
CANADA / JUDGMENT

Warbinek v. Warbinek

2006 BCSC 1728

COURT

Supreme Court of British Columbia

DECIDED

22 November 2006

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2006 BCSC 1728 Warbinek v. Warbinek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Warbinek v. Warbinek,

2006 BCSC 1728

Date: 20061122

Docket: D034727

Registry: New Westminster

Between:

Mark Wayne Warbinek

Applicant

And

Leah Arlene Warbinek

Respondent

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Mark Wayne Warbinek

Appearing on his own behalf

Leah Arlene Warbinek

Counsel for FMEP

Appearing on her own behalf

W. Lee

Date and Place of Trial/Hearing:

October 26, 2006

New Westminster, B.C.

INTRODUCTION

[1] There are a number of motions filed in this action, pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the Federal Child Support Guidelines, SOR/97-175, ("Guidelines"), arising out of the parties' separation agreement, dated May 8, 1994, as well as the parties' Divorce Order, pronounced on March 14, 1997 by Preston J. At the commencement of the proceedings, I asked the parties to identify the issues they wished to address in their respective applications.

[2] The respondent, Ms. Warbinek, articulated the following issues:

1. The applicant is no longer an appropriate guardian for the children of the marriage and the order of Preston J. should be varied to reflect the respondent as sole guardian;
2. The applicant should be prohibited from bringing any further applications to vary the separation agreement except in so far as the variations affect the quantum of child support;
3. The Court should impute a Guideline income to the applicant of \$42,000 based upon his deliberate under employment and vary child support to reflect the proper amount of child support and s. 7 benefits;
4. The Court should order the applicant to pay arrears of child support and s. 7 expenses estimated at in excess of \$14,000; and
5. The Court should impose a penalty upon the applicant for failure to pay life insurance premiums and, alternatively, the Court should order the applicant to designate the three children of the marriage as beneficiaries under his RRSP.

[3] The applicant, Mr. Warbinek, articulated the following issues:

1. The applicant asks the Court to waive his obligation to pay child support on the grounds of undue hardship;
2. The applicant seeks an order varying his proportionate share of the educational and medical expenses based upon the higher family income of the respondent;
3. The applicant seeks disclosure of financial information related to his two sons' income, the respondent's husband's income, and the medical expenses claimed for his son's orthodontic work; and

4. The applicant seeks variations of the settlement agreement including deletion of clauses 47 and 48, a \$1,000 threshold in article 49, a detailed financial disclosure procedure for s. 7 expenses, and an alternative means of paying his share of extraordinary expenses.
- [4] After the parties outlined the issues in dispute, I concluded that priority must be given to the outstanding financial matters related to child support and extraordinary expenses. Therefore, the issues addressed in these proceedings include:
 1. The amount of child support and s. 7 expenses payable for each of the parties' three children;
 2. Whether the parties' two sons remain children of the marriage;
 3. Whether the applicant is underemployed;
 4. Whether the applicant's proportionate share of the medical and educational expenses should be altered; and
 5. Whether the settlement agreement should be amended to provide for mutual disclosure of financial information.
- [5] The only issue resolved by consent is the deletion of clauses 47 and 48 of the settlement agreement. These clauses concern day care expenses and none of the parties' three children remain in need of day care. These clauses are thus ordered deleted from the agreement.

BACKGROUND

- [6] The parties were married in September 1982. They have three children: Aaron Donald Warbinek, born January 22, 1985, Bryce Alexander Warbinek, born September 1, 1988, and Layne Taylor Warbinek, born December 5, 1990. The parties separated in 1994 and their separation agreement was filed with the court on May 9, 1994. Pursuant to this agreement, Ms. Warbinek retained sole custody of the three children and Mr. Warbinek had a right to exercise defined access. The parties also agreed to joint guardianship of the children.
- [7] The separation agreement deals specifically with the medical expenses of the children in clause 44. By this provision, Mr. Warbinek agreed to maintain health insurance and dental coverage for the children, including medical, hospital and surgical coverage, all costs for eye wear, orthodontics, physiotherapy, massage and other health services, for so long as the children were eligible for maintenance under the Divorce Act, the Family Relations Act, R.S.B.C. 1996, c. 128, or otherwise at law. Further, the applicant agreed to pay one half of all medical and dental costs for the children that are not covered by any insurance plans available to Ms. Warbinek when she is employed full time.

