
CANADA / JUDGMENT

Newton v. Luettger

2011 BCSC 995

COURT

Supreme Court of British Columbia

DECIDED

22 July 2011

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2011 BCSC 995 Newton v. Luettger

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Newton v. Luettger,

2011 BCSC 995

Date: 20110722

Docket: 04-3235

Registry: Victoria

Between:

Noreen Philomena Newton

Claimant

And:

William Hans Luettger

Respondent

Before: The Honourable Mr. Justice R.D. Wilson

Reasons for Judgment

Counsel for the Claimant:

W. Murphy-Dyson

Counsel for the Respondent:

D.F. Tracy

Place and Date of Hearing:

Victoria, B.C.

July 5, 2011

Place and Date of Judgment:

Victoria, B.C.

July 22, 2011

I

- [1] On 3 October 2005, following a 15-day trial, the court made an order (entered 11 April 2006), defining rights and duties of the parties in connection with two infant children.
- [2] The order is unusual in the scope of the particulars defined for shared care, extending, for example, to Easter egg hunting and trick or treating.
- [3] Each of the parties has made application for an order varying provisions of that order.

II

- [4] For purposes of the current applications, the material provisions of that order are these:
 - 4. Subject to agreement by the parties otherwise and subject to other terms of this Order, care arrangements for the children of the marriage shall be based on the Defendant's normal eight day work rotation as follows:
 - (a) with the Plaintiff on Days 1, 2, 3, 4 and 5 until the end of school or until 3:00 p.m. if there is no school;
 - (b) with the Defendant from after school or 3:00 p.m., as the case may be, on Day 5 and for Days 6, 7 and 8 until 6:00 p.m., such return time to be flexible if the children are involved in activities such as soccer.
 - 22. The Defendant shall be responsible for team sports activities for the children of the marriage including registering them for the activity and ensuring that they have proper equipment for it and understand that they must transport such equipment back and forth between the residences of the Plaintiff and Defendant. The Defendant may choose the location of such team sport activities.
 - 25. The expenses for all such team sports, non-team sports, and music and cultural activities shall be shared equally between the Plaintiff and Defendant.
 - 26. In addition, all expenses for the children of the marriage except food and shelter but including clothing, counselling costs, medical and dental costs, sports and other extracurricular activities costs and school supplies shall be shared equally by the Plaintiff and Defendant but neither party shall purchase an item over \$100.00 without consent of the

other party. Receipts for such expenses shall be exchanged and reconciled by the parties every three months with payment of any amount outstanding to be made within ten days after the statements and reconciliation have been delivered, the first reconciliation to take place on December 31, 2005. This arrangement will continue until September 30, 2006 and, thereafter, the Plaintiff and Defendant shall continue that arrangement or move to another scheme as they may decide to ensure that the children of the marriage continue to receive appropriate financial support.

30. Unless in case of emergency or otherwise agreed by the Plaintiff and Defendant, communication between the Plaintiff and Defendant shall be in writing by email which emails should be kept and made available in the event of future Court proceedings.[1]

III

- [5] The Claimant's application for a variation order is based on the following premises, set out in her affidavit made 2 June 2011:
5. Contrary to what was anticipated by the Trial Judge's Order, I have consistently had the children in my care over 60% of the time. Attached and marked Exhibit "A" to this my Affidavit is a summary which I prepared from calendars I have been keeping since 2006. The percentage of time that I have had the children in my care since 2006 can be summarized as follows...
8. I have not complained to the Respondent about him not spending enough time with the children. The children are happy with the way things are. I have, however, asked the Respondent repeatedly to provide more financial assistance to me. He has consistently refused.
9. While the Order of Madam Justice Neilson specifically provided that it was the Respondent's responsibility to organize and pay for sporting activities (specifically hockey, lacrosse, football and soccer) and related costs for the children, the fact is that the Respondent has left that to me to do along with also being responsible for the non-team sport activities (specifically swimming and music lessons). I tried to reconcile expense receipts as ordered by Madam Justice Neilson, but the Respondent ignored me and, instead, unilaterally started paying me arbitrary amounts, (usually using the children as couriers) ranging from \$150.00 to \$500 dollars per month. I can never depend on getting any amounts from the Respondent.

