Case Name:
C. v. F.

Between
W.C., appellant, and
A.F. & Director of The Family Responsibility Office, respondents

[2004] O.J. No. 2155

131 A.C.W.S. (3d) 115

Court File No. 03-FA-11658

Ontario Superior Court of Justice
Toronto, Ontario

O'Neill J.

Heard: April 5, 2004.
Judgment: May 10, 2004.

(21 paras.)

Counsel:

Dennis Apostolides, for the appellant.

Steven D. Benmor, for the respondent A.F.

Shane Foulds, for the respondent, Director, Family Responsibility Office.

O'NEILL J.:--

PART A - INTRODUCTION

1 On January 14, 2003, Justice R. Spence of the Ontario Court of Justice made an order as follows:

1. The respondent's application to vary child support and to reduce outstanding arrears shall be dismissed. The respondent's motion to change shall be struck out but only as to that part which pertains to a variation of child support and rescission of child support arrears. The issue of access shall remain alive pending the receipt of a report from the Children's Lawyer.
2. Pursuant to Rules 14(21) of the Family Law Rules, R.S.O. 1990, the Respondent is prohibited from bringing any further motions to the court for a variation of child support or rescission of arrears of child support without leave of the court.
3. The arrears of support shall be fixed t $17,113.39 as at January 8, 2003.
4. There shall be no access to the children namely B.C. born (DOB) and K.C. (DOB) by the respondent.
5. The issue of access shall be adjourned to May 3, 2003 at 10:00 a.m. to allow the Office of the Children's Lawyer sufficient time to complete its report.

2 By separate order, Justice Spence also ordered as follows:

1. The arrears are fixed as of January 8, 2003 at $17,113.39.
2. The respondent support payor, W.C., shall pay at least $546.00 per month commencing August 1, 2002 comprised of the following amounts:

    a) $448.00 ongoing monthly support; and
    b) $100.00 per month on account of arrears.

3. In default of any of the above is noted payments set out in the above paragraph (2), the payor, W.C., shall be committed to jail for a period of forty-five (45) days and the Director, Family Responsibility Office may move ex-parte to obtain such Warrant.

3 In an amended notice of appeal filed in the Superior Court of Justice, the appellant requested an order setting aside the order of Justice Spence, and replacing it with the following:

1. An order re-instating the appellant's variation application/motion for change and allowing same to proceed to trial as promptly and expeditiously as possible.
2. An order allowing the appellant to have access to his children namely B.C. (DOB) and K.C, (DOB), as quickly as possible and under terms deemed reasonable and appropriate by the Honourable Court.
3. An order staying any enforcement proceedings by the Family Responsibility Office (FRO) and specifically a stay of the order of the Honourable Justice Spence permitting the FRO to move ex-parte to

obtain a warrant of committal against the appellant in the event of default.

4. An order setting aside the order of the Honourable Justice Spence whereby the appellant is prohibited from bringing any further motions to the court for termination of child support without leave of the court or for rescission of arrears of child support, pursuant to Rule 14(21) of the Family Law Rules.
5. An order suspending the payment of child support by the appellant to the respondent until this appeal is heard.
6. An order suspending the enforcement of arrears whether by garnishment of federal monies, suspension of the appellant's driver's licence, revocation of his Canadian passport, or enforcement in any other form whatsoever.

PART B - BACKGROUND INFORMATION

4 In part 2 of the factum of the respondent, A.F., counsel has set out a concise statement of the background facts and information with respect to this appeal. In paragraphs 6 through 24 therein, it is set out as follows:

6. The originating process in this matter between the parties was the Application by the mother in the Ontario Court of Justice in Scarborough for custody and child support that was issued in 1998.
7. Despite personal service of the Application upon the father on September 25, 1998, the father did not file responding material or attend court on the first return date of October 5, 1998.
8. On October 5, 1998, the Honourable Mr. Justice Nevins granted the mother custody of the children.
9. On December 7, 1998, the Honourable Mr. Justice Nevins granted the mother child support in the sum of $570 per month to commence October 1, 1998.
10. In May 1999, the father commenced an Application to seek blood tests to confirm paternity, vary child support, cancel the child support arrears and obtain a refraining order so that his driver's license would not be suspended by the Director of the Family Responsibility Office.
11. On June 8, 1999, the Honourable Mr. Justice Nevins granted the father an order for leave to obtain blood tests and a refraining order.
12. On June 14, 1999, the Director of the Family Responsibility Office had effected a garnishment, for the first time, of the father's employment income from his wages at his place of employment, M.S. Inc.
13. On August 20, 1999, the father quit his employment with M.S. Inc. The father has not been employed ever since that date and has been collecting social assistance from then on.
14. On October 14, 1999, the father's Application was dismissed by the Honourable Mr. Justice Nevins.

