IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Dorey v. MacNutt, 2013 NSSC 267

Date: 20130823
Docket: 1201-065873
Registry: Halifax

Between:

Amber Christine MacNutt (Dorey)

Petitioner

and

Cory Everett MacNutt

Respondent

Judge: Associate Chief Justice Lawrence I. O'Neil

Heard: March 5 and June 25, 2013, in Halifax, Nova Scotia

Counsel: Jennifer L. Schofield, counsel for the Petitioner
Leigh Davis, counsel for the Respondent

By the Court:

Introduction

[1] The parties married September 20, 2003. Their final separation was in March of 2011. The parties have a child, Tayler, born in 2005. They have parented the child in a shared parenting arrangement. They now agree the schedule must change because as structured, the parenting arrangement requires too many transitions for the child and is contrary to his best interests. Currently the child is with Mr. MacNutt on Mondays and Tuesdays; with Ms. Dorey Wednesdays and Thursdays and the parents alternate week ends.

[2] This is a divorce proceeding. The matter was before the Court for an interim hearing. Evidence was offered March 5, 2013 and summations were delivered June 25, 2013. Mr. MacNutt revised his position after evidence was presented and asks for week on, week off shared parenting with set off child support payable by him. Initially he sought primary care of the child. Ms. Dorey wants primary care of the child. Ms. Dorey wants the parenting arrangement to provide Mr. MacNutt with parenting time every other week end; two over nights during the off week and for equal sharing of holidays and summer vacation. She seeks the table amount of child support and spousal support.

[3] Ms. Dorey also agrees with joint custody but wants authority to place the child in counselling. Mr. MacNutt is agreeable to the child being provided counselling, if necessary.

[4] Ms. Dorey also seeks spousal support.

[5] **Issues**

1. What parenting arrangement is in the child's best interest? Should a shared parenting arrangement continue?

   If so, what is the appropriate shared parenting plan? If not, what is the appropriate parenting arrangement?

2. What child support should be paid by either party?

3. Is Ms. Dorey entitled to spousal support? If so, what is the quantum?

Parenting

- Best Interests Criteria

[6] The *Divorce Act*, RSC 1985, c 3 (2nd Supp)at s.16(1), (2) and (8), (9) and (10) provides:

> Order for custody
>
> 16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

> Interim order for custody
>
> (2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).
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> . . . . .
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> Factors
>
> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> Past conduct
>
> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> Maximum contact
>
> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[7] 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.

[8] Recent amendments (2012) to the *Maintenance and Custody Act*, R.S.N.S. 1989, c.160 ('MCA') give us statutory guidance on how the best interests of a child are to be determined. The following in s.18(6) of the 'MCA' is of persuasive value when interpreting s.16(8) of the *Divorce Act supra*:

> s.18(6) In determining the best interests of the child, the court shall consider all relevant circumstances, including
>
> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
>
> (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
>
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
>
> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
>
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
>
> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
>
> (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
>
> (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
>
> (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
>
> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>
> > (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
> >
> > (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

[9] Clearly there is significant overlap in the 'MCA' when compared to the checklist developed by Justice Goodfellow two decades ago.

[10] Justice Forgeron, in *MacKeigan v. Reddick* [2007] N.S.J. No. 425, also discussed a number of factors relevant to determining whether a parent should be designated the primary caregiver. At paragraph 45 she wrote:

> 45 Each party seeks to be the primary care giver of Brady. Each party states that Brady's best interests would be served if Brady was placed in his/her respective care. The most significant factors which have been espoused by the parties in support of their positions, and which were examined by me, are as follows:
>
> a) Status quo,
> b) Poor decision-making,
> c) Nutrition and hygiene,
> d) Willingness to facilitate maximum contact,
> e) Family attachments,
> f) Home environment,
> g) Time availability and parenting style, and
> h) Cultural and moral development.
>
> Justice Forgeron found shared parenting unworkable in that case.

