IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacDonald v. MacDonald, 2011 NSSC 317

Date: August 11, 2011
Docket: 63357
Registry: Sydney

Between:

Sherry MacDonald
Applicant

v.

David MacDonald
Respondent

DECISION

Judge: The Honourable Justice Kenneth C. Haley

Heard: May 24, 25 and June 9, 2011, in Sydney, Nova Scotia

Counsel: Ms. Darlene MacRury, for the Applicant
Mr. Frank Gillis, for the Respondent

By the Court:

BACKGROUND

[1] This is the application of Sherry MacDonald for custody of her 14 year old son, Connor Patrick MacDonald. The application was vigoursly opposed by the Respondent, David MacDonald, who also seeks custody of his son.

[2] The parties were married on May 19, 1990 and had two children. The elder child is not a dependent child within the meaning of the *Family Maintenance and Custody Act*. The parties have been living separate and apart since January 28, 2009.

[3] The Applicant is employed at the Cape Breton Regional Hospital with her current annual income reported to be $58,250.00.

[4] The Respondent is employed as a Teacher's Aid with reported income of $44,344.59 that is partially composed of Worker's Compensation Benefits.

[5] At the time of separation the Applicant, Sherry MacDonald, had the sole care, control and custody of her two children. As of April 16, 2010 the son, Connor, resided primarily with his father.

[6] The current parenting arrangement between the parties is one of shared custody as a result of an Interim Order dated May 13, 2011 which states as follows:

> The Applicant, Sherry MacDonald and the Respondent, David MacDonald, shall exercise "shared custody" of the child, Connor Patrick MacDonald, for alternating one week periods, such that on Sunday, May 1, 2011, Connor Patrick MacDonald, shall be in the care and custody of Sherry MacDonald until May 8, 2011, where the Respondent, David MacDonald shall assume "care and custody", and they shall thereafter alternate each Sunday until further order of a Court of competent jurisdiction;
>
> While in the care and custody of one parent the non custodial parent shall be permitted telephone contact with Connor Patrick MacDonald on a daily basis.

[7] The Applicant has been receiving child support from the Respondent in the amount of $385.00 pursuant to an Interim Order dated June 2, 2009.

[8] The Court heard evidence on May 24, 25 and June 9, 2011. The following witnesses testified, namely:

1. The Applicant, Sherry MacDonald

2. The Applicant's mother, Carol MacNeil

3. The Respondent, David MacDonald

4. The Respondent's mother, Donna MacDonald

5. The Respondent's partner, Sharon Ann Stubbert

[9] The Court received into evidence the following exhibits, namely:

1. Health records (child and adolescent services);

2. Report completed by Dr. Landry;

3. School records (February 22, 2010 for Connor);

4. Report Card;

5. In school suspension form;

6. Undertaking (David MacDonald);

7. Statement of earnings (Sherry MacDonald);

8. Statement of income (Sherry MacDonald);

9. Statement of income, (David MacDonald);

10. Maintenance fee to Sherry MacDonald , January 18, 2011;

11. Emails;

12. Schedule;

13. Receipts;

14. Emails.

[10] Written submissions were received by the Court on July 8, 2011 for which the Court thanks counsel.

ISSUES:

1. Which parental custody plan is in the child, Connor Patrick MacDonald's best interests?

2. What is the appropriate quantum for child support subject to the determination of issue No. 1?

3. What child support credit, if any, is payable to the Respondent?

APPLICANT SHERRY MACDONALD'S EVIDENCE AND POSITION

[11] Sherry MacDonald testified that there is very little communication between herself and the Respondent. She is not permitted to call his home under any circumstance nor is any member of her family permitted to call. This has resulted in an ongoing frustration which has been an impediment to the parties who have different parenting styles.

[12] Sherry MacDonald testified that poor or non existent communication is further complicated by the continued involvement of police due to complaints filed by the Respondent. In one instance on January 17, 2011, five police cars arrived at Sherry MacDonald's residence to investigate an allegation that Sherry MacDonald was holding her son against his will. No charges were laid against Sherry MacDonald.

[13] As well the relationship between the parties is strained due to pending criminal proceedings wherein the Respondent, David MacDonald is awaiting trial on charges of assault and uttering threats against the Applicant with an undertaking in place to have no contact with Sherry MacDonald.

