
CANADA / JUDGMENT

Scherk v. Nixon

2015 BCSC 1150

COURT

Supreme Court of British Columbia

DECIDED

28 May 2015

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2015 BCSC 1150 Scherk v. Nixon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Scherk v. Nixon,

2015 BCSC 1150

Date: 20150528

Docket: E031632

Registry: Vancouver

Between:

Margaret Anne Scherk

also known as Margaret Anne Nixon

Claimant

And

Dale Sidney Nixon

Respondent

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

Carla M. Courtenay

Counsel for the Respondent:

Michelle E. Guy

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 25, 2015

Place and Date of Judgment:

Vancouver, B.C.

May 28, 2015

- [1] THE COURT: Dale Nixon, in his notice of application filed January 7, 2015, asks for an order that Emily, the daughter of the parties' marriage, "ceased to fall under the definition of a Child of the Marriage on October 16, 2012." October 16, 2012, was Emily's 25th birthday.
- [2] Dale Nixon is a dentist, now living in Toronto. His former wife, Margaret Scherk, is a veterinarian, living in Vancouver. The parties married in 1983 and divorced in 1993. They had two children: Emily born in 1987, now 27, and Benjamin born in 1989, now 25.
- [3] Dr. Scherk submits that Emily ceased to be a child of the marriage in May of 2014, when she graduated at age 26 from Ryerson University with a bachelor of fine arts.
- [4] Dr. Nixon's assertion that Emily's status as a child of the marriage ended at age 25 is based on his interpretation of subsection 6.2 in the parties' separation agreement made in March 1994. Subsection 6.2 addressed child support. Paragraphs 6.2.1, 6.2.3 and 6.2.4 provided as follows:

6.2.1 Child Support

The contribution by the parties to the expense account as set out in paragraph 6.2.4 hereof shall be paid by the parties as child support.

...

6.2.3 Variation

The parties agree that the child support arrangement may be reviewed at the request of either party.

6.2.4 Children's Expense Account

Dale [Dr. Nixon] will contribute \$700 per month to the children's expense account. This contribution will be applied towards the children's expenses by Margie [Dr. Scherk].

The amount of this contribution to the children's expense account will be reviewed on July 6, 1994, and annually thereafter until the earlier of:

- (i) the child reaches the age of twenty-five; or
- (ii) the child ceases to be going to school fulltime.

Dale will give the bank post-dated cheques for one year in advance.

[5] Dr. Nixon interprets paragraph 6.2.4 as expressing the parties' intention at that time to end his obligation to pay child support when a child reached 25 or ceased full-time schooling, whichever happened first. Dr. Scherk says in response that paragraphs 6.2.3 and 6.2.4 read together speak only of reviewability and that s. 6 of the separation agreement does not contain an end time for Dr. Nixon's child support obligations. I do not accept that submission. Section 6 of the separation agreement does not read as clearly as it might, but I interpret it as being intended to address an end time for Dr. Nixon's child support obligations and not just an end time for reviewing the quantum of those obligations.

[6] But that does not end the matter.

[7] The 1994 agreement does not make reference to the concept of a child of the marriage as defined either in the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), or elsewhere. The phrase "child of the marriage" carries meaning in family law, primarily because of its definition and treatment in the Divorce Act. In s. 2(1) of the Act, it is defined to mean:

... a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) 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;

[8] After making their 1994 separation agreement, the parties did nothing for nine years to alter Dr. Nixon's financial obligations to support Emily. By then, that is in 2003, Emily was 18. At that time the parties obtained an order from this Court, by consent, addressing child support. Paragraph 4 of the order provides as follows:

4. The Defendant [Dr. Nixon] shall pay child support to the Plaintiff [Dr. Scherk] in the amount of \$1,123 per month, commencing the 1st day of June, 2003 and shall pay the sum of \$5,615 in respect of the months June through October, 2003, on or before the 30th day of November, 2003; and shall pay \$1,123 on the 1st day of each month from November 1, 2003 until each child is no longer a child of the marriage at law;

[9] Nothing in that order, or in the evidence of the parties' dealings leading to the order, causes me to conclude that they or the Court intended, in the order, to either expressly or impliedly incorporate the terms of the 1994 settlement agreement. Instead, the parties in 2003 made a fresh agreement which was adopted in the order. The order incorporated, for the first time in the parties' dealings, the legal concept of a child of the marriage to serve as the end date for child support obligations.

