
CANADA / JUDGMENT

Schill v. Schill

2008 BCSC 63

COURT

Supreme Court of British Columbia

DECIDED

16 January 2008

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2008 BCSC 63 Schill v. Schill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schill v. Schill,

2008 BCSC 63

Date: 20080116

Docket: 39395

Registry: Kamloops

Between:

Jennifer Rose Schill

Plaintiff

And

Jarrett Andreas Schill

Defendant

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the plaintiff

D. Komori

Counsel for the defendant

K.P. Jensen

Date and Place of Trial/Hearing:

December 17 - 19, 2007 &

January 7, 2008

Kamloops, B.C.

- [1] This divorce proceeding includes issues of custody, access, child support, spousal support and costs.

BACKGROUND

- [2] Ms. Schill is approximately twenty-seven and a half years of age and a university student. Mr. Schill is approximately thirty-one years of age and a school teacher. The parties met in August of 2004 when Ms. Schill rented a basement suite in Mr. Schill's home. Ms. Schill has a daughter from a prior relationship. That daughter was born in September of 1999 and is approximately eight and a half years of age.
- [3] Mr. and Ms. Schill became romantically involved and began living together in what has been described as a common law relationship in December of 2004. Ms. Schill was attending university and supporting herself with student loans. They were married July 2, 2005. Mr. Schill adopted Ms. Schill's daughter in March of 2006 and they had a child, Sebastian, born April 30, 2006. They separated October 14, 2006 but continued to see each other with Ms. Schill remaining in the home. Mr. Schill would visit the children in the home. A confrontation occurred between them on October 14, 2006 and ultimately Mr. Schill consented to being placed on a peace bond.
- [4] Prior to these proceedings the parties had a hearing in Provincial Court under the Family Relations Act, R.S.B.C. 1996 c. 128 and orders were made providing that Ms. Schill have primary residence of the children, access to the daughter at Ms. Schill's discretion and access to Sebastian one hour per week, supervised.
- [5] Mr. Schill also has a daughter from a prior relationship. That daughter is approximately three years of age. He has unsupervised access to that child alternate weekends.

ORDERS

- [6] The application for a divorce is unopposed. The parties have been separate and apart for one year. The evidence has been lead to support an order for divorce. The divorce is granted.
- [7] The parties have made their own arrangements with regard to Mr. Schill's obligation to pay support to his adopted daughter. They appear to have agreed that the relationship should end and that there will be no access to Mr. Schill, that she will remain in the sole custody and guardianship of Ms. Schill. Based on comments made during the trial, they may consider some way of changing her status including the possibility that Ms. Schill may adopt the child as a sole parent with Mr. Schill's consent. At the parties' request I am making no

order at this time with regard to the support of that child.

- [8] The parties agree that Mr. Schill will pay child support for their child Sebastian. This support is based on his income of \$60,409.60. The present interim order is dated March 8, 2007. The Federal Child Support Guidelines (the "Guidelines") child support is \$564.00 and Mr. Schill is ordered to pay that amount. This will commence as of February 1, 2008. The parties have treated Ms. Schill's income at \$17,880.00 based on student loans which she receives for her education. She pays daycare costs for Sebastian. Mr. Schill is to pay 77% of those net costs. Ms. Schill seeks payments on arrears of daycare costs in the amount of \$350.35 plus a monthly contribution of \$65.45. No issue was taken with those figures and that order is made.
- [9] The parties sold the matrimonial home and the proceeds were divided on a 60/40 basis. One of the terms of sale was that it included a dishwasher and that the home was to be in the same condition as it was when viewed. Ms. Schill replaced the dishwasher and asks Mr. Schill to pay \$264.41 as his 60% of the cost of that dishwasher. There was no evidence lead to conflict with her assertion that it had to be replaced and what her cost was. I order Mr. Schill to pay to Ms. Schill the sum of \$264.41 representing his portion of that cost.
- [10] The real issues between these parties is what order should be made with regard to custody and access for Sebastian and the amount of spousal support.
- [11] Spousal support pursuant to a divorce is governed by the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) as follows:

