

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Kipper v. Dill, 2009 NSSC 140

Date: 20090428

Docket: SFHMCA-063180

Registry: Halifax

Between:

Erika Kipper

Petitioner

v.

Justin Dill

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Heard:

April 6, 2009 in Halifax, Nova Scotia

Counsel:

Tanya R. Jones, for the Applicant

Terrance G. Sheppard, for the Respondent

By the Court:

[1] This is Erika Kipper's interim application for custody of Julian Kipper and child maintenance for him. Julian's father, Justin Dill, has replied to this interim application by seeking custody, child maintenance and an order that Ms. Kipper's access to Julian be supervised.

[2] Ms. Kipper and Mr. Dill met in April 2007. They had been dating for approximately five months when Ms. Kipper became pregnant. They did not cohabit. Their son, Julian, was born in June, 2008. From his birth until March 2, 2009, Julian's primary home was at his mother's. On March 2, 2009 Mr. Dill kept Julian with him following a visit, concerned that it was unsafe to return Julian to his mother. Ms. Kipper filed her application for custody as a result of Mr. Dill's action.

[3] Mr. Dill justifies keeping Julian because he says that Ms. Kipper was increasingly erratic and destructive. He also says that Ms. Kipper did not provide an environment for Julian that was safe, healthy and conducive to Julian's development. These factors, he claims, also support his application for interim custody of Julian.

[4] Ms. Kipper says that she has provided appropriate care for Julian and that the quality of her care for Julian is corroborated by the independent observations of Debbie Hollett, a social worker employed by the Dartmouth District Office of the Department of Community Services.

[5] Debbie Hollett testified, as did Ms. Kipper's mother and her cousin, and Kim Campbell, the vice-principal at Southdale - North Woodside School. The school is attended by Tyler Kipper, Ms. Kipper's older son. I received affidavits from Mr. Dill's mother and his step-father. I was provided with 393 pages of documents, comprising records from the Department of Community Services (relating primarily to the Department's involvement with Ms. Kipper and Tyler), Tyler's records from Southdale - North Woodside School, records relating to Ms. Kipper from the HRM Police Department, the Kensington PEI Police Service and the Halifax District RCMP.

[6] Ms. Kipper says her relationship with Mr. Dill has been troubled from the start. She hoped their relationship was monogamous, but her hope was not shared.

Her pregnancy added strain to the relationship. She feared that her new baby would grow up without a father and was upset at this prospect. During the pregnancy, Ms. Kipper and Mr. Dill learned the baby would be born with a cleft lip. Since Julian was born, both the police and child welfare authorities have been involved with Ms. Kipper and Mr. Dill.

[7] Mr. Dill kept a record of his contact with Julian. There is no disagreement with the record he prepared. From Julian's birth in June, 2008 until mid-November, 2008, Mr. Dill worked during the week in various locations in Nova Scotia and in Prince Edward Island. During this five month period, Mr. Dill saw Julian when he stayed with Ms. Kipper, generally on weekends. In late November, 2008 Mr. Dill began to spend time with Julian without Ms. Kipper present. These visits occurred at the home of Mr. Dill's mother and step-father, where Mr. Dill began to reside. The weekend visits eventually extended to include Thursday and Friday through January and February, 2009.

[8] On December 1, 2008, there were various calls between Mr. Dill and the Department of Community Services. During one he asked whether, if he did not return Julian to Ms. Kipper and left Julian with a babysitter while he travelled to Yarmouth to work for three weeks, could Ms. Kipper take Julian from the babysitter. According to the records from the Department, Mr. Dill confided that he was planning to seek custody, but did not want to "rock the boat" so that his access would be unimpeded and he could "push for custody" when Julian would be in his care. Both Mr. Dill and his mother were concerned that Ms. Kipper would learn of Mr. Dill's plans to seek custody of Julian. Each asked that Ms. Kipper not be told of the plan to seek Julian's custody.

