
CANADA / JUDGMENT

Whittick v. Whittick

2014 BCSC 1597

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1597 Whittick v. Whittick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Whittick v. Whittick,

2014 BCSC 1597

Date: 20140821

Docket: 03-1731

Registry: Victoria

Between:

Thomas Edward Whittick

Claimant

And:

Jane Croil Whittick

Respondent

Before: The Honourable Madam Justice Dorgan

Reasons for Judgment

The Claimant appearing on

his own behalf:

T. E. Whittick

The Respondent appearing on

her own behalf:

J. C. Whittick

Counsel for Director of Maintenance Enforcement for the benefit of

Jane Croil Whittick:

A. P. Leslie

Place and Date of Trial/Hearing:

Victoria, B.C.

April 1, 2014

Place and Date of Judgment:

Victoria, B.C.

August 21, 2014

[1] By notice of application filed January 6, 2014, Mr. Whittick applies:

1. To vary prospectively and retroactively the child and spousal support provisions of the March 5, 2010 order of Johnston J.; and
2. For the return of his passport which has been held by the Director of Family Maintenance Enforcement (FMEP) since January 10, 2012.

[2] The following is the briefly-stated background to this application.

[3] The parties married April 1, 1978 and have three children together; a daughter born May 11, 1981, a son born September 26, 1988, and a second daughter born December 19, 1990.

[4] The parties were divorced by order of Hutchison J. on January 30, 2004; the three children were then aged 23, 16 and 14 years. During this proceeding both parties were represented by counsel and the corollary relief, including detailed provisions regarding the division of significant capital assets, went by consent.

[5] The order provided that the children live in the primary care and sole custody of Ms. Whittick, with reasonable and generous access to Mr. Whittick. It required Mr. Whittick to pay child support of \$250 per month for the eldest child, as long as she was attending the University of British Columbia full-time, and \$550 per month for the two other children. This support was styled as basic support and the respective incomes of the parties was nil for the purposes of the Child Support Guidelines. Furthermore, the child support for the two youngest children was ordered to be "determined at first instance" on November 1, 2004. There were no provisions for Section 7 expenses.

[6] Hutchison J. dismissed Ms. Whittick's claim for spousal support, with liberty to apply if there were changed circumstances.

- [7] Another consent order was made on June 24, 2005 by Gill J. That order addressed a further disbursement of capital funds. Again, the parties were represented by counsel.
- [8] Sometime in mid-2005, Mr. Whittick stopped paying child support; a unilateral decision on his part.
- [9] Sometime in 2008, Ms. Whittick served Mr. Whittick with a notice of intention to proceed and on March 5, 2010, Ms. Whittick's application for child support for the parties' son and youngest daughter, as well as spousal support for herself, came before Johnston J. On that application Ms. Whittick acted for herself and Mr. Whittick did not appear.
- [10] Justice Johnston's reasons for judgment have been transcribed. He notes at para. 8 of the reasons as follows:
- [8] Mr. Whittick has not taken any part in these proceedings, although I am satisfied on the affidavit of service that he has had notice of this application and of the materials upon which it is based. The best evidence I have of Mr. Whittick's current income is quite old, it is a 2007 income tax return that fixes him with about \$48,000 in income. The Child Support Guidelines for one child at \$48,000 fix a basic amount of child support of \$446.
- [11] In the result, Johnston J. ordered child support for the youngest child in the amount of \$446 a month retroactive to July 1, 2005 and adjourned generally the application for retroactive and ongoing child support in regard to the parties' son.
- [12] In regard to the claim for spousal support, Johnston J. found evidence that there was a change in circumstances and concluded that Ms. Whittick was entitled to spousal support on both a needs and compensatory basis. After imputing an income of \$48,000 on Mr. Whittick and applying the Spousal Support Guidelines, he ordered Mr. Whittick to pay spousal support of \$700 a month commencing February 1, 2010 plus costs. There was no order for retroactive spousal support.
- [13] Mr. Whittick did not appeal Justice Johnston's order, but he made no voluntary payments pursuant to the terms of that order nor did he pay the court ordered costs.
- [14] Ms. Whittick enrolled in the Family Maintenance Enforcement Program on July 22, 2010. Mr. Whittick was then in arrears \$31,406 pursuant to the orders of Hutchison J. and Johnston J.
- [15] In December 2012, the Director requested a hold on Mr. Whittick's passport, which remains in place.
- [16] In the four years since enrollment, the total child and spousal support paid by Mr. Whittick is \$5,186.64. All payments have been collected through attachment proceedings; that is, no support has been paid voluntarily. At January 21, 2014, Mr. Whittick was in arrears \$82,760.42 which includes interest and fees.

