<u>**NOVA SCOTIA COURT OF APPEAL**</u>
Citation: Muir v. Sabean, 2003 NSCA 99

Date: 20030926
Docket: CA 194270
Registry: Halifax

Between:

Bobbi-Jo Natasha Muir

Appellant

v.

Gerald Wayne Sabean

Respondent

Judges: Glube, C.J.N.S.; Freeman and Saunders, JJ.A.

Appeal Heard: September 18, 2003, at Halifax, Nova Scotia

Held: **Appeal dismissed per reasons for judgment of Saunders, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.**

Counsel: Ronald Richter, for the appellant
Robert Stewart, Q.C., for the respondent

Reasons for judgment:

[1] After living together for seven years in a common law relationship the parties separated in 1997. Their union resulted in a daughter, Sydney Paige Sabean, born November 19th, 1995 and a son, Cody Douglas Sabean, born January 5th, 1992. In 1997 the Family Court ordered joint custody, awarding primary care to Bobbi-Jo Muir (the appellant), with reasonable access of three weekends each month to Gerald "Jody" Sabean (the respondent).

[2] In November 2000, the appellant began a common law relationship with Mr. Chris Scanlan, a member of the Canadian Armed Forces posted at Greenwood, Nova Scotia. Ms. Muir applied for a variation of the 1997 Family Court order in several respects. First, she sought full custody of their children with reduced access by their father. Second, she asked that child support be increased and determined on the basis of the respondent's current income. Third, she sought the right to move out of province with both children in the likelihood that Mr. Scanlan was posted elsewhere.

[3] The respondent filed a cross-application seeking his own variation of the 1997 Family Court order and asking that he be awarded sole custody of their two children.

[4] The case was heard by Family Court Judge Marshall Black on November 29th, 2002 and January 6th, 2003. After considering the affidavits and other documentary evidence filed, as well as two days of viva voce testimony, Judge Black ordered that the respondent have custody of the two children with reasonable access to the appellant throughout the school year and summer vacation; that the respondent's child support payments terminate in January, 2003; and that the case be reviewed in the Family Court sometime during the month of September, 2003 at a date to be fixed by the court.

[5] In appealing the decision Ms. Muir alleges several errors on the part of the trial judge which, for convenience, may be reduced and restated as three principal assertions. First, she says the trial judge ignored, misunderstood or misapplied the evidence such that his determination favouring Mr. Sabean was wrong and ought to be set aside. Second, she complains that the trial judge failed to give proper weight to her proposed plan and her wishes as the "custodial parent." Finally, she asserts that the type and frequency of the trial judge's interventions raise a

reasonable apprehension of bias, requiring this court to intervene. In the alternative, the appellant seeks a rehearing before a different Family Court judge.

[6] After carefully considering the record before me and all of counsels' submissions, I am not persuaded by any of the appellant's arguments.

[7] In my view, Judge Black's decision given orally at the close of argument reveals a careful and balanced consideration of all of the evidence put before the court. The hearing lasted two days spanning November, 2002 to January 2003, providing ample opportunity to consider all of the affidavits, documentary evidence and testimony. Much of the evidence was contradictory on central issues. When assessing this conflicting evidence, the trial judge had the advantage of observing the parties and their respective witnesses while testifying (**Mahoney v. Doiron** (2000), 182 N.S.R. (2d) 33 (C.A.); **Ryan v. Ryan** (2002), 199 N.S.R. (2d) 398 (C.A.)). He made important findings of credibility that are crucial to his decision. He said:

> There has been a great deal of conflict in the evidence as to who (sic) to believe. It is a difficult subject. However, in observing the demeanour of the witnesses and the plans and approaches they both set forth, it is my inclination to, wherever the stories conflict, to accept the evidence of Jody.

Judge Black was in the most advantageous position to assess the conflicting evidence particularly as it related to the best interests of these two children. It seems to me that the trial judge never lost sight of that paramount consideration. I see no basis in this case to question his findings of fact or the inferences he drew from the evidence.

[8] There was evidence that sometime after moving back to her parents' home with Cody and Sydney in 2000, the appellant had a falling out with her mother and left. This resulted in an estrangement between the appellant and her mother. At some point in 2001, without notice to the respondent, Ms. Muir left Cody to board with her parents, thereby separating brother from sister. The respondent's attempts at access were found by the judge to have been deliberately frustrated by the appellant and her mother.

[9] The appellant argues that the judge erred in accepting the parenting plan put forward by the respondent which provided that his sister Teena Sabean would care

for the children at her farmhouse while the respondent was at work. The appellant argues that the judge failed to consider the impact of farm life upon Sydney's allergies, the distance between the respondent's home and his sister's farm, the impact such distance may have on the children's schooling, together with the infrequent contact between the children and Teena Sabean prior to trial. It seems to me however upon a careful reading of the judge's decision, that he took into account those and other factors before deciding which parenting plan would be in the best interests of these two children. The distances complained of are minimal and would not require any significant uprooting of the two children. They will continue in their current schools. Most importantly they will be living together. Judge Black frequently emphasized the importance of reuniting Cody and Sydney to live together with their father in the same home.

