not gone well, historically. There were allegations by the plaintiff of verbal and physical abuse of the children by the defendant. These allegations ceased in 2001 when the parties obtained a Divorce Order and corollary relief, by consent, that included granting custody to the plaintiff, reasonable access to the defendant (alternate weekends and Christmas Day, two weeks in the summer and other times as agreed), joint guardianship, mutual refraining from physical discipline or verbal abuse or neglect of the children, support from the defendant to the plaintiff of \$815.00 per month based on an income of \$60,000.00, for the purposes of the Federal Child Support Guidelines, S.O.R. /97-175 (the "Guidelines"), one-half of day care or

child care costs and any other special expenses.

[6] Access continued, although sporadically, until October 2006 when the defendant was informed by the plaintiff's then counsel that the plaintiff had retained Dr. Elterman to provide what is commonly referred to as a "Views of the Child" report and the plaintiff would be applying to vary the consent order of 2001. The plaintiff's counsel was not clear in the letter of what the variations would consist, but there was reference to the children not wishing to have any contact with the defendant.

[7] Dr. Elterman provided a Views of the Child report dated December 15, 2006. He interviewed both children (who were ten and twelve at that time) and both parents. He concluded that:

If one considers this a Views of the Child Report, the children have said that there have been problems both in relation to their father's moodiness and also what he does while they are there including not engaging with them. Neither of the children said that they do not want to see him again but rather that there would need to be changes to the activities and level of interaction between themselves and their father in order for access visits to get back on track. From speaking to the two parents, I was led to believe that I would interview two children who are highly resistant to having any future contact with their father but while the children were unhappy with past interactions they certainly did not say that they do not want to see him again. The mother and father's positions are far more hardened than those of the children. (Mr. Fikkert takes the position that unless the children choose to come he does not want to do anything to force them). Ms. Gradl says that she also does not want to force the children and she seems to have taken some pride that Ben has stood up to Mr. Fikkert when Mr. Fikkert expressed frustration that a visit was being cancelled. I actually think that both parents could have been more understanding of the situation than they have been. I have no doubt, however, that this is not a recent crisis but that this has been building for a number of years and both parents now want to get on with their lives and not have to deal with this any longer. If there is still a willingness to improve the situation then I would recommend that Mr. Fikkert and the children attend some sessions of counselling in order to better understand their mutual expectations of each other.

[8] Dr. Elterman's report seems to have been ignored. The defendant did not seek counselling or the resumption of access. In fact, he took the position with Dr. Elterman that he would not insist on access if the children did not want this, but that he did not think it was appropriate that he has to pay child support. The plaintiff never applied to vary the access order until June 2008.

[9] The plaintiff makes the unfounded submission that Dr. Elterman's recommendation for the defendant and the children to attend counselling is contrary to their best interest, and potentially jeopardizes the children's health and emotional well being. Dr. Elterman is a well respected psychologist and I give weight to his opinion that counselling would be of assistance to the defendant and his children. There is no evidence to the contrary, except the plaintiff's subjective view of how the children would react if counselling was "forced" upon

them. The plaintiff's view of how the children feel about their father was not borne out by their interview with Dr. Elterman, and is likely not an accurate one.

- [10] The plaintiff cannot provide any reason why another report should be prepared, other than that two years has passed since the first one was delivered and ignored. The plaintiff does not seek an order for another report in her notice of motion, nor is there any evidence that she has unilaterally retained someone to provide it. The defendant, on the other hand, has proposed that he and the children meet with a psychologist or other counsellor to ease the process of resumed access and to build a healthier relationship, as recommended by Dr. Elterman. The defendant has recently completed the Parenting after Separation Course and plans to take the second course regarding high conflict situations. I infer from this that he is open to receiving help from those with expertise in the area of facilitating parent/child relationships. He ought to be encouraged and given every opportunity to do so.
- [11] The question of immediate, resumed access is somewhat more problematic. Given the unfortunate history of the situation, it would not likely be successful if not preceded by some initial counselling. If the counselling is successful, there should be an orderly progression to a form of access that will take into account the wishes of the children.
- [12] Therefore, I will order that for the next six months the defendant will have access to the children for the purpose of attending counselling only, and after that access shall resume as set out in the order of 2001, or as the parties agree with the assistance of a counsellor and the input of the children. Technically the plaintiff did not ask me to order another report, but I would decline to do so at this stage in any event.