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Terms and conditions

- (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;

- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[12] The parties' relationship was very brief. They lived together from December of 2004 to September of 2006, less than two years. They were married in July of 2005 and separated in September 2006, just over one year. They have one child. On the basis of Mr. Schill's income of \$60,400.00 and Ms. Schill's income of \$17,880.00, the Spousal Support Advisory Guidelines would indicate a range of support from \$341.00 to \$819.00 per month. The duration would be indefinite with the maximum duration of seventeen years from the date of separation.

[13] There are some unique circumstances in this case. Ms. Schill had essentially no assets when she met and became involved with Mr. Schill. Mr. Schill had a home. Ms. Schill had student debts of approximately \$20,000.00. The parties resolved their property issues by consent order of March 8, 2007. This provided that the home that they lived in would be sold and until its sale, Mr. Schill would continue to pay the mortgage, city utilities, insurance, electricity, gas bills and satellite service. In addition to the normal adjustments in the payout of the mortgage on the property, the parties agreed that from the sale proceeds, the following would be paid:

Ms. Schill's student loan - approximately \$44,800.00

Ms. Schill's Bank of Montreal MasterCard - approximately \$4,000.00

Ms. Schill's line of credit - approximately \$5,000.00

Mr. Schill's loan from his mother - \$6,502.00

The balance was to be divided on a 60/40 basis in favour of Mr. Schill.

[14] The following amounts were actually paid to the credit of Ms. Schill:

National Student loan - \$26,407.11

BC Student loan - \$18,392.92

Bank of Montreal MasterCard - \$3,926.39

Line of credit - \$5,050.01

40% of net proceeds - \$35,864.78 plus \$1,500.00

Total: \$91,141.21

[15] Paid on behalf of Mr. Schill was:

Personal loan to Dr. Erwin Schill - \$6,502.00

60% of net proceeds - \$53,797.16 minus \$1,500.00 to Ms. Schill

Total: \$58,799.19

[16] Ms. Schill is significantly better off after the separation than she was before the relationship began. She does have the responsibility of raising the parties' child, but other than that has suffered no disadvantage as a result of the dissolution of the marriage. She has in fact benefited significantly. Mr. Schill has benefited to the extent that the parties through their marriage and in a number machinations were able to affect the outcome of his bankruptcy. I am satisfied that they were both active participants in those events to the detriment of his creditors and to their mutual benefit.

[17] Since the sale of the home in June of 2007, Mr. Schill has paid up to and including January 1, 2008, child support for both children in a total amount of \$913.00 per month and spousal support in the amount of \$435.00 per month. This was pursuant to their consent order of March 8, 2007.

[18] Ms. Schill's position is that there should be an increase in the spousal support for a further period of two and half to three years to allow her to complete her education and to establish herself. She plans to change her course of studies and enter a two year program commencing in September of 2008. The program deals with geology. She suggested that because Mr. Schill is no longer paying child support for Victoria, that the spousal support be increased. Mr. Schill argues that spousal support should end at this time, that Ms. Schill has received more than a reasonable amount already.

- [19] The parties did enter into the consent order of March 2007, that provided commencing the month after the sale of the property, Mr. Schill would pay spousal support in the sum of \$435.00 per month until a review, included in the order, was concluded. The review could occur upon application of either parties at any time after eighteen months from the time that he commences paying spousal support. The order does not indicate whether it was an interim or a final order. The parties do not appear to have turned their mind to that issue. One other odd thing about the order is that it directs that the parties' applications for custody, guardianship and access shall be discontinued. Clearly that has not occurred and there is no indication that was their intention.
- [20] I am satisfied that the parties should be bound by their agreement to the extent that it provides support for a period of eighteen months from July of 2007. That would take the parties to and including December 1, 2008. Based on all of the circumstances including their property division and their obligations to their children, I am not satisfied that the amount of support should be varied from the amount that they agreed to, \$435.00 per month.
- [21] Given the very short period of their relationship and the significant financial benefits Ms. Schill has already received, I would have seriously considered making no order for spousal support except for their agreement. I am satisfied however that the spousal support should end as of December 1, 2008 and it should not be subject to further review at that time. Mr. Schill will certainly have met any obligation that he would have for spousal support under the Divorce Act by that time and there is no point in putting the parties to the further expense and uncertainty of further litigation.