[11] In a more recent "mobility" decision, Justice Forgeron ordered that a parallel parenting arrangement be established, notwithstanding a conflicted situation. In *Baker-Warren v. Denault*, 2009 NSSC 59 (CanLII), 2009 NSSC 59, at paragraph 42, she wrote:

> 42 In addition, the factors set out in the second part of the test in Gordon v. Goertz 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27 must likewise be addressed in any parenting dispute. These factors are noted at para. 23 of Burgoyne v. Kenny, 2009 NSCA 34 (CanLII), 2009 NSCA 34, wherein Bateman J.A. states as follows:
>
> > In para. 49 of Gordon v. Goertz, supra McLachlin J., as she then was, for the majority, summarized the applicable principles. An original custody determination is informed by the following considerations:
> >
> > 1. The judge must embark on an inquiry into what is in the best interest of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
> > 2. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
> > 3. The focus is on the best interests of the child, not the interests and rights of the parents.
> > 4. The judge should consider, inter alia:

a) the desirability of maximizing contact between the child and both parents;
b) the views of the child, if appropriate;
c) the applicant parent's reasons for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
d) the disruption to the child consequent on removal from family, schools and the community he has come to know.

[12] Justice Forgeron went on and analysed the child's best interests by reference to (1) the allegation of parental misconduct: violence; (2) the allegation of parental misconduct : substance abuse; (3) the allegation of child alienation; (4) the maximum contact principle; (5) the impact of a possible move by a parent; (6) the state of the parent-child relationship; (7) the physical environment and financial circumstances of the child; (8) the child's educational, cultural, spiritual and general welfare needs; (9) the parent's approach to discipline; (10) the child's health needs; (11) the availability of family support; (12) each parent's time availability; and (13) the child's views, if ascertainable.

[13] Finally, Justice Forgeron concluded as follows:

> 120. It is in Kyra's best interests to have healthy relationships with both parents. Currently, this is compromised by Ms. Baker-Warren's manipulation and alienation, and by Mr. Denault's impulsive and reactive personality. Both flaws pose risks to Kyra.
>
> 121 Despite these significant limitations, the court must, nonetheless, determine the type of parenting plan in Kyra's best interests. Ms. Baker-Warren has been the primary care parent. Mr. Denault does not have the parenting experience that Ms. Baker-Warren has. It is, therefore, in Kyra's best interests to be placed in the shared and parallel parenting of the parties, but in the primary care of Ms. Baker-Warren. This finding is contingent on the parties fully cooperating with the therapies and making the necessary changes in his/her conduct. If the parties refuse or are unable to make the necessary changes, then this parenting plan will likely have to be revisited.
>
> 122 The shared parenting plan is necessary so that Kyra benefits from both of her parents. The parallel parenting regime will permit the establishment of a meaningful and balanced relationship between Kyra and each of her parents. The shared parenting plan will ensure that Kyra's material, emotional, educational, and social welfare needs are met.
>
> 123. The plan will be tailored to meet the needs of Kyra - not the needs of Ms. Baker-Warren or Mr. Denault. Kyra will spend significant block time with each

> party. Weekly transitions between households will be reduced. The plan will also decrease conflict by providing the parties with few opportunities to make independent scheduling choices.
>
> 124. The parallel parenting regime does not follow Dr. Landry's recommendations on a verbatim basis. Dr. Landry's expert opinion was exceedingly helpful, albeit dated by the time the trial concluded. I have veered from the recommendations based upon the totality of the evidence and to ensure the best interests of Kyra are met. The court cannot delegate its judicial role and responsibilities to health care professionals in any event.

[14] Justice Forgeron then directed a two-week rotation of the parenting time which she described as sharing custody in a parallel parenting regime. Justice Forgeron also outlined very detailed guidelines to govern the parenting arrangement. She authorized the child's move to Gatineau, P.Q.

- Shared Parenting

[15] Notwithstanding complaints the parents herein have about each other's parenting choices from time-to-time, they agree that the other is capable of parenting Tayler to a level within the range of appropriate parenting.