[10] As to the contact between Teena Sabean and the children, the evidence was somewhat ambivalent on this point. She testified that she had seen the children more often in the months leading up to the trial and that the children had stayed with her about six times in the past year. It appears to me that as far as the trial judge was concerned, whatever contact Teena and the two children had had was not so infrequent as to be of any concern. Such a finding by the trial judge can hardly be characterized as manifestly wrong.

[11] It is true that the trial judge appears to have been mistaken when he said that in the event Mr. Scanlan was posted outside of Nova Scotia the appellant would probably stay behind and continue to reside here. From all of the evidence the indications were such that the appellant would join Mr. Scanlan and move with him whenever and wherever he was posted. However, nothing turns on the slip. There was evidence before the court to support the conclusion that the appellant's move would not take place in the immediate future. In addition and more importantly, the trial judge turned his mind to the consequences of the appellant's move. For example, in describing the appellant he found that:

> . . . should she go west she would look for a job and find a baby-sitter . . .

Judge Black clearly preferred the parenting plan of the respondent to that of the appellant, whether she stayed in Greenwood in which case the children would most likely continue to remain separated, or whether she moved away, in which case the children, while not in school, would be looked after by non-relative, baby-sitters.

In either event Sydney would lose the chance for social contact that her father's plan offered.

[12] Judge Black echoed the respondent's concern that Sydney was showing signs of poor socialization skills, acting out at school, swearing and other inappropriate behaviour. These factors weighed heavily in the judge's finding that the respondent had a much better grasp of his children's needs, and the benefits they would enjoy by reuniting and living together, with him, while having reasonable access with their mother.

[13] Ms. Muir complains that the trial judge failed to give appropriate weight to her wishes and preferences as the "custodial" parent. With respect, I disagree. In **Gordon v. Goertz**, [1996] 2 S.C.R. 27 the Supreme Court of Canada rejected the idea that any legal presumption favoured the preferences of the custodial parent when determining the principal residence of the child as a normal incident of custody. After rejecting any such presumption the court acknowledged that the views of the custodial parent who lived with the child and made decisions in the child's interests on a day-to-day basis were entitled to great respect. In the instant case the appellant lived with just one of the children, Sydney, and maintained only ostensible day-to-day decision making power over Cody, who had resided with Ms. Muir's mother for more than a year. Accordingly, Ms. Muir's situation can hardly be compared to that of the custodial parent in **Goertz**. In any event, I am satisfied that Judge Black engaged in a thorough review of the best interests of these two children, as was required in **Goertz**, and based his decision on this fundamental concern. In the result there is no merit to the appellant's second complaint.

[14] Before leaving this subject, much was made of the judge's finding that Cody was being spoiled by his maternal grandmother. While obviously the appellant and her mother dislike the judge's conclusion, it was certainly his to make from his advantageous position of being able to observe and size-up the witnesses. Judge Black made a strong finding that Ms. Muir's mother had spoiled her grandson and had been an obstacle to the respondent's attempts to exercise access. These were findings the judge was perfectly suited to make in deciding what custodial arrangements were in the best interests of these children.

[15] Relying upon **Miglin v. Miglin** (2003), 224 D.L.R. (4th) 193; and **R. v. S. (R.D.)**, [1997] 3 S.C.R. 484, the appellant asserts that the manner and frequency of

the trial judge's questioning of witnesses and exchanges with counsel raise a reasonable apprehension of bias requiring a setting aside of his order or alternatively a rehearing. I disagree.

[16] The transcript of these proceedings makes it evident that the trial judge had deep concerns over the amount of time the children spent with parties other than their parents. In a case in which one of the two children spent most of his time in the home of a grandparent, it cannot be said that the judge's concerns were unwarranted. He also clearly had strong reservations about strangers looking after the children if the appellant took them with her when she moved away from Nova Scotia. The appellant gave evidence of her work hours from which it could be inferred that as many as three school days per week she would be working from 3:00 p.m. until 11:00 p.m. There was therefore evidence to support a conclusion that Ms. Muir's chosen work and schedule interfered with her ability to spend time with the children.

[17] While the appellant might complain that certain questions or suggestions from the trial judge may not have been as precise or tactful as she would have liked, a careful review of the entire record persuades me that the trial judge's principal concern was the best interests of the children. His questions as to why the appellant worked were not intended as a criticism of the appellant's lifestyle, but rather an attempt to gauge the importance she placed upon spending time with her children. Judge Black is a very senior judge. On balance it seems to me that his interventions ought not be seen as critical of the appellant's attitude toward employment, as much as a legitimate attempt to choose which of the parenting plans offered by these parents was truly in the best interests of their son Cody and their daughter Sydney.

[18] In conclusion, I am not persuaded that the trial judge erred in determining that the children's best interests would be achieved by reuniting them under their father's care and custody, with generous access to their mother. The several allegations put forward by the appellant do not establish that the trial judge acted upon any wrong principle of law; ignored, misunderstood or misapplied the evidence; or made any manifest error of fact.

[19] I would dismiss the appeal and award $1,000 costs inclusive of disbursements to the respondent.

Saunders, J.A.

Concurred in:

Glube, C.J.N.S.
Freeman, J.A.