CHILD SUPPORT

- [13] The parties agree that prospective child support will be calculated and paid according to the defendant's current Guidelines income of approximately \$57,000.00.
- [14] The defendant submits that since the order of 2001 until recently he has been unable to earn anywhere near the sum of \$60,000.00 per annum. In 2001 he changed his vocation from investor relations to sales and only earned \$21,191.00 in 2001, \$8,332.00 in 2002 and \$17,753.00 in 2003. In July 2003 the defendant lost his arm in a traffic accident, and did not fully recover until mid 2004. He earned \$24,083.00 for 2004 and then his income dramatically increased in 2005 to \$60,581.00. In 2006 he earned \$53,534.00 and in 2007 he earned \$57,706.00.
- [15] FMEP calculates a balance owing of \$57,498.17 as at January 26, 2009 plus provincial government fees of \$2,400.00.

- [16] The defendant submits that if child support had been based on his actual income for 2001 - 2008, his arrears (not including interest or penalties) would be \$15,828.00. Therefore, he seeks a retroactive variation of the order back to 2001. FMEP has levied a default charge of \$2,400, ICBC has suspended his right to renew his license, and he has been unable to apply for a passport.
- [17] The plaintiff submits that the defendant did not work to his full capacity apart from the year during which he sustained injury. In addition, the plaintiff submits that it is impossible to ascertain the defendant's true income because he has failed to disclose any bank accounts, RRSP's, or disposal of shares and other property. The defendant has remarried, and states that his wife is unemployed, but his 2003 and 2004 tax returns indicate she earns income.
- [18] I am not satisfied that the defendant has met the criteria to reduce or cancel arrears as set out in *Earle v. Earle*, [1999] B.C.J. No. 383 (S.C.). Most notably, the defendant has not provided full financial disclosure, nor established that the change in financial circumstances was significant and long lasting. In my opinion, he has not established on a balance of probabilities that the change in financial circumstances was not the result of choice nor has he established that he made efforts to earn money but was unsuccessful, with the exception of the year when he was recovering from his accident.
- [19] I cannot make a finding on the evidence before me that it would be "grossly unfair" not to cancel or reduce any arrears, except for the period July 2003 - 2004. I am not satisfied with his efforts to comply with the order, nor with explanation for the delay in applying. The court holds the bar of "gross unfairness" at a high level, making cases in which arrears are cancelled rare. It is not simply a question of showing a material change in employment between 2001 and 2003 that was temporary (*Luney v. Luney*, 2007 BCCA 567, 74 B.C.L.R. (4th) 203). The court looks at the capacity to pay and in order for it to be considered as a special circumstance under s. 96(3)(c) of the Family Relations Act, R.S.B.C. 1996, c. 128, there must be incapacity of a long lasting nature (*Earle v. Earle*).
- [20] In the case before me, I am of the view that the defendant has the capacity to pay and the only truly special circumstance illustrated in the case before me was the loss of the defendant's arm and subsequent loss of earning for a 12 month period.
- [21] The order for child support shall not be varied retroactively, but the arrears, interest and penalties that have accrued for the twelve month period July 2003 to 2004 shall be cancelled.
- [22] The defendant is still heavily in default of the 2001 order, and although I have not calculated the amount owing once 12 months of the arrears have been cancelled, I expect it will still be substantial. FMEP is at liberty to take whatever steps necessary to collect this amount, including entering into a payment schedule with the defendant, and I will not interfere with any imposition of government fees.
- [23] As success was more or less divided on these two applications, there will be no costs to either party.

"The Honourable Madam Justice Satanove"

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Prepared on 29 October 2026 · Esheria