

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacDonald v. MacDonald, 2009 NSSC 263

Date: 20090807
Docket: 1201-062450
Registry: Halifax

Between:

TRACEY LEE DUNCAN MacDONALD

Applicant

v.

HEATHER JAN MacDONALD

Respondent

Judge: The Honourable Justice Moira C. Legere Sers

Heard: August 7, 2009, in Halifax, Nova Scotia

Written Decision: September 3, 2009
(Oral decision rendered on August 7, 2009)

Counsel: Tracey Lee Duncan MacDonald, self-represented
Tammy Wohler, counsel for Heather Jan MacDonald

By the Court (Orally):

[1] I have an application by Mr. MacDonald for an immediate variation to a settlement agreement entered into on May 8, 2009. The affidavits contain the facts. This is brought on a fairly quick basis.

[2] I reserve the right to edit this oral decision. It is given orally but has been typed in order to provide it to Justice MacDonald for the purposes of another pre-trial settlement with her. The goal is to clarify the schedule of access which I believe has been read down by the mother perhaps inaccurately. The wording however is ambiguous for a third party to understand what was truly meant by this agreement entered into between the parties before the Justice. .

[3] The respondent Heather MacDonald is the mother of these children, Alexa MacDonald, born December 9, 2001, and Julia Kristen MacDonald born December 9, 2001, and Chase John Michael MacDonald born September 20, 2005.

[4] The parties were married on March 8, 2003, and separated on January 10, 2006.

[5] There have been a number of settlement conferences prior to the final settlement conference resulting in an agreement. Mr. MacDonald advises me that he was receiving access time sporadically every second weekend. He has had difficulty with access.

[6] I admit that Ms. MacDonald has not had a chance to speak to this.

[7] The matter was before Justice Williams in July 2008, resulting in an order which essentially increased the father's contact to include every week using a schedule of week 1 - week 2. As I interpret Justice William's decision the father would have the children from Monday after work until Tuesday at 7:30, that would be 7:30 to 7:00 given his then work schedule and then from Friday through until Sunday at 7:00 pm which would put him in the children's lives much more frequently. During week 2 he would have parenting time from Monday until Tuesday. The balance of the week would be the mother's.

[8] My understanding is that the mother was a stay-at-home mother at that time and there were other parenting times set out in the agreement.

[9] I note that each agreement that has been entered into by consent between the parties does have an enforcement clause which allows sheriffs, deputy sheriffs, constables or peace officers to enforce the order in the event the parties cannot agree or

the child is not being provided for the visits. While it is not the best possible scenario to use sheriffs, clearly when one parent is keeping the child from another the police do have to be called on occasion.

[10] There was another settlement conference as a result of the divorce petition that proceeded on May 20, 2009, before Justice Beryl MacDonald. The Corollary Relief Judgment was issued on May 8, 2009. At that time it is my understanding from the evidence, and I am satisfied, that both parties entered into this Corollary Relief Judgment on the understanding that their current residence would allow for a joint parenting arrangement which would entitle each parent to be close to the school, the parents to be close to one another and the children to have access with both parents without significant miles or kilometres between them.

[11] The mother had lived at 12 Pioneer Court for three years and had moved there shortly after they separated and it is my understanding that the father moved there to facilitate an appropriate joint parenting arrangement. It is also my conclusion based on the limited time that I have had with these parties, their affidavits and their direct evidence, that the settlement agreement very much presumed that the children would remain in the school in which they were located in the mother's jurisdiction and that the mother would remain where she was in cooperative housing and the father would be living nearby.

[12] At the time of the Corollary Relief Judgment the father earned \$33,360.00 annually and the projected income for the mother was \$4,145.52 which consisted of social assistance and the federal child credit.

[13] The parties have joint custody which means that each parent has the right to make decisions with respect to the children and must be consulted about the decisions relating to the children and each party continues to bear responsibility for the children. No party has been divested of any of their rights and responsibilities with respect to the children.

[14] The custody and access agreement which has been adopted by the court sets out the responsibility for transportation and it also envisions an inclusive and expansive agreement which does not appear to have been enforced by the parties.

[15] In order words, there was a basis of access and a clause which acknowledged that further access was to be encouraged between the parents and the children on a flexible basis, including telephone access.

