

Date of Release: 22 December 1993

No. D085696
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)	
)	
BARBARA ANNE FOXWELL)	REASONS FOR JUDGMENT
)	
PETITIONER)	
)	
AND:)	OF THE HONOURABLE
)	
RODNEY BRUCE GEORGE FOXWELL)	
)	
RESPONDENT)	MR. JUSTICE COLLVER
)	

Counsel for the Petitioner:	Frank G. Potts
Counsel for the Respondent:	Sefton L. Levine
Place and Date of Hearing:	Vancouver B.C. December 13, 1993

The petitioner, Barbara Foxwell, practices family medicine at Langley, B.C. The respondent, Rodney Foxwell, an orthopaedic surgeon, also practices at Langley. Barbara Foxwell alleges that Rodney Foxwell is in contempt of orders of this court, for failing to pay interim support, and also failing to disclose information concerning his income and expenses. In response, Rodney Foxwell seeks reduction of spousal support of \$6,000 per month, which was ordered by a Master of this court on July 23, 1993.

1993 CanLII 2405 (BC S.C.)

Although the trial is scheduled to commence on February 23, 1994, given the nature of Barbara Foxwell's allegations and the dire straits in which Rodney Foxwell claims he now finds himself, I agreed to hear Rodney Foxwell's sworn evidence as to both the contempt and the variation issues.

This is an unusual case, and at this stage of the litigation all I can be certain of is that what I have now decided to do will satisfy neither party.

Barbara Foxwell is fifty-one years old. She has re-entered her profession after devoting years of her time and energy to raising the couple's three children. She had a salaried consulting position for a time, but she has recently established a private practice and now enjoys rising earnings.

On the other hand, Rodney Foxwell, who is sixty-seven, is in the twilight years of his professional life, and both his health and his income are declining.

Rodney Foxwell's testimony was frustrating and unsatisfactory, in tone and effect. His cross-examination was marked by evasion, obfuscation, and indignation, and when those tactics failed, he cried. I conclude that much of his response to questioning was managed - but I am not prepared to find him in contempt.

To find contempt, I must be satisfied that the conduct was calculated to defeat the claims advanced against him (*Manolescu v. Manolescu* (1991), 31 R.F.L.(3d) 421 (B.C.S.C.)). Here, I think that Rodney Foxwell, armed with yet frustrated by the legal advice he has been receiving, has simply become incapable of fathoming the extent to which his own personality and actions have contributed to the breakdown of a marriage he thought he had under control.

As to variation, there have been three significant changes in Rodney Foxwell's circumstances since the Master's order was pronounced.

First, he has assumed additional responsibility for child support, including tuition fees.

Second, his available surgery time has been cut drastically at the hospital to which he admits. Although his wife may doubt it, I think there is justification for claiming his earnings are on the wane.

Third, he faces surgery himself, later this week, for removal of a tumour (of an uncertain nature) from his hip. Both his availability and his inclination to resume practice at former levels seem problematic.

At the same time, while Rodney Foxwell struggles to maintain anything close to his former earnings, his wife's recently-revived practice has gone well past the break-even point, and her income may soon match (if not surpass) his.

In the circumstances, I am reducing spousal maintenance to \$4,000 per month, effective December 1, 1993.

However, in view of Rodney Foxwell's pathetic performance to date (most of the many interim applications are attributable to his obstinacy) there is justification for stipulating that his future performance be guaranteed.

By Friday, January 14, 1994, Rodney Foxwell must deposit into the trust account of his wife's counsel an amount sufficient to secure both spousal and child maintenance for this month and the next three months.

Given the manner in which the Foxwells have funnelled income, and have also held and managed their horse-breeding enterprise and their real estate interests, the necessary banking arrangements will not be simple. However, that is the price to be paid for choosing a corporate vehicle to minimize exposure to tax, and between their competent counsel and their accountants I assume the means can be found to meet the bank's requirements.

The only costs I propose to order - on Scale 3 - are those payable by Rodney Foxwell with respect to the application his wife was forced to bring on December 6, 1993, regarding payment of the home insurance premium.

Vancouver, B.C., December 22, 1993

"R. COLLVER, J."