SEBASTIAN

- [22] The Divorce Act provides for custody and access as follows:

Order for custody

16(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

Joint custody or access

- (4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

Access

- (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

Terms and conditions

- (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

Order respecting change of residence

- (7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

Factors

- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

Past conduct

- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

Maximum contact

- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.
- [23] I order that Ms. Schill have sole custody of Sebastian, but that the parties be joint guardians. The terms of guardianship will be in the terms of what is referred to as the Joyce order. There are definitely problems with regard to the parties communicating, but I am not satisfied that they can not be resolved if the parties make an honest effort. Mr. Schill is presently bound by the terms of a peace bond, preventing him from having contact with Ms. Schill and of course he is bound by the terms of that bond relating to her and her child Victoria if it includes those terms. However, I am not making any order in addition to that. I understand that order will expire in February of 2008.

- [24] The real issue is the terms of access. Mr. Schill was granted supervised access pursuant to Provincial Court order under the Family Relations Act. The supervisor was at the discretion of Ms. Schill. Some of the supervision was provided by a paid supervisor and some by other adults on a voluntary basis. Ms. Schill became dissatisfied with the people who had been proposed as supervisors by Mr. Schill and insisted that the supervision take place under the supervision of the paid supervisor. This cost Mr. Schill approximately \$60.00 per time and was limited to one hour per week. Mr. Schill exercised no access from May 31 to December of 2007. He had one access visit in December 2007 and one since the trial began. Ms. Schill insisted that these be supervised by the paid supervisor and was not prepared to extend them past one hour.
- [25] Ms. Schill's position is that access should continue to be supervised one hour per week, by the paid supervisor or one of the volunteer supervisors earlier agreed to for a period of eight months and then be reviewed. Mr. Schill argues that access should be increased with a phasing in from supervised to unsupervised access and that he not be limited to the supervision of these paid supervisors.
- [26] I should say before I review the evidence regarding access, that I am not impressed with the credibility of either of these parties. Ms. Schill has been unreasonable with regard to her position regarding supervisors for access and extending the period of access. Her evidence about her concerns about the voluntary supervisors simply does not ring true. She was an active participant with Mr. Schill in arranging his affairs that benefited both of them despite his bankruptcy, to the detriment of his creditors. Her explanation as to why no notice was given to her daughter's natural father regarding the adoption also does not ring true. She suggests that somebody else was a potential father of this child, but I am satisfied that this is more of an after thought than anything else. The natural father showed little or no interest in the child and she simply did not want him to be involved at all.
- [27] Mr. Schill's credibility if anything is worse. He was dishonest with his trustee in bankruptcy and in his actions before his bankruptcy. He was dishonest in giving his evidence in earlier court proceedings and inconsistent between the evidence he gave in those court proceedings, his examinations for discovery and the trial before me.
- [28] Ms. Schill's concerns with regard to Mr. Schill as a parent are that:
1. He has minimal involvement with the children;
 2. While they were together on one occasion she was away from home, having coffee with a friend and he did not appear to be able to handle the children and was calling every five minutes for Ms. Schill to come home and help;
 3. That he would walk around the home or lounge around the home without clothes on. He knew that this bothered her daughter, but that he continued to do so despite discussions between them. That on one instance he exposed himself to her daughter when she was in the bathroom and he wished to use the bathroom;

