

CANADA / JUDGMENT

Schubert v. Schubert

2013 BCSC 704

COURT

Supreme Court of British Columbia

DECIDED

22 April 2013

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2013 BCSC 704 Schubert v. Schubert IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Schubert v. Schubert, 2013 BCSC 704 Date: 20130422 Docket: 10211 Registry: Rossland Between: Gary James Schubert Plaintiff And Colleen Denise Schubert Defendant Before: The Honourable Mr. Justice McEwan Reasons for Judgment Counsel for the Plaintiff: J.T.E. Gelber Counsel for the Defendant: S.H.M. Smaill Q.C. Place and Date of Trial/Hearing: Rossland, B.C. April 8 and 9, 2013 Place and Date of Judgment: Rossland, B.C. April 22, 2013

- [1] This is a divorce proceeding. The plaintiff is 59 years old and the defendant is 42. They have twins born February 11, 2001, Coltin James Schubert, and Kaitlin Rose Schubert. They presently live with the plaintiff and there is no question that it is in their best interest that they continue to do so.
- [2] The court has been provided with a report on the views of the children which the parties agreed to commission at a trial management conference on March 7, 2013. The interviews took place on March 15 and 16, 2013. The children were interviewed separately in two sessions each. They express a strong preference for living with their father, who is better able to provide for them materially and who offers a stable and supportive environment. For reasons I will touch on in due course, the material differences in circumstances are not things that could be addressed by adjustments to the distribution of assets or child support. The children want to visit their mother and retain a relationship with her, but they both clearly expressed reservations about her volatility and her related drinking habits.
- [3] It is characteristic of this case that the defendant denies that she drinks or behaves as both children say she does. She apparently fails to see that if she is telling the truth then children are telling lies about her which would bespeak a far worse relationship with them than if they are telling the truth. I accept that the children love the defendant and wish she would change her negative behaviour. They still wish to see her and I will direct that there be reasonable access at reasonable times. The children's wishes will have a bearing on when and if they go.

- [4] Kaitlin's wishes are summarized in the Report in the following terms: Kaitlin is aware that there will be a decision made in Court regarding where she and Colton will live. She stated that she wants to live in the same home as Colton and she would be sad if they were to live in different homes; as well as being twins, they are close friends. Asked how she would feel if the Court decision is for her to live with her mother, Kaitlin's response was as follows: "Why? Because I want to live with my Dad." Asked how she would feel if the Court decision is for her to live with her father, her reply was as follows: "Happy". In considering how she would continue to spend time between the homes of her parents, Kaitlin would want to see her father as often as possible if she is to live with her mother. If she continues to live with her father, she would like to maintain the visitation schedule as it is presently. She wants to be on the same visitation schedule as Colton, although she would be willing to go for a visit occasionally without Colton. Communication between homes has been a problem for the children. When they are in Gary's home, they have the right to phone Colleen whenever they want to. When they are with Colleen, she denies them the right to phone Gary, even when they're in Kimberley for one month in the summer. According to Kaitlin, Colleen says that, when the children are with her, it's her time and they can't phone Gary. Kaitlin was asked if there was one thing that she wanted the Judge to know. Her reply was as follows: "I want to live with my Dad". Asked if either of her parents had talked to her about what she should say to me, Kaitlin replied that no one had tried to influence what she should say to me.
- [5] Colton's views were similar: I explained that the Court is concerned about the safety of Colton and Kaitlin wherever they live. Colton replied that no one had ever hurt him or threatened to hurt him in the home of his father; asked if he feels safe in Gary's home, Colton's reply was: "Yes". Asked if he felt safe in his mother's home, his reply was: "Sometimes"; asked if he felt safe in Colleen's home when she was drinking, his reply was: "No". Colton also commented about Colleen's unwillingness to allow the children to phone Gary when they are visiting her. According to Colton, Colleen tells them that "You're on holiday with me. You can't phone him at all." Whereas the children aren't allowed to phone Gary when they visit with Colleen, they can phone Colleen from Gary's home anytime. Colton is aware that the Court will make a decision about where he is to live. He was asked what his reaction would be if the decision is for him to live with his father; his reply was: "Happy. Grateful." Asked what his reaction would be if the decision is for him to live with his mother, his reply was: "Shocked. I would live there but I wouldn't be happy". Asked if he had a preference for where he lived, his reply was as follows: "Here. I want to live in Fruitvale with my Dad". Wherever he lives, he wants to live in the same home as Kaitlin. If he is to live with his father, he would like to maintain visitations with his mother on the present schedule; if he lives with his mother, he would like to see his father more often than he presently visits his mother. I asked Colton if there was anything that he would like the Judge to know. Colton's reply was as follows: "My mother drinks when she's not supposed to. I would like to live here in Fruitvale with my Dad." Asked if anyone had tried to influence his comments to me, Colton replied that neither of his parents had talked to him about what he should say to me.

