IN THE SUPREME COURT OF BERMUDA

Divorce Jurisdiction

2004: No. 187

BETWEEN

DAYNA KIM SAMPSON Petitioner

and

COREY ANTON W. SAMPSON Respondent

RULING

Date of Hearing: 27 August, 2008
Date of Ruling: 25 September 2009

Mrs. Georgia Marshall, Marshall Diel & Myers, for the Petitioners
Ms. Narinder Dosanjh, Christopher Francis Forrest, for the Respondent

1. The parties were granted a Decree Nisi on the 17th December 2004 and a Decree Absolute on the 15th April 2005. They were and still are the parents of a single female child, date of birth 8th September 2001.

2. A Consent Order, dated the 17th December 2004, vested joint custody of the child in the parents with care and control to the mother and generous and liberal access to the father, defined as every other weekend from Friday after school to Sunday at 7.00 pm.

In addition, the father was required to pay $630.00 per month towards the child's maintenance, through the Collecting Office. Any further monetary contributions were to be on a voluntary basis.

3. On 17th October 2008 the father issued a summons for an order that;
   a) He be granted care and control of the one child of the family
   b) The mother be granted reasonable access to the child
   c) Maintenance in such sum as the court deems fit.

4. Affidavits and other relevant materials were exchanged over time. There were attempts at negotiating a settlement. After several appearances the matter was eventually heard on 9th March 2009 before this court. Both parties were represented by counsel.

   At the onset the court was informed that the parties had come close to an arrangement for access to the child but were unable to agree. This was made evident by the mother's counsel that she had been unable to bring her client any closer to a settlement of that issue. As for the maintenance issue, that needed to be settled by the court.

5. After a somewhat lengthy hearing, the court found, on the basis of the affidavit evidence, that circumstances had changed since the 2004 order. The mother had become seriously ill at some stage. It necessitated her treatment overseas. At her request the father kept the child. During these times the child appeared to strive and improve educationally. There was no doubt that the increased access was beneficial to the child. This was not seriously disputed in the affidavit evidence at all. It was evident that the mother having now returned to better health appeared to have been exercising a degree of control over the child that was denying the father a sufficiently reasonable access in the circumstances. Even now after much effort, she had agreed to an extra Wednesday but refused an extra Thursday in the week when he would not have the child. It was evident from the affidavit evidence that there was either a tendency to play access games from time to time which resulted in denial of access to the father at those times or on those

occasions when he was unable to achieve his expected access, those perceptions were reasonably created in his mind.

6. The court however found, on the affidavit evidence, that both parents were good, caring and capable parents who each possessed the time and ability to be of positive benefit to the child and that each brought his or her unique qualities to the benefit of the child. The parties were so informed and encouraged to make a reasonable compromise for the benefit of the child but this was of no avail.

7. Counsel has complained about the language used by the court in respect of that encouragement. It may be said that the language used was not of the best quality but on the other hand there was absolutely no indication by complaint or otherwise, by either party or counsel at the time, that any party as a result of it, acceded to or receded from anything done.

8. The application of the father was for care and control; this application had never been abandoned, though the father was prepared to compromise if the mother would agree. She did not. In all the circumstances the court, applying the principle that reasonable access is a right of the child rather than of any parent and ought not to be denied except in reasonable or exceptional circumstances, felt that an order for joint care and control with a defined access order which in effect shared the child equally between the parents, was most reasonable.[1] This benefitted the child and removed or reduced the opportunity for abuse or denial of access by either parent due to their acrimony as evidenced by their affidavits and by their admitted inability to communicate.

9. In respect of the maintenance, the court found, on the basis of the affidavit evidence that circumstances had changed since the 2004 order. The child was no longer in nursery, hence a significant amount of expense for that purpose was no longer necessary. The child was now in primary school and was found to require certain special educational assistance. This was accepted by the medical evidence

[1] Childrens Amendment Act 2002. S 18D; 36B, 36C-36F.
UN Convention on the Rights of the Child. Art. 9

provided by the mother herself. The father had been meeting these expenses from his own funds and it was not disputed that his involvement both financially and by personal time had benefitted the child. In addition there was no serious dispute about the earnings or expenses of either party. Their respective incomes had been disclosed to each other. At the hearing there was no dispute about who or what had or had not been disclosed. The court found that there was no substantial disparity in income between the two. In fact the court found after reviewing the evidence before it, that both parties were about equally financially capable of maintaining the child to a reasonable degree.

10. Applying the principle that each parent is under duty to provide reasonable maintenance for the child to the extent that each parent is reasonably able to do so,[2] the court first of all ascertained the actual maintenance cost of the child, excluding any contribution thereto by either parent. Once this was ascertained, the court ascertained the individual net income of each parent, excluding any contribution to the child. In each instance the court allowed or made adjustments to some claims in respect of inflated or deflated stated amounts. Once the nets were ascertained, the court then applied on a pro ratio basis what quantum each parent should from their respective net, contribute to the total reasonable maintenance of the child. In this case because the parties' incomes were not substantially different and their net was not substantially different, the ratio of contribution by each was found to be 50/50. The total reasonable maintenance of the child having been found to be $1265 per month, each parent was found to be required to contribute one half of that. Since the father was personally spending $340 per month toward the child's education and so on, that being not disputed or suggested to be unreasonable or unnecessary and since the mother was spending approximately $630 per month, that too not disputed as unreasonable or unnecessary, the court considered it appropriate that the father should only now provide the mother with an additional $300 per month. Thus his total contribution to the child's maintenance was $640 per month and the mother's was implied at $630.

