
CANADA / JUDGMENT

Swann v. Swann

2009 BCCA 335

COURT

British Columbia Court of Appeal

DECIDED

15 July 2009

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2009 BCCA 335 Swann v. Swann

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Swann v. Swann,

2009 BCCA 335

Date: 20090715

Docket: CA036822

Between:

Pamela Nicole Swann

Appellant

(Plaintiff)

And

Donald Edward John Swann

Respondent

(Defendant)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Levine

The Honourable Mr. Justice Groberman

On appeal from Supreme Court of British Columbia, February 4, 2009,

(Swann v. Swann, No. 08/3649, Victoria Registry)

Oral Reasons for Judgment

Counsel for the Appellant:

D. R. McLeod

The Respondent, D. Swann:

Appearing In person

Place and Date of Hearing:

Vancouver, British Columbia

July 15, 2009

Place and Date of Judgment:

Vancouver, British Columbia

July 15, 2009

- [1] GROBERMAN J.A.: This is an appeal by the plaintiff from the dismissal of her application to have the defendant found in contempt of court for his failure to pay the full amount of child and spousal support required by court orders.
- [2] There are two underlying court orders. A consent order for child support was made at a judicial case conference on October 31, 2008. It declares the defendant to have a guideline income of \$59,192 and orders that he pay the sum of \$553 per month, on the first day of each month in respect of the parties' one child. The second order was made on November 18, 2008, and provides for spousal support in the amount of \$1000 per month, half of which is payable on the 1st of each month and half of which was payable on the 15th.
- [3] By January 22, 2009, when the contempt motion was filed, Mr. Swann had paid \$2,275 of the total of \$4,159 that was payable. The payments reflected compliance with the child support order and the first payment of spousal support, and some payment, albeit a modest amount, towards further spousal support. It appears that the arrears were somewhat higher by the time the hearing took place on February 4, 2009. While it is not entirely clear how the figure was arrived at, the chambers judge found that as of the date of hearing arrears were \$2,437.
- [4] The affidavit evidence before the chambers judge was limited. On the critical issue of the defendant's ability to pay, the only evidence put forward was a copy of Mr. Swann's Form 89 financial statement filed in Supreme Court, dated October 21, 2008. It indicates that Mr. Swann is employed by the Department of National Defence at CFB Esquimalt. It discloses a guideline income of \$59,192.86, or \$4,933 per month. Expenses, other than child support, are shown to be \$4,511 per month, including a car payment amount of \$437 per month.

[5] The defendant did not file affidavit evidence, but attended the hearing, and appears to have made representations as to his financial situation. He stated that after paying living expenses, he is about \$300 per month short of having enough money to pay child and spousal support. It is not clear whether any explanation was proffered as to why the arrears substantially exceeded that figure; however, the expense statement included in the Form 89 suggest that the shortfall, at least until the defendant was able to restructure his affairs, would have been much higher than \$300 per month.

[6] In dismissing the application, the chambers judge quoted from the judgment of Craig J. in *Stevenson v. Stevenson* (1977), 3 B.C.L.R. 7, and then summarized:

[A]s a general proposition of law, I take Mr. Justice Craig to be saying that to imprison or to find contempt and imprison for non-payment there must be, first, a refusal, second, the refusal to pay must be wilful, and, third, that it must have been occasioned by someone with the means to pay.

[7] The chambers judge noted that Mr. Swann made a "persuasive case that he is not wilfully disobeying the order of the court."

[8] The plaintiff presents two arguments in this court. First, she argues that the judge erred in finding that the defendant's failure to pay was not "wilful" because of his impecuniosity. Second, she contends that the judge erred in focussing on the appropriateness of imprisoning the defendant rather than on whether he was guilty of contempt. The plaintiff points out that imprisonment is not the only possible sanction for contempt.

[9] The second argument can, in my view, be disposed of quickly. While the chambers judge did, in his reasons, digress into a brief discussion of the history and availability of imprisonment for non-payment of monetary judgments, those issues were not his focus. Fairly read, it cannot be said that the judge's reasons indicate a refusal to make a finding of contempt because he thought that imprisonment was not an appropriate remedy.

[10] With respect to the principal argument on this appeal, I am not persuaded that the judge misstated the elements that the plaintiff had to prove in order to establish contempt of court for non-payment of maintenance ordered by the court. There are four elements that must be established: that the debtor had notice of the order, that he or she did not comply with the order, that the non-compliance was "wilful" (i.e., deliberate, as opposed to accidental or unintentional), and that the debtor was, in fact, capable of complying with the order (i.e., that he or she had the means to make the required payments).

