

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: MacKinnon v. MacKinnon, 2008 NSSC 337

Date: 20080730
Docket: 1205-002681
Registry: Pictou

Between:

Lawrence MacKinnon

Petitioner

v.

Melinda MacKinnon

Respondent

D E C I S I O N

Judge: The Honourable Justice Douglas L. MacLellan.

Heard: July 30th, 2008, in Pictou, Nova Scotia

Written Decision: November 24, 2008

Counsel: Lloyd Berliner, Esq., for the petitioner
Katherine Briand, for the respondent

By the Court: (Orally)

[1] Let me start by thanking counsel for doing this matter as quickly as you have. I consider this an emergency-type application which the Court dealt with as quickly as possible depending on the scheduling and the time allotted for it today.

[2] This is an application by Mr. MacKinnon by which he requests an order from the Court to prevent the respondent, Mrs. MacKinnon, from relocating to the Province of New Brunswick, specifically, Moncton, with the two children.

[3] The background of the matter is that the parties here separated in February of 2007. They were married in March 2003. There are two children: Ben, who is six years old, and Laureen, who is four years old.

[4] A Family Court order dealt with the question of child support, only in April 2007, and Justice Hood, of this Court, in May 2007 dealt with interim custody. It provided primary care to Mrs. MacKinnon with every second weekend to Mr. MacKinnon from Thursday evening to Sunday night.

[5] The full hearing on final custody is now set for four or five days starting October 6th of this year. Both parties are requesting primary care. I believe the matter had originally been set for sometime in June, as a backup, but did not proceed at that time.

[6] In February 2008, counsel for Mrs. MacKinnon advised counsel for Mr. MacKinnon that Mrs. MacKinnon was planning to move to Moncton, New Brunswick to take a nursing-type course. The evidence was that she had tried in November of 2007 to get into that same course in Pictou County, but that in November of 2007 was told that there were no seats available and she was placed on a waiting list. The evidence is that following that she applied and was accepted to the program in Moncton.

[7] In June of 2008, a new section of courses was opened in Pictou and the evidence appears to be that she probably could get into that course if she applied. After accepting the position in New Brunswick, Mrs. MacKinnon asked to be taken off the waiting list in Pictou.

[8] In May of this year, Mr. MacKinnon made this application.

[9] In June, and I am not quite sure when, but after school in June, Mrs. MacKinnon moved with the children to Moncton. She found an apartment there which is located in an area convenient for her to take her course and for the children to attend school and daycare.

[10] I understand the arrangements since the move has been that she has arranged for transportation to allow the children to come back every second Thursday to visit Mr. MacKinnon and she is providing that transportation. Her position is that that arrangement will have to stop in September when one child is in school and she is in the course, and her position is that she will be expecting Mr. MacKinnon to travel to Moncton to pickup the children. Of necessity, it would appear that that will involve Mr. MacKinnon doing that on Friday night, not Thursday night, because the oldest child will be in school.

[11] It is of note that Mrs. MacKinnon has an older child who is eight years old from a previous marriage.

[12] The issue is whether the Court should order Mrs. MacKinnon to return to Nova Scotia prior to the hearing in October, or as requested and suggested by Mr. MacKinnon, to turn the children over to him in the interim period till the hearing.

[13] Counsel for Mr. MacKinnon has provided a number of cases which hold that generally the status quo should be maintained until a full hearing. That interim orders are intended to be interim, and simply puts the parties in a holding position until the Court is able to hear all of the facts.

[14] The issue for me to decide is whether considering the present arrangement should I order that Mrs. MacKinnon return to Nova Scotia, or should I order that the children be turned over to Mr. MacKinnon prior to the hearing. Both parties acknowledge that the test is: what is in the best interest of the children. Many times what is in the best interests of the children are not necessarily in the best interest of the parents.

[15] The Court here is dealing with a very difficult situation. I cannot undo what has already happened. I find based on what I know of the evidence and the background that Mrs. MacKinnon's decision to move to New Brunswick at the time she made it

was a reasonable one. She was faced with a situation where she wanted to take the course and was not able to do so in Pictou County. There was no restriction in the interim order made by Justice Hood that would prohibit her from moving out of the Province. I cannot criticize her for making the plans that she did at that time.

[16] Both parties here have valid concerns. Mrs. MacKinnon, about her plans for the future with the children, in an attempt to better herself financially, to be better able to support them, and therefore, in need to take the course that was available to her and get the children settled in Moncton.

[17] Mr. MacKinnon has concerns because, in effect, the arrangement where he visited the children from Thursday night to Sunday night, every second weekend, is interrupted in the sense that the move will mean that once school starts he will not be able to do that on Thursday nights.

