SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Mahaney v. Malone*, 2009 NSSC 217

Date: 20090428
Docket: SFHD-045320, 1201-060579
Registry: Halifax

Between:

Thomas Russell Mahaney

Petitioner/Applicant

v.

Andrea Gail Malone

Respondent

Judge: The Honourable Justice R. James Williams

Heard: April 14 & 15, 2009, in Halifax, Nova Scotia

Oral Decision: April 28, 2009

Written Decision: July 9, 2009

Counsel: Terrance G. Sheppard, for the Petitioner/Applicant
Julia E. Cornish, Q.C., for the Respondent

By the Court: (Orally, April 28, 2009)

[1] This is an application to vary under the *Divorce Act*.

[2] Andrea Malone and Tom Mahaney were married August 1st, 1997. They have two children; Thomas Wayne Mahaney, born […], 1999 and Alexis Gael Mahaney, born […], 2003. Both parents are teachers, as is Karen O'Leary, Mr. Mahaney's current partner.

[3] The parties separated on or about September 9th, 2005 when Mr. Mahaney moved out of the matrimonial home. Mr. Mahaney commenced a divorce petition March 23rd, 2006.

[4] Mr. Mahaney made an interim application that was heard October 20th, 2006. He sought a 50/50 shared parenting arrangement. Justice Dellapinna heard and decided the matter. The parenting issue was contested. The resulting order provided that the parties would share joint custody, Ms. Malone would have primary care, Mr. Mahaney would have access or parenting time:

> a. From September through June, each Tuesday and Thursday, 3:30pm to 8:00 p.m. and every other weekend from Friday at 3:30pm to Sunday at 6p.m.;
>
> b. Additional time during the school breaks as arranged and agreed between the parties;
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> c. Additional time during holidays as arranged and agreed between the parties;

[5] The parties' divorce trial took place May 16th and 17th, 2007 before Justice Beryl MacDonald. The only issues before the court were parenting and child support. The trial appears to have been split. The parenting issues dealt were with on the 16th and 17th, the child support issue later.

[6] Mr. Mahaney put forward a parenting plan that sought to change the interim order making the Tuesday and Thursday access overnight, seeking essentially shared parenting. Summer, Christmas and holiday access was largely agreed to on a shared 50/50 basis. Ms. Malone opposed the change in the school year weeknight regime.

[7] Justice MacDonald concluded that conflict between the parties was an issue, but hoped it would subside. The then current arrangement was working well. It was acknowledged and contemplated that Mr. Mahaney would be moving to a new home with a new partner, Ms. O'Leary. These events have occurred just as contemplated by the court at that time. Justice MacDonald concluded that it was not in the children's best interests to adopt Mr. Mahaney's proposed parenting plan.

[8] While the Corollary Relief Judgment issued May 17, 2007, the matter of child support was reserved. That hearing took place January 2nd, 2008. The

Supplementary Corollary Relief Judgment issued April 15th, 2008, providing that Mr. Mahaney pay the table amount of child support and a contribution to child care. The parenting arrangements ordered by Justice Dellapinna were left in place by Justice MacDonald in her May 2007 decision.

[9] On July 3, 2008, Mr. Mahaney commenced this variation application, just over a year after Justice MacDonald's decision. The application sought changes in access or parenting time, essentially seeking once again a shared parenting arrangement and changes in child support.

[10] I will refer to his position on child support as the decision continues. Essentially his position on child support was that child care expenses should terminate as of the younger child's commencement of school in September of 2008 and that there should be adjustments to the table amount of support.

[11] Mr. Mahaney's parenting statement requested that the children "reside equally with both parents on alternate weeks."

[12] The *Divorce Act*, s. 17 provides:

> (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
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> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or former spouses or by the other person.

[13] Section (a) refers to child support provisions. Subsection (3) provides:

> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

[14] Subsection (5) provides:

> 5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or

> other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

[15] Subsection (6) provides:

> (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

[16] Subsection (9) states:

> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[17] The Supreme Court of Canada in *Gordon & Goertz*, [1996] 2 S.C.R. 27, has commented on variation applications. The court there stated:

> 9 The principles which govern an application for a variation of an order relating to custody and access are set out in the *Divorce Act*. The Act directs a two-stage inquiry. First, the party seeking variation must show a material change in the situation of the child. If this is done, the judge must enter into a consideration of the merits and make the order that best reflects the interests of the child in the new circumstances.
>
> 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[18] I have attempted to consider and apply the provisions of the *Divorce Act* and the law as outlined in *Gordon & Goertz, supra*, in this decision.