[9] During these calls on December 1, 2008, Mr. Dill was twice asked whether he had concerns about Julian's care. Mr. Dill said he did not have any immediate concerns for Julian's well-being if Julian was to stay with his mother for three weeks. In cross-examination, Mr. Dill explained that he either had to give this answer or "open a can of worms". He said he "had no choice" but to give this answer.

[10] Mr. Dill's mother, Donna Dill, called the Department in late 2008 and in early 2009 to make reports about Ms. Kipper. On January 3, 2009, Donna Dill reported that Ms. Kipper was driving while taking Tylenol 3 painkillers and behaving erratically when she came to pick up Julian. The Department confirmed

with Ms. Kipper that she was not taking any medication and corroborated this with her doctor who had not prescribed any drugs for her. Police at Ms. Kipper's home at the time confirmed that she "was not presenting as out of control or erratic".

[11] Ms. Kipper is currently charged with two criminal offences (assault with a weapon and mischief) arising from events that occurred when she and Mr. Dill met to transfer Julian on March 2, 2009. Ms. Kipper denies the events which form the basis of the criminal charges. It is these events which provided the immediate justification for Mr. Dill's decision to keep Julian. The terms of Ms. Kipper's undertaking restrict the contact she may have with Mr. Dill, his mother and Julian.

[12] On different occasions prior to March 2009, child welfare workers have visited Ms. Kipper. Their observations of her and Julian raised no concerns for Julian's physical wellbeing. Julian was observed as happy and content, Ms. Kipper was attentive to Julian and Julian seemed to have good attachment with his mother. During an unannounced visit to Ms. Kipper's home, Julian was clean, dressed and cared for. According to the Department notes, "Ms. Kipper responded appropriately to Julian and he appeared to respond positively to her interaction. Ms. Kippers [sic] home appeared to be clean and tidy and there were no noted hazards to children." Julian's doctor is noted as expressing no concerns regarding Julian's development, in the Department's records.

[13] In his March 13, 2009 affidavit, Mr. Dill says that he visited Ms Kipper's home on January 8, 2009. He describes food and garbage scattered all over the outside deck, uncleared snow on the driveway and walkway, a freezing cold wind blowing through open windows into the house and filthy dishes scattered about. Mr. Dill noted that Debbie Hollett was present with Ms. Kipper when he was at the house. The Department's notes mention this visit to Ms. Kipper, which was unannounced. The house was described as appearing "to be clean and tidy and there were no noted hazards to children" during this visit.

[14] Until mid-November, most of Julian's time was at his mother's home with his mother and with his half-brother, Tyler. Tyler is 11 years old and in grade 6. When Tyler was born, Ms. Kipper was sixteen years old. She has always raised Tyler as a single parent, though she has received assistance from her mother, her aunt and her cousin.

[15] Much was made of Ms. Kipper's efforts in raising Tyler and the complete records of the Dartmouth District Office of the Department of Community Services were produced. Debbie Hollett answered questions about them. The Department has been involved with Ms. Kipper and Tyler intermittently since 1998. The Department's records provide an overview of its involvement. Various concerns have been noted over the years: Ms. Kipper's parenting skills, general neglect, parent drug/alcohol abuse, Tyler's unmanageable behaviour, Ms. Kipper's mental and emotional health, inappropriate discipline, emotional abuse, physical neglect, and Tyler's threat of suicide. Typically, when a complaint was made, the file was closed at intake. According to Debbie Hollett, the file is closed where the risks are alleviated or minimized.

[16] Ms. Kipper is on maternity leave. She has no job to return to when her leave ends. Ms. Kipper's mother lives in Antigonish and Ms. Kipper's cousin and aunt live in Dartmouth. All have provided assistance to Ms. Kipper in parenting Tyler and support her in parenting Julian.

[17] Mr. Dill lives with his mother, step-father and sister. Since mid-November, 2008 he has cared for Julian in this home. He has not lived on his own while caring for Julian. Mr. Dill's mother and step-father both filed affidavits stating their willingness to support Mr. Dill in parenting Julian. It was anticipated that Mr. Dill might begin regular employment in July, 2009, however this will not occur and he will continue to work sporadically as a substitute teacher until he can obtain regular work.