[18] The evidence also is that Mr. MacKinnon has, on a frequent basis, visited the children during the week at the babysitters. So obviously, Mr. MacKinnon has a significant interest and desire to have contact with the children. He has also suggested that the travel from Moncton to New Glasgow is about a 2 ½ hour drive. I suggest

after making that trip a number of times myself that it is probably just a bit over two hours.

[19] The position I have to decide is whether I should disrupt what is in place at this point, and i.e., order that the children come back to Nova Scotia either to live with Mr. MacKinnon, or to live with Mrs. MacKinnon back in Nova Scotia which, in effect, would mean that she couldn't start the course in New Brunswick. There clearly is evidence that she might be able to get that course in Pictou at the same time, however, the evidence is that she has signed a lease, actually after she was aware of this application, and has made significant plans.

[20] I see this case as basically having to deal with what should happen in the one month period, that is, the month of September. Starting on October 6th, the parties will have a full opportunity to present their sides of the picture to determine what is best. I understand Mrs. MacKinnon's position at that time will be that her plan for long-term custody will involve her living in Moncton, and Mr. MacKinnon's plan will involve him living in New Glasgow. After the full hearing in October, the Court can, after hearing all of the evidence, decide what is best for the children and hopefully be in a much better position than I am to consider the situation at that time.

[21] I would note here that the question of a two hour drive to exercise access is not overly excessive. I deal with many cases where non-custodial parents drive that distance and further to exercise weekly or bi-weekly access. I think if the move involving a trip of two hours was within the Province of Nova Scotia, there might very well not be as significant an objection to it because it happens regularly.

[22] I conclude that to make the change requested by Mr. MacKinnon to simply deal with the month of September would not be in the best interests of the children, and while I recognize that Mr. MacKinnon will lose some access time, at least two weekends during that month, I do not find that as significant as the disruption I believe would be caused if I do what he has requested I do.

[23] I would therefore dismiss his application to prohibit the move which, of course, has already taken place and dismiss his application to force Mrs. MacKinnon back. However, I would note that it seems to me that this is something that can be addressed as agreed to by Ms. Briand at the full hearing, and the Court can, after hearing all of that and how it came about, consider that as a factor in deciding the primary care issue. It could very well be at that time, after hearing all the evidence, that the Court

will order that if Mrs. MacKinnon is to have primary care that she will be obligated to stay in Nova Scotia. If the decision is that Mr. MacKinnon have primary care, then she will have to decide what she does.

[24] On that basis the application is dismissed. However, let me say this, and I did not address it with the parties, but I intend to address it with counsel that in light of my decision to permit this move and since I have, in effect, found that it's basically covering the month of September, I assume the parties have an arrangement to deal with the month of August. Does Mr. MacKinnon have extended access to the children during the month of August?

MS. BRIAND: He's entitled to it, but I don't think he's contacted Mindy about when he wants to exercise that and that's pretty much open.

MRS. MACKINNON: In extended -- I said extended (inaudible)...

MS. BRIAND: Yeah.

THE COURT: Mr. Berliner, does your client have any interest in having extended access during August? Do the parties have any suggestions as to what that could involve?

MR. MACKINNON: (Inaudible)

MR. BERLINER: Pardon.

MR. MACKINNON: At least two weeks in August. The week ending the 22nd or the 23rd. The week before that for sure. (Inaudible)

THE COURT: Okay. What – what two week period are you suggesting? The – ending the 23rd is the – the 22nd is the second last week..

MR. MACKINNON: What about the two weeks before that?

THE COURT: ...and the – the week that starts before that is the 11th, Monday the 11th. Do you want these two weeks?

MR. MACKINNON: Sure.

THE COURT: Okay. Mrs. MacKinnon, do you have any problem with that?

MRS. MACKINNON: Absolutely not.

THE COURT: Okay. When is the normal weekday-weekend access now?

MRS. MACKINNON: This is my weekend, so next weekend will be...

THE COURT: Is this your weekend coming up?

MRS. MACKINNON: This is my weekend coming up.

THE COURT: Okay. So he would be normally getting the children on the 7th.

MRS. MACKINNON: Yes.

THE COURT: So Mr. MacKinnon if you want...

MS. BRIAND: So that's just before the long week – that's just before his access...

MR. MACKINNON: No. The end of the week of the 7th...

THE COURT: Yes, the week - Thursday is the 7th.

MR. MACKINNON: Oh, okay.

MS. BRIAND: Yes.

THE COURT: So the suggestion is that he pickup on the 7th and then go for, in effect, two weeks and return on the 22nd. Is that – or do you want a return on the 24th which would be Sunday?

MR. MACKINNON: It would be Sunday. Yes.

