

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacDonald v. MacDonald, 2011 NSSC 27

Date: 20110127

Docket: 1201-062450

Registry: Halifax

Between:

Tracey MacDonald

Petitioner

v.

Heather MacDonald

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Heard:

January 21, 2011

Written Decision:

January 27, 2011

Counsel:

Charlene Moore on behalf of Heather MacDonald
Tracey MacDonald on his own behalf

By the Court:

Introduction

[1] Heather and Tracey MacDonald divorced in May, 2009. Their Corollary Relief Judgment provided they would have joint and shared custody of their twin daughters and their son. The Corollary Relief Judgment projected that Mr. MacDonald's gross annual income was \$33,600.00 in 2009. This included the very modest amount of \$25.00 each month in overtime earnings. For the purposes of the *Federal Child Support Guidelines*, SOR/97-175, Ms. MacDonald's income was determined to be approximately \$4,150.00.

[2] The Corollary Relief Judgment provided that Mr. MacDonald's child support payment was \$350.00 each month. The parties agreed that support, as calculated by section 9(a) of the *Federal Child Support Guidelines*, was the appropriate amount to be paid, in addition to Mr. MacDonald paying the full cost of his son's daycare attendance for two days each week and the full cost of the twins' Excel program for April, May and June 2009. The MacDonalds were ordered to review these financial arrangements in September 2009 and, if they couldn't resolve matters, either was to write to the court and schedule a conference with Justice Beryl MacDonald.

[3] In mid-August 2009, Ms. MacDonald's counsel wrote to the court to schedule a conference to review child support. It's taken from mid-August 2009 until January 2011 to bring this matter to a hearing. During this time there have been various changes in Ms. MacDonald's employment and in Mr. MacDonald's income. Mr. MacDonald was involved in a car accident in April 2010. The children's parenting arrangement changed, too: until the beginning of May 2010, they were in a shared parenting arrangement. Since then, their primary care has been with their mother. On one occasion, Mr. MacDonald wasn't prepared for the matter to proceed. On most other occasions, the matter couldn't proceed because of circumstances relating to Mr. MacDonald's car accident.

[4] Ms. MacDonald wants three issues resolved:

- (a) she wants me to determine the amount of child support that Mr. MacDonald should be paying;
- (b) she wants me to determine if Mr. MacDonald should make a retroactive child support payment; and
- (c) if Mr. MacDonald is to pay a retroactive child support award, she wants me to determine what the amount of that award should be.

What amount of child support should Mr. MacDonald be paying now?

[5] The current payment of child support is to be calculated pursuant the *Federal Child Support Guidelines* having regard to the children's parenting arrangement and Mr. MacDonald's income. There is no claim for a contribution of special or extraordinary expenses pursuant to section 7 of the *Guidelines*. The children's primary residence is with Ms. MacDonald.

[6] Mr. MacDonald's income is not easily determined. His April 2010 car accident meant that he was unable to do his job as a machine operator at Saputo. His earnings were replaced by short-term disability insurance benefits which ended in October 2010. At some point after that, he began to receive Section B benefits from his motor vehicle insurer. He has an outstanding claim for long-term disability insurance benefits which he anticipates will be equal to between eighty-five and ninety percent of the amount of his short-term disability insurance benefits. This claim hasn't been resolved, though Mr. MacDonald believes it will be resolved shortly. He is not sure whether he is entitled to a retroactive payment for long-term disability benefits.

[7] Mr. MacDonald is hopeful of returning to work soon. He must attend an as-yet-unscheduled meeting before he returns to work for one month on a part-time basis when his ability to return to work full-time will be assessed. He currently receives Section B benefits of \$140.00 each week. Annualized, this will provide him with yearly income of \$7,280.00. In the near term, Mr. MacDonald sees his future income as coming from one of three sources: he will receive long-term disability insurance benefits or he will return to work and earn employment income or he will apply for Employment Insurance sickness benefits if he is not eligible for long-term disability benefits and cannot return to work.

[8] If Mr. MacDonald returns to work full-time, he says his income will return to its pre-accident level of \$40,700.00 per year. Employment Insurance sickness benefits are typically fifty-five percent of one's employment earnings to a ceiling of yearly maximum insurable earnings of \$44,200.00. For Mr. MacDonald, this would translate to Employment Insurance sickness benefits of approximately \$22,385.00 annually. Accepting that Mr. MacDonald's long-term disability benefits would equal eighty-five percent of his short-term disability benefits (of approximately \$1,650.00 per month), this means that Mr. MacDonald would receive \$16,830.00 if this was the source of his income.

