<u>NOVA SCOTIA COURT OF APPEAL</u>
Citation: *Marginson v. Marginson*, 2004 NSCA 119

Date: 20041006
Docket: CA 215922
Registry: Halifax

Between:

Grace Marginson

Appellant

v.

Gloria Amanda Irene Marginson and Allen Norman Deveau

Respondents

Judge(s):	Glube, C.J.N.S.; Bateman & Hamilton, JJ.A.
Appeal Heard:	September 23, 2004, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, as per reasons for judgment of Hamilton, J.A.; Glube, C.J.N.S. and Bateman, J.A. concurring
Counsel:	Patricia Reardon, for the appellant Johanne Tournier, for the respondent (Marginson) Raymond Jacquard, for the respondent (Deveau)

Reasons for judgment:

[1] This appeal concerns the custody of and access to two grandchildren of the appellant, Grace Marginson ("Grace M."). Grace M. asks this court to set aside the September 3, 2003 decision of Chief Judge John D. Comeau of the Family Court and remit the matter of custody and access to a new judge for retrial. The trial judge ordered that the children's parents, Gloria Marginson ("Gloria M.") and Allen Deveau, the respondents, have joint custody with the father having day to day care; that Grace M. have access to the children one day every alternate weekend, eight days each summer and two days at Christmas. Grace M. is Gloria M.'s mother and, until the trial judge's decision, had willingly filled the breach and been the primary care giver of the children for at least two years while Gloria M. was unwell and unable to care for the children.

[2] I will not review in detail the history of these children and the parties or what occurred at each of the court appearances that took place over approximately one and one-half years after Grace M. and Mr. Deveau separately sought custody of the children because I am satisfied that what happened at the last two court appearances addresses each of the many grounds of appeal raised by Grace M.. There were several court appearances and adjournments. Home studies were ordered. Various interim orders were made. Not all parties were in attendance at all hearings. All parties were represented by counsel.

[3] Before evidence was called at the hearing that finally began on August 20, 2003, the parents indicated to the trial judge that they had reached an agreement between themselves on custody, day to day care and access. They proposed they would have joint custody with Mr. Deveau having day to day care. Grace M. would have access one full weekend out of every four and two days access at Christmas. In light of the parents' agreement, the trial judge indicated to Grace M. that the onus was now on her to demonstrate that it was in the best interests of the children that she rather than the parents have custody and day to day care.

[4] On August 20 the trial judge also asked the parties if they agreed that the two home studies that had been prepared would be admitted as evidence. Grace M.'s counsel indicated her agreement, subject only to having the opportunity to cross examine Dr. Michael Donaldson, the author of one of the home studies. Grace M. testified and was cross-examined. The respondents did not. The hearing

was adjourned to September 3, 2003 to provide the opportunity for cross-examination of Dr. Donaldson.

[5] When the matter resumed on September 3, Grace M.'s counsel indicated he no longer wished to cross examine Dr. Donaldson and would not be calling any further evidence:

> We don't propose to call any evidence.... As Your Honour's aware this matter was adjourned to - my client had gave [sic] her evidence, for Mr. Donaldson - for me to cross examine Mr. Donaldson. My client, we've agreed that's not going to be necessary.

[6] Grace M.'s counsel also indicated to the trial judge that Grace M. now accepted the parents' agreement with respect to custody and day to day care of the children stating among other things:

> So she accepts that the move is going to have to be made to Mr. Deveau's as recommended.

[7] Grace M. sought more access for herself than the parents' agreement provided. She wanted two weekends out of every four instead of one, two weeks in July, to substitute for Gloria M. anytime Gloria M. was working and not able to exercise her access with the children and a longer phasing-in period for the younger child to move in with Mr. Deveau.

[8] Without hearing further evidence and after hearing argument from all parties on access, the trial judge ordered custody and day to day care in accordance with the parents' agreement and access that varied slightly from it by giving Grace M. additional access. He ordered that Grace M. have access to the children one day every second weekend, eight days every summer and two days at Christmas. He did not order mandatory substitution for Gloria M. by Grace M. when Gloria M. was working and did not lengthen the phase-in period. It is this order that is appealed.

[9] The standard of review in a case such as this is one of considerable deference to the trial judge who saw and heard the evidence first hand. **Van de Perre v. Edwards**, [2001] S.C.J. No. 60, paras. 11 and 12.

[10] None of the numerous grounds of appeal argued by Grace M. has merit in light of the record which clearly indicates (1) that counsel for Grace M. agreed to the admission of the two home study reports that were done subject to cross examination of one of the authors, which qualification was later withdrawn, and (2) that counsel for Grace M. indicated that she accepted the custody and day to day care arrangements the parents agreed to and sought access that varied only slightly from the access awarded to her by the trial judge.

[11] Grace M. has not satisfied me the trial judge erred in any way and accordingly I would dismiss the appeal, in the circumstances without costs.

Hamilton, J.A.

Concurred in:

Glube, C.J.N.S.

Bateman, J.A.