IN THE SUPREME COURT OF NOVA SCOTIA
Citation: McCafferty v. Baillieul-Scott, 2008 NSSC 44

Date: 20080102
Docket: 1217-000078(053971)
Registry: Truro

Between:

Darrin John McCafferty

Applicant

v.

Kathy Diane Baillieul-Scott

Respondent

DECISION

Judge:	The Honourable Justice J. E. Scanlan
Heard:	January 2, 2008 in Truro, Nova Scotia
Written Decision:	February 12, 2008
Counsel:	Darrin McCafferty, Applicant, self-represented Margaret Campbell, Solicitor for the Respondent

By the Court:

[1] The parties are before the Court today to deal with a number of matters, many of which have been disposed of by consent. There is agreement that Ms. Baillieul-Scott's income for the year 2006 was $32,900.00. The proper table amount for maintenance, moving forward, is $291.00 per month. The issue before the Court originally started as an application by Mr. McCafferty wherein he sought maintenance for the child of the marriage starting in early July of 2007. The situation is that in late June of 2007 the child of the marriage, Nicole Marie McCafferty, born November 9, 1989, without any prior notice or consultation with the Respondent, Ms. Baillieul-Scott, with the assistance of a number of her friends, moved all of her possessions out of Ms. Baillieul-Scott's home in Port Hawkesbury and moved to live with Mr. McCafferty in Truro.

[2] It is true that it is pretty difficult to tell a 17 year old child they have to stay and live with mom. We do that sometimes when there is an immediate and present danger to children but not when they are going from one parent to another parent. There is no evidence as to immediate and present danger. I must, however, say to Mr. McCafferty that it is highly unusual, extremely unusual, that a parent would

participate in a move to have it occur as it did in this case. It is concerning to the Court that Mr. McCafferty would participate in that type of move without any prior knowledge by simply leaving a note for Ms. Baillieul-Scott, stapled or attached to the door of the house. I am concerned that a 17, now 18, year old child goes out and makes these types of decisions without talking to the parent who has been her sole caregiver for almost her entire life. What the underpinnings of that are I am not really sure. Mr. McCafferty suggests that she is afraid of her mother. I am not sure what is going on there. I am concerned Mr. McCafferty would have participated in it, no matter how bad your communications are with Ms. Baillieul-Scott. I would have thought Mr. McCafferty would have let Ms. Baillieul-Scott know there was something up beforehand. He could have made arrangements even if Nicole was not able to talk with her mother about it.

[3] That having been said, the fact of the matter is Nicole has been in Mr. McCafferty's sole care since June 28, 2007. That has been recognized in an earlier decision from Chief Justice Kennedy in September of 2007. I do understand there is an order on file which says there is still joint custody, even though it is primary care. That means that Ms. Baillieul-Scott is still entitled to be informed and to participate in decisions about things like school, about work, about post-secondary

education, etc. Even though Nicole is living with Mr. McCafferty now, Ms. Baillieul-Scott is entitled to that information and is entitled to discuss it with Nicole. Mr. McCafferty should make sure he does nothing to block that. If Nicole is discussing information or plans with Mr. McCafferty in terms of education, he is to send an e-mail or something to Ms. Baillieul-Scott letting her know what the thoughts are. She has a right to have some input on it. I have no doubt she will somehow be participating and supporting Nicole in those endeavours. Ms. Baillieul-Scott said here in Court today that she intends to support her daughter in whatever she chooses to do.

[4] The issue before the Court relates to maintenance and whether or not there should be a retroactive adjustment to maintenance. There was an order starting in 1992 with the Family Court. It was incorporated into the Supreme Court corollary relief judgment in March of 1994 by Justice MacLellan. It required a payment of $135.00 per month payable on the 1st day of each and every month starting April, 1994.

