IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Skipton v. Skipton*, 2004 NSSC 260

Date: 20041213
Docket Number: 1204-003406
Registry: Kentville

Between:

Andrea Lynn Skipton

Petitioner

v.

Perry Ronald Samuel Skipton

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: October 8 and November 22, 2004, in Kentville, Nova Scotia

Counsel: Ronald D. Richter, Esq., for the Petitioner

Donald C. Fraser, Esq., for the Respondent

By the Court:

Procedural Background

[1] This is the Court's decision respecting the custody, access and child support for Samantha Skipton, born […], 1996. It also varies the interim spousal support order. It does not deal with division of the matrimonial property.

[2] Divorce proceedings were commenced by Andrea Skipton on December 4, 2002. Following a hearing, Mr. Justice Boudreau issued an interim order respecting custody, access, child support, spousal support and possession of the

matrimonial home. His decision, in summary, was to grant possession of the matrimonial home to Ms. Skipton, to award joint custody to the parents with day to day care to Ms. Skipton and liberal access to Mr. Skipton. Mr. Skipton paid child support based on his income in the amount of $457.00, and spousal support in the amount of $612.50; as part of that order Ms. Skipton was required to pay the mortgage payment in the amount of $612.50 per month.

[3] Mr. Skipton applied to vary the order in August, 2004 after Ms. Skipton had moved to Dartmouth with Samantha. Instead the matter was set down for a full divorce hearing which was heard on October 8 and continued to November 22, 2004. The Skiptons believed they had settled the matrimonial property issue but on November 22nd it appeared they had not done so and hearing dates with respect to that issue have been scheduled for January 25 and 26, 2005.

CUSTODY

(a) **Background**

[4] Andrea and Perry Skipton met in the summer of 1991. Ms. Skipton was studying to be a nurse's assistant. Mr. Skipton was in the Armed Forces and going through a divorce. He had custody of four young children. By November, 1991,

Ms. Skipton had quit school to become Mr. Skipton's paid live-in nanny. Thereafter (the starting time is disputed between the parties) Mr. and Ms. Skipton commenced a conjugal relationship. By the time that Mr. Skipton was posted from Cornwallis to Greenwood, Nova Scotia, in October, 1994, they had agreed to become married and they were married in June, 1995.

[5] In […], 1996, their own daughter, Samantha, was born. Throughout the marriage Ms. Skipton was a stay at home mother. At first she was the step-mother to Mr. Skipton's four children and on the birth of Samantha mother to her own daughter. Shortly before their separation in 2002, Ms. Skipton had begun part time work (15 - 25 hours per week) at Roos Play House (a daycare centre). Mr. Skipton continued as a full time member of the Canadian Armed Forces.

[6] In August, 2002, Mr. Skipton moved out into the military barracks and Ms. Skipton remained with Samantha in the family home at Kingston, Nova Scotia. About October 1, 2002, Mr. Skipton returned to the matrimonial home. As a result Ms. Skipton was moved up into a small apartment over the garage, which apartment had formerly been occupied by Mr. Skipton's oldest daughter Barbara. The apartment was without a bathroom or a kitchen. Mr. Skipton lived in the main

house with Samantha and his daughter Barbara. He apparently controlled access by Ms. Skipton to the rest of the house. In December, 2002, Ms. Skipton commenced divorce proceedings and an application for possession of the house and custody of Samantha, which resulted in the interim order issued on December 17th,2002.

[7] After December, 2002, Ms. Skipton lived in the matrimonial home with Samantha and Mr. Skipton's access included:

(a) during school time, every second weekend and on the off week one weekday overnight;

(b) sharing time during school holidays;

(c) brief daily contact at supper, either in the home or by telephone.

[8] Mr. Skipton pushed for more time during the years after the interim order and did not always get all of the extra time that he wanted.

[9] In January, 2004, Ms. Skipton advised Mr. Skipton that she planned to move with Samantha in June, 2004, to Dartmouth to enroll in a course in Early Childhood Education. In April, 2004, when she was accepted into the course she gave formal written notice to Mr. Skipton. Ms. Skipton could have enrolled in a course at

N.S.C.C. in Kentville, but chose the course in Dartmouth, because it apparently would provide her with more job opportunities and was a better program. At the same time she was in desperate financial circumstances and her boyfriend would be subsidizing her living expenses. Mr. Skipton objected to her moving with Samantha. In early June, 2004, Ms. Skipton moved with Samantha into a three bedroom house in Dartmouth, Nova Scotia, where she cohabitated with her boyfriend of one and a half years. He worked in the construction industry (a drywall specialist) in the Dartmouth area. Ms. Skipton's school attendance was pursuant to an HRDC Skills Development Agreement which paid her tuition ($3,825.00), books ($400.00), Samantha's day care for 36 weeks ($1,404.00) and living expenses for 36 weeks in the amount of $110.00 per week ($3,960.00).