- [10] Dr. Nixon's date of October 16, 2012 for Emily no longer being regarded as a child of the marriage is simply her 25th birthday. As noted earlier, he picks that date relying on the 1994 settlement agreement terms quoted above. But given my conclusion that the terms of the 1994 agreement no longer have application, October 16, 2012 can no longer reasonably be taken as a proper date for Emily losing her status as a child of the marriage. There is no legal or factual basis for employing that date.
- [11] The date proffered by Dr. Scherk, May 2014, is more reasonable because it is when Emily graduated from university. The definition of a child of the marriage in the Divorce Act, quoted above, read with related sections in the Act, contemplates financial support for a young adult child who is attending university full-time. The commonly-applied tests for finding child support obligations when an adult child is at university are found in *Farden v. Farden*, 1993 CanLII 2570 (BCSC), which I will briefly return to later in these reasons.
- [12] To conclude with respect to the correct end date for Emily being a child of the marriage, I find that it is May of 2014, when she completed university.
- [13] From there, Dr. Nixon would seek to carve out times between Emily turning 19, in 2006, and when she graduated in May 2014. These are times, he submits, when she was not attending post-secondary schooling full-time and thus, he says, times she should not be viewed as a child of the marriage within the statutory definition. (It is common ground that Emily moved from home on or before her 19th birthday.)
- [14] In April 2014, Dr. Scherk received her first notice that Dr. Nixon was opposing or questioning his obligation to pay child support as this Court ordered, by consent, in 2003. As I noted at the start of these reasons, he filed the present application on January 7 of this year.
- [15] Emily attended high school at the Langley School of Fine Arts. She graduated with honours in June 2005, when she was 17. The same year, in the fall, she attended UBC, but withdrew after six weeks because of depression.
- [16] In January 2006, she moved to Montreal to audition for the National Theatre School. She turned 19 in the fall of 2006. She was not accepted at that school in either 2006 or 2007.
- [17] In 2007, Emily auditioned to the theatre program at Ryerson. She was accepted in August 2007. In her first year of the program there, she returned to Vancouver and admitted herself to St. Paul's because of depression. She received psychiatric care. She returned for a time to living with her mother, Dr. Scherk, who was by then remarried.
- [18] The evidence summarized above about Emily's depression is in the affidavit of Dr. Scherk, her mother. No objection was taken to the admissibility of that evidence. I am accepting as well some further evidence of Emily's depression contained in an affidavit sworn by the paralegal for Dr. Scherk's lawyer. The paralegal spoke with Emily by telephone on January 21, 2015. Dr. Scherk's lawyer was with the paralegal at the time. There was no application brought to cross-examine on the affidavit, which one can understand, but nor was there an application brought to have the Court strike out the evidence on the ground that it was

hearsay. I was asked instead only to give it little or no weight. But I will give it some weight. It is some evidence relevant to the question of whether Emily was a child of the marriage. From the affidavit, Emily confirms the evidence about her mental health found in her mother's affidavit as set out above. Further, she adds, and I accept, first, that the psychiatrist treating her told her that she has a generalized anxiety disorder and second, that she is regularly monitored by a psychiatrist today and takes prescribed medication.

- [19] Emily returned to Ryerson in the fall of 2008. Her academic transcripts at Ryerson from the fall of 2008 to her graduation in May 2014 are in evidence. She missed one term as a student, the fall term of 2009. For the fall of 2009, Dr. Scherk advised the Family Maintenance Enforcement Program (FMEP) office that Emily was not attending school and FMEP did not enforce the child support order from June to December of that year. In May 2014, Dr. Scherk told FMEP of Emily's graduation and that no child support was payable after that.
- [20] Emily and her father are alienated. Four years after the parties divorced, Dr. Nixon moved to Australia for several years. Dr. Scherk does not know when he moved back to Canada. Emily was 10 when Dr. Nixon left for Australia. There has been almost no contact between them since then.
- [21] On the facts I have found above, I am not prepared to accept Dr. Nixon's submission that the Court should now carve out times between Emily's 19th birthday and her university graduation at age 26 when Dr. Nixon should not have to pay child support.
- [22] Dr. Nixon complains that he has been kept in the dark about Emily's life during those years. In fact, he has been disinterested, or at least has behaved as though he were. He only brought this application when family maintenance enforcement officials in Ontario were asking him for money.
- [23] He asks this Court now to revisit seven years of Emily's life, to claw back months here or there for times when there might be an argument that Emily was not to be viewed and treated as a child of the marriage. But it is impractical, if not impossible, now to meaningfully parse Emily's life in those seven years as between her pursuit of education, her having to cope with depression and any other events or circumstances. Clearly, when she was a student and when she was battling her depression, she needed financial support from her parents, not to mention other support.
- [24] The so-called Farden factors for child support during a child's higher education contemplate either a prospective or contemporary assessment of the facts, or at least one conducted soon after the relevant events have occurred. They include considerations such as the child's ability to financially contribute, including whether the child is or was entitled to student loans. The court and the respondent in such an analysis should not be required to engage in a seven-year retrospective examination of what occurred over the extended course of the child's education, punctuated, as in this case, with periods when she was unable to study because of health problems.

[25] Further, paragraph (b) in the definition of a child of the marriage obviously is not confined in its application to higher education. Higher education is not even specified. Paragraph (b) speaks of illness, disability or other cause. Emily was a sensitive child who experienced depression and continues psychiatric treatment for depression. It would be unfair to determine now that at some times over those seven years of her life, Emily might not have needed financial support as a child of the marriage.

[26] In the result, the application is dismissed.

"MACINTOSH J."

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