- [8] Clauses 46 to 52 of the agreement address child support. The agreed to pay \$450 per month for each of the three children until the children were no longer eligible for child support at law. In addition, Mr. Warbinek agreed to pay discretionary, child-related expenses of \$200 or more, provided the parties agreed the expenses should be incurred. Clause 50 specifically addresses post-secondary education expenses for the children:
50. In the event that the children desire to attend university or a duly certified post-secondary vocational institute, the husband covenants and agrees that in addition to the payment of ongoing child maintenance, he will pay one half the cost of books and tuition for each consecutive year for each child towards completion of an under graduate degree or diploma providing each child maintains a passing average.
- [9] The separation agreement obliged Mr. Warbinek to increase child support each year his income increased and, in order to facilitate a determination of his income, the applicant was required to disclose pay stubs on a monthly basis and tax returns annually until he was no longer required to pay child support. Finally, the agreement provided that the quantum of child support would be reviewed by the Court one year from the date of execution.
- [10] On March 14, 1997, the parties were divorced and the order of Preston J. addressed interim custody, access, and joint guardianship of the children as per the separation agreement. The applicant's request to amend the separation agreement was denied, but child support was varied and reduced to \$125 per month for each child commencing February 1, 1997. During 1997, the FMEP obtained various enforcement orders in respect of child support arrears and on May 29, 1997, Preston J. determined that the applicant had paid the arrears up to that date, but dismissed his application to vary the separation agreement.
- [11] The child support arrears began to accumulate again in 1997 and on July 23, 1997, Preston J. suspended the applicant's obligation to pay child support for one year, ending May 1998. Currently, arrears in child support and medical and educational expenses claimed by Ms. Warbinek are in excess of \$14,000, \$11,200 of which represents educational expenses and an orthodontics expense for Bryce.

THE APPLICANT'S GUIDELINE INCOME

- [12] There are three issues under this heading:
1. What is the applicant's Guideline income for the purpose of calculating child support?
 2. Should the Court impute income to the applicant pursuant to s. 19 of the Guidelines based upon his underemployment?
 3. Conversely, should the Court excuse or reduce the applicant's child support obligation on the ground of undue hardship?
- [13] Regarding the issue of underemployment, Mr. Warbinek has a B.A. in Criminology and for many years was a police officer in New Westminster. In 1996 he was forced to leave this employment for reasons that precluded any possibility of returning to this type of work in

the future. Between 1996 and 1998 the applicant worked at a variety of occupations, including computer data entry. His employment was generally full time throughout this period. In 1998 he was unemployed and forced to go on social assistance. In the fall of 1998, the applicant completed a job reorientation program.

- [14] In 1999 Mr. Warbinek relocated to Vernon and took a job with the City of Vernon as a municipal guard. He continues to be employed in this capacity. This employment is of a casual nature. The applicant is called out to a shift based on his seniority. He works an average of 20 hours per week at rates of \$21.42 per hour on a day shift and \$21.92 per hour for the night shift. Most of the applicant's hours are worked on weekends and evenings, replacing employees who are sick or on leave. While the applicant has applied for positions that guarantee full time work, he has been unsuccessful due to his lack of seniority. The applicant's reported income for 2005 was \$28,156 and for 2004 it was \$23,274. For 2006, the applicant projects a reduction in his income to \$26,000 because of a change in the number of regular employees available for him to relieve.
- [15] Mr. Warbinek also reports about \$300 per year as earnings from computer repair jobs. Although the applicant intends to become certified in the area of computer repairs some time in the future, to date he has not taken the required courses because of the cost.
- [16] The applicant also says he has conducted a job search in the Vernon area without success. The jobs he sought included positions as a Handi-dart driver and a by-law officer. When asked about working part-time at home, or at other types of employment, Mr. Warbinek maintained that any other job would interfere with his casual employment as a guard. He also professed to have a limited skill set, notwithstanding having been able to do household repairs in the past.
- [17] Section 19 of the Guidelines grants the Court discretion to impute income to the applicant in a variety of circumstances, including where he is found to be intentionally underemployed. Imputation of income in circumstances of intentional underemployment is addressed by s.19(1)(a):
19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [18] In *Barker v. Barker* (2005), 45 B.C.L.R. (4th) 43, 2005 BCCA 177, the appellant/husband appealed an order that imputed income for underemployment, pursuant to s. 19(1)(a). Dr. Barker worked four days a week and argued that he was contributing a reasonable amount to the children and should not be precluded from living the lifestyle of his choice; however, the trial judge held he had the capacity to work an additional day each week and imputed

income accordingly. The Court of Appeal would not interfere with the trial judge's order to impute income for a fifth day of work; the Court held that a parent who works less than a regular work week must justify that choice by the needs of the children or suffer the loss personally.