[14] Also, there have been peace bond proceedings initiated by the Respondent's partner against Sherry MacDonald which were ultimately dismissed.

[15] Sherry MacDonald is very concerned about Connor's performance in school which she testifies has been poor since he started spending more time with his father. In 2010 and 2011 Connor has had numerous suspensions from school and his aggressive behaviour has been escalating.

[16] Sherry MacDonald believes Connor needs more strict discipline in his life and she disagreed with the Respondent allowing Connor to travel to Halifax for a football tournament in the wake of his school performance issue. Sherry MacDonald testified that she feels she has to have control of Connor during the school year to ensure he attends school and completes assignments on time. Sherry MacDonald believes she is in a better position to reinforce positive behaviours and invoke proper discipline when Connor gets involved in behaviour which results in his removal from class and/or suspension from school and other community facilities.

[17] Sherry MacDonald acknowledged that sports play an important role in Connor ‘s life and that the Respondent plays a very important role in assisting Connor participate and excel in his sporting activities.

[18] Sherry MacDonald requests the Court set an access and custody schedule which would place Connor with her the majority of the school week which she believes would lead to an improvement of Connor ‘s current performance issue.

[19] Sherry MacDonald supports a custody and access regime that would place Connor with his father on weekends to facilitate his sporting activities.

[20] Sherry MacDonald further supports equal sharing over the summer with each parent having custody of Connor for one month.

[21] And finally, given the ongoing communication issues between the parties, Sherry MacDonald requests that she have final decision making authority with respect to Connor.

RESPONDENT DAVID MACDONALD’S EVIDENCE AND POSITION

[22] David MacDonald testified he understands the issues concerning his son and believes he is in the best position to deal with them due to his experience as a Teacher's Aid. He supports talking to his child about the concerns as opposed to taking punitive measures, such as being denied the opportunity to play football.

[23] David MacDonald testified he believes Connor was being bullied and that is what caused him to have the fights that resulted in his school suspension. David MacDonald testified he discussed this matter with Connor and he does not believe it will continue to be an ongoing problem.

[24] David MacDonald stated:

- I talk to him
- I don't condone it
- ...but he has to protect himself.

[25] David MacDonald confirmed the communication difficulties between himself and Sherry MacDonald. David MacDonald testified that he relies upon their older daughter, Jocelyn MacDonald , to act as a "go between". David MacDonald finds that works well and he proposes it continue even while Jocelyn

MacDonald is out of the area in Moncton, New Brunswick attending a Lab Assistant Program. The Court does not favour this approach.

[26] David MacDonald testified he never prevented Connor from calling his mother but did confirm that he does not want Sherry MacDonald or any of her family members calling his house.

[27] David MacDonald acknowledged he is under an undertaking to have no contact with Sherry MacDonald. He denies the criminal allegations against him. He further stipulates he does not demean Sherry MacDonald in front of their son.

[28] David MacDonald testifies he checks Connor 's homework and helps Connor with his projects. He testifies:

- that's my profession
- I teach kids.

David is very proud of his son's accomplishments in sports and fully supports his son in all of his sporting endeavours. He testified:

> "I am very connected to sports and involved with kids"

[29] David MacDonald requests the Court to alter the present shared custody order and place Connor in his primary care with access to Sherry MacDonald. Exhibit No. 12 details David MacDonald's proposed custody and access schedule. This schedule running from September 2011 to July, 2012 would place Connor in his care 161 days and in Sherry MacDonald's care for 58 days with 57 days being travelling days from one parent to the other and sharing for Christmas and March Break. David MacDonald testified this is what Connor wants and he is prepared to facilitate it.

LAW AND ANALYSIS

[30] The primary question with respect to any custody issue is "what is in the best interests of the child?" Section 18 (5) of the *Maintenance and Custody Act* states as follows:

> 18 (5) In any proceeding under this *Act* concerning care and custody or access and visiting privileges in respect to a child, the Court shall apply the principle that the welfare of the child is the paramount consideration.

[31] In looking at the "best interests" of the child, Justice McIntyre speaking on behalf of the Court in **King v Low**, [1985] 1 S.C.R. 87 stated at paragraph 27 as follows:

> 27 "I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and the material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of the child, to choose which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside."