15. On November 30, 1999, the father commenced his second Application to vary child support and cancel the child support arrears.
16. After numerous Case Conferences and Settlement Conferences, this Application proceeded to trial before the Honourable Mr. Justice Otter. The trial was heard on June 14, 15, 18, and July 19, 2001. The parties were represented by counsel. The parties testified and were cross-examined. During this four day trial, the Honourable Mr. Justice Otter heard the totality of evidence presented by the parties.
17. Specifically, the Honourable Mr. Justice Otter heard the following evidence:

    a. the father was 44 years old, having been born on November 1, 1956;
    b. the father immigrated to Canada from Jamaica at age 14 years;
    c. after high school, the father attended Seneca College for courses in computer skills and real estate management;
    d. the father was employed by Dominion Groceries for many years (age: 15 to 20 years);
    e. between 1987 and 1992 (age: 31 to 36 years), the father purchased, renovated, rented out and resold residential properties at locations in Toronto including Kingston Road and Morningside, Markham Road, Painted Post Road and in Ajax;
    f. the father was a very astute businessman and was scouting rental properties, negotiating offers to purchase, arranging private mortgages, hiring trades to renovate or repair his properties, marketing these rental properties to tenants, acting as superintendent and making repairs and collecting rent;
    g. between 1989 and 1992 (age: 33 to 36 years), the father registered a new business named C.H. and operated a business hauling gravel and waste and providing snow removal;
    h. between 1991 and 1992 (age: 36 to 37 years), the father also was employed as a car salesman for Action Honda, Downsview Chrysler and Robertson Chevrolet Oldsmobile;
    i. between 1993 and 1999 (age: 37 to 43 years), the father worked as a cab driver in Jamaica;
    j. the father was last employed by M.S. Inc. (age: 43 years), where he quit on August 20, 1999, after the first child support deduction was deducted from his pay-cheque;
    k. the father had been receiving welfare since September 15, 1999 until the date of trial;
    l. the father had made no efforts to secure employment;
    m. the father did not provide any evidence of applications for employment; and

n. the father did not suffer from any physical or psychological problem that prevented him from maintaining full-time employment.

18. On July 19, 2001, the Honourable Mr. Justice Otter gave lengthy reasons and granted a final Order regarding child support, child support arrears, access and costs.
19. From the date of that Order until the present day, this Appellant has ignored the Order dated July 19, 2001. This Appellant has refused to pay child support. This Appellant has refused to pay the child support arrears. This Appellant has refused to visit his own children. This Appellant has refused to pay the costs in the sum of $1,000.
20. On October 26, 2001, the Director of the Family Responsibility Office issued a Notice of Default Hearing against the father for failure to pay child support and for the accumulated child support arrears.
21. On May 30, 2002, the Honourable Mr. Justice Spence ordered the father to deliver financial disclosure, pay the mother $446 per month as the ongoing child support, pay the mother $100 per month towards the child support arrears and to initiate a motion to change the order for child support.
22. On August 29, 2002, the father commenced his third Application to vary child support and cancel the child support arrears.
23. On January 14, 2003, the Honourable Mr. Justice Spence heard lengthy submissions from counsel for all three parties and granted the Order that the father now appeals from.
24. The Children's Lawyer conducted an investigation of the issue of access to the children in January 2003 and found that the father "demonstrated no empathy in what this can do to the children's sensibility and insists on seeing them now. Although the children do not know him as a father and may view him as a stranger, Mr. C. insists that he wants to see them unsupervised and scoffs at any suggestion that he begin this reunification process in an access center. He sees no purpose in that and is totally oblivious to the psychological implications of this for the children."