[9] Ms. MacDonald urges that I impute income of approximately \$27,000.00 to Mr. MacDonald. This amount is comprised of short-term disability benefits, Section B benefits and earnings. She says Mr. MacDonald has a history of under-reporting his income and failing to report changes to his income promptly.

[10] Section 19 of the *Federal Child Support Guidelines* empowers me to impute income as I consider appropriate in the circumstances. It enumerates categories where income may be imputed. These circumstances include, in section 19(1)(f), a spouse's failure to provide income information when under a legal obligation to do so. Mr. MacDonald has both failed to provide disclosure of his income as required by the Corollary Relief Judgment and he has failed to

provide disclosure of his income as required during the course of this application. As Ms. MacDonald notes, his disclosure has, frequently, created the impression that his income is less than it actually is.

[11] Having regard to section 19(1)(f) of the *Guidelines*, Mr. MacDonald's current Section B benefits, the likely amount of long-term disability benefit payments, the delay in his return to work and the dates for upcoming court proceedings, I fix his income at \$24,100.00 for the purpose of the *Guidelines*. This amount reflects a combination of Section B and long-term disability benefits. Based on this amount, I order Mr. MacDonald pay monthly child support of \$477.00, pursuant to section 3 of the *Guidelines*. His payments will start on the last day of January 2011 and continue on the last day of each month. Payments will be made in arrears, which is to say that his January 31, 2011 payment will be for the month of January. I order that payments be made through the Maintenance Enforcement Program. I note for Mr. MacDonald that the order will compel him to provide the Program with his address and this must be kept current at all times - just as he must keep the court and Ms. MacDonald's counsel advised of his current address at all times.

[12] I order that Mr. MacDonald notify Ms. MacDonald of any change in his income circumstances immediately and no later than two weeks after any change in his income circumstances occurs. The upcoming court dates will allow the parties some opportunity to adjust Mr. MacDonald's payments based on any changes in his income. The order will also provide for annual income disclosure by both of the parents.

Should Mr. MacDonald make a retroactive child support payment?

[13] Retroactive maintenance is governed by the Supreme Court of Canada's decision in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37. A "retroactive" award is one which addresses a historic period when there was no prior agreement or order or which varies the terms of a prior agreement or order after the fact, rather than on a prospective basis. Here, there was an award made in May 2009. Ms. MacDonald's claim is that it ought to be adjusted retroactively to September 2009, the date when Justice MacDonald ordered that it be reviewed and adjusted.

[14] According to paragraph 99 of *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37, when determining whether it is appropriate to make an award retroactively, I am to consider: the reason for the recipient's delay in making the claim, the payor's conduct; the children's past and present circumstances; and whether an award made retroactively would result in hardship. All of these factors must be considered and none is dispositive on its own.

[15] There has been no unreasonable delay by Ms. MacDonald in pursuing this claim. Ms. MacDonald's counsel promptly sought to return this issue to the court's docket in August 2009, though seventeen months have passed since she wrote to the court. The delay which has occurred has not been because of any action or inaction on Ms. MacDonald's part. While Mr.

MacDonald was not available to address the claim on one occasion, for the most part his delay has been attributable to the car accident and its impact on him.

[16] In terms of blameworthy conduct, as I have noted, Mr. MacDonald's disclosure has not been promptly made. Some of this failure may be due to the after-effects of his accident which left him experiencing amnesia.

[17] The children's past and current circumstances are ones which would benefit from a retroactive child support award. Ms. MacDonald's annual income has never exceeded \$18,500.00 during the course of this proceeding. To put this in context, I note that for a household of four people (comprised of one adult and three children) the low income measure contained in Schedule II of the *Federal Child Support Guidelines* is \$20,764.00. Ms. MacDonald may receive additional support from her cohabiting partner. This would be essential, in light of her income.

[18] With regard to the prospect that a retroactive award might occasion hardship, I note Mr. MacDonald has a minimum of \$5,000.00 in savings through his employment. He testified that he has a tax-free savings account with a balance of \$2,600.00 and Saputo shares with a balance of \$2,800.00.