[32] Justice Goodfellow, in his often quoted decision **Foley v. Foley** [1993] N.S.J. No. 347, outlined factors generally relevant to an assessment of what parenting arrangement is in a child's best interest. At paras. 16-20, he wrote:

16 Nevertheless, there has emerged a number of areas of parenting that bear consideration in most cases including in no particular order the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);

2. Physical environment:

3. Discipline;

4. Role model;

5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists- psychiatrists- etcetera;

8. Time availability of a parent for a child ;

9. The cultural development of a child:

10. The physical and character development of the child by such things as participation in sports:

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

17 The duty of the court in any custody application is to consider all of the relevant factors so as to answer the question.

With whom would the best interest and welfare of the child be most likely achieved?

18 The weight to be attached to any particular factor would vary from case to case as each factor must be considered in relation to all the other factors that are relevant in a particular case.

19 Nevertheless, some of the factors generally do not carry too much, if any, weight. For example, number 12, the financial contribution to the child. In many cases one parent is the vital bread winner, without which the welfare of the child would be severely limited. However, in making this important financial contribution that parent may be required to work long hours or be absent for long periods, such as a member of the Merchant Navy, so that as important as the financial contribution is to the welfare of that child, there would not likely be any real appreciation of such until long after the maturity of the child makes the question of custody mute.

> 20 On the other hand, underlying many of the other relevant factors is the parent making herself or, himself available to the child. The act of being there is often crucial to the development and welfare of the child.

[33] In **N.D.L. V M.S.L.** (2010) 289 (N.S.R.) (2d) 8 (NSSC) Justice MacDonald stated as follows:

> "What parenting arrangement is in the best interest of this child? Many courts have attempted to describe what is meant by "best interests". Judge Daley in **Roberts v Roberts**, 2000 Carswell NS 372 (Fam. Ct.) said:

> "These interests include basic physical needs such as food, clothing and shelter, emotional, psychological and educational development, stable and positive role modelling, all of which are expected to lead to a mature, responsible adult living in the community..."

[34] The Court is of the view that both the Applicant and the Respondent love their son Connor very much. To date they have provided their son an excellent up bringing, but their ability to continue to do so has been severely compromised by the intense hostility and ongoing conflict that exists between them. Upon review of the medical records (Exhibit No. 1) and the Report of Dr. Reginald Landry (Exhibit No. 2) it is clear to the Court that Connor has been negatively impacted by his parent's aggressive and adversarial approach toward one another.

[35] Connor loves his mother and father both equally, but unfortunately their contempt for one another has thrust him into a “to and fro” battle, one of which he wants no part. He has been put in the middle of his parent’s conflict.

[36] Although David MacDonald denies having made negative comments about Sherry MacDonald it is apparent from the medical records that Connor has been made to feel very uncomfortable when in a position to either hear or over hear negative conversation about his mother while in his father’s home. This is not a positive or productive circumstance for any child to have to deal with.

[37] As noted by Dr. Landry at Page 3 of his Report:

> Connor Patrick MacDonald presented as being an articulate young man of 13 years. He presented as being very open to the discussion. He evidenced a considerable amount of insight given the degree of conflict between his parents. There was no evidence of any mental health issues at the present time. Connor Patrick MacDonald reported close relationships with both Mr. and Mrs. MacDonald. He described nurturing parental behaviour from both of his parents. He noted; however, that his parents did not communicate in anyway. He reported that he sometimes felt as if he was put in the middle when having to deal with some of the conflict or having to bring forth matters of money such as payments for extracurricular activities. He noted that in some cases, his parents’ lack of

> communication would result in conflict and it was easier in avoidant strategies such as turning off his telephone.

> As noted, Connor reported close relationships with both of his parents. He reported that he enjoyed the time that he spent at his father's home and that he also enjoyed spending time with his mother. He reported; however, that he was somewhat reluctant to make a decision because he did not want to be locked into a fixed pattern of access.

[38] In grade 7 Connor began having increasing behavioural difficulties which progressed into grade 8. Connor's marks began to suffer and his unacceptable behaviour both in and out of school resulted in suspension from school and the local community centre.

[39] While his marks are passable the current reported school absences and suspensions are not acceptable and not indicative of long term success for this child. This intolerable situation appears to have become more chronic while Connor was spending more time with his father. Sherry MacDonald offers herself as the solution to the problem. That being said the Respondent has been an excellent support to Connor with regard to his athlete activities and it is equally clear from the medical records that Connor wants and appreciates the support of his father in this regard.