[16] There was an agreement that each would carry a cell phone, that maintenance would be paid on a regular basis and there was a clause specifically providing for a form of communication between the parties so that the discussions could go back and forth to avoid difficulties.

[17] The father was to be consulted with the children's child care providers, health and medical professionals, and educational professionals in the immediate and direct care of the children and they were to keep each other apprised of medical, dental issues, etc..

[18] In fact what has happened is that the mother has moved. This is a change in circumstances and it has the potential of affecting the basis, the foundation of the agreement. What convinces me that the mother was going to adopt a plan that would be fundamentally in conflict with this agreement is the notion that once she got into financial trouble with her landlord she moved to Fall River with her parents and at first her intention was to make significant changes in the lifestyle of the children, put them in school locally in the Fall River area and go back to school herself. And that in my view would be a fundamental and material change in circumstances in relation to this agreement.

[19] The mother got herself in financial difficulty for a number of reasons. Number one she only receives \$258.00 per month for social assistance and that is a paltry amount of money and absolutely insufficient to sustain her as she attempts to address the needs of three children. She receives \$350.00 from Mr. MacDonald and he has made mistakes in terms of setting up a continual flow of money. He has not failed to pay but one of his cheques has bounced, the other got lost in the mail and the two have been slow to process, whether they're processing, because he is delivering the cheques directly to Maintenance Enforcement that's totally unacceptable. You are to provide Maintenance Enforcement with twelve post-dated cheques and they are to be there so that they can be cashed on the date and that the mother will have these funds in her hand. I note that \$350.00 for three children is not reflective of the children's needs. It's reflective of your income and the children's needs far exceed \$350.00 so the amount of child support has been based on your income and that's in accordance with the Guidelines and you will make sure that that money flows on a correct and appropriate basis through Maintenance Enforcement. With your financial support that would raise the mother's income to \$608.00.

[20] It's my understanding she also receives \$965.00 from child tax benefit. Due to her own fault she failed to file her income tax and was absent from the child tax credit for a number of months. This clearly got her into trouble financially over a period of time and

got her into rental trouble which got her into trouble with her landlord which resulted in a failure to sustain the apartment. There is no room for that kind of delay. The mother recognizes that, the difficulty that it has caused to her; it just can't happen again because it destabilizes the children's foundation.

[21] In addition she receives \$400.00 per month from the Federal Government for a total of \$1973.00, \$950.00 of which will go to pay rent, which leaves her the balance to sustain the three children and herself.

[22] It's my understanding she's enrolled in a course which will take one year and another two which will put her in a position where she will be able to increase her ability to support her children and create a better lifestyle.

[23] The changes that have occurred both as a result of the failure for the child support to flow smoothly, which was not a callous intentional issue but it's a management issue, and the problems she had gotten herself into by not filing her tax return and getting her child tax credit put her in a financial crisis and resulted in a move.

[24] I have indicated that the move to Fall River would be a fundamental change to this agreement and would require the parties to come back and look again at how to make sure that the children are connected with their father in a manner in which this agreement intended.

[25] The second thing is that she has introduced another individual to the children and so has Mr. MacDonald. This other individual may increase the financial stability providing this is a stable relationship and not just a momentary relationship. Only time will tell.

[26] As I heard the parents testify, neither party appears to recognize their positive responsibility to foster joint custody. The mother has not in my view been as generous with contact between the father and as appears the intention in the access schedule as is required by the agreement.

[27] There is no room for making changes in this agreement unless there is consent of the parties. Both parties have to think ahead about their circumstances.

[28] There is evidence to suggest that the mother has delayed access on occasion due to poor planning. Simply put, poor planning raises an issue again in the circumstances and interferes with the father's access. And the father has been reluctant to create a

conflict and therefore the children haven't seen him on a regular basis as he is entitled to under this agreement. The mother doesn't have a choice to alter this agreement. You have a choice, the agreement is a minimum and minimum plus and the father must be encouraged to exercise his contact and his parenting time according to his schedule and not to defer to avoid conflict but simply to arrive, pick up the children in a peaceable fashion and exercise his access. And there is no right, you don't have a right to change this, for any reason, unless it's consented to by the parties or unless there is another court order.

[29] The spirit of this agreement requires that you live up to your promises to get counseling for the children, to communicate with one another. It's unacceptable in a joint parenting situation that you are not communicating with one another.

