IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Penney v. Mifflen, 2009 NSSC 96

Date: 20090325
Docket: 1201-063058
Registry: Halifax

Between:

Vanessa Fawn Penney

Petitioner

and

John Kenneth Mifflen

Respondent

Judge:	Justice Lawrence I. O'Neil
Heard:	March 16, 2009, in Halifax, Nova Scotia
Oral Decision:	March 19, 2009, in Halifax, Nova Scotia
Written Reasons:	March 25, 2009
Counsel:	Tanya G. Nicholson, counsel for the Petitioner John K. Mifflen, Self Represented

By the Court:

[1] This is a decision flowing from a Divorce hearing, following the filing of a Divorce Petition by Vanessa Fawn Penney, the Petitioner. The Respondent is John Kenneth Mifflen.

Introduction

[2] The parties' litigation commenced in July 2007 with the Respondent, Mr. Mifflen making an application under the provisions of the *Maintenance and Custody Act*, R.S.N.S. 1989 c.160. There were various legal steps along the way that ultimately resulted in an interim order dated September 5, 2008, dealing with custody and access of the parties' child.

[3] On October 21, 2008, Ms. Penney filed a Petition for Divorce. The parties agreed that the matter would proceed as a divorce hearing, with material filed as part of the application under the *Maintenance and Custody Act*, R.S.N.S. 1989 c.160, also being evidence in the divorce proceeding. More specifically, the parties identified those affidavits and those financial filings that are part of the evidence in the divorce hearing.

Background

[4] The parties were married January 11, 2004 and separated on June 9, 2007. They cohabited for a period of several years, beginning in September or October 2000 to the date of their marriage. They have one child born in July, 2003.

[5] In her petition, Ms. Penney seeks a decision on the divorce, custody, access and child support. She asks that neither party be ordered to pay spousal support and she asks for division of pension entitlements and for division of property under the *Matrimonial Property Act*, R.S.N.S. 1989 c.275. No answer has been filed.

Divorce

[6] The parties are in agreement that the divorce should issue on the basis of their having lived separate and apart for more than one year. I find that they were married January 11, 2004; that they have lived separate and apart for more than one year. I find that they were residents of Nova Scotia for more than one year prior to the filing of the Petition for Divorce. There are no bars to the issuance of the divorce. The divorce is therefore granted.

Matrimonial Property

[7] The parties have advised the court that as a consequence of a settlement conference, held in September 2008 and resumed on January 26, 2009, the parties have reached a settlement of the property issues relevant to their relationship. The court is advised that they have reached an agreement but Mr. Mifflen may have some difficulty refinancing the former matrimonial home, as he tries to implement the terms of that settlement.

[8] Subject to a request to rule on how long Mr. Mifflen has to refinance the matrimonial home, the court is asked to consider the matrimonial property issues settled.

Spousal Support

[9] The parties agree that no spousal support shall be payable by one to the other. Mr. Mifflen is employed and Ms. Penney is well educated, holding a masters in library science. No spousal support is therefore ordered.

Child Support

[10] As stated, the parties have one child. Mr. Mifflen is subject to a court order dated September 29, 2008 that requires him to pay the table amount of child support based on his income of $53,592. That amount is currently ordered as $467 per month. He is prepared to continue to pay that amount of child support.

[11] He is currently in arrears of child support. He does not dispute that he is under an obligation to pay the arrears.

[12] Outstanding Issues:

1. Whether the parenting time of the Respondent should be increased to one half the overnight periods? Whether the weekend parenting time of the Respondent should move to every other weekend?

2. Whether the Respondent should be required to pay retroactive child support for the period beginning April 2008 to the commencement of the current order?

3. Whether the period of time for the Respondent to meet his obligation to remove the Petitioner from the mortgage documents should be defined?

Retroactive Child Support

[13] Ms. Penney is requesting an order requiring Mr. Mifflen to pay child support for the period April 2008 to October 2008. This is a period of time after Mr. Mifflen was given written notice by Ms. Penney's lawyer that she would be seeking payment of child support by Mr. Mifflen. The period ends with the commencement date of the current order for child support. The order dated September 29, 2008 at clause 3 preserves the opportunity for the Petitioner to seek a retroactive review at the time of trial, for the period prior to October 2008.