[19] Mr. Mahaney's affidavit of July 8th, 2008, asserted:

- That he now lived five minutes from Ms. Malone in the home referred to in Justice MacDonald's decision;

- That he had lived with his common-law partner, Karen O'Leary, for over a year; (Again, Justice MacDonald appears to have contemplated the inevitability of that occurring.)

- That Thomas asked to spend more time with him;

- That the back and forth of the current schedule created difficulties; and

- That the Tuesday/Thursday schedule through the week is "hectic".

[20] Mr. Mahaney has also expressed a large number of concerns and made a wide range of assertions and allegations. They include:

- That the assistance Ms. Malone gets in parenting from others, (including her parents and her children's grandparents), and indicates she has difficulty handling parenting; that Ms. Malone has had a relationship with someone from Scotland who visited; (And that the relationship was on and off.)

- That she, Ms. Malone has or has had one or two other male friends, including one that Mr. Mahaney asserted was married;

- That Ms. Malone kept Alexis, then four, home from school on a Friday morning. (Ms. Malone was off work that day.)

[21] This is an example of what in the end is really petty concerns or assertions. The evidence indicates for instance that neither party has any trouble with Thomas missing a day of school to go to a hockey tournament or something of the nature. The concern expressed by Mr. Mahaney here is, as I indicated, petty.

[22] Mr. Mahaney complains or expresses concerns that Jessica Aslyn who tutored Thomas privately and worked at his school, boarded for a time with Ms. Malone.

[23] He referred to alleged incidents of physical violence and drinking to excess by Ms. Malone that were if not prior to the separation, clearly prior to the divorce hearing and interim hearing that took place before that. Those assertions and

allegations are of little or limited relevance at this point after the two previous hearings. It is very difficult to understand why they are put forth.

[24] He referred to a number of occasions when there were difficulties or inappropriate communications with the parties at times of exchange. At the end of the day, the record would indicate that both of the parties have had mis-communications or incomplete communications and at times even inappropriate communications with each other.

[25] Mr. Mahaney's affidavit goes on to request a cessation of the childcare component of child support, but does not refer to the other aspects of child support.

[26] Mr. Mahaney's later affidavit of March 27, 2009, repeats much of the earlier affidavit. It requires almost a clause by clause review to determine what is different between the affidavits. The latter affidavit is longer. It does outline further examples of difficult communication between the parties, including assertions that Ms. Malone had indicated that he could take two nights if the child support continued, referring he said, to an August 2008 conversation; a conversation that took place shortly after the filing of the first affidavit.

[27] At the end of this latter affidavit, Mr. Mahaney indicates he sought a shared parenting arrangement, cessation of the childcare contribution and a variation of the child support payments. He did not indicate what that variation of child support should be, though his counsel's brief dated some time later, April 7, 2009, virtually right before the trial, asked that no child support order be made.

[28] Mr. Mahaney has had and I conclude will continue to have access or parenting time with both children beyond the September-June schedule that has been in place and the week to week schedule that will be in place following this decision. The evidence indicates that he has been involved with the extra curricular activities of the children when he has had the children and extra times when Ms. Malone travelled or was busy. Some of those occasions when he has had the children on extra times he lists as "concerns" in his own affidavits as if turning to him as a choice or first choice when Ms. Malone is travelling or otherwise occupied is something that should be held against her.

[29] He and Ms. O'Leary, his current partner, gave the impression that all was rosy with Ms. O'Leary's ex-husband in their custody and access arrangements.

Cross-examination disclosed the police had been involved more than once and as recently as December of 2007 in that relationship. Mr. Mahaney's concerns and by "concerns" I use his word from his affidavit, (Indeed "concerns" is a title of a "section" in both affidavits) about stability in Ms. Malone's life and household come without disclosure of significant events involving his new family constellation. He and Ms. O'Leary say things have been "good" with her and her ex since November of 2008. All of that said, it is an example of Mr. Mahaney being all too willing to express concerns, to express negative views concerning Ms. Malone without looking in the mirror.