[10] Mr. Skipton has been living with his girlfriend Aja Jackson and her two children since March, 2003. After Ms. Skipton moved out of the matrimonial home in June, 2004, he moved in and has taken over responsibility for the mortgage and other household expenses.

(b) **Proposed Parenting Plans**

[11] Andrea Skipton proposes that Samantha will be in the joint custody of both parents, that she will continue to have the day to day care and control and that Perry Skipton will have access generally as follows:

(a) two weekends per month, inclusive of in-service days (except July and August);

(b) daily telephone access;

(c) two weeks in July and two weeks in August;

(d) one-half of the Christmas school holidays on an alternating basis (each parent having Samantha on Christmas day every other year);

(e) every Thanksgiving school holiday;

(f) every March break;

(g) every Easter weekend;

(h) such other times as they might agree.

[12] Mr. Skipton proposes that he would have the day to day care of Samantha and that Ms. Skipton would have access that was similar to her plan but slightly more complicated. The major differences between his and her proposal is that his proposal would give access for every alternate Easter weekend, March break and Thanksgiving and his proposal provides that the access parent will have every alternate Victoria Day, Labour Day, Halloween and Remembrance Day.

(c) **Analysis**

[13] The only consideration for the Court in determining custody is the best interests of the child. Because Samantha should have as much contact with each parent as is consistent with her best interests, the Court must consider the willingness of the custodial parent to facilitate access with the other. In each case the factors that are relevant, or important, or significant, vary. In the case at bar both parents are capable of providing day to day care to Samantha. Both parents have a strong and close relationship with their daughter. This makes the decision of this Court more difficult.

[14] The Court indicated to the parties before the trial that the principles in the Supreme Court of Canada decision in **Gordon and Goertz** [1996] 2 S.C.R. 27 might apply to the case at bar. Counsel for Mr. Skipton suggests that it does not apply as in that case permanent custody had been awarded and the application was for a variation pursuant to s. 17 of the **Divorce Act** based on a material change in circumstances. In the case at bar, an interim order had been issued in December, 2002 and been in effect for almost two years, but this divorce hearing was for the

purpose of granting custody under section 16 of the Divorce Act, not to vary under section 17.

[15] The Nova Scotia Court of Appeal in **Burns v. Burns** (2000), N.S.C.A. 1 at paragraph 19 summarized the law applicable in circumstances where one parent seeks to move a child away and change the location of her principal residence.

[16] Whether or not the principles in **Gordon and Goertz** apply to the facts of this case, many of the principles and factors set out in paragraph 19 of the **Burns** decision are applicable and relevant to any decision respecting custody.

[17] Each party in the case of bar has the onus of proving that their parenting plan is in the best interests of the child. The merits of their respective plans are to be reviewed in the context of the relocation of Samantha by Ms. Skipton. There is no presumption in favour of or against a relocation; it is simply a factor that will be considered in assessing the parenting plans. Each case is unique and the weight to be given to various factors varies in each case.

[18] The interests of the parents are not relevant. It is only the advantages and disadvantages to Samantha with respect to the proposed parenting plans that are relevant.

First Factor - Existing Arrangment Between Samantha and Her Parents

[19] Until the separation Ms. Skipton was a stay at home primary caregiver for Samantha and carried out most of the necessary parenting functions. This is not to say that Mr. Skipton was not active as a parent and did not provide guidance to Samantha, particularly in relation to her school activities. Between August and October, 2002, when Mr. Skipton moved into barracks Ms. Skipton remained the primary caregiver. From October to December, 2002, when both parties lived separated but in the same house, the duties appear to have been shared although Ms. Skipton complained that Mr. Skipton controlled her access to Samantha. From January, 2003 until June, 2004, when Ms. Skipton moved to Dartmouth, I accept that Ms. Skipton remained the primary caregiver and that Mr. Skipton's access was as set out in earlier in this decision.

[20] Mr. Skipton presented a chart (Exhibit C to his July 22, 2004, affidavit) which was presented to show that he had Samantha in his physical care for 46 % of the

"quality hours" (as he defined quality hours). The intended effect was to show that custody was in effect shared. The Court does not argue that between January, 2003, to and including June, 2004, that he had about 2200 "quality hours" with Samantha. I reject, however, the notion that his chart (which broke down each month into hours) was reflective of the actual care giving arrangement with Samantha.