[14] However, the earlier order, dated September 5, 2008 is silent on the issue of child support. It addressed the issues of custody and access.

[15] Mr. Mifflen takes the view that he and Ms. Penney had agreed that no child or spousal support would be payable and that after receiving the subject letter from Ms. Nicholson in April 2008, he had further discussions with Ms. Penney about the payment of child support. He testified that she assured him that the claim for child support was an error on the part of her lawyer and that she would not seek child support.

[16] He states further that throughout, he assumed a significant level of the parties' debt after they separated and further, that he has made financial contributions to the child's welfare on an ongoing basis.

[17] Finally, he argues that his high level of current indebtedness will require him to declare bankruptcy and he is not in a position to pay retroactive child support.

[18] Ms. Penney simply argues that Mr. Mifflen had an obligation to make payments and did not make them following Ms. Nicholson's letter. She does not respond directly to Mr. Mifflen's assertion that they had agreed to proceed in another fashion.

[19] The law the court must apply when considering whether a retroactive child support order should be made was summarized in *Burchill v. Savoie* , 2008 NSSC 307, as follows:

> [142] I remind myself of the directions of the Supreme Court of Canada when considering the issue of retroactivity of a child support order: *D.B.S. v. S.R.G.* [2006] S.C.J. No. 37.
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> [143] The burden of proof upon Ms. Savoie is to satisfy me on a balance of probabilities that the award of child support should not be made retroactive and why her child support obligation should not be reassessed based on her actual imputed income since September 2006. (*Coadic v. Coadic*, [2005] N.S.J. No. 415 (SC); and *McCarthy v. Workers' Compensation Appeals Tribunal (N.S.) et al* (2001), 193 N.S.R. (2d) 301 (C.A.) at para. 574).
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> [144] The Supreme Court in *D.B.S. v. S.R.G.* [2006] S.C.J. No. 37 addressed the issue of whether a court can make an order for retroactive child support and in what circumstances it is appropriate to do so. Three situations were described; awarding retroactive support where there has already been a court order for child support to be paid; awarding retroactive support where there has been a previous agreement between the parents and awarding retroactive support where there has not already been a court order for child support to be paid.
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> [145] Justice Bastarache then reviewed factors that could curtail the power of judges to make retroactive awards in specific circumstances. These are:
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> 1. Status of the child. (para. 86)
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> 2. Federal jurisdiction for original orders. (para. 91)
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> 3. Reasonable excuse for why support was not sought earlier. (para. 100)
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> 4. Conduct of the payor parent. (para. 105)
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> 5. Circumstances of the child. (para. 110)
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> 6. Hardship occasioned by a retroactive award. (para. 114)
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> [146] He then commented on how the court is to determine:
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> the amount of a retroactive child support award, (para. 117);
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> the date of retroactivity (para. 118), and the
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> quantum of the retroactive award (para. 126).
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> [147] Justice Bastarache summarized the governing principles as follows:

131. Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.

132. In the context of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.

133. In determining whether to make a retroactive award, a court will need to look at all the relevant [page 288] circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.

134. Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.

135. The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

> [148] The award of a retroactive maintenance award is a discretionary remedy. (Roscoe, J.A. in *Conrad v. Rafuse* (2002), 205 N.S.R. (2d) 468, para. 17-20). Judicial discretion was described by Justice Bateman in *MacIsaac v. MacIsaac*, [1996] N.S.J. No. 185 (N.S.C.A.) at para. 19 and 20. Discretionary decision making within the judicial context confers an authority to decide "according to the rules of reason and justice, not according to private opinion".