THE COURT: The 24th would be Sunday. So that – that will be the order. That he will be able to pickup on the 7th of August and that he is going to end up being two weeks plus and I believe that's fair...

MS. BRIAND: Yes.

MR. BERLINER: Then why wouldn't you have Ms. MacKinnon drive them as she's been doing through the summer.

MRS. MACKINNON: I will – I will bring them down.

THE COURT: Okay. Yeah, she'll be...

MRS. MACKINNON: I will bring them.

THE COURT: ...responsible for bringing them down. And then for the month of September, after that happens, then they will be with her for the 29th of August which is good then, because I assume school starts around the 2nd. So Mr. MacKinnon would be entitled to pickup -- and I'm going to change the order to make it on Fridays since Ben is in school. So it'll be the weekend of the Friday the 5th, 6th, and 7th of September. Yes?

MRS. MACKINNON: Ben is done school at 1:30 in New Brunswick, which is earlier than here, so if Mr. MacKinnon wanted to...

MS. BRIAND: If he's still taking...

THE COURT: If he wants to pickup at 1:30 on Friday afternoon...

MRS. MACKINNON: If he wants to pickup early on Friday afternoon.

MS. BRIAND: Yes.

THE COURT: Okay. That's acceptable and then it would be every second weekend the same bases until you get to Court on the 6th and go from there.

MR. MACKINNON: Both ways or...

MRS. MACKINNON: I can meet you halfway (inaudible)...

MR. MACKINNON: My question was: Do I travel both ways or do I get met or -- one way or -- does she come and get them on Sunday and I go get them on Friday or...

MRS. MACKINNON: I can meet him halfway on Sunday.

THE COURT: Well, I don't like halfway visits. I'm getting old, I think.

MS. BRIAND: No, not you.

THE COURT: I have – I have quirks but I guess my suggestion is that the person who is going to get custody should go and pickup. In effect, Mr. MacKinnon if you could pickup on Friday afternoon and the mother pickup on Sunday evening. In other words, then it's just one full trip for both of you and I think that's fair in the circumstances until the Court hears the entire matter. So you're going to be responsible for delivery and pickup for the summer, Mrs. MacKinnon, but after September you'll be just for the pickup, okay, from Mr. MacKinnon's place.

MS. BRIAND: Okay. So in August for the vacation period, she'll do the pickup and delivery.

THE COURT: Yes.

MS. BRIAND: Okay.

THE COURT: Yes. And just let me say this. As I've said in my decision this, and I think Mr. Berliner characterized the law fairly here, this is a very close decision, folks. This is not – I think both of you had legitimate arguments to be made and I guess I'm paid to make the choice, but I would hope that both of you, now, have gone through this, I'm looking at – you folks are looking at a four or five day full hearing

of custody, that's before another judge, so it won't be me, but I would hope that maybe at some point you would consider the possibility of settling that matter without the necessity of going to Court, but that's entirely up to yourself.

MR. BERLINER: Just one other point, though, My Lord, that in the evidence we heard from Mrs. MacKinnon that she's blocked e-mail to Mr. MacKinnon therefore he has no ability to contact the children.

MRS. MACKINNON: He – he calls the house. He's free to call the house.

MR. BERLINER: (Inaudible - too many people speaking at one time)

MRS. MACKINNON: ...these insane e-mails, and I just couldn't (inaudible)...

MR. BERLINER: Like in – in relation to issues involving the children. They have joint custody. There should be some form of communication in relation to the children.

THE COURT: Why don't – well, Mrs. MacKinnon let me suggest that you open up the e-mail and keep track of it and if you can show at the full hearing that it's becoming an issue then it's a legitimate issue for the trial judge at that time.

MRS. MACKINNON: Okay.

THE COURT: Okay.

MRS. MACKINNON: Yup.

MS. BRIAND: No problem.

THE COURT: Okay. Anything else.

MR. MACKINNON: Her son is going for surgery in October and if it (inaudible) on the days that we have for Court how does this affect...

THE COURT: Well you have the days for Court and please don't attempt to move them. We are struggling very hard to get these dates and if you have to move them you might not have this here heard...

MRS. MACKINNON: It's a serious surgery and it...

THE COURT: ...until two — yeah — 2009.

MRS. MACKINNON: And I need to be there.

THE COURT: But we're as bad off as the surgery people. I — I don't know. All I'm saying is that you have the dates. You're guaranteed the date. You have a judge. If for some reason you're not able to have the thing heard, then you'd be looking at probably the spring of 2009 before you can have the matter heard.

MS. BRIAND: Yes. Thank you, My Lord.

THE COURT: So the application is dismissed. So the current order is that — I guess I made a little bit of a change. Can somebody draft an order to reflect that?

MS. BRIAND: Sure. I'll do that.

THE COURT: Okay.

J.