- [19] A parent is obliged to take reasonable steps to maximize their earnings to the extent consistent with their age, education, skills, health and work history. In this case, the applicant works half time as a casual guard. There are no apparent age or health impediments to working full time. He has computer skills and experience in the institutional setting. The applicant maintains there are no jobs available that would allow him to continue his casual employment with the City of Vernon. I find, however, that the applicant has unnecessarily restricted his job search to employment that is related to his work as a guard. He has dismissed out of hand working from home doing computer data entry or telephone solicitation and has failed to consider other types of jobs for which he might be qualified.
- [20] The applicant's casual shifts as a city guard are also not so unpredictable that other part-time work would invariably interfere with his schedule. His work is concentrated into two, 12 hour shifts per week and there are specific times of the year that the work increases or decreases. The applicant has made no attempts to work around this schedule even on a trial basis with a part-time job.
- [21] I am satisfied the applicant is intentionally underemployed within the meaning of s. 19(1)(a) of the Guidelines. His job search efforts have not been comprehensive in any sense. Ms. Warbinek argues for an imputed income of \$42,000 per year. Given the applicant's past income as a police officer, his age of 50 years, his post secondary education, and his computer skills, I find an imputed income of \$38,000 is reasonable.
- [22] A Guideline income in the amount of \$38,000 results in a monthly child support payment for the child Layne in the amount of \$352. For three children, the Guidelines amount for monthly maintenance would be \$767; however, the application of the Guidelines to the applicant's two sons must be addressed separately because Mr. Warbinek maintains they are no longer dependents. This issue is addressed below.
- [23] Turning to the issue of undue hardship, the applicant maintains the Guidelines child support he pays is excessive for two reasons. First, he must travel from Vernon to the Lower Mainland to exercise access to the children and the costs associated with these trips are beyond his means. Second, he owes Revenue Canada approximately \$4,200 because he incorrectly deducted child support payments from his taxable income. Finally, he also has a car loan debt incurred during the marriage.
- [24] The circumstances giving rise to undue hardship are defined in s. 10(2) of the Guidelines. The applicant's circumstances appear to be governed by ss. 10(2)(a) and (b). Where debts are cited as a ground for reducing child support on the basis of undue hardship under s. 10(2)(a), the Court must find responsibility for "an unusually high level of debts reasonably

incurred to support the spouses and their children prior to the separation or to earn a living." The debts claimed by Mr. Warbinek are not unusually high, are not exclusively related to expenses incurred during the marriage, and do not relate to employment. Thus, I find the debts claimed by the applicant do not qualify as undue hardship.

- [25] Regarding Mr. Warbinek's claim that child support should be reduced on the basis that, pursuant to s. 10(2)(b), he has incurred "unusually high expenses in relation to exercising access," the applicant has not produced evidence of the actual cost of a visit from Vernon nor has he produced evidence of the projected cost of such a trip. This is a precondition to any consideration of undue hardship on this ground: *Vinderskov v. Vinderskov* (2002), 174 B.C.A.C. 248, 2002 BCCA 590.
- [26] It is also apparent Mr. Warbinek has not raised any concerns about the cost of exercising access since he moved to Vernon in 1999. I must presume that had this been a real financial barrier to the applicant, an application would have been brought before the Court at a far earlier date. Finally, it is significant that Mr. Warbinek chose to relocate to Vernon for reasons not related to employment. This is not a case where the applicant moved some distance from his children because he was offered a job in Vernon. I therefore deny the applicant's claim for a reduction in child support based upon undue hardship.