Decision/Reasons: Retroactive Child Support

[20] I am not prepared to order that Mr. Mifflen pay child support for any period pre-dating the child support order dated September 29, 2008. I have come to this conclusion for the following reasons:

> 1. I am satisfied that the parties did communicate with each other after the April 2008 letter and the July 2008 application were received by Mr. Mifflen. These documents advised him of a pending claim for child support. They can be viewed as notice. However, I conclude that Mr. Mifflen was reassured by Ms. Penney that she was not in fact pursuing a child support claim. Other evidence places this communication in the context of significant and pressing financial obligations being met by Mr. Mifflen. What money was available to the parties was in fact, being applied to their joint obligations. They had not yet disentangled their financial affairs. One can not ignore this context in assessing what the parties were thinking. As stated, they had agreed that child support would not be sought by the Petitioner.
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> 2. An order for Mr. Mifflen to pay retroactive child support would simply be hardship, a burden that can not be met in the short term and may well be the additional push, making bankruptcy inevitable. Such an outcome is not in Gabriel's best interests. Mr. Mifflen is struggling to re-establish himself financially and to retain ownership of the former matrimonial home, a place that is also Gabriel's home.
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> 3. I observe that an opportunity existed to have the child support obligation addressed and incorporated in the September 5, 2008 order. The Petitioner did not have that issue placed before the court at that time. At best, the Petitioner sent conflicting and ambiguous messages to the Respondent. It would be unfair to him to now retroactively impose a child support obligation for the period before October 2008.

Access

[21] The court has heard from both parties. It is beyond question that they are both committed and loving parents. I am satisfied that they accept the role each must play in Gabriel's life. They are prepared to be flexible to achieve that objective.

[22] Ms. Penny is currently at home and able to prepare Gabriel for school each day and is able to meet him after school. Mr. Mifflen is a hard working father, moon lighting in an effort to get the money necessary to meet the financial obligations he assumed following the parties' separation and the division of matrimonial property. He values his time with his son.

[23] Ms. Penney is a librarian. Mr. Mifflen is a technician, employed by Dalhousie University. He supervises five to seven people. He also has more than ten years experience working as a carpenter.

[24] These parents have much to offer Gabriel and they are currently doing so. They have been following a schedule that ensures frequent contact between each parent and Gabriel. The schedule has some logistical challenges but it is working well for Gabriel. No significant concerns have been supported by the evidence.

[25] The parties seek to tinker with the schedule.

[26] The most difficult issue the parties have had to deal with concerns the access arrangement involving their child. Currently, the child is with Mr. Mifflen from Tuesday at 4:30 p.m. to Wednesday at 7:00 a.m., from Thursday at 4:30 p.m. to Friday at 7:00 a.m. and from 9:00 a.m. Saturday to 9:00 a.m. on Sunday. This is during the school year.

[27] The law the court must apply when determining an appropriate access schedule for the child requires an assessment of what is in Gabriel's best interest.

[28] Section 16 of the *Divorce Act* , S.C. 1985, c.3 (2nd Supp.) empowers the court to make a custody and access order. It outlines some parameters that govern the exercise of this authority. Section 16(5) provides:

> (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

[29] The factors the court is to consider are set out in s.16(8):

> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

[30] Significantly, s.16(10) specifically directs that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child. Section 16(10) provides:

> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[31] At paragraph 20 in *Gordon v. Goertz* [1996] S.C.J. 52, Justice McLachlin described the best interests test as follows:

> 20 The best interests of the child test has been characterized as "indeterminate" and "more useful as legal aspiration than as legal analysis": per Abella J.A. in *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.), at p. 443. Nevertheless, it stands as an eloquent expression of Parliament's view that the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake. The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty. Moreover, Parliament has offered assistance by providing two specific directions -- one relating to the conduct of the parents, the other to the ideal of maximizing beneficial contact between the child and both parents.

[32] Justice Goodfellow, in *Foley v. Foley* [1993] N.S.J. 347 delineated criteria that are generally relevant to determining the best interests of a child. In *Burchill v. Savoie*, 2008 NSSC 307, I adopted those criteria and added the value of preserving the status quo as an additional factor.

[33] At paragraph 5 in *Burchill v. Savoie supra*, I wrote:

> Justice Goodfellow in *Foley v. Foley* [1993] N.S.J. 347 enumerated a helpful list of considerations that frequently must be addressed depending on the facts of a particular case. They are the following:
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> 1. Statutory direction *Divorce Act* 16(8) and 16(9), 17(5) and 17(6);

2. Physical environment:

3. Discipline;

4. Role model;

5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists-psychiatrists- etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child:

10.The physical and character development of the child by such things as participation in sports:

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. *The Divorce Act* s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and

> severely impact on the ability to adequately meet the child's reasonable needs; and
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> 17. Any other relevant factors.

