
CANADA / JUDGMENT

Whittington v. Swanson

2007 BCSC 1157

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1157 Whittington v. Swanson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Whittington v. Swanson,

2007 BCSC 1157

Date: 20070801

Docket: E016666

Registry: New Westminster

Between:

Christine Anne Whittington

Plaintiff

And:

Gregory Irving Swanson

Defendant

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Plaintiff:

In Person

Counsel for the Defendant:

J. B. Thompson

Date and Place of Trial/Hearing:

July 18, 2007

New Westminster, B.C.

INTRODUCTION

- [1] The parties have been separated since May 2003 and were divorced in February 2006. They have two children, Lief Keenan Swanson born December 20, 1991, and Ryan Odin Swanson born September 16, 1996. Dr. Whittington and Mr. Swanson have joint custody and guardianship of the children but their primary residence is with Dr. Whittington.
- [2] Since August 2003 the parties have been involved in litigation flowing from the breakdown of their marriage. They have made numerous court appearances in conjunction with their many and varied applications. Their litigation has often been protracted and acrimonious.
- [3] In this application, Dr. Whittington seeks sole custody and guardianship of the children. Dr. Whittington also seeks orders that would obviate the necessity for the defendant's consent when travelling with the children outside the Province of British Columbia, vest sole ownership and control over trust monies and RESP monies held for the children in her own name, leave access with Mr. Swanson to the wishes of the children, and impute income to the defendant for the purpose of calculating child support. Finally, to facilitate the calculation of the defendant's Federal Child Support Guideline income, Dr. Whittington seeks certain financial disclosure orders.
- [4] Although there was initially a request for the payment of arrears of child support commencing September 1, 2006 to today's date, Dr. Whittington agreed to accept replacement cheques for those months due to the likelihood that the original cheques were lost in the mail rather than deliberately withheld. Dr. Swanson, through counsel, agreed to provide those replacement cheques and to cancel the original ones.
- [5] Dr. Whittington's application requires the court to consider whether there are circumstances justifying a variation of the custody and access regime ordered by Mr. Justice Bernard on February 23, 2006. To the extent Dr. Whittington seeks to vary the order of February 23, 2006, she acknowledges the legal obligation to prove a material change in circumstances as defined by s. 17 of the Divorce Act R.C.S. 1985 c. 3 (2nd Supp.).
- [6] Mr. Swanson opposes the relief sought by the plaintiff and argues there is no evidence of a material change in circumstances warranting a review of Mr. Justice Bernard's order. Mr. Swanson maintains he has complied with the obligation to disclose his income tax returns and has provided the court with an updated Form 89 with attachments.

HISTORY OF PROCEEDINGS

- [7] Dr. Whittington began an action for divorce and corollary relief shortly after the parties separated. At the Judicial Case Conference (JCC) on August 20, 2003 Mr. Justice Chamberlist issued a consent order that addressed, among other issues, the terms upon which Mr. Swanson was to exercise access to the children. This access order was to be in place until the continuation of the JCC on October 16, 2003. Unfortunately the parties were unable to resolve their differences on that date and the matter came before Mr. Justice Williams for hearing on February 19, 2004. Mr. Justice Williams dismissed Mr. Swanson's application for sole custody and guardianship of the children along with his request for a restraining order and a contempt order against Dr. Whittington. There was no order concerning the custody and guardianship of the children, however, Mr. Justice Williams did order certain restrictions on Mr. Swanson's access to ensure he did not expose the children to "any religious practices of the Emissaries of the Devine Light or any activities carried on by the Emissaries of the Devine Light that might be characterized as religious practices."
- [8] After the February 2004 hearing the parties were again having difficulties agreeing to an access schedule. Thus on July 20, 2005 Mr. Justice Truscott made further orders in respect of Mr. Swanson's access. Specifically, Mr. Swanson was given permission to take the children to Alberta during his summer access period which was expressly defined in the order.
- [9] On February 23, 2006 Mr. Justice Bernard granted the parties a divorce and made final orders with respect to the corollary relief claimed. By consent, Mr. Justice Bernard ordered that the parties share joint custody and joint guardianship of the children. The children's primary residence remained with Dr. Whittington while Mr. Swanson's home was designated as their secondary residence. The terms of joint guardianship were in the form of a Master Joyce order authorizing Dr. Whittington to make decisions concerning the children in the event no agreement could be reached with Mr. Swanson. Also by consent the parties agreed Mr. Swanson was to have access on each Tuesday after school until 7:00 pm and every other weekend until Monday morning. The children were to be exchanged at the Abbotsford police station. Access during the summer, Christmas, and Spring break was defined, again by consent. Finally, by consent the parties agreed the children would not be removed from the Province without the written consent of the other parent or by further order of the court.
- [10] Based upon a guideline income of \$29,416 Mr. Swanson was ordered to pay child support in the amount of \$439 per month commencing March 1, 2006. Mr. Swanson was ordered to use the RESP monies held in his name solely for the benefit of the children. All the other family assets were divided by consent.
- [11] On June 22, 2007 the parties were again before the court concerning a dispute about the children travelling to Australia to visit their maternal grandmother, Lief's attendance at a French immersion class in Montreal scheduled for August 2007, and the securing of Canadian passports for the children. Both parties appeared before me in person. My order