[5] It is clear that Ms. Baillieul-Scott has not made formal application to this Court to have an adjustment to the maintenance. It is also clear to this Court that

certainly since 1999 the amount of maintenance Mr. McCafferty has paid in relation to the child of the marriage to Ms. Baillieul-Scott is pathetic. Mr. McCafferty was paying $1,620.00 per year and he was getting tax relief for that. At the same time Ms. Baillieul-Scott was required to include that in her income. I have no idea what her income situation was at that time but there is a possibility she did not get to keep the $1,620.00 because she may well have paid income taxes on the $1,620.00. Certainly at her current rate of income she would have been paying income taxes on the $1,620.00 because it is added to the top of her income. She would be losing 17 to 30 percent of that $1,620.00. She was getting, when it comes to the cost of raising a child, next to nothing in terms of support. Mr. McCafferty paid a total of $14,580.00 since the beginning of 1999 when in fact he should have, according to the tables, paid $33,078.00. I indicated to counsel I used the new tables when I did that whole calculation. If I used the old tables it would be a little bit different but within a few dollars really. Mr. McCafferty is about $18,500.00 short.

[6] In addition, Ms. Baillieul-Scott indicates that, in relation to the corollary relief judgement, there was $500.00 in legal fees that Mr. McCafferty was suppose to pay. He did not pay that. She had another judgment through Small Claims

Court for $73.00 of which Mr. McCafferty paid $20.00. Ms. Baillieul-Scott says, why would I go back to Court for any more? She indicated at one point when Nicole was three or four years old she asked Mr. McCafferty for a contribution towards swimming lessons. The answer was, no, you get $135.00 and that's it.

[7] I accept Mr. McCafferty's evidence that he did have to travel to Port Hawkesbury and he paid the expense of going to Port Hawkesbury to exercise his access. I have no evidence as to how often he went to Port Hawkesbury or what his costs were. It is a given there were some access costs. Is it inordinate for a parent to travel from Truro to Port Hawkesbury to exercise access? It happens all the time. We see it just about every day in this Court where people are required to travel throughout the province to exercise access. In fact they are required to travel throughout the continent or even the world to exercise access. The costs can be quite extraordinary in many cases.

[8] The **Divorce Act** contemplates that one of the issues the Court must take into account when setting an appropriate amount of maintenance is the access cost to the non-custodial and non-primary care giving parent. It is a consideration the Court would have made if there had been an application to increase maintenance at

any time by Ms. Baillieul-Scott. The Court would have also taken into account indirect contributions. In most cases the accessing parent is the one that is responsible to pay the costs of access. If it is extraordinary or inordinate then the Court will give some consideration to it.

[9] I have never seen a situation where an accessing parent is entitled to have a deduction for the amount of food their child eats when they are with them. That does not happen. Most parents buy a certain amount of presents for children when it comes to clothes, shoes, boots, pants, coats, sweaters, etc. Mr. McCafferty is suggesting, however, that he bought all or almost all of the clothing for Nicole, without giving any evidence as to how much he spent. I tried to have him narrow it down and he said, no it wasn't $10,000.00. He didn't narrow it down anymore. I have no evidence even though I gave him an opportunity to explain how much he and his present partner may have spent on Nicole. It is clear from his evidence a lot of the stuff that was provided to, or for, Nicole came from his mother as opposed to coming from Mr. McCafferty. Again, I have no idea as to the amounts.

[10] Mr. McCafferty suggests as well that he has Nicole on his medical plan. I accept the evidence of Ms. Baillieul-Scott that she was not aware that Nicole was

on Mr. McCafferty's medical plan. She indicated to the Court that she, as a sole provider, caregiver, even though things were tight, kept Blue Cross coverage in place in terms of a family plan, so that Nicole could be on her plan, since the date she got work in Port Hawkesbury. It speaks to the issue as to whether or not she knew or thought she had coverage for Nicole.

[11] Having said that, I am satisfied there were substantial periods, even though it is not clear to me that Mr. McCafferty had coverage all of the time through his employer for Nicole, he did have coverage for Nicole for some, if not all, of the period of separation. He did not necessarily make it clear to Ms. Baillieul-Scott that he had coverage. As I understand it, about the only things Mr. McCafferty ended up getting through his plan were some eye glasses for Nicole. It did not come out of his pocket in any event.

[12] The Court routinely makes orders not only for maintenance but also that it be a requirement to keep the children on any medical plan through employment. We do not often give credit when that occurs. I have no evidence as to what it cost Mr. McCafferty. I assume it was not an inordinate amount in terms of premiums

to pay to have Nicole on his plan, or if there was any extra premium to have Nicole on his plan. It is really a non-issue for the Court.