[34] The parties have a current arrangement with respect to holidays and special days and summer vacation, that is not in dispute.

[35] At 7:00 a.m. on Wednesday and Friday, Gabriel is returned to his mother's care and she bathes him, feeds him breakfast and prepares him for school. She then walks him to school. She also picks Gabriel up from school at 2:00 p.m. and prepares him for his overnights with his father on both Tuesday and Thursday.

[36] Mr. Mifflen would propose to keep the Tuesday, Thursday and Saturday access as it is in week one, with week two changing to require an additional overnight being overnight, from 4:30 p.m. to 7:00 a.m. That would be a change from six of fourteen possible overnights in a two week period to seven overnights out of a possible fourteen overnights.

[37] In response, Ms. Penney suggests that in the second week, the Thursday overnight be deleted and replaced by an overnight from Friday evening to Sunday, and that access on every Saturday would become part of weekend access every other week. That would give her every other weekend with the parties' child.

[38] Mr. Mifflen argues that the parties' child should spend as many overnights with him as he does with his mother. He does not seek a reduction or diminution of his child support obligation as a result of such a sharing.

[39] As stated, the child spends three overnights per week with him.

[40] It is significant that Mr. Mifflen does not want to have the opportunity to prepare Gabriel for school. He is content to deliver him to his mother at 7:00 a.m. and have her prepare him. This arrangement is also preferred by Ms. Penney.

[41] I do not accept that Mr. Mifflen simply defers to Ms. Penney and gives up the opportunity to prepare his son for school on those mornings Gabriel awakes in Mr. Mifflen's home. I am satisfied that Mr. Mifflen accepts that Ms. Penney is more capable of this task. It is also less burdensome for Mr. Mifflen if Ms. Penney performs this role. In my view, the latter reason is the main reason Mr. Mifflen

does not seek the opportunity to prepare Gabriel for school. Had he sought a change resulting in Gabriel being in his care until school commenced on Wednesday and Friday, I would have granted that change.

[42] Mr. Mifflen has two mornings during the week when he may have the special experience of getting his son ready for school. He does not seek to do so. Had his application been simply about more parenting time, seeking to add this period to his overnight access would have been logical. Instead, he seeks to add one more overnight. I do not view such a change as in Gabriel's best interests.

[43] He argues that Ms. Penney's proposal for access every other weekend will effectively create a five day period between his access periods, on occasion. He says this is too long for their son and for him. He says it is not necessary.

[44] I am persuaded that on the facts of this case, and in particular, the established parenting schedule and pattern both parents and the child have become accustomed to, the change proposed by Ms. Penney is not in the best interests of the parties' son. There is no reason to not continue a pattern of frequent contact between Gabriel and his father.

[45] Ms. Penney, as part of her argument for alternating weekend access, observes that under the current arrangement, she does not ever spend Saturday with her son. This is a valid observation. The court is prepared to order that the current Saturday access period of Mr. Mifflen become every other Saturday. On the alternate weekend, Mr. Mifflen's parenting time will be from 4:30 p.m. Saturday to 4:30 p.m. Sunday.

[46] In other respects, the current schedule will remain.

Refinancing of the Matrimonial Home

Time to Sell

[47] The parties have asked the court to determine how much time Mr. Mifflen may have to refinance the matrimonial home, thereby having Ms. Penney removed as a signatory to the mortgage. The Petitioner, to her credit, is prepared to give the Respondent a lengthy period of time to accomplish this.

[48] I direct that Mr. Mifflen move with dispatch to refinance the home and that it be accomplished on or before March 31, 2010. Mr. Mifflen testified that he anticipates having to go through bankruptcy. He said a consequence of such an event is that he will be unable to refinance for a few years, at least through a commercial lender. It may be that he will be unable to refinance within the next twelve months. If that is the case, the home is to be listed for sale before the end of April 2010. The parties are, of course, free to negotiate another outcome. Failing that, and the refinancing of the home, it is to be sold.

Costs

[49] No award for costs to either party is made.

J.