[30] Mr. Mahaney's concerns about communication and some of the examples of such problems came with little or no examination or recognition of his own role in such events or the limits in his own behaviour and life. Mr. Mahaney presents as being rather self-righteous concerning his own circumstances, while all too anxious to -- and I use a phrase used by Ms. Malone's counsel, "to mine Ms. Malone's circumstances for negative concerns." He does so both directly and by innuendo. He expresses concern for example that Ms. Malone's parents, the children's maternal grandparents, stay three, four or five nights at a time to help her parent. Her parents live in New Brunswick. One would hardly expect that they come and stay for a day and leave. He expresses concern that the children or Thomas is upset when a male friend calls Ms. Malone and he, Thomas, answers the phone. Assuming Thomas raised this with his father without any probing by this father, it might have been enough to simply reassure Thomas that his "Mom" and Dad have moved on to new adult relationships, that he, Mr. Mahaney was lucky to have found Ms. O'Leary, that they were happy together in a committed relationship and that Mom had not been so fortunate yet, but that he was sure she would find somebody to partner with in time, rather than to raise it as a quote or concern in the context of this application. At the time this evidence was given, I asked Mr. Mahaney what he wanted Ms. Malone to do in those circumstances? To prohibit Thomas from answering the phone? To tell individuals who dated her not to phone or whatever? I believe that series of questions led to Mr. Mahaney recognizing the narrowness of his comment.

[31] There are examples also of innuendo throughout Mr. Mahaney's evidence. One example and there are others, being reference to him saying that Thomas was tired of eating pizza at his mother's home, the not too subtle innuendo being the suggestion of nutrition concerns and a lack of regular meals at her home.

[32] There are 47 paragraphs, 11 pages of "concerns" in Mr. Mahaney's affidavit of March 27th, 2009. They include the examples above. They reference events prior to the separation, prior to the divorce. An example of that is Ms. Malone having taken a stress leave in 2005-2006 and asserting that she misses a lot of time from school now. I have no idea how much time Ms. Malone misses from school. I have no idea how that relates to this proceeding and his application that he should have more parenting time, but I do know that Ms. Malone's principal testified -- she indicated she saw Ms. Malone as a very good, if not exceptional teacher and was not asked at all about the missed time.

[33] Mr. Mahaney interpreted negatively events he was not present for, interpreting events in Ms. Malone's home repeatedly, often with information from the children. He made complaints about Ms. Malone involving or discussing adult or court related matters with the children when many of his "concerns" came right from the mouths of the children. An example of that (apart from some of the examples I have already given) is his saying that one or both children have said that Ms. Malone has two drinks almost every day. Apart from being inadmissible that kind of comment is entirely without context. It doesn't say when or where that comment was made. There is nothing for the court to contextualize the comment with. Other concerns of a like nature include Alexis' sleeping habits in her mother's home, toilet accidents while with her mother and so on.

[34] Mr. Mahaney's concerns are diverse and seem even to this court unrelenting. He indicated at one point in his evidence "he would not stop until he got what he wanted." I believe Mr. Mahaney is a well-intentioned and good parent who has simply gotten off track. As I have indicated, many of the concerns amount to statements or innuendo arising from information from the children, recounting of events that pre-date the divorce or separation. Most of them are inadmissible or irrelevant to this proceeding. Putting the concerns out there has he has is of little assistance to the court and of no assistance to where he wants the proceeding to go. Even if some of them may be accurate, as I have indicated, many are not admissible. Many are not relevant. They pre-date the divorce temporally or under the tests expressed by the *Divorce Act*. The emphasis on this negative approach has diminished Mr. Mahaney's application and certainly not furthered his case.

[35] Helen Healy, the principal of Ms. Malone's school spoke highly of Ms. Malone's abilities as a teacher. She described events at the school one day when Alexis was put on the wrong bus. Her description of those events differed

markedly from that description Mr. Mahaney gave. Ms. Healy indicated Mr. Mahaney presented as upset, agitated and that he said something that upset Ms. Malone a great deal. Mr. Mahaney's evidence was that he was calm, rational. I accept Ms. Healy's evidence.

[36] Ms. Healy confirmed also that there were issues with Mr. Mahaney and him e-mailing Ms. Malone at the school e-mail or education department e-mail address of Ms. Malone's.