[11] The chambers judge's summary of the law was non-technical; that is not surprising given that the defendant was self-represented. There is no indication, however, that he misconstrued the elements of contempt. It may be that at some points in his judgment, the judge conflated the concept of "wilful non-compliance" with the question of whether the defendant had the ability to pay, but any such error is of no consequence, since inability to pay is an excuse for failure to comply with a court order for the payment of money.

- [12] The difficulty in this case, then, is not the legal test for contempt, but rather the basis upon which the chambers judge found that the defendant lacked the capacity to pay.
- [13] The plaintiff contends that the defendant's capacity to pay had already been determined by the court in the context of the applications for the support orders, and that in failing to find contempt, the chambers judge was, in effect, sanctioning a variation in the support orders. In her factum, she states:
30. In allowing the argument that the Defendant was not wilfully disobeying the Orders of the Court because he simply did not have enough money to meet his obligations, the Court was in effect revisiting the decision of the two previous Courts that had made a determination based on his Financial Statement, that the appropriate level of child support was \$553 and the appropriate level of spousal support was \$1,000 per month.
31. The Court was in effect acceding to a variation argument when there had been no application for variation and no change of circumstances.
- [14] I am not persuaded that this argument is meritorious. On a contempt application, the applicant must demonstrate, beyond a reasonable doubt, that the respondent has committed contempt (See *North Vancouver (District) v. Sorrenti* 2004 BCCA 316, at para. 10). In this case, it was established, beyond a reasonable doubt, that the defendant knew of the order, that there had been non-payment, and that the non-payment was wilful, in the sense of being deliberate rather than accidental. The remaining element was that of whether the defendant had the means to pay.
- [15] The evidence of the defendant's means, here, was limited. It consisted only of his Form 89. The fact that the form had been sufficient, in earlier civil proceedings, to convince a court that the defendant had the means to pay is not determinative of the question of whether his subsequent capacity to pay was established beyond a reasonable doubt. There are at least two reasons for this. First, the standard of proof on a contempt application is higher than on an application for child support or spousal maintenance. Second, circumstances may have developed that would show that the court's order was beyond the capacity of the defendant to fulfil. Still, it was open for the chambers judge, in the absence of evidence to the contrary, to infer from the Form 89 and the previous orders of the court that the defendant had the capacity to pay the amounts that he was required to pay under the orders. In deciding whether to draw that inference, the chambers judge would have had to examine the Financial Statement in some detail, however, and not simply rely on the fact that maintenance orders had been made.
- [16] In this case, the defendant was allowed to make submissions. While the judge stated, in his reasons, that the submissions were not evidence, it is apparent that he considered them. In the end, the judge was, apparently, left with a reasonable doubt about the defendant's ability to pay. Unfortunately, his reasons do not explain precisely what raised that reasonable doubt.

- [17] Contempt is a serious matter, and the judge did not err in exercising his discretion to allow the defendant to address the court, notwithstanding that he had not filed affidavits in a timely manner. That said, it was important that any facts that were put forward form part of the court record - they should have been included in affidavits, or given by way of testimony. That did not occur in this case.
- [18] We can say, however, that it was open to the chambers judge, on the evidence, to find that it was not proved that Mr. Swann was in contempt. It is significant that he was making payments; he was not simply flouting the court's orders. A careful examination of his Form 89 raises concerns as to his ability to make payments until he had restructured his affairs - it would have taken time, for instance, to downsize his residence, or sell a vehicle. The Form 89, along with the payments, would have allowed the chambers judge to find that the defendant, while in arrears, was not being contemptuous of the court process.
- [19] In saying this, I would add that it was incumbent on Mr. Swann to properly provide his evidence to the court, and to expeditiously restructure his affairs so as to comply with the court orders. The evidence that was before the court, and the precipitous commencement of contempt proceedings persuades me that the result reached by the chambers judge should be upheld.
- [20] I would dismiss the appeal.
- [21] SAUNDERS J.A.: I agree. I would add this direction to Mr. Swann that the reasons for judgment just expressed by Mr. Justice Groberman do not represent a forgiveness of those arrears. They are still outstanding and require to be paid by the orders that have caused these proceedings to be brought.
- [22] LEVINE J.A.: I agree with the reasons for judgment of my colleague Mr. Justice Groberman, and with the further comments of my colleague Madam Justice Saunders, and that the appeal should be dismissed.
- [23] GROBERMAN J.A.: I also would indicate my agreement with the additional comment of my colleague Madam Justice Saunders.
- [24] SAUNDERS J.A.: The appeal is dismissed.
- "The Honourable Madam Justice Saunders"
- "The Honourable Mr. Justice Groberman"

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