[13] Perhaps only for the fact that Mr. McCafferty and Ms. Baillieul-Scott are almost incapable of communicating on anything directly, I suppose it ended up that both of them had coverage and did not know the other was providing coverage. It should have twigged in Mr. McCafferty's mind sometime that when he was not getting any receipts to send in for claims that maybe some other arrangement was being made, or that Ms. Baillieul-Scott did not know Mr. McCafferty still had coverage in place, or that she alternatively had coverage in place. In any event it was not of any benefit to Nicole at the end of the day. Even for the glasses, I note in Mr. McCafferty's evidence, he started to say Ms. Baillieul-Scott wasn't doing the motherly thing by buying glasses for Nicole. It turns out Mr. McCafferty was not buying them either, he was jut putting them through his plan. That is what his evidence ended up being. It does not make him a hero. It is a fact he had a plan in place and that is good. It is lucky that he has it in place. There were no heros and there were no villains when it comes to the glasses.

[14] At the end of the day, I am left with a situation where I have to ask whether or not there should be an adjustment retroactively in terms of the maintenance. I have already given an indication as to what the numbers should be. I noted earlier there are outstanding amounts in relation to the judgments that are in place. I am going to allow a credit to Ms. Baillieul-Scott in relation to those judgments that are outstanding. They will be satisfied through non-payment of the maintenance. The maintenance is set at $291.00 per month, effective July 1, 2007. For any amounts that are owing Ms. Baillieul-Scott can deduct the $1,034.18.

[15] As regards the issue of retro-activity, I am satisfied that Ms. Baillieul-Scott was genuinely scared and frightened of Mr. McCafferty. From what I witnessed here today Mr. McCafferty is a person who was at best forceful and aggressive. That is how I would characterize Mr. McCafferty here in Court today. Ms. Baillieul-Scott went further than that. She said in terms of her dealings both during and after the relationship he was downright belligerent, threatening and violent. She spoke of incidents where he threw telephones so they punched a hole in the wall. That he ignored the judgment for the $500.00 plus the $73.77. She talked about the fact that on the day she got the divorce she was served with papers through Small Claims Court. Mr. McCafferty was asking that Ms. Baillieul-Scott

give him some portion of her income tax refund. The Adjudicator of the Small Claims Court said, no it was not a valid claim. As I indicated, I do accept that Ms. Bailllieul-Scott was genuinely afraid of Mr. McCafferty. It really does not matter as to whether or not he thinks she should have been afraid of him. What I witnessed is a person who is, at best, described as forceful and aggressive. Ms. Baillieul-Scott said at one point in time she did ask for a contribution and it was turned down. She is stuck with a situation where she did not ask this Court in a formal application for an adjustment to the maintenance.

[16] I refer to **Miglan v. Miglan,** 53 O.R. (3d) 641. There are a number of considerations the Courts have to take into account. One of the issues is when did the parties first raise the issue of retro-active support? The Court is in a difficult situation, to say the least. For Mr. McCafferty to hang his hat solely on the suggestion that when Ms. Baillieul-Scott asked for a contribution to swimming lessons that was the last time that she could have, or should have, asked for a adjustment to the maintenance is not good enough. The Court cannot in any way condone a situation where a parent who is responsible to contribute to the maintenance, support, and costs of raising a child, somehow escapes that

obligation by being so forceful and aggressive as to intimidate the other side so that it is no longer worth it to them to ask for the support they are entitled to.

[17] We heard Ms. Baillieul-Scott talk of the fact she moved to Port Hawkesbury just so she could be far enough away that she felt some security. She lived with her mother. She said, we got along, we didn't have an awful lot extra. I did a good job of raising Nicole, got a place to live, everyone loved her. She excelled and had very high marks in school. It is a credit to her considering the paltry amount of financial support she was getting from Mr. McCafferty, that she was able to do that. As I understand the evidence, she was not making an awful lot of money herself but she managed to do it. It speaks of the intimidation and fear that she felt from Mr. McCafferty. As I said already, I am satisfied she was genuinely afraid of him. I am concerned that because of her fear she didn't bring a formal application.