[37] Ms. Malone's evidence recounted some of the difficulties the parties have encountered. Halloween in the fall of 2008 was on Mr. Malone's weekend. It became an issue. Mr. Malone doing just enough to appear reasonable or to, in his view, to appear reasonable, taking the children back to Ms. Malone's home area later in the Halloween evening when I conclude they were tired.

[38] I conclude from Ms. Malone's evidence, the e-mails, the affidavits from other individuals, the evidence of Mr. Mahaney and the evidence of Ms. O'Leary, that Mr. Mahaney is strong-willed and at times passive-aggressive in some of his communications with Ms. Malone. At times he would communicate part, but not all of the information that should be given. At times negative, either by innuendo or assertion.

[39] Ms. Malone is less than perfect too. Mr. Mahaney, however, with his pages and pages and pages of concerns has brought the court's attention to his actions and assertions. I have examined them. I have taken those pages seriously. I have read the pages. I have examined the pages.

[40] Ms. Malone is entering a new relationship with a Mr. Hubley. He was introduced to the children in February or March. They may well cohabit in the future. Ms. Malone wants the current parenting arrangement to continue. To some extent, both parties have made adjustments in their work schedule to "make it work". Ms. Malone also states that she does not want one party to be a "winner".

[41] I conclude that Justice MacDonald contemplated Mr. Mahaney's move into his current home with Ms. O'Leary in the same area and school district as Ms. Malone. I conclude that there is no material change in circumstance arising from that move. I conclude that the mere aging of the children since the divorce trial 23

months ago is not a material change in circumstances as contemplated by the *Divorce Act*.

[42] Justice MacDonald hoped the conflict between the parties would subside. It has not. She did not foresee that it would not. In fact, she assumed it would. I conclude that there is a material change in circumstance that was not foreseen by Justice MacDonald, the persistence of conflict. I conclude the conflict is exacerbated by the back and forth of the current schedule. I conclude that it is not in the children's best interest to maintain the current schedule.

[43] Mr. Mahaney has sought a shared parenting, a 50/50 parenting relationship. The courts in Nova Scotia have been rather consistent in considering shared parenting arrangements and expressing the view that a greater degree of communication and cooperation is needed for those relationships to work than in more traditional custody arrangements.

[44] Justice Stewart in *Rivers v. Rivers* [1994], 130 N.S.R. (2d) 219, and other courts (For example in the *Farnell v. Farnell* [2002] 209 N.S.R. (2d) 361 and *Bryden v. Bryden,* [2005] NSSF 9) have adopted this approach.

[45] Justice Stewart in *Rivers, supra,* indicated while speaking of and using the language of joint custody (but I conclude considering issues of analogous to shared custody) stated the following:

> 48 Besides the obvious that there is no mutual agreement to joint custody, does the actual evidence mitigate against joint custody? Do obstacles exist to joint custody? In answering, any number of questions should perhaps first be asked:
>
> > (1) A very basic question would be has each parent maintained a meaningful relationship with their children and does each possess parenting capabilities that are adequate to meet their children's needs?

I have no question, no hesitation in saying, "yes" to this question. Taken individually and apart, these are two exceptional parents.

> (2) Will the parents be able to make decisions together about the children? Are they able to co-parent despite any conflict on a personal level between themselves? Can they separate feelings for each other to focus upon the children's need for a relationship with both parents? Can they separate their personal relationship from the parent/child relationship?

I would answer,"no". I have no idea how Mr. Mahaney would expect to foster some kind of relationship or communication pattern that was respectful and constructive by tossing the pages and pages of concerns into this process, many of them petty almost beyond reason.

> (3) Will the children be involved in the conflict between the parents in a detrimental manner?

I would conclude, "yes". I have to conclude that given the current situation as Mr. Mahaney has described it. He has described some 37 clauses worth of concerns in his affidavit, plus the ones he expressed on the stand.

[46] In *Bryden v*, *Bryden*, *supra*, Justice Coady of this court indicated (with respect to shared parenting) that both parents would have to support such an arrangement for it to be in the children's best interests. Shared parenting will only work, he opined, if both parents are committed to such an arrangement.