[21] Mr. Skipton's chart showed that between January, 2003 and June, 2004, there were 13,126 hours. He deducted from those hours ten hours per night as Samantha's sleeping time. He further deducted seven and one-half hours for each day that Samantha was in school. He further deducted time that Samantha spent in a day camp and with Ms. Skipton's mother. He was left with a sum of 4,850 hours of time which he called "quality hours". This is the time that he claimed to have spent forty-six percent of with Samantha.

[22] The reality is that while "quality hours" are certainly the best time between a parent and a child, care includes responsibility for the child when she is sleeping, when she is at school and when she is in the physical presence of others. The reality is that Ms. Skipton had Samantha in her primary care for between 22 and 25 days

and nights per month during the school year and for one-half or more of the time during school vacations. This is not equal sharing.

[23] Since Ms. Skipton's move to Dartmouth in June, 2004, she has continued to have primary care and Mr. Skipton has continued to have access every second weekend (including in-service days when they occur on his weekends) and some vacation times.

[24] Ms. Skipton's plan will not decrease the time that Mr. Skipton has with Samantha significantly, if at all. Mr. Skipton will lose approximately twenty alternate weekday overnights that he had with Samantha before she moved to Dartmouth, but he will gain quality hours under Ms. Skipton’s proposal in that he have all of every March break, Easter and Thanksgiving. He gains quality hours in exchange for non-quality time. In general terms Ms. Skipton's proposal would be maintenance of the status quo in terms of the relationship between Mr. Skipton and his daughter and Ms. Skipton and her daughter.

Second Factor - Maximizing Contact With the Non-custodial Parent

[25] Mr. Skipton has complained about some interference with his access. In particular he complained that Ms. Skipton had cut him off from a phone call with Samantha. Ms. Skipton replied that the one incidence that she did occurred recently when Mr. Skipton had Samantha on the phone for 45 minutes and it was past Samantha's 8:30 bedtime and she suggest that Samantha should hang up. The Court notes that telephone access appears to be daily. The Court points out that telephone access, like all access, is for the benefit of the child and not the parent. I am skeptical that lengthy daily phone calls are for the benefit of the child. Mr. Skipton complained that when Ms. Skipton first moved to Dartmouth he was not fully advised with regards to Samantha's school teacher and family doctor. The Court recognizes that there were and will continue to be some problems of communications between the parents; this is not unusual in these kinds of disputes. I do, however, accept that Ms. Skipton has not acted intentionally in a way that would interfere with Mr. Skipton's access.

[26] What disturbed me more was the manner in which Mr. Skipton moved back into the matrimonial home in October, 2002, shunted Ms. Skipton into the upstairs apartment without a kitchen and bathroom, and unilaterally controlled her access to the rest of the house and to Samantha.

[27] I am satisfied that neither parent will intentionally interfere with access by Samantha to the other; Mr. Skipton is more aggressive and self-confident and consequently less likely to allow his access to be interfered with, than Ms Skipton.

[28] The biggest factor affecting access by the non-custodial parent is the distance between Kingston and Dartmouth. It is about 130 kms on a limited access highway. This distance makes it impractical to continue the weekday (every second week) overnight access during the school year. Mr. Skipton is better able to handle the access driving requirement because of his work schedule, and his better access to transportation and financial resources than Ms Skipton would be if Mr. Skipton had primary care.

Third Factor - Samantha's Views

[29] Samantha is eight years old. Her wishes, therefore, have limited significance. The evidence before this Court shows that she will adapt to whatever arrangement is made for her care.

[30] Ms. Skipton states that Samantha was excited about the adventure and the move to Dartmouth and, since she entered school and day care, has been enthusiastic.

[31] Ms. Skipton's mother, Nancy Burrell, has been- both before and after the separation, very involved in Samantha's life. It was my impression that, next to Mr. and Mrs. Skipton, she was the most important person in Samantha's life. Samantha has spent much time at the Burrell residence near Annapolis Royal and Ms. Burrell has spent considerable time caring for Samantha.

[32] Ms. Burrell's evidence is that Samantha was tense about the move before arriving in Dartmouth but since the arrival in Dartmouth Samantha has been more happy and independent than she was before the move. Samantha looks forward to school and to going for walks from their home to the nearby duck pond.

[33] Even Mr. Skipton acknowledged that Samantha is “generally” happy since the move.

[34] This is not a matter that Samantha is choosing between her parents. The evidence of Mr. Skipton's daughter, Barbara, is that Samantha is a “daddy's girl”. Samantha will love and accept both parents, even though, through no fault of her, she cannot live with both.