Interim Custody of Julian Dill

[18] I was referred to Justice Goodfellow's decision in *Foley*, 1993 CanLII 3400 (NS S.C.) for guidance in deciding this application. At paragraph 7 of his decision, Justice Goodfellow outlined those areas of parenting that bear consideration in parenting cases:

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, uncle's, aunt's, grandparent's, 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

17. Any other relevant factors.

[19] Julian is ten months old. Many of the considerations identified by Justice Goodfellow are not relevant to him. This includes Julian's wishes, religious and spiritual guidance, the assistance of experts, cultural development, Julian's physical and character development, and plans for Julian's welfare. Of the remaining considerations which might have some relevance, there was little evidence.

[20] Mr. Dill argues that Tyler's history, as revealed by the records from the Department and the school, is Julian's future if Julian remains with his mother. Ms. Kipper points out that the records document no problems with the quality of her care for Julian and, while she has not always initially reacted appropriately to problems with Tyler, she has ultimately acted appropriately.

[21] Tyler has significant needs. His behavior has been uncontrollable. He has spoken and acted with violence toward others and himself. It takes a formidable effort to parent Tyler and Ms. Kipper has admitted that she can become frustrated and exhausted and, when frustrated, she has said things she doesn't mean. For example, she has told Tyler that he will cause her boyfriend to leave her and he will cause her to lose her job. She has told Tyler that she would place him in foster care. She has told Tyler that if he is unhappy, he should leave home.

[22] Tyler's situation raises two concerns. First, his behavior exhausts and frustrates Ms. Kipper. At the age of ten months, Julian cannot meet any of his own needs. He relies entirely on his mother and she must be able to meet his needs. Ms. Kipper cannot be exhausted and frustrated when dealing with Julian. Second, while Ms. Kipper has not been physically abusive to Tyler, the remarks she makes in her exhaustion and frustration are destructive ones. Such comments cannot exist in Julian's life.

[23] The Department's records indicate that Ms. Kipper's care for Julian is adequate. They do not endorse it as ideal. The extent of the destructive dynamic

between Ms. Kipper and Tyler must be minimized in Julian's life. I note that Ms. Kipper is working with the Department to deal with this and Tyler is receiving counselling at school. These are positive developments. Julian is too young to delay determining his parenting arrangement for progress.

[24] This is an interim order and both parents acknowledge that a final hearing will follow. Accordingly, I understand this order will not have a long lifespan. The relevant context for my decision is the unemployment of both parents, Julian's history of sharing his time with both parents each week, and the level of conflict between the parents. Having regard to these considerations, I order that Julian shall reside with his mother on Monday, Wednesday and Friday each week from 8 a.m. until 7 p.m. on each of these days. At all other times, he shall reside with his father at the home of Walter Burlock and Donna Dill. Julian shall be transported between his parents' homes by someone other than the parents or Donna Dill. Neither parent shall use non-prescription drugs or alcohol or abuse prescription drugs while caring for Julian. The parents shall use a communication notebook to relay any information about Julian which must be shared.

[25] I have structured the time periods for Julian's contact with his mother so there will be no need for supervision. The time periods when Ms. Kipper will be dealing with both children are limited to minimize the prospect that Ms. Kipper might be overwhelmed by Tyler's needs. However, the time will not be so limited so as to deny Julian and Tyler time to be together or to deny Julian the time he is accustomed to having with his mother.

Interim Child Maintenance

[26] Neither parent has paid the other any maintenance for Julian.

[27] The parties agreed that if Julian was to be in the primary care of Mr. Dill the appropriate amount of child maintenance for Ms. Kipper to pay Mr. Dill would be \$100.00 per month. I have placed Julian in the primary care of his father, so Ms. Kipper will pay monthly child maintenance of \$100.00 to Mr. Dill. Her payments shall be made through the Maintenance Enforcement Program. Maintenance is awarded retroactive to March 31, 2009, with payments to be made on the last day of each month in arrears for that month.

J.S.C. (F.D.)

Halifax, Nova Scotia