PART C - ANALYSIS

5 It is important to note that on January 14, 2003, the following events were either known to Justice Spence, or had been earlier established in the various proceedings:

(i) On August 20th, 1999, a little over two months after the Director of the Family Responsibility Office had effected a garnishment, for the first time, of the appellant's employment income, he quit his position with the company, M.S. Inc. This is confirmed in a letter dated August 30th, 1999 signed by Mr. D.R., the payroll manager.
(ii) In the change information form filed on August 29th, 2002, the appellant indicated that he was asking to change the child support or-

der on the basis that a change in circumstances had taken place. He wrote: "I've lost my job. I'm now on Welfare i.e. Social Assistance."

(iii) In the affidavit also filed on August 29th, 2002, the appellant stated in paragraphs 1 and 2 as follows:

> 1. I lost my job in September 1999 at the time I lost my Driver's Licence.
> 2. In those past, intervening 32 months, I have been unemployed.

(iv) On May 30th, 2002, Justice Spence, who was the case management judge in this matter, made a lengthy order, on consent, in relation to the default hearing then before him. Paragraph 1 of the order provided that the appellant was to provide the Family Responsibility Office with various items of financial disclosure and in paragraph 3, the appellant was ordered to pay $546.00 per month commencing August 1st, 2002 comprised of $446.00 for ongoing monthly support and $100.00 per month on account of arrears.

(v) By November 12, 2002, the appellant had commenced his variation or change application. The appellant was two months in default with respect to the order of May, 2002 and Justice Spence ordered that this amount be paid in seven days. He adjourned the proceedings to January 14th, 2003 as the appellant required an opportunity to reply to the respondent mother's answer to his motion to vary. The learned justice also made the following order:

> Father is to keep his support payments current. If he appears in court on the next date, not having made his payments on time I will strike out his change proceedings.

(vi) Lengthy submissions were made by counsel for each of the three parties before Justice Spence on January 14th, 2003. Justice Spence found that the appellant had not made his January support payment, and his counsel made, in addition to other arguments, the following request:

> So, what I ask Your Honour to consider is, again, give him the opportunity, even if its for a couple of months, to be able to get his act together, even if he can not get a job as a truck driver, to at least make an effort to work at Tim Horton's or where ever. Then if that doesn't materialize, if he's given an opportunity to where he doesn't have to scramble to live day to day, then Your Honour would be justified in accepting my friends position, I would submit. Certainly, it is his way of demonstrat-

> ing to the court that in fact even when he is given a break, he's not taking the opportunity.

6 Except for the access portion of his order, which is discussed below, I am of the view that the appeal of the other provisions of the order of January 14th, 2003 must fail. S. 37(2.1) of the Family Law Act provides that an order for child support shall not be varied unless the court is satisfied that there has been a change in circumstances or that evidence not available on the previous hearing has become available. As at January 14th, 2003, there was no indicated change in circumstances or evidence that was not available on the previous hearing. At the time of the trial before Justice Otter, the appellant was unemployed and collecting social assistance. At the time of the January 14th, 2003 order now under appeal, the appellant was still unemployed and collecting social assistance.

7 Justice Otter's child support order was based on his findings, after a trial, by which there was imputed to the appellant annual income of $30,000.00. Indeed, when Justice Otter granted his order, the appellant had been unemployed for almost two years.

8 The written materials supporting the application to vary before Justice Spence do not outline or suggest any new changes in circumstances since July, 2001, or indeed August of 1999. The appellant was taking the position that he had been on social assistance since 1999 and that he had lost his job. The appellant had consented to making ongoing payments of $546.00 commencing August 1st, 2002, but he was in arrears of at least one month on January 14th, 2003. He had also been made aware on November 12th, 2002 that if his payments were not made on time, his change proceedings would be struck out.

9 Rule 14(21) of the Family Law Rules provides that if a party tries to delay the case or add to its costs or in any other way to abuse the court's process by making numerous motions without merit, the court may order the party not to make any other motions in the case without the court's permission. Rule 14(22) provides that the court may, on motion, strike out all or part of any document that may delay or make it difficult to have a fair trial or that is inflammatory, a waste of time, a nuisance or an abuse of the court process.