[40] Dr. Landry notes at page 4 of his Report regarding Connor's wishes:

> Connor Patrick MacDonald noted that his wishes presently are to participate in a shared agreement with 60-65% of his time spent at his father's and 35-40% spent at his mother's. However, Connor also specified that this was certainly not "fixed" because he noted that he may want to share the time 50-50 at some point. This reflects his attachment to both parents and the desire to ensure that he spends time with both.
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> As noted above, Connor Patrick MacDonald 's reported insistence on having some decision making did not seem to reflect any undue need for control or unwillingness to cooperate with his parents. It, as noted above, reflected a typical adolescent desire to ensure access to peer and extracurricular activities. His flexibility; however, is significantly hampered by Mr. and Mrs. MacDonald's difficulties with communications. In the best case scenario, adolescents are able to communicate more effectively to ensure that supervision is maintained and limits are set.

[41] Regardless of the decision in this case it is clear to the Court that the parties must strive to address their ongoing conflict issues. The Court's concern in this regard is evidenced by it's order at the conclusion of the hearing on June 9, 2011, that the parties seek out immediate professional counselling to address their conflict issue.

[42] As stated by Dr. Landry in his Report at pages 4 and 5:

Given the conflict between the two parties may be contributing to the some of the challenges, reducing some of the conflict would help to promote the security of the child and to reduce the children's exposure t conflict. To accommodate these changes, Mr. MacDonald and Ms. MacDonald would benefit from the services of a professional to build a bridge between the two. For example, this neutral party could help to ensure that the expectations and rules at the home of both parents are relatively similar to make sure that the child is not taking advantage of these holes in the communication between parents.

Second, this individual could mediate any disagreements that may develop between the parties, and disagreements are very likely to happen given the recent history of the couple. While these are often relatively minor issues, they may well create huge obstacle to implementing a working plan. An impartial professional such as a psychologist or social worker well versed in child development may effectively field any concerns and bridge the gap of communication between Mr. MacDonald and Ms. MacDonald, acting as a go-between. If there are any difficulties, then the "mediator" could intervene and neither parent would be in the position of acting unilaterally.

In addition, this individual could help develop some more effective communication strategies between the two. This would include dealing with some of the issues related t different values and to identifying some of the obstacles to effective communication and avoid putting Connor in the middle.

[43] Dr. Landry further recommends:

Some thought may go into establishing a rudimentary form of communication such as e-mail to ensure that Mr. and Mrs. MacDonald are able to communicate about some of these basic issues. Consequently, for example, if there was a standard schedule of parenting time, then they may be able to effectively communicate some flexibility for Connor with respect to changes in the schedule and to ensure that he is able to have access to these opportunities.

[44] Currently the parties have an interim “shared custody” arrangement. Sherry MacDonald believes it is working however she seeks more control over education issues while David MacDonald wishes more overall control.

[45] Counsel for the Applicant submits at page 8 of her brief:

> 38. For Connor ‘s best interest, it is at this time necessary to allow Sherry MacDonald to assume more parenting and parental control of Connor. This will allow to have stability knowing when he is going to be in the care and custody of each parent and further, he can have the structure and nurturing available through his mother to assist him as he enters his formative years.
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> 39. Sherry MacDonald also recognizes that David MacDonald plays a vital role in Connor’s life and this should be permitted to continue, albeit on a more restricted basis such as weekends and summer.
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> 40. Therefore, Sherry MacDonald requests this Court put into place an Order recognizing she is the primary custodial parent for Connor and he would be in her care and custody each week from Monday until Friday and thereafter from Friday after school to Sunday evening he would be in the care of his father. Holidays and summers would be equally shared by the parents. Sherry also requests that she have final decision making authority, she is prepared and requests email communication with David MacDonald to exchange information about Connor, his activities, health etc.

[46] Counsel for the Respondent submits as follows at page 10 of his brief:

The Respondent is asking that the Court adopt the schedule as put forward as an Exhibit in his evidence for the division of custody with Connor.

We are cognizant of the fact that since late April the Respondent has agreed to an equal parenting situation while the matter is under consideration of the court.

The Respondent is prepared to follow a similar equal distribution of parenting time during the summer break as in the recent order. The issue is really the accommodation of the desire of Connor to make alterations.