- [6] Because the parties live at some distance from each other, the plaintiff in Fruitvale, near Trail, and the defendant in Kimberley, and because the defendant's means are limited, transportation to and from access visits can be a problem. I think this can be adjusted by obliging the plaintiff to share in the transportation of the children or in the cost of it.
- [7] The other issues before the court are the matters of divorce, property division and spousal support.
- [8] The parties were married on May 20, 2000, in Fruitvale, B.C. They had lived together for about a year. It was a first marriage for the plaintiff, at the age of 46. The defendant had previously been married. She had two daughters when the parties married. They were raised by the defendant's mother. They are now adults.
- [9] Before the marriage the plaintiff had worked at the Cominco Smelter in Trail and later for Cominco-Teck and latterly for Teck, as the company has variously been known. He first went to work for the company in September of 1976. He was laid off in 1981. He then worked sporadically between layoffs until 1991. He has worked there steadily ever since.
- [10] In the years before the marriage the plaintiff and his brother acquired a number of rental properties which generated some revenue. The parties met as a result of the defendant becoming a tenant in one of their apartments. They moved to another of their rental properties in Sunningdale, a Trail neighbourhood, and lived there until they built the home on Caughlin Road in Fruitvale where the plaintiff presently resides. The purchase of the Caughlin Road property was enabled partly by about \$50,000 that the plaintiff realized as his share of the Sunningdale rental property. The defendant contributed some \$7,000 in cash.
- [11] The two brothers had owned and sold a number of properties before the plaintiff met the defendant. Since the marriage the brothers have held only two small apartment buildings. The plaintiff says they have run at a deficit for the last 12 years or more. They are not fully tenanted. The rents that are presently coming in appear to more or less service the mortgage. The plaintiff says they are in arrears on the property taxes about \$8,000. The properties are run down.
- [12] The plaintiff was also involved in a snowplowing venture. This involved a series of contracts with a number of businesses and enterprises in the Trail area. It was seasonal work, obviously, and also sporadic within the winter season. The parties differ as to how much money this work actually yielded. None of this income was ever reported.
- [13] The marriage was what is sometimes called "traditional". The plaintiff acknowledges that there was no expectation that the defendant would work outside the home. She had occasional employment, but such work was not material to the economic well being of the family.

- [14] The parties differ on what contributions, if any, the defendant made to the plaintiff's business interests. She certainly filled in at times on the snowplow, to an extent that, I think, would make that business a family enterprise. With respect to the apartments her contributions appears to have been more casual and occasional.
- [15] The parties also differ on the degree to which the defendant's interest in online gambling was an economic detriment to the family. The plaintiff says that debt as a result of these activities amounted to about \$16,000 all of which he has paid off. The defendant acknowledges only a few hundred dollars.
- [16] What has been established is that the economic situation of the family, as of separation through to the present, is probably negative in terms of net equity. The plaintiff produced a summary of debts which was not introduced as an exhibit proper, but marked for identification. I am, however, satisfied that the plaintiff proved the listed debts, or substantially all of them, at trial by introducing the relevant documents. Inasmuch as this case does not turn on the precise arithmetic but on the substantial positions of the parties, I reproduce Exhibit "B" as setting out the essential outline of the parties' debts in 2010 and the situation at present. There is no issue with the fact that the defendant left the home in 2010 and has made no or no significant contribution to paying down these liabilities. Exhibit "B" shows: DEBTS 2010 2013 RBC Credit Card ***-001 \$33,813.78 \$29,035.26 RBC Mortgage \$210,950.40 \$192,426.86 RBC Loan #1 *-**-001 \$32,929.28 \$20,541.89 RBC Credit Cards *-***-003 \$34,755.91 \$31,981.56 RBC Line of Credit \$10,423.67 \$ 9,102.31 Subtotal: \$322,873.04 West K Sand/Gravel \$373.62 \$373.62 Mister Transmission \$511.00 Paid Associates (CitiFinancial) \$1,476.92 Paid WSA Engineering \$4,138.96 \$3,192.56 D&A Collections (HSBC) \$2,555.00 Paid Property Taxes \$3,350.07 \$291.24 tax debt as of July 2012 CitiFinancial Loan (November 2012) Nil \$18,467.29 \$335,278.61 \$305,412.59
- [17] The value of the house on Caughlin Road according to the 2013 tax notice is \$300,000. On March 13, 2013, it was appraised by a local appraiser at \$280,000. It has been listed since August 2011 at \$330,000 but there have been no offers at that price. The plaintiff seeks sole conduct of sale so that the property can be offered at a more realistic price, any such sale to be subject to court approval. There is some suggestion that joint conduct is not workable. I do not make a finding on that issue but do think it best that the property be offered for sale at a price more likely to attract offers and think the defendant would be adequately protected by the imposition of court approval and an opportunity to oppose the sale if she thought it improvident.
- [18] I am satisfied that the sale of the house in order to clear the debts incurred during the marriage is the most sensible course for the parties to take. I accept that the plaintiff's financial position is such that he is able to cover the debt payments but otherwise lives paycheque to paycheque. This is despite reported earnings of more than \$90,000 in recent years, partially owing to a bonus in one year and overtime.