[19] There is some uncertainty about Mr. MacDonald's financial circumstances. He was hesitant to provide his address when he began his testimony and mentioned he was moving in with his sister. This wasn't explained. I don't know if he and his partner are separating or if they are together moving in with his sister. I wasn't told whether Mr. MacDonald is obliged to contribute to the cost of staying with his sister. At the hearing, Mr. MacDonald swore that the contents of his statement providing a breakdown of living expenses remained true, which leads me to conclude that despite the move, these circumstances are unchanged.

[20] If Mr. MacDonald and his partner, Jeannine MacLeod, continue to cohabit, I note that she has annual income of \$50,000.00. After the deduction of income tax, Canada Pension Plan and Employment Insurance premiums, and payment of all of the expenses noted on Mr. MacDonald's general expense breakdown, approximately \$6,000.00 remains of her income - without considering any of Mr. MacDonald's income.

[21] Regardless of Ms. MacLeod's income, I find that Mr. MacDonald's employment savings are sufficient to protect Mr. MacDonald from hardship in paying a retroactive award of child support.

[22] This is an appropriate case for a retroactive award to be made.

What should the amount of the retroactive child support award be?

[23] The retroactive period is from September 2009 to December 2010. September 2009 is when the Corollary Relief Judgment was to be adjusted and a few weeks after Ms. MacDonald sought to return this matter to Justice MacDonald's docket.

[24] The children remained in a shared parenting arrangement with both parents until May 2010, immediately following their father's accident. The parents agreed that the payment of child support while the children were in a shared parenting arrangement would be based on section 9(a) of the *Federal Child Support Guidelines*, with an additional proportionate sharing of the children's net child care cost. This is not as Justice Bastarache directed in *Contino v. Leonelli-Contino*, 2005 SCC 63 at paragraph 27, but neither parent has argued I should make any alternate calculation, so I follow their lead.

[25] Following Ms. MacDonald's guide, I have broken the retroactive period into briefer periods which reflect the transition points in the parents' incomes or the children's parenting circumstances. I attach a schedule of my calculations which corrects errors I made in haste when rendering my oral decision.

September 1, 2009 to December 31, 2009

[26] From September 1, 2009 to the end of 2009, the parties agree that Ms. MacDonald's income was \$15,061.00 and Mr. MacDonald's income was \$40,717.00. Pursuant to section 9(a) of the *Guidelines*, this equates to a monthly child support payment of \$496.00 by Mr. MacDonald. The after tax expense for the children's care was \$1,022.00 during this period. Based on their incomes, Mr. MacDonald would pay seventy-three percent of this cost or \$186.52 each month. In the months of September through to the end of 2009, Mr. MacDonald should have paid \$682.52 each month. During this time he did pay \$350.00 each month and he paid \$644.00 toward child care costs. These amounts need to set off against his obligation of \$2,730.08. For the period from September 1, 2009 to December 2009, Mr. MacDonald owes \$686.08.

January 1, 2010 to April 30, 2010

[27] From January 1, 2010 until Mr. MacDonald had his accident at the end of April, 2010, Mr. MacDonald's income was consistent with his earnings in 2009: \$40,717.00. I find that Ms. MacDonald's income was \$18,186.00. Her evidence indicates that the after tax cost of child care during this time period was \$1,110.00. During these four months, the set off amount of child support that Mr. MacDonald should have paid was \$402.00, while his proportionate share of the child care expense was sixty-nine percent or \$191.48 each month. In this time frame, Mr. MacDonald's child support obligation was \$2,373.92. He paid his regular payments of \$350.00 monthly and \$610.00 toward child care expenses. Accordingly, he owes \$363.92.

May 1, 2010 to July 31, 2010

[28] Beginning in May, 2010, the children's shared parenting arrangement came to be one of primary residence with their mother. This means that Mr. MacDonald's child support is calculated on the basis of sections 3 and 7 of the *Guidelines*. At this time, Mr. MacDonald agrees that Ms. MacDonald's income was \$16,099.00. Ms. MacDonald argues that Mr. MacDonald's income was \$15,000.00, based on the short-term disability insurance benefits he was receiving and annualizing them over a year-long period. I accept this figure for his income. It adequately reflects the benefits he was receiving.