provided that Lief could attend the French Immersion course and passports could be obtained by Dr. Whittington without the approval or signature of Mr. Swanson. The balance of the application was adjourned to July 18, 2007 and costs were awarded to Dr. Whittington.

ISSUES

1. Has there been a material change in circumstance warranting a review of the custody, guardianship, and access regime ordered by Mr. Justice Bernard in February 2006? If so, should the court order a Custody and Access Report pursuant to s. 15 of the Family Relations Act R.S.B.C. 1996 c. 128?
2. Is there an evidentiary basis for concluding that Mr. Swanson's guideline income has changed or was not properly disclosed during the proceedings before Mr. Justice Bernard?
3. If Mr. Swanson's guideline income has changed, or was not properly disclosed to Mr. Justice Bernard, what child support is payable and should the court order further disclosure to facilitate a determination of his income?
4. What costs, if any, should be awarded for this proceeding and the June 22, 2007 hearing?

HAS THERE BEEN A MATERIAL CHANGE IN CIRCUMSTANCES?

- [12] Dr. Whittington argues that since the order of February 23, 2006 the needs, means and conditions of the children have changed. Specifically, she deposes that both children suffer from dyslexia and require special learning assistance to overcome this disability. In addition, both children require special glasses to correct their vision impairments and Ryan requires speech therapy. Both children also need orthodontics.
- [13] Dr. Whittington argues that Mr. Swanson is no longer willing to accommodate the children's special needs. He has applied to the court for a reduction in the child support payable based upon a decline in his annual income, he refused to consent to Lief's trip to Montreal to attend a French language course, and suggested Lief take French in school in place of another elective. Dr. Whittington also deposes that Mr. Swanson pays none of the children's educational expenses and no expenses under s. 7 of the Guidelines.
- [14] Dr. Whittington also argues the parties are unable to come to agreements with respect to travel outside of British Columbia and have been required to seek court orders with respect to passports and trips planned for the children. She points to Mr. Swanson's recent reluctance to allow the children to visit their grandmother in Australia as evidence of their inability to communicate successfully about the care of the children.
- [15] Dr. Whittington deposes that Mr. Swanson continues to allow the children to be exposed to members of Emissaries of the Devine Light and that their religious practices are harmful to the children. She also deposes that he lives in a place unsuitable for the children.