4. That he had said to the daughter that if she did not get out of the bathroom, that he would pee on her;
 5. That on once occasion, he allowed his daughter from a prior relationship to touch his private parts. Her concern is that he puts his ideas and philosophy regarding nudity ahead of what is in the best interest of the children;
 6. That he was careless with regard to leaving power tools plugged in and in a location where the children could access them;
 7. That on one occasion he left her child and a friend's child in the car on the street;
 8. That on one occasion he was fishing and left her child on a dock by herself while he was fishing in the canoe near by;
 9. On one occasion he left the child Sebastian in the care of her daughter while he was supposed to be supervising them and he left the room. That on this occasion her child dropped Sebastian;
- 10 Prior to their relationship he was aware that his tenant had left her three year old child locked in a room in the basement suite. It was only after a women that he was romantically involved with, pointed out to him that this was wrong, that he realized it was improper; and
11. That he uses excess of physical discipline with regard to her child, including frequent spankings. On one occasion slapping the child's face and on one occasion holding his hand over the child's mouth when he was trying to make her go to bed. He had been drinking at the time.
- [29] Her argument is that he has extremely poor judgment and inability to properly raise a child. Nothing he has done since their separation has given her any confidence that has changed.
- [30] She is also concerned that he did not see Sebastian from May 31 to December of 2007 and argues that it was simply because he refused to have supervised access rather than being a monetary issue.
- [31] Mr. Schill argues that since their separation he has taken a number of courses including parenting after separation. That he has a better understanding of the needs of children at this time. He also argues that he has been exercising regular and overnight access to his three year old daughter without any incident and without any concerns by that child's mother. He argues as well that despite any allegations made with regard to inappropriate conduct towards his adopted daughter, that there is no evidence that he has acted inappropriately with regard to his son.

- [32] Ms. Schill was the primary caregiver for the children during their relationship, but Mr. Schill did assist. Despite a number of these complaints, and particularly issues with regard to nudity, Ms. Schill consented to and encouraged the adoption of her child by Mr. Schill in March of 2006. Both parties made mistakes with regard to physical discipline of Ms. Schill's daughter.
- [33] Mr. Schill did have difficulty dealing with the child Sebastian on one occasion when Ms. Schill went out for coffee for a period of time from one to two and a half hours. I am not convinced that he was calling Ms. Schill every five minutes. Obviously she was satisfied at that time that he should be able to cope with the children for at least an hour or more while she was away from home. She did not immediately return home in order to deal with his concerns. I also note that at that time Sebastian was breast feeding and would not take a bottle. Sebastian is now at the stage where he is toilet trained and eats solid food.
- [34] Mr. Schill denies that he exposed himself to Ms. Schill's daughter in the bathroom. His explanation is that there is one bathroom in the home and that the daughter was inclined to take a great deal of time in the bathroom. He had come in from outside where he was working and had to use the bathroom quite badly. Despite a number of requests the child would not leave the bathroom and that is when he made the statement that he would pee on her if she did not leave the bathroom. He acknowledges that was inappropriate.
- [35] Mr. Schill denies that he allowed his own daughter to touch his private parts. He says that he and Ms. Schill had discussions about his nudity and that they agreed that around the home he would wear a wrap-around kilt of some sort or a bathrobe. He said that on that occasion he was sitting on the couch wearing the kilt. His daughter was playing on the floor and stood up and reached towards him. His evidence is that he told his daughter "No" that it was not appropriate in no uncertain terms. He said that he then told Ms. Schill what had occurred. Ms. Schill's evidence is that she only became aware of it when she heard her own daughter say something to Mr. Schill. Ms. Schill said that she then came into the living room area and observed the child touching or attempting to touch Mr. Schill. Given the limited credibility of both of these witnesses, it is impossible to decide what really happened.
- [36] I am satisfied that Mr. Schill exercised extremely poor judgment with regard to nudity in the presence of Ms. Schill's daughter. It was clear that Ms. Schill did not approve of this and that Mr. Schill did not take her disapproval seriously. However I am not dealing with regard to access to her daughter. There is no indication that he has acted inappropriately in the presence of their son Sebastian.
- [37] Mr. and Ms. Schill both agree this time that they were wrong in using corporal punishment as a means of disciplining her daughter. I am satisfied that it was Mr. Schill who was the principle disciplinarian and used more force than was necessary in dealing with her.
- [38] I do accept the evidence of Ms. Schill's mother, that in August of 2006, after attempting to put Ms. Schill's daughter to bed for approximately two and a half hours, that Mr. Schill spanked the child. This occurred at Ms. Schill's mother's home. Ms. Schill's mother then went to see