[29] During this period, Mr. MacDonald takes issue with the \$312.00 expense for child care. He says that Ms. MacDonald's partner could have cared for the children before school, the children could have attended a school-based lunch program and that he, Mr. MacDonald, could have cared for the children after school. Mr. MacDonald doesn't argue that child care was necessary, only that alternate no-cost arrangements should have been put in place. Section 7 of the *Guidelines* asks me to look at the reasonableness of the expense in relation to the parents' means. The child care expense was approximately \$104.00 each month and I find this is a reasonable amount considering the parents' incomes. I don't accept Mr. MacDonald's submissions about alternate child care arrangements. I don't have evidence that Ms. MacDonald's partner was actually available to care for the children. The school lunch program wouldn't have been available during July. One effect of Mr. MacDonald's accident was amnesia which left him, at times, unaware who his children were, so it would be inappropriate for him to care for the children.

[30] At an income of \$15,000.00, Mr. MacDonald's income would generate child support payments of \$280.00 and he would pay forty-eight percent of the child care expense (\$49.92 per month). During this time, Mr. MacDonald was actually continuing to pay his regular monthly payment of \$350.00, so he accumulated a surplus of \$60.24 in the period from May 1, 2010 to July 31, 2010.

August 1, 2010 to December 31, 2010

[31] During this time frame, Ms. MacDonald makes no claim for child care expenses. The sole issue is Mr. MacDonald's income. According to records that Mr. MacDonald provided, his total short-term disability insurance benefits were \$6,600.00. In my oral decision, I treated the figure of \$6,600.00 as if it was the amount Mr. MacDonald would have received if he had received short-term benefits for the entire year. This was incorrect. The correct approach is to take the income he received during this period and to annualize it. Mr. MacDonald received short-term disability benefits of \$3,300.00 in this period. Annualizing the \$3,300.00 that Mr. MacDonald received in the period from August 1 to December 31, results in an annual income of \$7,920.00. On this amount, he would have no monthly child support obligation for the children.

[32] Overall, I calculate the arrears of child support Mr. MacDonald owes as \$989.76. I consider this to be an appropriate amount having regard to the circumstances of the parents and the children, as described to me.

Conclusion

[33] Starting on the last day of January 2011 and continuing on the last day of every month thereafter, Mr. MacDonald will pay child support of \$477.00 to Ms. MacDonald through the Maintenance Enforcement Program. Immediately and within two weeks of any change in his income circumstances, Mr. MacDonald will notify Ms. MacDonald of that change. He will also provide annual income disclosure as our orders typically provide.

[34] Mr. MacDonald will pay a retroactive child support award of \$989.76 for the period from September 1, 2009 to December 31, 2010 and to make this payment on or before February 28, 2011.

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia

September 1 2009 - December 31 2009	
Ms. MacDonald's income = \$15,061 -> child support for three children	280.00
Mr. MacDonald's income = \$40,717 -> child support for three children	776.00
Difference between Mr. MacDonald's payment and Ms. MacDonald's payment	496.00
Parents' total income (\$15,061.00 + \$40,717.00 =)	55,778.00
Mr. MacDonald's proportionate share of after tax child care costs $40,717.00/55,778.00 = .7299$	73%
After tax child care cost $\$1,022.00/4 = 255.50 \times .73 = 186.52$	186.52
Total monthly child support ($496.00 + 186.52 = 682.52 \times 4 =$)	2,730.08

January 1, 2010 - April 30, 2010	
Ms. MacDonald's income = \$18,186.00 -> child support for three children	374.00
Mr. MacDonald's income = \$40,717.00 -> child support for three children	776.00
Difference between Mr. MacDonald's payment and Ms. MacDonald's payment	402.00
Parents' total income (\$18,186.00 + \$40,717.00 = 58,903.00)	58,903.00
Mr. MacDonald's proportionate share of after tax child care costs $40,717/58,903 = .6912$	69%
After tax child care cost $\$1,110.00/4 = 277.50 \times .69 = 191.48$	191.48
Total monthly child support ($402.00 + 191.48 = 593.48 \times 4 =$)	2,373.92

May 1, 2010 - July 31, 2010	
Mr. MacDonald's income = \$15,000.00 -> child support for three children	280.00
Parents' total income (\$16,099.00 + \$15,000.00 = 31,099.00)	31,099.00
Mr. MacDonald's proportionate share of after tax child care costs $15,000.00/31,099.00 = .4812$	48%
After tax child care cost $\$312.00/3 = 104.00 \times .48 = 49.92$	49.92
Total monthly child support ($280.00 + 49.92 = 329.92 \times 3 =$)	986.76