- [16] Mr. Swanson says he has withdrawn his application for a reduction in child support because his income has not declined since the February 23, 2006 order. In regard to s. 7 expenses, Mr. Swanson deposes that he agreed to a Catholic school for the children provided Dr. Whittington paid the costs.
- [17] Further, Mr. Swanson deposes that the disagreements the parties have in respect of the children's travel and access derive from Dr. Whittington's failure to comply with the existing court orders. Mr. Swanson deposes that Dr. Whittington took the children to Australia in 2006 without his written permission, kept the children during his Christmas access in December 2006, and refused to comply with the division of asset agreement by failing to return a diamond ring.
- [18] Mr. Swanson denies that he is exposing the children to any harmful religious practices and deposes that they have had no contact with any Emissaries except a couple well known to Dr. Whittington. In addition, Mr. Swanson deposes that his apartment is a proper living space for the children and he has, in any event, purchased a house valued at \$326,000.
- [19] Addressing Dr. Whittington's application to vary the custody and access arrangements, I find there is no evidence of a material change in circumstances justifying the orders sought. I am unable to accept that the special needs of the children are relevant to custody and guardianship in the circumstances of this case. Clearly such matters are irrelevant to the access exercised by Mr. Swanson. The fact that Mr. Swanson seeks to vary child support downward in accordance with a reduction in his annual income is not evidence that he no longer has the best interests of the children at heart. Moreover, it is apparent that Dr. Whittington has never sought any additional monies in the form of reimbursement for extraordinary expenses pursuant to s. 7 of the Guidelines.
- [20] Dr. Whittington's allegation that Mr. Swanson is continuing to allow contact between the children and his associates in the Emissaries of the Divine Light appears to have merit; however, it is not contact with members that is prohibited. Mr. Justice Williams ordered Mr. Swanson to monitor contact with members to ensure the children were not exposed to their religious practices. Mr. Swanson is cautioned to ensure that when there is contact with members he continues to supervise the children to ensure Mr. Justice Williams' order is respected.
- [21] I am also unable to conclude that Mr. Swanson lives in a residence unsuitable for the children. Indeed, as part of Dr. Whittington's claim for an increase in child support, she points to a new house recently purchased by Mr. Swanson for \$326,000. There is no evidence to support her allegation that the house is located in a dangerous neighbourhood or that it was used to grow marihuana.

- [22] Mr. Swanson appears to regularly exercise his access rights and, indeed, insists upon them being respected to the letter. Further, there is no evidence Mr. Swanson does not properly care for the children when they are residing with him. If the children are missing activities because of time spent with their father, they are old enough to express their concern directly to him.
- [23] In short, since the parties' separation in 2003 Mr. Swanson has continued to be an integral part of his children's lives. There is no evidence that he has acted other than with their best interests in mind. Accordingly, there appears to be no reason to deprive Mr. Swanson of his decision making authority over the children's lives.
- [24] I am also unable to agree that the children, at 11 and 15 years old, have reached an age where it is appropriate that their wishes dictate when and if they have contact with their father. Moreover, apart from the parties' miscommunication in respect of Christmas access in December 2006, there appears to be no ongoing problems concerning access in general. The incidents described in Dr. Whittington's affidavits regarding access occurred in 2003 and 2004.
- [25] Notwithstanding my view that the status quo in regard to joint custody and guardianship, as well as access, should be maintained, it is readily apparent the parties have not learned to communicate with each other in a civil manner post separation and that because of this problem they are unable to resolve many issues involving the children in a timely fashion. Their only effective means of communication is through legal counsel.
- [26] Although almost every allegation of misconduct raised by the parties is denied by the other, I find the affidavit material evidences a mutual lack of cooperation and an inability to come to agreements about matters in dispute regardless of the level of importance. Minor and inconsequential issues are just as likely to be left unresolved as the larger, more important ones.
- [27] It is also very difficult to determine who is more to blame for this failure to communicate. While Dr. Whittington took the children to Australia without Mr. Swanson's written consent, he inappropriately tied consent to her fulfillment of other unrelated terms in the February 23, 2006 order. In doing so, Mr. Swanson ignored the interests of his children who may well have desired a trip to Australia. In retaliation, Mr. Swanson took the children to Saskatchewan without Dr. Whittington's written consent.
- [28] The same scenario occurred in December 2006 when the parties could not agree on a change to Christmas access. Dr. Whittington acted unilaterally and Mr. Swanson retaliated by retaining the children long after his access period had expired.