- [17] According to the affidavit evidence of two enforcement officers in the Family Maintenance Enforcement Program, Ms. Hull (who has generally had carriage of the file) and Ms. Mather, the Director was in contact with Mr. Whittick periodically regarding the arrears of support. At times Mr. Whittick stated he was trying to retain counsel and suggested he was attempting to refinance his home in order to pay arrears and/or that he was considering a declaration in bankruptcy.
- [18] The uncontradicted evidence of Ms. Hull is that in January 2012 she discussed with Mr. Whittick the possibility the Director would grant a priority agreement to enable Mr. Whittick to refinance the mortgage financing on his house with a view to paying on account of the arrears or the arrears in total.
- [19] There is also evidence that periodically Mr. Whittick and Ms. Hull discussed the possibility of a variation application, particularly after the hold was placed on his passport.
- [20] On Mr. Whittick's evidence, he is 65 years old and has a Commerce degree from UBC. In the early years of the marriage Mr. Whittick was apparently a successful self-employed business person. Ms. Whittick, who is 65 years old as well, remained in the home caring for the household and three children during the 26 years of marriage. The evidence shows that neither of the parties is presently employed.
- [21] Mr. Whittick's affidavit, sworn January 6, 2014, discloses his present income to be:
1.
Canada Pension Plan:
\$ 345.71 per month
 2.
Old Age Security:
\$ 550.99 per month
 3.
Guaranteed Income Supplement:
\$ 550.49 per month
- TOTAL:
\$ 1,447.19 per month --\$17,366.28 per year
- [22] In evidence are his income tax returns for 2012 and 2013 showing line 150 income of \$12,875.20 and \$12,440.89 respectively.

[23] Mr. Whittick lives in a common-law relationship with a woman who is self-employed and operates some form of business. Their household income is not disclosed. Mr. Whittick is the sole registered owner of a home in Lake Cowichan. The only evidence of value is the 2014 property assessment notice which shows \$226,600. According to his income and expense form completed for FMEP and sworn August 2, 2013, the home is subject to a first mortgage of approximately \$150,000. Mr. Whittick discloses two credit card debts which total \$70,000 on which he is paying \$300 per month. He shows a mortgage payment of \$1,100 per month and various other household expenses. It is unclear from the evidence whether or not the monthly household expenses he shows are shared with his common-law spouse.

The Law

[24] The principles relating to the parental obligation to support children, the right of a child to a fair standard of support, and the basic principles of variation and abrogation of arrears are succinctly set out in *Earle v. Earle*, [1999] B.C.J. No. 383, a case which has been followed consistently by our courts.

[25] The basic principles are summarized at para. 46 of *Earle* as follows:

1. Child Support Generally:

- a) Parents have a joint and ongoing legal obligation to support their children;
- b) It is the child, not the other recipient parent, who has the right to maintenance;
- c) The payment of maintenance is based on not just what a parent does earn, but what a parent can earn.

2. Variation of an Existing Order:

- a) The applicant must show there has been a material change of circumstances that is significant and long-lasting;
- b) A change to the Guideline income of the payor parent (or the recipient for that matter) does not automatically lead to a variation of the amount of child support.

3. Arrears: Basic Principles:

- a) There is a heavy onus on the person seeking a reduction or a cancellation of arrears, to show that there has been a significant and long-lasting change in circumstances. Arrears will not be reduced or cancelled unless it is grossly unfair not to do so (my emphasis added);
- b) If arrears are not reduced or cancelled, the court can order a payment plan over time if convinced the arrears cannot be paid right away.