It is humbly suggested that to ignore the clear preference of Connor would only lead on the type of concern as commented upon by James Gary McLeod in *Custody of Children - Canada, 5.26...*

Views of teenage children - although a child's wishes are not necessarily determinative of custody, there comes a point when, at near adult years, a child capable of responsible thought must be deemed to be able to settle his or her own future.

*In **O'Connell v McIndoe**, the trial judge adopted the assessors recommendations that the 13 year old son reside with his mother with limited access to his father to his father, an order that broke the status quo and went against the clear wishes with the child to live with his father and older brother. The child refused to accept the court's decision and ran away from his mother's home five times. On appeal the court accepted the reality of the situation and awarded custody to the father.*

> It is recognized that a portion of the difficulty in allowing a teenager to subsequently alter times set forth in court order is its possible exploitation by the child for negative purposes.
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> If Connor were allowed to make changes wherein he had given notices of the requested change to both parents, at least four days in advance, this would enable him to shorten or lengthen his stay with either of the parents without empowering a minor to attempt to use this tool for changes in curfew or other features that may not be in their best interest. Naturally, we would ask that the court direct that the order can be changed with the written consent of both parents.
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> It would be expected that a special arrangement would exist for birthdays and an alternate sharing of holidays and school break.
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> It is only through the cooperation of the parents that any custody arrangement will be feasible.

[47] As a general rule Courts have avoided joint or shared parenting plans where there is conflict and communication issues existent between the parents. However, the Court may apportion decision making or give one parent ultimate decision making to avoid future conflict on deadlock on important issue (**Wilson v Wilson**, 2004 Carswell Ont 1078CSCJ) .

[48] A Court may order joint/shared custody where both parents have problems, but together are capable of meeting their child's needs. In such cases, two partial

parents can be better than one alone where each parent balanced the other's short comings. (**Allister v Allister** 2004, Carswell BC 2037 (SC)) and **Atkinson v Atkinson**, 2005 Carswell BC 589 (SC)).

[49] With the advent of the electronic age, parents can now effectively communicate with one author about their children without having to have face to face contract. This can reduce conflict on the assumption that such communication does not contain any incitefull or accusatory language. In **Winterwerb v Winterwerb** , 2004 Carswell BC 62 (SC) the Court ordered the parties to communicate by email until communication improved.

[50] Where a Court is of the opinion that the parental relationship is too conflicted to make a joint or shared custody order work in a meaningful way , the Court may instead establish a form of "parallel parenting". Parallel parenting has been offered as an option in situations where both parents want a high level of involvement in their child's life, but the level of conflict between the parents makes this difficult. The Order can be constructed by specifying the time the

children will spend with each parent and each parent's responsibilities while the child is with him or her.

[51] The structure of parallel parenting was used in the case of **Baker-Warren v Dinaut** (2009) NSJ No 2009. Justice Forgeron found that joint custody was not appropriate as the parties' relationship was characterized by a high level of distrust and lack of communication. In these circumstances she found that a parallel parenting regime was in the child's best interest. At paragraphs 26 to 29 she states"

> 26 Courts have increasingly embraced the concept of parallel parenting in circumstances similar to the case at bar. A parallel parenting regime is a mechanism which can be employed where there is a high parental conflict, and where a sole custody order is not in the child's best interests. A parallel parenting regime permits each parent to be primarily responsible for the care of the child and routine decision-making during the period of time when the child is with him/her. Significant decision -making can either be allocated between parents, or entrusted to one parent. Parallel parenting ensures that both parties play an active and fruitful role in the life of their child while removing sources of conflict through a structured and comprehensive parenting plan.
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> 27 In **Ursic v Ursic**, [2006] O.J. No. 2178, [2006] W.D.F.L. 3290 (C.a.), the Ontario Court of Appeal affirmed a trial judge's order for parallel parenting and so guided in a new era for the concept of parallel parenting. Laskin J.A. states at para 26:

26 Also, importantly, the trial judge, [2004] O.J. No. 3550, did not merely order joint custody. He included with it a parallel parenting order. Many trial courts have recognized that joint custody under a parallel parenting regime may be suitable where both parents love the child and should play an active role in the child's life, yet have difficulty communicating or reaching a consensus on the child's upbringing. See **M.(T.J.) V. M.(P.G.)** (2002), 25R.F.L. (5th) 78 (Ont. S.C.J.) And **Mol v Mol**, [1997] O.J. No. 4060 (Ont. Gen. Div.). The trial judge viewed parallel parenting to be suitable in this case, and I am not persuaded that he erred in ordering it.