- [29] The fact the parties are unable to make decisions concerning the children is some evidence that joint custody and guardianship is no longer appropriate. The arrangement imposed in the February 23, 2006 order, however, recognized that these parties may have difficulty reaching agreements as to issues surrounding the care and upbringing of the children. The order expressly allows Dr. Whittington to make the decision if there is no agreement with Mr. Swanson, subject to his right to come to court seeking an order or directions.
- [30] The parties' inability to establish an amiable relationship after separation has undoubtedly had a negative impact in the children's lives. They cannot help be affected by their parents' obvious dislike and lack of respect for each other. Nevertheless, their best interests are served by continuing to have significant contact and involvement with both parents.
- [31] Balancing these conflicting interests, I find the appropriate course of action is to amend the order of February 23, 2006 to remove the most significant sources of conflict between Mr. Swanson and Dr. Whittington and, at the same time, retain joint custody and guardianship. By doing so, it is hoped that their relationship will improve.
- [32] The most troublesome aspect of the February 23, 2006 order is the requirement that each parent have the written permission of the other to take the children outside British Columbia. The parties appear to have had several disputes surrounding the children's travel outside the Province. Yet, there is no evidence to suggest that either party will abscond with the children against the wishes or without the knowledge of the other parent. The children travelled to Australia without Mr. Swanson's written consent, but they returned after three weeks. Mr. Swanson took the children to Saskatchewan without Dr. Whittington's consent. He returned them after a week. Both parties have significant ties to British Columbia. Dr. Whittington has a medical practice and Mr. Swanson has his new business. Consequently, it is very unlikely that either party would move from the jurisdiction and uproot the children to do so.
- [33] Accordingly, to remove this source of conflict between the parties I am amending the February 23, 2006 order to provide that either party may remove the children from British Columbia for a maximum of sixty days in any calendar year without the consent of the other party provided the absences from the Province are during their respective access or parenting periods and do not interfere with the other party's access or parenting time. By mutual agreement, the parties may exchange or vary parenting periods to accommodate their travel arrangements.
- [34] The party taking the children outside British Columbia shall give to the other party written notice of his or her intention to leave the Province at least 30 days prior to the commencement of the absence, except in an emergency. The party taking the children outside the Province shall also provide the other party with written notice of the address and telephone number where the children can be reached during the absence within three days of departure and shall afford reasonable telephone access to the other party during the absence.

- [35] The other issue that appears to cause significant problems between the parties is the matter of extraordinary expenses. Although the parties have a joint trust fund held for the benefit of the children, and an RESP held in Mr. Swanson's name to be used solely for the benefit of the children, they cannot agree upon how to spend these monies.
- [36] To remove this source of conflict, I find it is appropriate to amend the existing order to provide that Dr. Whittington may unilaterally determine what, if any, monies should be paid out of the jointly held trust fund and the RESP held by Mr. Swanson provided such monies are for the benefit of the children and, in the case of the RESP, in connection with post-secondary education for the children. Dr. Whittington must provide Mr. Swanson with thirty days written notice of her intention to withdraw monies from the trust funds or the RESP. The written notice shall contain a detailed description of the purpose for which the monies will be used and the precise amount of the intended withdrawal. If the parties are unable to come to an agreement concerning the withdrawal of funds within the thirty day notice period, Dr. Whittington is authorized to make the withdrawal and Mr. Swanson shall complete and sign all documents necessary to release the monies. Lastly, Mr. Swanson is at liberty to apply for an order precluding a withdrawal upon two clear days notice to Dr. Whittington.
- [37] As the primary residence parent, this authority is consistent with the joint guardianship regime ordered by Mr. Justice Bernard. I note, in particular, that the parties consented to this regime.