AARON AND BRYCE - CHILD SUPPORT AND SECTION 7 BENEFITS

- [27] Aaron is now 21 years old. He is an Honours Music Student, currently enrolled full time at Acadia University in Nova Scotia, seeking a B.A. degree in Music. Aaron previously attended Kwantlen College for two years, where he was enrolled full time in the Music Department. For the 2006/2007 academic year, Aaron's tuition will be \$8,100; his projected textbook cost is \$900 and his living expenses are estimated at \$8,700. To help pay for his educational expenses, Aaron works from May to August each year. In 2004 and 2005, Aaron earned approximately \$4,000 each year. He also received a \$1,000 scholarship toward his fees. To date, Aaron has accumulated a \$6,000 student loan and Ms. Warbinek has paid the balance of his educational expenses with her income and by selling assets.
- [28] Bryce is now 18 years old. He completed high school in June 2006 and is now enrolled at Simon Fraser University as a full time student. He attends SFU on a football scholarship in the amount of \$3,000 per year for five years. He is a gifted athlete and plans to complete a degree in Criminology and obtain work as a police officer or a firefighter. Because of the gruelling football schedule, Bryce lives in residence at SFU. Bryce's educational expenses for the 2006/2007 academic year total \$10,500, after deducting his \$3,000 scholarship for the year. Included in this total are the cost of books and tuition which are projected to be \$4,500 for the year. He has yet to accumulate a student loan. During the summer of 2006, Bryce earned \$4,000 toward his educational expenses.

- [29] The Divorce Act defines "age of majority" as the age determined by the laws of the province where the child ordinarily resides. In British Columbia, the Family Relations Act defines "child" as a person who is under the age of 19 years. Accordingly, until his birthday on September 1, 2007, Bryce remains a child. It is also my view that Bryce remains dependent upon his parents notwithstanding he is living on campus at SFU. Although he has worked to supplement his SFU scholarship, it is apparent that Bryce continues to be dependant upon his parents for the majority of his living and educational expenses. Moreover, he will be returning to live with his mother during the months of May through August. This is clearly a case similar to the facts in *Del Puppo v. Del Puppo*, [1999] B.C.J. 1721 (S.C.) (QL), where the court held there was a presumptive entitlement to child support in the case of a child under the age of 19 years who is living at home or otherwise financially dependent upon the custodial parent.
- [30] Accordingly, I find the applicant is required to pay child support pursuant to the Guidelines for Bryce and Layne in the amount of \$583 per month.
- [31] Aaron's right to child support must be determined somewhat differently. Where a child over the age of majority (Aaron is now 21 years old) seeks child support and extraordinary expenses, there is a three step procedure for determining entitlement. First, the court must decide if the person is a "child of the marriage," as defined by s. 2(1) of the Divorce Act. Second, if the person is a child of the marriage, the court must determine whether the Guidelines should be applied as if the child were under the age of majority. Third, if the usual Guidelines approach is not appropriate, the court must establish a quantum of child support having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- [32] "Child of the marriage" is defined by s. 2(1) of the Divorce Act as a child of two spouses who, at the material time, is "the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life." Based upon the factors outlined in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60, by Master Joyce (as he then was), I find Aaron remains a child of the marriage. He is enrolled as a full time student in post-secondary education completing his degree in music. He has been very successful in this program in the first two years of study at Kwantlen College and has reasonable prospects for completing this program within the next two years. He has worked every summer to earn money towards his educational and living expenses and has taken out student loans. The separation agreement between the parties also contemplates a sharing of post-secondary education tuition and books, which demonstrates the parties' intention to provide financial assistance for their children beyond the age of majority.
- [33] Addressing the second and third steps of the test, I am satisfied the Guidelines amount is not the appropriate benchmark for Aaron's child support. In my view, Aaron's age, his demonstrated ability to contribute to his own living and educational expenses, the moderate incomes and means of his parents and the availability of student loans dictate that less than

the Guidelines amount be paid. In calculating child support, I am also taking into account the parties' agreement to divide the cost of tuition and books. Having regard to these relevant factors, I find the applicant is required to pay an additional \$100 per month in child support for Aaron.

[34] Turning to the matter of extraordinary expenses, I find the parties' agreement to share equally the cost of books and tuition should prevail over a different sharing arrangement pursuant to s. 7(1) of the Guidelines. An order for special or extraordinary expenses under s. 7 is discretionary and I find clause 50 of the parties' agreement fairly balances both the means of the parents and the needs of the children. Moreover, there has been no material change of circumstances since the date of the separation agreement that would render this sharing arrangement inequitable. However, to reflect the real costs of books and tuition it is appropriate to deduct scholarship monies received by Bryce and Aaron each year to offset the cost of their tuition. Thus, for the 2006/2007 academic year the applicant shall pay the following for books and tuition:

1. For Aaron, one half of \$9,000 (minus a scholarship of \$1,000), for a total of \$4,000.
2. For Bryce, one half of \$4,500 (minus a scholarship of \$3,000, for a total of \$750.