28 In **Andrade v Kennelly**, [2006] O.J. No. 2457, [2006] W.D.F.L. 2887 (S.C.J.), Harvison Young J. ordered joint custody with parallel parenting. This decision was upheld on appeal at 2007 ONCA 898 (C.A.) Harvison Young J. examined case law which held that parallel parenting may be the solution where a parent had a history of making decisions not in the best interests of the child. In such circumstances, a sole custody order was not a solution because sole custody is able to make decisions on his/her own in the best interests of the child. In the case before her, and despite the high levels of acrimony, Harvision Young J. Ordered joint custody with parallel parenting. The children were placed in the primary care of the father, although he had not exercised that role before. The father had proven himself to be a better and more stable parent than the earlier assessment had indicated, and the father would support the relationship between the children and the mother.

29 In **Moyer v. Douglas** [2007] W.D.F.L. 1924 (S.C.J.), parallel parenting was ordered. Communication problems were not seen as an obstacle because cooperation was not a prerequisite to each parent making decisions, nor the parents carrying out his/ her parental responsibilities. Further, parallel parenting was not made with the hope that parenting skills would improve, but with a recognition that both parties had adequate parenting skills.

30 In **Howard v. Howard** 2006 SKQB 352 (Q.B.), a parallel parenting award was granted despite the parental conflict and with divided authorities for decision-making. The father was vested with final decision-making on matters concerning education and extracurricular activities in the event of disagreement, while the mother would have final decision making on issues relating to health, religion and child care.

[52] The following commentary by A.C.J. Lawrence O'Neil in the case of **Murphy v Hancock**, 2011 NSSC 197 at paragraph 49 is relevant to the ultimate decision to be made by this Court:

> 49 Jurisprudence on the issue of whether shared parenting should be ordered is very fact specific. I agree with the comments of Justice Wright in **Hackett V. Hackett** [2009] N.S.J. 178, at paragraph 13:
>
> > 13. It is all well and good to look at other cases to see how these principles have been applied, but the outcome in other cases is really of little guidance. Every case must be decided on a fact specific basis and nowhere is this to be more emphasized than in custody/access/parenting plan cases. To state the obvious, no two family situations are ever the same.

Decision/Conclusion

[53] I have scrutinized the evidence with care, have considered all the exhibits and the submissions of counsel. The Court has applied the standard of proof which

is on a balance of probabilities. In determining whether either party has met the civil burden of proof, I have looked for clear, convincing and cogent evidence.

[54] As stated in **C.(R.) McDougall**, 2008 3SCR 41 at paragraphs 40, 45 and 46:

> 40 Like the House of Lords, I think it is time to say, once and for all in Canada there is only one **civil** standard of proof at common law and that is proof on a balance of probabilities. Of course, contest is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the serousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow:
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> 45 To suggest that depending upon the seriousness, the evidence in the **civil** case must be scrutinized with greater care implies that in less serious **cases** the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all **cases**, evidence must be scrutinized with care by the trial judge.
>
> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious case, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[55] Applying the **Foley**, supra criteria to this matter I am satisfied that both parents love their child and can provide an adequate physical environment. They are both prepared to deal with disciplinary issues, albeit differently and both are good role models. Each parent is sensitive to Connor 's emotional and medical needs, although David MacDonald takes some issue with his son being counselled by Child and Adolescent Services. Both parents are readily available to their child.

[56] The parents live quite proximate to one another which is to Connor's benefit as both parents are involved with and support Connor's recreational activities. Both are capable of supporting their child and will involve extended family in his life.

[57] After examining the factors enunciated by Justice Goodfellow it is apparent that each parent has a reasonable plan to care for their child. It is also apparent each parent has practical strengths in terms of being better able to deal with different child care issues.

[58] Notwithstanding complaints about one another's parenting styles and choices, they do tend to agree that the other is capable of parenting their child to a level within the range of appropriative parenting.

[59] The parents live in the same community and their residences are proximate. This eliminates the risk of Connor losing relationships at school or through recreational activities. The extended family can easily be involved in Connor's activities as spectators at sporting events as an example.