4. In applying the Basic Principles relating to arrears, the court must consider that:

- a) Arrears will only be cancelled if the person is unable to pay now and will be unable to pay in the future;

- b) A reduction or a cancellation requires detailed and full financial disclosure, under oath (usually in the form of an affidavit) that at the time the payments were to be made:
 - (i) the change was significant and long-lasting;
 - (ii) the change was real and not one of choice; and
 - (iii) every effort was made to earn money (or more money) during the time in question, and those efforts were not successful;
 - c) Courts will not cancel arrears solely because the children were looked after in spite of the non-payment;
 - d) An agreement between parents to change the amount of child support or to eliminate the requirement that it be paid is not determinative of the issues.
- [26] In considering an application to abrogate, the court must determine whether or not there should be a retroactive order of any nature, and in that regard the factors set out in *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 94-116 are to be taken into account. The factors include a consideration of whether the payor parent engaged in blameworthy conduct, the present and past circumstances of the children, the hardship occasioned by a retroactive order, and the circumstances surrounding the delay in bringing the application.
- [27] A payor parent's blameworthy conduct is defined as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support". Abrogation of arrears is less likely to be ordered if the payor spouse has engaged in blameworthy conduct, see *D.B.S.* at paras. 106-109. The circumstances of the children who are the subject of an order, in this case the youngest child, are relevant in order to ensure that the child receives the benefit, in a timely fashion, of the support to which they are entitled. Finally, the consideration of hardship that may be occasioned by a retroactive order is not limited to the hardship that may be experienced by the payor parent.

Application to Vary

- [28] Has Mr. Whittick met the onus to show that the circumstances found by Johnston J. on March 5, 2010, have changed and that the change is significant and long-lasting? I take into account the following.
- a) An income of \$48,000 was imputed to Mr. Whittick by Johnston J.
 - b) Mr. Whittick now disputes this finding. However, the explanations of his non-attendance before Justice Johnston and his lack of response to either the notice of intention to proceed or the application for support are not particularly compelling. He refers to dated medical history and the fact of his business ventures having failed or changed considerably from as far back as 2001. He also asserts that he did not believe that any order could be made in the circumstances, considering the previous orders and the parties' settlement agreement (or words to that effect). That asserted belief is, of course, incorrect.

- c) There is evidence before this court that during the taxation years 2012 and 2013 and at present Mr. Whittick's income was and is far lower than that imputed to him. However, regarding his income for the years 2005 (the date the child support was ordered to commence) to 2012, Mr. Whittick's disclosure is insufficient for the purposes of a variation application. Many of Mr. Whittick's assertions and his evidence relate to dated history. The evidence is simply insufficient to establish Mr. Whittick's income pattern from 2005 to 2012, whether greater or less than the income imputed to him.
 - d) The evidence is sufficient, in my view, to conclude that it is reasonable that Mr. Whittick's income pattern from 2012 and 2013 will continue into the future, particularly because it is composed almost entirely of benefits payable on account of his age.
- [29] I have concluded that the order of Johnston J. should be varied. I am satisfied that Mr. Whittick's present circumstance -- in which his income is \$17,366.28, basically comprised of pension incomes as a result of his age 65 -- meets the onus of changed circumstances which, on the evidence before me, I find to be significant and apparently long-lasting. Accordingly, the March 5, 2010 order ought to be varied regarding child support for the parties' youngest child. This variation will be retroactive to January 2012, the approximate date of evidence of a significant and long-lasting diminishment in Mr. Whittick's income.
- [30] As of January 1, 2012, and on the first day of each month thereafter, Mr. Whittick's obligation to pay child support (based on Guideline income of \$17,366.28 per year) for the parties' youngest child, Olivia Mary Whittick, born December 19, 1990, is \$140 per month. I am satisfied that she remains a child of the marriage and will do so until she graduates from McGill in January 2015. All child support obligations will cease as of February 1, 2015.
- [31] There will be no obligation for Mr. Whittick to pay spousal support, effective January 1, 2012. I find that his income for 2013 is \$17,366.28 and Ms. Whittick's income (according to her financial statement sworn March 10, 2014) is \$14,201.67 (exclusive of support). The combination of the fact that Mr. Whittick's income is less than \$20,000 and the amount of the difference in the respective incomes of Mr. and Ms. Whittick means that it would be inappropriate to order spousal support. See also, the Spousal Support Advisory Guidelines.