[30] You have to have cell phones that allow you to contact one another and to let each other know in advance of the reasons for a move, when the move's going to happen, where the address is, what the phone number is, and these terms have to be agreed upon. Your notice to him was insufficient. It does not live up to the spirit of what was intended here. Both parents are entitled to know in advance if there's going to be any changes to the schedule, that includes education, medical, spiritual, and physical.

[31] There is no ownership of these children, you are both joint parents and you have to live up to your schedule by being there to pick up the children and learning how to deal with conflict in a way in which the children are not exposed to conflict. And if one of you doesn't do that over a protracted period of time the *Divorce Act* says on an application to vary that the court must consider which parent will best facilitate contact with the other parent in a healthy way. So your failure to live up to the agreement can be used against you.

[32] You should be doing it for your children. But if you begin to think this is an ownership and control thing and you stop cooperating with one another and you have to come to the court and there has to be a change, the court will be impressed by the parent who is best able to put aside their own interests and facilitate the contact between the children and the other parent.

[33] In my view you have not kept cell phones up to date, you have not arranged the counseling either one of you, because it says both of you are responsible. You have not set up a communication strategy that works and you have not consulted and by letting him know when there's a move, that doesn't equal consultation. And by arbitrarily

suggesting that you're going to move to Fall River that a fundamental breach of the spirit and intent of your agreement.

[34] Now, this is not a situation where your residence wasn't important. Normally parents have to move. But you have agreed that when you sat down to the table part of the concerns that were raised was the place where you were living.

[35] Finally, I'm confused by paragraph 2 and your interpretation. My belief that week one, and I could be incorrect but I'm going to enforce this until you get back before Justice MacDonald, week one is from Wednesday until Monday evening. Yet your interpretation would totally eliminate the need for (b). There would be no need for a section (b) there if in your view week one includes week 2.

MS. MacDONALD: My Lady, may, may I comment on that?

THE COURT: Well, no, not really, because I'm making my decision.

MS. MacDONALD: Alright, sorry.

[Excerpt from unofficial transcript]

[36] But I don't understand why you, why Justice MacDonald would include week 2 if there is no additional days as a result of (b). So, as I've gone through a schedule and it could be that it wasn't intended to be a week 2 or it was intended to be only 5 days twice a month but in my view, if that's the case, all she needed to say was every second weekend from Wednesday until Monday. But there is a (b) which tells me that it should be read from Wednesday to Monday and then the next Sunday, Monday and so each week the children have contact; otherwise, if I read it your way, 1-2-3-4-5-6-7, there are 8 days when these two, three young children don't see their father and that doesn't make sense in terms of what I understand of the practice.

[37] Now, I wasn't at the settlement conference and I didn't draft the agreement and I may have misinterpreted it but between now and the time you get back to Justice MacDonald to review this, I'm going to insist that you follow a schedule which allows for an (a) and a (b).

MS. MacDONALD: My Lady, that would not allow for me to have a weekend with the children at all.

THE COURT: At the time this was entered into you weren't working.

MS. MacDONALD: No but we have, we had ... (inaudible).

THE COURT: So if you changed that because you're joint parents you have to change it with consent. And if you can't communicate and consent you have to change it with court order. So it's my understanding you weren't working and weekends didn't mean that much when you're not working. And it may be in September it's going to be different in which case you too have to sit down and figure out another schedule, that's what joint parenting is all about.

MR. MacDONALD: My Lady...

THE COURT: And with her work schedule, please don't interrupt.

MR. MacDONALD: Sorry.

THE COURT: You may need to make an adjustment to reflect the fact that if she's free on weekends, but not during the week, both of you should make sure that each one of you shares a weekend but that each one of you has what your entitled to in accordance with the agreement. Do you understand what I'm saying?

[Excerpt from unofficial transcript]

[38] Neither one of you is entitled to change the agreement unless there's consent or you go to court and get it changed. So my reflection on this is this: the agreement is too new for me to make a change in custody. It's too new and neither one of you really understand or have lived up to the terms of the agreement that you've entered into which have formed part of the Corollary Relief Judgment. You each have to work harder at doing everything in these sections.

[39] Now in September there's going to be a change. So you're going to have to negotiate a change of the schedule and I am just reading the schedule as it appears to me.