what the problem was and found Mr. Schill with his hand over the child's mouth trying to keep her quiet. Mr. Schill had been drinking. Ms. Schill's mother chastised him for this conduct and indicated that it was completely inappropriate. I am also satisfied that Mr. Schill was placed in the position of attempting to deal with a child who would refuse to go to bed and wished to see her mother. Ms. Schill in the mean time was out on the porch smoking marijuana with her brother and a number of friends. Neither of the parties was acting responsibly at that time, but Mr. Schill's conduct was certainly more irresponsible than Ms. Schill, given his inappropriate discipline. Ms. Schill's mother had to deal with the child and within a short period of time had the child settled down. Mr. Schill obviously still has a good deal to learn about raising children.

- [39] However there is no evidence that during any of the access visits Mr. Schill had with Sebastian that there were any discipline problems whatsoever. The evidence is that he and Sebastian both seemed to enjoy the visits. Mr. Schill acted appropriately with regard to checking Sebastian's diaper and changing it when it needed it on occasion. He played with Sebastian during these access visits and both of them seemed to enjoy and benefit from them. None of the supervisors paid or otherwise, expressed any concerns about the access visits.
- [40] I do not accept Mr. Schill's evidence that he did not see his son Sebastian for almost six months simply for financial reasons. It is certainly possible that he was unable to pay \$60.00 per week to see Sebastian each week, but it simply is not believable that he was unable to see Sebastian at least occasionally during that period, even if it meant paying for a supervisor. Given the very limited time that Mr. Schill has spent with Sebastian over the last year, I am satisfied that it is necessary for his increased access to be phased in. The initial two visits will be supervised. They can be supervised by a volunteer supervisor, including one that Ms. Schill has already agreed to a Dr. Broersma or Dr. Boughton who gave evidence, or anyone that the parties agree to or I specify on application. The first visit will be for two hours and the second for three hours. Thereafter the visits will occur once a week, the next two being for four hours and following that, this will include day access from 9:00 a.m. to 6:00 p.m. This will occur once per week until the end of March, 2008. Thereafter the access will be reasonable access to include overnight access as agreed between the parties, with liberty to apply if they are unable to agree.
- [41] Ms. Schill raised the issue of her moving from the Kamloops area in September of 2008 in order to attend school near Castlegar, British Columbia. Her parents live in that area and she would have their support, caring for the children, while she attended school. The program that she wishes to take is only available in that area. Mr. Schill's position is that the only order that should be made now is that she give sixty days notice in writing of any intention to change residence. She has made it clear that is her intention to move. It is uncertain what the circumstances will be in the fall of 2008 or the relationship between Mr. Schill and Sebastian. Ms. Schill should give Mr. Schill notice of her intention to move in writing sixty days before she does move. The parties will have to deal with issues of how access will be

facilitated if that move occurs. I am unable to say what the circumstances might be at that time, but can tell the parties if the decision were being made at this time, I would certainly not prevent Ms. Schill from moving, provided reasonable arrangements can be made to facilitate access. I think that is the real issue for the parties to deal with between now and September 2008.

[42] If the parties are unable to agree, they have leave to address the issues of costs.

"R.E. Powers, J."

POWERS J.

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Prepared on 28 October 2026 · Esheria