[18] Certainly Mr. McCafferty had no difficulty making application. Within six days of Nicole going to live with him, probably just about as soon as he could find the Court doors open after Nicole moved in with him, he was here asking for his share of the money in terms of maintenance or support coming from Ms. Baillieul-

Scott. After all of those years when he was paying substantially less than his fair share of the money. I suppose when you look at the equities as between the two parties it is going to take a long time for Ms. Baillieul-Scott to catch up in terms of what she should have been receiving and dared not ask.

[19] I am satisfied there has to be some sharing of responsibility as between the parties. While I indicated I am accepting of the fact that Ms. Baillieul-Scott was genuinely afraid of him, she cannot simply sit on her laurels and say, I did nothing until he finally came after me. She cannot now say, "I am now asking that you give it all back to me." As I said, there is some sharing of the burden here. As much as he should have been paying more, she should have been bringing this application on earlier for Nicole's sake.

[20] I am satisfied that an appropriate order in this case is there be a retro-active lump sum maintenance award made to Ms. Baillieul-Scott. It is non-taxable in the hands of Ms. Baillieul-Scott and it is not deductible in the hands of Mr. McCafferty. As I have indicated he was able to deduct, and she had to be taxed on, the $1,620.00 a year that she was getting. In terms of sharing the responsibility as between the parties and considering all of those factors that I must

consider in the **Miglan** case, and keeping in mind the genuine fear and threats that Ms. Baillieul-Scott felt, based on Mr. McCafferty's actions both before the separation and subsequent to the separation which prevented her from making this application at an earlier date and the parties not being able to talk, I am satisfied an appropriate amount is $10,000.00. Mr. McCafferty will be required to pay that amount to Ms. Baillieul-Scott.

[21] Given the circumstances of the parties, however, where Mr. McCafferty now has Nicole living with him and would normally be entitled to $291.00 per month in child maintenance based on the current table amounts, I am going to simply allow the $10,000.00 to be continued to be paid by way of non-payment of the maintenance from Ms. Baillieul-Scott to Mr. McCafferty on an ongoing basis. There will be adjustments each year. Ms. Baillieul-Scott will have to give a copy of her tax returns to Mr. McCafferty each year no later than the first day of June of each year. For now up until June of 2009 the maintenance will be $291.00 per month. I am not dealing with any section 7 expenses here. Section 7 expenses are expenses in relation to university. That is a separate issue. Ms. Campbell already alluded to the fact that this may have to be revisited in September to see who has to

pay what share of the university expenses if Nicole goes to university or college. The $291.00 per month will be paid by deductions from the $10,000.00 amount. It only kicks in once the initial $1,034.19 is used up. Ms. Baillieul-Scott is entitled to that judgment amount first. While Ms. Baillieul-Scott owes the $291.00 per month through to June of 2009 she does not have to pay it. It comes off the $10,000.00 in retro-active maintenance. I could have ordered $18,500.00 in retro-active maintenance but I am not ordering it. Ms. Baillieul-Scott shares some of the responsibility.

[22] I would encourage the parties, in relation to section 7 expenses, to take a look at what the costs are for university or post-secondary education and try to come up with some arrangement. This Court should not have to make those types of decisions. The RESP is in place and it may be that if their incomes are somewhat close, or whatever their pro-rated incomes are, Ms. Baillieul-Scott can start making her contributions for the first year through the RESP. Mr. McCafferty could make his contribution as towards the post-secondary education expenses on top of that until the RESP is used up. After that it will be a matter of taking a look at what is still owing on the $10,000.00 and see when that is depleted.

[23] At the end of the day if Nicole does not go on to post-secondary education there may well be a balance owing on the $10,000.00. If there is a balance owing on the $10,000.00 when Nicole is no longer a child of the marriage, as defined within the **Divorce Act**, it will be collectible by way of a judgement.

[24] Ms. Campbell will draft a copy of the order within the next ten days. Mr. McCafferty will have fourteen days after receipt of the Order to indicate what his objections, if any, are to the order. If Mr. McCafferty objects he can forward his submissions on to the Court, with a copy to Ms. Campbell. Upon receipt of Mr. McCafferty's objections, Ms. Campbell will have ten days to respond. The Court will then fix the terms of the form of the order based on the record.

J.

01/31/08