Abrogation of Arrears

- [32] In order for the court to abrogate the arrears, Mr. Whittick must show that all or part of the arrears arise from a significant and longstanding change in circumstances and that it would be grossly unfair not to abrogate.
- [33] I am satisfied he has not met this significant onus in regard to all of the arrears based on the following findings:
- a) Mr. Whittick unilaterally ceased paying child support in 2005 despite an agreement between the parties and an order of the Supreme Court. It appears that since the divorce in January 2004, Mr. Whittick voluntarily paid child support for approximately one year only.

- b) I find that Mr. Whittick has consistently given his own interests priority over the needs of his children and their right to support.
- c) The evidence that over the relevant years Mr. Whittick has been consistently unable to contribute to the support of his children is not compelling.
- d) In spite of the fact that Justice Johnston declined to order retroactive spousal support and retroactive child support for the two oldest Whittick children, Mr. Whittick did not comply with his obligation regarding child support for the youngest child or his obligation regarding spousal support for Ms. Whittick.

[34] Furthermore, I am satisfied that:

- a) The Director of FMEP has been willing to consider reasonable proposals from Mr. Whittick; for example, refinancing his mortgage in order to make some arrangements for payment on account of the arrears. However, it is clear that Mr. Whittick has not taken active steps to follow up on such opportunities;
- b) there has been an unreasonable delay in bringing forward this application to vary; and
- c) while Mr. Whittick may suffer a hardship if the arrears are not abrogated in whole, Ms. Whittick will also suffer a hardship if they are abrogated.

[35] Finally, I am satisfied that to abrogate all arrears would have the effect of granting Mr. Whittick an appeal of the order of Johnston J. four years after the order was made; an outcome which is entirely inappropriate.

[36] In summary, I am satisfied that there has been an unreasonable delay and blameworthy conduct on the part of Mr. Whittick which militates against abrogating all arrears. Accordingly, I decline to abrogate the arrears of child support arising from the order of Johnston J. dated March 5, 2010, except to note that the order has been varied effective January 1, 2012. Accordingly, arrears of child support from the months January 2012 going forward must be adjusted (abrogated) to reflect the fact of that variation.

[37] Similarly, the arrears of spousal support must be adjusted (abrogated) to reflect the termination of that obligation as of January 1, 2012.

The Passport

[38] On the evidence I am satisfied that in accordance with the Family Orders and Agreements Enforcement Assistance Act, R.S.C. 1985, c. 4, and specifically s. 67(1), Mr. Whittick is in persistent arrears and the Director's application for a hold on Mr. Whittick's passport is entirely appropriate.

- [39] Furthermore, none of the provisions of s. 72, which relate to a request to terminate the Director's request for a hold on Mr. Whittick's passport, apply in this situation: Mr. Whittick is in arrears, has no payment plan that is reasonable, and the hold on his passport is reasonable in all the circumstances.
- [40] There is insufficient evidence for this court to accept Mr. Whittick's assertion that the revival of his business interests requires international travel and therefore he requires his passport. The only evidence provided in that regard is his simple assertion: there is no third party evidence in support and based on Mr. Whittick's present circumstances it is difficult to conclude that he has the income required to travel internationally.

Conclusion

- [41] The March 5, 2010 order is varied. Mr. Whittick is required to pay child support for the parties' youngest child in the amount of \$140 per month, commencing January 2012 and payable on the first day of each month, up to and including January 1, 2015, after which it will terminate. Spousal support is terminated as of January 1, 2012.
- [42] The application to abrogate all arrears of support, that is, \$82,760.42 including interest and fees, is dismissed in part. The amount of arrears including interest and fees will be recalculated by the Director to reflect the variation of support as of January 1, 2012, in accordance with these reasons.
- [43] Mr. Whittick's application for a return of his passport is dismissed.
- [44] There will be no order as to costs.

"J. L. Dorgan, J."

The Honourable Madam Justice Dorgan

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