[47] In the case Justice Coady heard, he indicated:

> I believe these parents are not so antagonistic so as to rule out week on/week off parenting but individually and collectively have made choices that are not consistent with moving to such an arrangement.

[48] In my view, Mr. Mahaney has made exactly that kind of choice. The irony here is that the manner in which he has litigated matter this has driven the court away from a shared parenting arrangement. A commitment to work together at the end of the day has to be constructive. No one, no independent person could read Mr. Mahaney's affidavits and conclude that they were constructively written.

[49] I have considered -- I have given lengthy consideration to the maximum contact provision in the *Divorce Act*, s. 17(10) and view that as an imperative operating in every case of this nature. I also believe, while it is a very important consideration, it must be balanced with the other provisions of the *Divorce Act*, the evidence and the overall best interests of the children. Here a conflictual tenor and relationship has persisted between the parties. Indeed it has been exacerbated by the application and evidence of Mr. Mahaney.

[50] I (perhaps like Justice MacDonald did at the time of the divorce hoped) hope that the parties' communication improves in the future. In this regard, Mr. Mahaney, based on what I have heard, has more work to do than Ms. Malone, though neither is without significant responsibility.

[51] The parties have agreed to summer, Christmas and Easter access.

[52] I have concluded from the evidence before me, the *Divorce Act* and the case law made available to me, that the variation order will provide for the following with respect to custody/access:

- Ms. Malone will have the children each Halloween night or will at least decide what their evening will involve irregardless of where the night falls on the schedule;

- Ms. Malone will continue to have primary care and the order will provide that she have final decision making authority that normally flows from that designation;

- The schedule between September and the end of the school year will be changed. As I have indicated, I have concluded that the frequency of the back and forths in the current schedule, taken together with the negativity that exists in the parental relationship lead me to conclude that it is not in the best interests of the children to continue such a back and forth schedule. The schedule will provide that Mr. Mahaney will have the children in his care on a two-week schedule from after school Friday to their return to school on Tuesday morning in week one and in week two from after school Monday to their return to school on Tuesday morning.

[53] It will provide that the table amount of child support payable by Mr. Mahaney will be based on current salary. The teachers have a new contract. The table amount should be adjusted to reflect his actual salary as of January 1st, 2009. I do not know for certain, but I understand that the retroactive cheque the teachers received would include retroactive payments before January 1st, 2009. I would not include them in assessing his current salary. The table amount of child support under the guidelines shall be payable based on his current salary. The annual adjustment should be made on the anniversary date of the teacher's contract. Both parents are teachers here. That is information that should be readily available to them and counsel.

[54] I do not know what Mr. Mahaney's salary is right now in an actual sense. I do not know whether he has received his retroactive cheque. I believe he has not. I believe he knows what his salary is. Teachers have endorsed a new contract recently. There is evidence of that. All one has to do is live in the community to know that. It is in the newspapers. So if you take the new contract and you said, including what is in the new contract, what was his salary effective January 1? That is what the January 1, 2009 table amount should be based on. If his salary increases August 1, 2009 or September 1, 2009, the support should be adjusted then, then annually thereafter.

[55] If the current economic circumstances persist and by that I mean Mr. Mahaney living in a two-income household, having shared custody of Ms. O'Leary's children and Ms. Malone being in a one-income household, I would not adjust the child support under s. 9 of the Child Support Guidelines even if Mr. Mahaney's contact with the children, considering the holiday time and new schedule, exceeded the forty percent referred to in the Child Support Guidelines. I do not believe that the order I have made exceeds the forty percent but I want to make clear what my conclusion would be if it was found to do so.

[56] The order will provide that each party provide the other with a summary of their (the) 2009 and their then current income of the adults living in each household based on 2009 income tax returns and notices of assessments received on or before June the 30th of 2010 and each year thereafter. The parties should not have to initiate some sort of litigation process to find out what's happening in the other household economically. To be clear, in Mr. Mahaney's circumstances he and Ms. O'Leary and in Ms. Malone's circumstance if Mr. Hubley moves in, it is her and Mr. Hubley. "Adult partner" may be a better way of phrasing it.

[57] September 1, 2009, the support should be adjusted then, then annually thereafter.

[58] Counsel will address the issue of costs in June. One half hour will be scheduled. Should counsel reach agreement on costs, they will advise the court this date is no longer needed.

Williams, J.