- [19] The defendant's circumstances are straitened. She receives \$657 per month which includes a life annuity she receives of some \$252. She reports \$8,800 or so per year in income.
- [20] The defendant submits that the work she did in and around the rental properties was reflected in notional wages paid to her and to the children to show an expense on the balance sheet for tax purposes. She suggests that this, along with the work she did, makes the rental properties a family asset.
- [21] The evidence of value of these properties is scant. The plaintiff submits that together they are worth perhaps \$200,000, and might in their present conditions sell for \$175,000, half of which would belong to his brother. I note that the plaintiff's brother has not been joined in this proceeding and the court has no way of knowing what interest he might assert. These issues would have to be resolved were they found to be family assets.
- [22] There are no reported savings or accounts for RRSPs. The plaintiff has a Cominco-Teck pension which has not been evaluated.
- [23] The relevant provisions of the Family Relations Act are ss. 56 and 58-60. They read: 56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when
- (a) a separation agreement,
 - (b) a declaratory judgment under section 57,
 - (c) an order for dissolution of marriage or judicial separation, or
 - (d) an order declaring the marriage null and void respecting the marriage is first made.
- (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.
- (3) An interest under subsection (1) is subject to
- (a) an order under this Part or Part 6, or
 - (b) a marriage agreement or a separation agreement.
- (4) This section applies to a marriage entered into before or after March 31, 1979. ... 58 (1) Subject to section 59, this section defines family asset for the purposes of this Act.
- (2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.
- (3) Without restricting subsection (2), the definition of family asset includes the following:
- (a) if a corporation or trust owns property that would be a family asset if owned by a spouse,
 - (i) a share in the corporation, or (ii) an interest in the trust owned by the spouse;
 - (b) if property would be a family asset if owned by a spouse, property

- (i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;
 - (c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
 - (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;
 - (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.
- (4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979. 59 (1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.
- (2) In section 58 (3) (e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property. 60 The onus is on the spouse opposing a claim under section 56 to prove that the property in question is not ordinarily used for a family purpose.
- [24] The family home and the pension are family assets.
- [25] The properties owned by the plaintiff and his brother were acquired well before the marriage and although some earnings from it might have been of modest benefit to the family - it is hard to tell - the properties appear to have been carried on a maintenance basis or at a modest loss for some years. The contributions to occasional maintenance by the defendant appear to have been minimal. I accept the plaintiff's evidence respecting the limited extent of these contributions.
- [26] It does not appear that the family had any significant benefit or that it subsidized these properties to any particular extent. They have been kept separate and involve another owner. I do not think the nominal use of the children and the defendant as employees creates an interest any more than the actual employment of anyone else would. It did provide a way to reduce the taxable income of the enterprise by providing a benefit that could be shown as an expense. Bearing in mind that the onus is on the plaintiff in this regard, I am of the view that this was a longstanding business interest that essentially carried itself off-side of the family assets, and maintained without any significant direct or indirect contribution by the defendant, including effective household management. They are accordingly not family assets.

- [27] Between debt servicing and taking sole responsibility for the children, I accept that the plaintiff has very little money for other things, and that the way out of the situation is to give him sole conduct of sale subject to court approval.
- [28] When the property sells, the defendant may renew her application for spousal support in light of the change in circumstances clearing the debts will bring about. She may also return for directions if the plaintiff does not appear to be making serious efforts to market the property.
- [29] The plaintiff's Cominco-Teck pension is a family asset divisible in terms of part 6 of the Family Relations Act, the relevant period of cohabitation, for the purpose of the fractional calculation, being the date of marriage to the date of the divorce.
- [30] I am satisfied on the basis of all of the evidence that a decree of divorce should be pronounced and I make that pronouncement, to be effective 31 days from the date of these reasons.
- [31] I grant the plaintiff the ordinary day-to-day care of the children. The parties are both guardians and shall remain so. There shall be reasonable access at reasonable times including up to half the summer and half the long school breaks. Apart from encouraging the accommodation of other times sought by the defendant such as her birthday and other special occasions, I will not specifically order that the children attend on those dates. They will have some say in these matters. I do expect the plaintiff to accommodate her at such times if they are in a position to go, particularly if the defendant requests such a visit upon reasonable notice. The parties shall share the transportation by doing one trip, either the drop-of or the pick-up, each. In recognition of the fact that the plaintiff works and the defendant does not, I direct that the plaintiff may leave the driving to the defendant if he chooses, by paying her \$100 for the fuel and other costs associated with one pick up or delivery per visit.
- [32] In postponing the question of spousal support I specifically defer any finding that the defendant is, as she claims, disabled. She says she suffers from heart troubles, but nothing in the material amounts to medical corroboration of a presently disabling condition, or in what sense it is disabling. A better medical case will be required if the defendant asserts a medical condition in the future.
- [33] I make no order for costs. "The Honourable Mr. Justice McEwan"

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