10 Finally, Rule 1(8) provides that the court may deal with a failure to follow the rules, or a failure to obey an order in the case or a related case, by making any order that it considers necessary for a just determination of the matter, on any conditions that the court considers appropriate, including, (a) an order for costs; (b) an order dismissing a claim made by a party who has willfully failed to following the rules or obey the order.

11 In the change proceeding and default hearing before Justice Spence, the appellant had not requested a stay of enforcement of the order of Justice Spence permitting the Director to move ex-parte to obtain a warrant of committal against him in the event of default. In addition, the appellant had not requested an order suspending the enforcement of arrears. The issues before the court on January 14th, 2003 were the relief requested by the appellant to vary the order of Justice Otter of July 19th, 2001, rescind the arrears, secure an access order, as well as issues relating to the default hearing.

12 Findings of fact made by a justice of the Ontario Court of Justice at a default hearing should be reversed on appeal only if there was no evidence to support them, or there was a misapprehension of the evidence, or there was some overriding or palpable error in the findings, or the findings were unreasonable. The finding of the learned judge that the ap-

pellant had not satisfied the onus that he was unable to pay for valid reasons was supported by the evidence then before the court.

13 In my view, Justice Spence correctly determined on January 14th, 2003, that the appellant had had ample opportunity, by due diligence, to produce the evidence which he required for his motion to change and the default hearing. In addition, I agree with counsel for the respondent that even though the present appeal relates to the order dated January 14th, 2003, by virtue of the materials filed in 2002, and the submissions made on January 14th, 2003, the appellant is in fact attempting to appeal the trial decision of Justice Otter dated July 19th, 2001.

PART D - THE ACCESS ISSUE

14 The learned judge made a written endorsement dealing with the access issue on November 12th, 2002. At that time, he questioned whether "any access at all can be in the best interests of the six and seven year old children". The Office of the Children's Lawyer was asked to investigate and report to the court as to "what may work for these children in this particular situation". The matter was adjourned to January 14th, 2003.

15 On January 14th, 2003, the report of the Children's Lawyer had not been completed. It was since completed on April 16th, 2003 and it was produced, with other documents, at the appeal hearing. In the report summary, on page 5, it is stated: "With regard to recommendations this office cannot make any as a full investigation including the primary parties (the children) and their father was not completed for reasons stated above."

16 By paragraph 1 of his order of January 14th, 2003, Justice Spence provided that: "...The issue of access shall remain alive pending the receipt of a report from the Children's Lawyer." In paragraph 4 the learned judge stated: "There shall be no access to the children namely B.C. (DOB) and K.C. (DOB) by the respondent." Paragraph 5 of the order provided: "The issue of access shall be adjourned to May 1st, 2003 at 10:00 a.m. to allow the Office of the Children's Lawyer sufficient time to complete its report."

17 In his order dated July 19th, 2001, following trial proceedings, Justice Otter's order provided, with respect to access, as follows: "The respondent W.C. shall have access to said children as arranged between the parties to include birthday cards, Christmas cards, gifts and other correspondence from the respondent to the children; the applicant to take all reasonable steps with the children to foster and encourage gradual contact and access with the respondent."

18 I would allow the portion of the appeal relating to the access order granted on January 14th, 2003 by deleting paragraph 4 of the order. Paragraph 1 of the order contemplated the preparation of the report from the Children's Lawyer and paragraph 5 of the order adjourned the access issue to May 1st, 2003 in order to allow for preparation of the report.

19 In short, I believe that the learned judge erred by not permitting the status quo to remain in effect, pending completion of the report of the Children's Lawyer. The status quo would have preserved paragraph 3 of Justice Otter's order of July 19th, 2001.

20 In conclusion, I would dismiss the within appeal, except, as noted, by striking paragraph 4 of the order of January 14th, 2003, relating to the no access order.

21 If access needs to be further dealt with, or if the earlier order of Justice Otter needs to be refined, or changed, it can be dealt with in the Ontario Court of Justice. I would fix the costs of this appeal in the total amount of $3500.00. The appellant is hereby ordered to pay the sum of $1750.00 forthwith to the respondent, A.F., and the sum of $1750.00 forthwith to the respondent, the Director of the Family Responsibility Office. Order accordingly.

O'NEILL J.