Fourth Factor - Contact With Family

[35] As a result of the separation in 2002 there was a reduction in the time that Mr. Skipton's extended family had with Samantha - other than during his access times. Ms. Skipton has testified that she has advised his parents and Mr. Skipton's other children (Samantha's step-brothers and sisters) that her door is open and they are welcome. It is understandable that it is awkward for Mr. Skipton's parents and family to visit Samantha while in the care of Ms. Skipton. That would be so whether or not Samantha lived in Dartmouth or in Kingston.

[36] There has been no loss of contact between Samantha and Ms. Skipton's family. In fact, Ms. Skipton had no immediate family in the Kingston area but has several members of her family who live in the Dartmouth area.

Fifth Factor- Contact With School and Friends

[37] Samantha moved from a rural neighbourhood where she had only one close friend (next door neighbour) to an urban area with a much bigger population base and access to many more children in daycare and school. Depending on one's point of view, there are advantages and disadvantages to both the rural and the urban setting.

[38] Younger children are quicker to adapt to their surroundings. Younger children are more prepared to accept the adventure of the move. As children get into their teens they get more set in their ways and with their friends and with their school activities.

[39] The Court sees no disruption to Samantha by reason of the move from Kingston to Dartmouth.

[40] The Court has considered Ms. Skipton's reason for moving. The Court accepts that her reason for moving was to get the best education she could and to move on to a career which her aptitude and abilities will allow her to pursue. It is a practical plan. The Court accepts that her decision to move to Dartmouth was influenced by the fact that her boyfriend for the last year and a half was employed in

Dartmouth and could assist her financially. I accept that it is an advantage to Samantha's well being that her mother is on track to gain a career and some financial security for herself.

(d) **Conclusion**

[41] For the reasons set out above the Court accepts Ms. Skipton's proposed parenting plan which would continue the existing custody and access arrangements.

CHILD SUPPORT

[42] The parties in their post-trial memorandums agreed that Mr. Skipton's income for the purposes of determining child support is $57,552.00 and that in accordance with the **Guidelines** the basic table amount of child support is $475.00. The Court orders that effective October 1, 2004, child support shall be in the amount of $475.00 per month.

[43] Ms. Skipton claims pursuant to s.7 of the **Guidelines**, child care expenses in the amount of $155.00 per month.

[44] It is clear from Exhibit 7, Ms. Skipton's contract with HRDC , that the contract includes assistance of $39.00 per week ($169.00 per month) for 36 weeks of child care. This amount is in excess of the amount of the child care expenses. For that reason Mr. Skipton is not ordered to pay a contribution towards the child care expenses. This, of course, is subject to variation if in the future circumstances change and Ms. Skipton is not in receipt of assistance.

SPOUSAL SUPPORT

[45] Ms. Skipton unilaterally moved to Dartmouth and vacated the family residence. It is clear that the interim spousal support order in the amount of $612.50 per month was equal to the mortgage payment at that time and the order required her to pay the mortgage.

[46] Ms. Skipton's unilateral move has created an expense for Mr. Skipton that he did not have as a result of the December, 2002, interim order; that is, maintaining the home property, including the mortgage (which forced him to move back into the home).

[47] It is normal that the Court would, before making a spousal support determination, take into consideration the division of matrimonial property and debts and the position of the parties as a result of that division.

[48] Even though the parties had thought they had settled matrimonial property issues and the Court had instructed them on October 8th that if they did not have a final resolution of the matter to provide statements of property and advise to each other and the Court by November 5th. They did not do so.

[49] Ms. Skipton's statement of financial information does not reflect the income of her boyfriend with whom she resides and such information should appropriately be before the Court makes a fair determination of her needs.

[50] There is already evidence upon which the Court could consider entitlement and some aspects of section 15.2 of the Divorce Act, but the compensatory factor , and the non-compensatory factor, cannot be finally determined fairly without all the relevant information, including the final division of assets and debts. It is inappropriate at this time to make a spousal support order- other than to adjust it, on an interim basis, based on her unilateral move in June 2004.

[51] Without prejudging what decision this Court may make after hearing the parties and the evidence in January, 2005, the Court accepts the position of counsel for Mr. Skipton that until further order of this Court that spousal support should be in the amount of $150.00 per month.

DIVORCE

[52] Finally, the Court accepts, based on the evidence presented at the hearing, that the marriage has been proven, the jurisdiction of the Court has been proven, the grounds for divorce have been established, that there is no possibility of reconciliation, and that a divorce judgment should issue. If the parties cannot agree upon the upon the provisions of a corollary relief judgment dealing with the matters covered by this decision, the Court will hear them further.

Warner, J.