[35] Mr. Warbinek's share of these educational expenses shall be paid in two equal instalments. The first payment of \$2,375 is retroactively ordered, paid effective September 30, 2006, and the second instalment of \$2,375 is ordered payable on or before January 30, 2007.

[36] Mr. Warbinek's obligation to pay a share of the educational expenses of Aaron and Bryce shall remain in force until they no longer meet the requirements set out in clause 50 of the separation agreement or until further order of this Court. The applicant's one half share of the cost of tuition and books (minus any scholarship money received by Aaron and Bryce towards their education costs), shall be payable in two equal instalments. In future academic years, the first instalment must be paid on or before September 30th of each year and the second instalment shall be paid on or before January 30th of the following year.

ORTHODONTIC EXPENSE FOR BRYCE

[37] Pursuant to clause 44 of the parties' separation agreement, Mr. Warbinek is required to pay one half of the dental expenses incurred for the children that are not covered by a dental plan. Pursuant to this clause, the applicant agreed to pay approximately \$3,900 toward the cost of dental surgery for Bryce, along with a promise to pay over \$1,400 in additional monies. Based on the affidavit material filed in this application, I am satisfied that the applicant was fully apprised of his son's need for the surgery, that he implicitly consented to the surgery by agreeing to pay his share of the costs and that there is no principled basis for excusing the applicant from his obligation under the separation agreement. I therefore order the applicant to pay 50% of the total cost of the dental surgery, minus any amounts already paid to the respondent.

LIFE INSURANCE

[38] Ms. Warbinek seeks enforcement of clause 59 of the separation agreement, which obligates the applicant to maintain a life insurance policy in the amount of \$150,000, naming the respondent as irrevocable beneficiary. It was the intention of the parties to use the life insurance as a means of securing the payment of child support in the event of the applicant's death. The applicant's failure to maintain such a policy is a violation of the separation agreement and he is hereby ordered to comply with this clause and forthwith provide proof of the life insurance coverage to the respondent.

EXCHANGE OF INCOME TAX RETURNS

[39] In accordance with the Guidelines, the parties are ordered to disclose their respective income tax returns to each other on or before May 1st of each year, commencing May 1, 2007. While Bryce and Aaron remain children of the marriage and are primarily resident with the respondent, she shall disclose to the applicant Aaron and Bryce's annual income tax returns each year on or before May 1st, commencing May 1, 2007.

ARREARS

[40] Mr. Warbinek is ordered to pay arrears of child support and s. 7 expenses in the amount of \$2,800. All other arrears are reduced to zero, except those additional payments ordered pursuant to this judgment.

SUMMARY

[41] The applicant is ordered to pay to the respondent the following amounts for child support and s. 7 expenses:

1. \$2,800 for arrears of child support and s. 7 expenses recorded as owing by FMEP, payable in twelve equal instalments commencing December 1, 2006 and thereafter on the first day of each month until paid in full;
2. Effective October 1, 2006, the applicant is deemed to have an imputed Guideline income of \$38,000 and shall pay child support for Bryce, Layne, and Aaron in the amount of \$683 per month commencing October 1, 2006 and continuing thereafter on the first day of each month until further order of this Court. The arrears for October and November 2006 shall be paid in twelve equal monthly instalments commencing December 1, 2006 and thereafter on the first day of each month until paid in full;
3. The applicant is ordered to pay his share of the tuition and book expenses for Aaron and Bryce for the 2006/2007 school year in the amount of \$2,375 forthwith and the balance of his share of these expenses, in the amount of \$2,375 on or before January 30, 2007. Thereafter, the applicant is ordered to pay his share of Aaron and Bryce's educational expenses in accordance with para. 36 of this judgment; and

4. The applicant is ordered to pay one half of the total cost of Bryce's dental surgery, minus any amounts paid as certified by the respondent. This amount shall be paid forthwith.
- [42] The applicant is ordered to secure and maintain a life insurance policy in accordance with clause 59 of the separation agreement and provide proof of coverage to the respondent forthwith.
- [43] By consent, clauses 47 and 48 are deleted from the separation agreement.
- [44] The parties are ordered to exchange income tax returns in accordance with para. 39 of this judgment.
- [45] Except where specifically granted by the Court, any relief claimed by the applicant in respect of amendments to the separation agreement are dismissed. All other outstanding issues are adjourned generally.

"C.J. Bruce, J."

The Honourable Madam Justice C.J. Bruce

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/06/17/2006bcsc1728.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/warbinek-v-warbinek-2006>

Prepared on 29 October 2026 · Esheria