VARIATION OF CHILD SUPPORT - MR. SWANSON'S GUIDELINE INCOME

- [38] Dr. Whittington maintains Mr. Swanson has misrepresented his income for the purpose of the Guidelines and seeks further disclosure orders to facilitate a calculation of his true income. In particular, Dr. Whittington deposes that Mr. Swanson purchased a home in April 2007 for \$326,000 with a high ratio mortgage that has a current value of \$327,000. The mortgage payments are said to be \$1,759 per month. Dr. Whittington argues that without evidence of earnings substantially in excess of Mr. Swanson's admitted income of \$29,740 he would not qualify for a mortgage of \$327,000. Dr. Whittington also points to the fact that Mr. Swanson's annual expenses, which he states to be \$54,900, are far in excess of his income. His debts, on the other hand, are not increasing to cover the shortfall.
- [39] Dr. Whittington also argues Mr. Swanson has misrepresented his financial circumstances under oath by deposing he was moving into a rental accommodation and paying rent of \$1,000 when in fact he had purchased a house. Mr. Swanson deposed that he would have difficulty paying the \$1,000 rent but now pays \$1,759 per month on his mortgage. While petitioning the court to reduce his child support, Mr. Swanson asked Lief to work with him over the summer because his company's business was too much for one person to handle. Mr. Swanson is also considering hiring another person to handle the additional work.

- [40] Lastly, Dr. Whittington argues that Mr. Swanson is underemployed compared to his qualifications and experience. Mr. Swanson has an MBA in Finance and Marketing, has almost completed a degree in Accountancy, a Bachelor of Science in Chemistry and Economics and a mortgage brokers licence.
- [41] Mr. Swanson deposes that in his mid-50's it is very difficult to obtain employment in his field and, as a consequence, he has started his own business. As a fledgling business, the profits are minimal. He acknowledges that Lief has been offered work in the business during the upcoming summer and that he hires labourers on a daily basis and pays them in cash.
- [42] Mr. Swanson also deposes that while he has the qualifications alleged by Dr. Whittington, he left the workforce in September 1996 when the parties' second child was born. He continued to be the homemaker and caregiver for the children until the marriage broke down in May 2003. During this period the majority of his income came from accounting services he performed for Dr. Whittington in connection with her medical practice.
- [43] Mr. Swanson deposes that he sought work as a CGA but could not find an employer who would hire him as an articulated student. Lastly, Mr. Swanson deposes that his academic training is dated and he has had no real job experience in the past ten years.
- [44] In regard to the purchase of his home, Mr. Swanson deposes that he intended to find rental accommodation when he was evicted from his apartment in Abbotsford; however, a mortgage broker friend offered to find him a mortgage. He subsequently made an offer on the home and obtained a mortgage from the Aldergrove Credit Union. He borrowed the down payment from friends and agreed, as a condition of the mortgage, to convert the basement to a rental suite. It was also a condition of the mortgage that Mr. Swanson transfer his RRSP's to the Aldergrove Credit Union.
- [45] Having reviewed the evidence submitted by the parties, I find there are grounds to question the accuracy of Mr. Swanson's statement of income. Based on an income of less than \$30,000 I find it is highly unlikely that the Aldergrove Credit Union would grant Mr. Swanson a mortgage in the amount of \$327,000 even with the security of RRSP's totally \$238,484.48. The mortgage payment of \$1,759 per month represents over 2/3's of Mr. Swanson's income before taxes. His annual expenses, at \$54,900, are almost twice his gross annual income. Apart from the \$10,000 borrowed for the house down payment, Mr. Swanson's debts are not increasing in proportion to his stated expenditures. Lastly, there is no evidence that he has rented part of his residence or started work on renovating his residence to help with the mortgage.
- [46] All of these circumstances raise concerns that Mr. Swanson has not fully disclosed his income for the purpose of calculating child support. As a consequence, I find the following orders for disclosure are appropriate:

1. Mr. Swanson shall forthwith authorize the Aldergrove Credit Union to disclose to Dr. Whittington, or her legal counsel, all documents relevant to the mortgage registered against the Abbotsford property at 32094 Sherwood Crescent, Abbotsford, including the mortgage application.
 2. Mr. Swanson shall forthwith provide to Dr. Whittington copies of the purchase and sale agreement with respect to the Abbotsford property.
 3. Mr. Swanson shall forthwith disclose to Dr. Whittington the account numbers and names of all financial institutions in which he has an account held in his name or held jointly with other persons or in the name of his business. Further, Mr. Swanson shall provide Dr. Whittington with copies of his bank statements from these accounts for the period January 2005 up to and including July 2007 within thirty days of this order.
 4. Mr. Swanson shall provide Dr. Whittington with copies of all loan and credit applications made in his name or the name of his business between January 2005 and July 2007 within thirty days of this order.
 5. Mr. Swanson shall prepare a detailed projection of income and expenses for his business for the calendar year 2007 and provide this projection to Dr. Whittington within thirty days of this order. Each expense must be broken down into categories and specifically itemized.
 6. Mr. Swanson shall provide Dr. Whittington with copies of the financial statements prepared for his business since its inception within thirty days of this order.
- [47] Dr. Whittington's application for a variation in child support shall be adjourned pending receipt of the financial disclosure ordered above. Dr. Whittington is at liberty to set down this matter for hearing upon three clear days notice to Mr. Swanson. In the event that Mr. Swanson is unable to comply with the disclosure orders within the time limits specified he may seek an extension by application to the court upon two clear days notice to Dr. Whittington.
- [48] In the interim, the child support payable by Mr. Swanson, for the benefit of Lief Keenan Swanson born December 20, 1991 and Ryan Odin Swanson born September 16, 1996, shall be fixed at \$467 per month effective July 1, 2007 and continuing on the first day of each month thereafter in accordance with Mr. Swanson's stated guideline income of \$29,740 and until further order of this court. Arrears owing for the month of July 2007 shall be paid by August 15, 2007.
- [49] The question of further arrears and retroactive child support shall be addressed at the continuation of Dr. Whittington's application for a variation of child support.
- [50] While Dr. Whittington argues Mr. Swanson is capable of earning up to \$70,000 annually given his qualifications and experience, I find the evidence does not establish that Mr. Swanson is currently under-employed. The income derived from his business is comparable to the income he earned during the latter part of their marriage. In addition, he has been

out of the labour market for several years because of the mutual agreement of the parties that Mr. Swanson would leave his job to assume primary care of the children. Although he continued to provide accounting services to Dr. Whittington, Mr. Swanson essentially did not work outside the home between 1996 and 2003. Lastly, Mr. Swanson is over 50 and, for the most part, his educational qualifications were acquired many years ago.

- [51] I accept Mr. Swanson's evidence that when his job search was unsuccessful, he chose to develop a new business as a source of income. After two years the business is showing a profit and Mr. Swanson appears to be working hard to ensure the profits increase in the future.
- [52] Based upon the evidence before me, I find Mr. Swanson has taken reasonable steps to date to earn an income commensurate with his age, experience, and qualifications. If, over the next two to three years, Mr. Swanson's business is unable to maintain or improve its net profit situation the question of whether he is underemployed may be re-addressed. At this time, however, I am not satisfied that income may be imputed to Mr. Swanson based upon a conclusion that he is intentionally under-employed.

COSTS

- [53] Dr. Whittington asks that the costs ordered in her favour in respect of the June 22, 2007 application be fixed at \$600. She also seeks costs for this application. Mr. Swanson submits that nominal costs should be awarded for the June 22, 2007 appearance because he consented to most of the orders sought prior to the hearing of the matter. He seeks costs in respect of this application.
- [54] I ordered costs against Mr. Swanson in the June 22, 2007 proceeding and he has not appealed that order. Thus I have no jurisdiction to deny Dr. Whittington a reasonable amount for the costs of preparing the application and appearing in court. I fix these costs at \$350. Mr. Swanson shall pay these costs within seven days of this order.
- [55] Given the divided success of the application before me, I find it is appropriate that each party bear his or her own costs.

"The Honourable Madam Justice Bruce"

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