IV

- [6] The Respondent agrees that the parties have not complied with the order. He contends the parties "otherwise agreed", orally or by conduct. The Claimant disputes that contention. That is not a matter for resolution in a summary application, on conflicting affidavits.
- [7] The jurisdiction in this court to vary one of its own orders is conferred by s. 17(1) of the Divorce Act. For variation of a custody order, that section reads as follows:

17. (1) A court of competent jurisdiction may make an order varying...
- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
- [8] The court's exercise of that jurisdiction is subject to a pre-condition, defined in ss. 5 of s. 17 in these words:
- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order...
- [9] The argument advanced by the Claimant is based on the proposition that the failure to comply with the terms of an order is equivalent to "a change in the condition, means, needs or other circumstances of the child of the marriage...". To me, that is a novel proposition. No authority was cited in support of it. Absent binding authority, it is not a proposition which commends itself to me.
- [10] Non-compliance with the provisions of an order is not the equivalent of a change in circumstances. The Claimant's application for a variation order is dismissed because she has failed to establish that there has been a change in the condition, means, needs or other circumstances of the children, or either of them.

V

- [11] The Respondent's application for a variation order is based upon a change to his work schedule.
- [12] At the time the order was made, the Claimant's schedule of employment was on an 8-day cycle. On the first two days of that schedule, the Respondent worked 12-hour shifts from 6:00 a.m. to 6:00 p.m. For the two days following, the Respondent worked from 6:00 p.m. to 6:00 a.m. The Respondent did not work the following four days.
- [13] As evidenced by paragraph 4 of the Order, referred to above, the Respondent's work schedule was taken as the starting point for the shared care regime. The learned trial judge put it in these words:

I take [the Respondent's] schedule as the starting point as it is more predictable and known further in advance than the [Claimant's].

- [14] In January 2010, the two night shifts, that is to say, from 6:00 p.m. to 6:00 a.m. were deleted. The Respondent now works four shifts of twelve hours, from 6:00 a.m. to 6:00 p.m., and is off for the four days following.

- [15] The Respondent's change in schedule is relevant to his application because the current order presupposes that he will not be working on the day the children are transferred into the Respondent's care. That transfer time was either after school, or at 3:00 p.m.; if the children, or either of them, presumably, were not attending school. With the elimination of night shifts, the Respondent has demonstrated a change in circumstances. However, for the court's jurisdiction to apply, a change must be "material".[2]
- [16] The scheduled change does not affect the shared care arrangement.
- [17] Under the current order, the Respondent collects the children on Day 5 of his eight-day rotation. The children are then in his care until 6:00 p.m. on Day 6, 7 and 8. As before, the Respondent will not be working on Day 5 and will be able to collect the children at the close of the school day or 3:00 p.m. as the case may be.
- [18] The Respondent's application for a variation order is dismissed because he has failed to prove that there has been a material change in circumstances.

VI

- [19] In addition to a variation order, the Claimant is also seeking an order that the Respondent pay child support in accord with the Child Support Guidelines.
- [20] The order of 3 October 2005 was silent on the matter of child support. The Claimant's application is the first application for an order for support. The application is based on the proposition that a non-custodial parent is under a duty to pay child support to a custodial parent, pursuant to the Child Support Guidelines. That duty may be affected in a shared care regime pursuant to s. 9 of the Child Support Guidelines. If a parent has care of a child for not less than 40% of the time over the course of a year, different considerations apply.
- [21] The evidence in this case is clear that the Claimant has had care of the children over the past five years for more than 60% of the time. The Respondent cannot controvert the Claimant's evidence, because the Respondent did not keep day-by-day records of the time spent with the children.
- [22] As a matter of law, says the Claimant, an order for support must be made. There is no discretion. I accept the Claimant's argument as sound. In result, I find the Respondent's Guideline income to be \$104,000, and order that, commencing the 1st day of May 2011, and continuing on the first day of each succeeding month thereafter, until further order, he pay to the Claimant for child support the sum of \$1,495.00.

[23] The Respondent resisted the child support order, on the ground that it would exacerbate the acrimony between these parties and lead, inevitably, to yet more court applications. He did not have an answer to the Claimant's argument on the law. In any event, as I understood Mr. Murphy-Dyson, he would welcome future applications by the Respondent because it would enable the Plaintiff to apply for a change in the custody regime to one of sole custody, with defined access to the Respondent. Regrettable.

[24] There has been divided success on these applications. There will be no costs payable by or to either party.

"R.D. Wilson, J."

The Honourable Mr. Justice R. D. Wilson

[1] Only one email was lead in evidence. It is an email dated February 18, 2010 from the Claimant to the Respondent. The Claimant is seeking "proper child support". The Respondent says he has "never seen" that email.

[2] Willick v. Willick, [1994] 3 S.C.R. 760.

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