In the circumstances the following was ordered;

[2] Childrens Amendment Act 2002. S 36.1B-1E

a) The said child…remains in the joint care and control of the Petitioner and Respondent.

b) The Petitioner and Respondent shall have the child on alternate weeks with effect from 10th March 2009, Sundays at 1 p.m.

c) The Respondent shall continue to personally spend on the child $340 per month and shall in addition pay to the Petitioner $300 per month towards the total maintenance of the child which at present is found to be $1265.00 with the Petitioner providing the remaining $630 per month.

11. On the 21st May 2009 the court heard an Exparte Application from new counsel for the mother, seeking leave for an extention of time for leave to appeal the above decision. Leave was granted for the extention of time and the application for leave to appeal was adjourned to be heard interpartes.

12. On 27th August 2009 that application was heard and the decision reserved. Of the several grounds stated in the application, counsel for the applicant argued the following in relation to the joint care and control order;

- the court failed to take into account that the paramount consideration is the welfare of the child.

13. Counsel for the mother submitted that there was no evidence before the court of the immediate impact the joint care order would have upon the child, that there was no weighing of the paramount consideration because there was no evidence upon which it could be placed. In support of that she argued that there had been no sworn evidence before the court on cross examination of either of the parties nor was there a social inquiry report to assist the court. In the circumstances therefore she submitted that the mother has an arguable case and ought to be granted leave to appeal.

In respect of the maintenance order she argued;

- It was flawed in principle because it was based on the wrong premise. A premise of joint care and control. Further it was arrived at on the acquiessence of counsel without cross examination of the parties on oath. There was no satisfying evidence of disclosure of income on the part of

the father. She submitted therefore the mother had an arguable case and ought to be granted leave to appeal.

14. In support of her submissions, counsel cited several passages from *Gregory v Gregory 1985* 2 *All ER* 225. The principle being, that the Court of Appeal would not interfere with the decision of a lower court even if the Court of Appeal may have come to a different conclusion, where that decision by the lower court resulted from an exercise of discretion, unless that court was wrong in principle, for example in a case concerning children and had committed an error in the balancing exercise by giving too much or insufficient weight to certain factors.

15. In respect of the first argument, this court is unable to find a sufficiency in argument or evidence, as submitted by counsel for the mother, to satisfy the test in *Gregory.*

The court finds that there was ample evidence before it upon which it could and did base its decision. Both parties had provided substantial affidavit evidence. There was really no need for further cross examination and neither party requested to do so. The record clearly shows that the court read the affidavits and informed both sides that it had. There was no need for any social inquiry report and no party requested or suggested one. There is no duty upon the court to order one and even if one was ordered, it would not be binding on the judge. Further it cannot be said that the result would have been any different. To the extent that there was some flaw in the process because no further sworn evidence was taken at the proceeding, there had been no complaint at all by either party, nor was there any evidence of discontent with the process to which they consented. Both counsel participated in the process without any contrary instructions or complaints from their respective clients. Where counsel are agreed to what evidence a court may take into account, there is no rule to prohibit them from stipulating it, not even in criminal cases.

16. In the circumstances, this court is of the view that these orders were purely discretionary and respectfully finds that even if a superior court would not have reached the same conclusion, it is unlikely to result in a successful appeal. In

short, this court is not satisfied that an arguable case has been met. The Application will therefore be refused.

17. In respect of the second argument, this court is also unable to find a sufficiency in argument or evidence by counsel to satisfy the test in *Gregory.*

There was ample evidence before the court upon which it could and did base its decision. The parties had filed their affidavit evidence. They had disclosed their respective income and expense statements. At no time during the proceedings did any party raise any issue of dissatisfaction about the quality of the disclosure. Both parties were aware of what principle the court would apply in arriving at a fair assessment. There was no argument against the principle applied or the assessment process. To the extent that it was not done by way of cross examination under sworn testimony there maybe some weight in that submission. But all parties adopted the process without protest. This court would say that once counsel agreed to what evidence was to be admitted and considered, whether sworn or unsworn, it may not now be a legitimate complaint, sufficient in these circumstances to merit a successful appeal. It is highly doubtful that the result would have been different had all the evidence been sworn.

Counsel's submission that the award was arrived at because it had been premised on the joint care order is totally without merit. The fact that the mother was awarded $300 per week out of the fathers half share of the expenses, despite him having the care of the child half of the time demonstrates that. Had it been as counsel has suggested, the mother would not have had an award at all. She would have been entitled to provide her half share of the child's expenses and the father would have been entitled to provide his half share of the child's expenses with neither being required to pay the other anything. As it is the father still has to add to the personal expense he now pays whilst he contributes $300 to the mothers half share resulting in an actual reduction in the amount she is required to provide to $330. It seems that it is the father, not the mother who has reason to complain.

In the circumstances this court is unable to find an arguable case on the part of the mother and must respectfully refuse the application.

Dated this day of September 2009.

Hon. Carlisle Greaves
Puisne Judge