[40] And so I'm going to ask you to set this down before Justice Beryl MacDonald for another settlement conference of another two hours. My decision is going to be written up and if I'm incorrect, you and she can work out a new agreement based on current schedules so one week, two weeks in advance of that you shall provide her with the changes in your circumstances since you entered into this and that would include the change in your residence, the change in your schedule and the plan for the children.

[41] Now let me say this about where you're moving, now that you've come back and you're living in fairly close proximity, it's not what was intended, it's certainly not what

was intended but it is (now) and it has the possibility of working out. While it is a change it certainly was not contemplated. It came about because of your crises and because of both of your participation in a sense in the crises by way of payment of maintenance and by way of failing to file your income tax returns, you had to move.

[42] Now because you've made efforts to move close by and have babysitting arrangements, although the children will change their schools, I'm not going to interfere with this order because it has the potential of working, it has the potential of keeping you both very closely connected with your children and it seems to me that given that Mr. MacDonald has a car and a partner who is able to make sure that when the children are with him they can get back and forth to school and arrangements can be made.

[43] I'm not prepared to make the major shift that you've asked me to make, which would require far more evidence and certainly a longer contested hearing.

[44] So I've told you that I'm going to interpret that agreement to mean that you get Wednesday to Monday night and the next weekend Sunday and Monday and you can certainly negotiate a change on that but it must be agreed upon in writing in advance.

[45] You will look to the terms and make sure each of you have a cell phone and respond to calls, respond to reasonable calls and give full information and find a way and a strategy in which you can communicate.

[46] You will also set up the counseling and you will provide her with the full plan particulars, not the STOR, it's one thing to provide the STOR, but you will provide her with the full plan particulars...

MR. MacDONALD: I don't...

THE COURT: You can get that from your...

MR. MacDONALD: I don't have it. It's on the internet-based. I...

THE COURT: You can get it from your employer and if you can't get it from your employer you can go on the internet, you can download it, you can get the two-digit number she's looking for. It's your responsibility, it's your plan. She can't access it. You're do that within one week of today's date.

MR. MacDONALD: Okay.

[Excerpt from unofficial transcript]

[47] So my decision I hope reflects what I saw as a potential for disturbing the basis of your agreement with the Fall River move. That has been rectified with your move back and the move while disruptive may well work out and is still within proximity to the father sufficiently to allow him to exercise the contact contemplated in this agreement.

[48] My concern is neither one of you full understand your rights and responsibilities in this regard.

[49] You each have an obligation to live up to the joint custody arrangement and to facilitate contact with the other parent. You need to learn about that yourself. I presume you've been to parent information; you've gotten information from them, go to the library, follow up on that, read books because as long as your children are happy with each one of you your lives will be much easy and you can get on with your individual lives.

[50] I think if you follow the week one - week two as I've interpreted it that gives you significant contact with your children and it gives you significant contact and it does not disturb their connection too much with both of you and that seems to me the best way to proceed.

THE COURT: Counsel, you will draft the order that is amending this, set it down before Justice MacDonald and if there's a need to set it down for a contested hearing after that, I truly hope there's not, you can get that date through scheduling.

MS. WOHLER: Okay, so My Lady, so the order I guess then would read that, looking for, of interpretation of paragraph 2, or simply to have it set down before...

THE COURT: It should indicate that there's some difficulties with the agreement and compliance; that there's been a move but the move has been addressed by moving back from Fall River closer to Mr. MacDonald; that the medical; that the post-dated cheques will be provided forthwith to Maintenance Enforcement; full and particulars of the medical plan shall be provided within a week of today's date; the agreement is interpreted until such time as the matter can be set before Justice MacDonald as separate, as an "and" and not inclusive and the decision will be typed so that Justice MacDonald will have access to my comments when she sees you next. Alright?

MR. MacDONALD: There'll be a copy provided to me as well?

THE COURT: Of course. I am addressing some of the concerns so I'm not fully dismissing the application but I am indicating on the basis that the apartment is where it is, the job and the employment situation is what it is, and the concerns have been addressed and that's what your client has indicated, that I will not interrupt joint custody arrangement at this time. Alright? Thank you.

[Excerpt from unofficial transcript]

Legere Sers, J.

September 3, 2009
Halifax, Nova Scotia