[60] But for the strained communication issues and disagreement regarding discipline, the Court would have considered maintaining the shared parenting arrangement. But upon review of the evidence I accept Sherry MacDonald's concerns regarding Connor's school issues and I find she is the preferred parent to address these concerns in Connor's best interests. Similarly David MacDonald is the preferred parents to address Connor's sporting and recreational activities. As a result the Court will order that a parallel parenting regime be created to exploit each parent's strengths to the benefit of Connor.

[61] It is in Connor's best interest that Sherry MacDonald be primarily responsible for Connor's education and medical needs. David MacDonald shall be solely responsible for Connor's recreational needs. I reject the contention that it is Connor's wish to spend more time with his father. I find that his views in this regard are not clearly articulated and I place reliance upon Dr. Landry's report which confirmed Connor's attachment to both his parents both of whom he wants to spend time with.

[62] Once the communication issues are addressed Connor should no longer be placed "in the middle" which should make for a long term workable custody arrangement.

[63] The Court thus orders:

Parallel Parenting: Sherry MacDonald and David MacDonald will share custody of Connor Patrick MacDonald, born May 17, 1997.

1. The current shared custody regime will continue until the end of the summer which provides for Connor to spend one month with each parent.

2. Regular Schedule: Effective September 3, 2011, the parties will alternate weekly custody/access as follows:

Sherry MacDonald shall have Connor Patrick MacDonald in her care from Sunday at 5:00 p.m. to Thursday at 5 :00 p.m.;

David MacDonald shall have Connor Patrick MacDonald in his care from Thursday at 5:00 p.m. to Sunday at 5:00 p.m. at which time custody will revert back to Sherry MacDonald;

David MacDonald shall also have Connor Patrick MacDonald in his care on Tuesday after school to 7:30 p.m. at which time Connor is to be returned to his mother;

- During the time that Connor is in the custody of Sherry MacDonald, David MacDonald shall have the right to communicate with Connor via telephone, text or email;

- During the time that Connor is in the custody of David MacDonald, Sherry MacDonald shall have the right to communicate with Connor via telephone, text or email;

- To assist with the above said communication Connor will be provided with a cell phone and laptop computer, the cost of which is to be shared equally by both Sherry MacDonald and David MacDonald;

- Both parties are ordered and directed to ensure Connor's cell phone and computer are in proper working order so as to be able to continually receive messages from the access parent when he is in the other parent's custody;

- Sherry MacDonald shall have sole decision making authority regarding Connor's educational and medical needs;

- David MacDonald will have sole decision making authority regarding Connor's recreational needs;

- Each party is encouraged and expected to support the other in the making of these decisions made on behalf of Connor;;

- Absent an emergency situation all communication between Sherry MacDonald and David MacDonald shall be done via email or text until such time conflict

issues between them have been sufficiently addressed to consider other forms of contact. In this regard both parties are ordered to obtain professional counselling to deal with their conflict and anger management issues;

- all efforts must be made to eliminate and/or minimize contact between the two MacDonald households, except for the direct communication and contact with Connor as ordered by this Court.

[64] The Court has elected not to detail holiday and summer schedules as the parties should be able to work out these details in consultation with Connor.

[65] In the event there is conflict or disagreement in this regard the Court will entertain a return application by either or both parties to address same.

[66] The Court encourages the parties to be flexible with one another in Connor's best interest and the Court would support any other access arrangement that the parties can mutually agree upon.

[67] The Court has given consideration to the request by David MacDonald for a child support credit from Sherry MacDonald and the Court has determined no

adjustment will be made up to and including May 13, 2011, the date of the Interim Consent Order .

[68] Any payments made by David MacDonald after May 13, 2011 shall be reimbursed by Sherry MacDonald forthwith.

[69] There shall be no further child support payments to be paid by either party pursuant to the terms of this order.

[70] Each party shall pay 50 percent toward Connor's extraordinary and /or extracurricular expenses as they relate to his education, medical and recreational needs.

[71] Upon the provision of a receipt by the payor parent of any such extraordinary expense the other parent shall pay 50 percent within 30 days of having been provided with said receipt.

[72] Each party shall bear their own costs.

Order Accordingly.

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Justice Kenneth C. Haley