[16] Shared custody is defined by s.9 of the *Federal Child Support Guidelines*, SOR / 97-175 as amended and by s. 9 of the *Nova Scotia Child Maintenance Guidelines*, N.S. Reg. 53/98 as amended. It is defined by the amount of time a spouse/parent exercises a right of access to, or has physical custody of a child. When that reaches forty percent a shared custody situation exists. The arrangement implies a greater role for the parents in the management of the child (ren) and may impact on the child support obligations of the parents. The leading case on the latter issues is *Contino v. Leonelli-Contino*, 2005 SCC 63 (CanLII), [2005] S.C.J. No. 65; 2005 SCC 63. Although the word custody denotes decision making authority there is no statutory direction on how decision making authority associated with shared custody (parenting) is to be allocated.

[17] A wide range of descriptions of the decision making authority are possible in a shared parenting arrangement. All decisions need not result from an agreement reached by the parties. Day to day decisions affecting a child are typically made by the parent exercising "access to, or having physical custody " of the child. Other decisions require a consensus to be effective but this is not always the case. The current state of the law is that in most cases, regardless of

the parenting arrangement, joint custody is ordered. Most parents accept the obligation and need to consult each other and to keep each other informed on all issues affecting their child(ren).

[18] 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.

[19] Within the assessment of the best interests of a child when shared parenting is proposed a number of factors frequently prove important. These factors are refinements to the best interests analysis discussed earlier. The factors are the following:

> 1. The proximity of the two proposed homes to each other is an important factor to consider. This is relevant to assessing how shared parenting will impact on all aspects of a child's life, including what school the child will attend, what recreational or social relationships will be disrupted or preserved and how available each parent will be to the other should shared parenting be ordered;
>
> 2. The availability of each parent to the child on a daily basis and the availability of step-parents is an important consideration. A court should also consider the availability of members of the respective extended families and whether a shared parenting arrangement impacts negatively or positively on a child's relationship with the extended family;
>
> 3. The motivation and capability of each parent to realize their parenting opportunity for the best interests of the child. If a parent is not truly motivated to use the parenting opportunity to enhance the child's relationship with him/her, that weighs against shared parenting;
>
> 4. Whether a reduction in transitions between households can be achieved by a shared parenting arrangement. This is particularly important when transitions frequently give rise to conflict between the parents;
>
> 5. Whether "mid-week" parenting time or contact with the other parent can be structured without disrupting the child. This contact might be after school or after supper time, for example, the objective being the elimination of extended periods without contact between the child (ren) and a parent and it is an opportunity for a

child to share life's experiences with both parents in a timely way. The easier and less disruptive "mid-week" access is to arrange, the more attractive shared parenting becomes;

6. The opportunity, if any, that shared parenting provides for each parent to be involved in decisions pertaining to the health, educational and recreational needs of the child; the level of interest each parent has in participating in decision making in these areas is relevant to this assessment. As the opportunity increases so does the case for shared parenting;

7. The extent to which shared parenting enhances the development of a routine in each parent's home. In many cases, the more traditional every other weekend schedule for the non-primary care parent means a routine cannot be developed;

8. Shared parenting imposes responsibility on each parent to share the parenting burden and to be involved in decisions pertaining to the health, educational and recreational activities of the child and requires an assessment of each parent's willingness to assume their share of that responsibility after entrusted with it. Shared parenting is about more than sharing the child's time, it is very much about sharing the daily responsibility of parenting;

9. Related to the preceding is a consideration of the employment and career benefits that may accrue to each parent as a result of a shared parenting arrangement and a more equal sharing of the parental responsibilities;

10. Whether improvements in the standard of living in either or both households may accrue as a consequence of a shared parenting arrangement;

11. The willingness and availability of parents to access professional advice on the issue of parenting;

12. The "elephant in the room" in many custody/access disputes is frequently the financial consequences of the court's custody/access order and the extent to which the allocation of parenting time creates a winner or loser. Three factors must frequently be assessed: a) whether a parent's proposed parenting plan is really about the child support consequences that flow from a shared parenting arrangement or the alternative; b) the manner in which a primary care parent can use his/her position to have power and control of parenting; and c) whether a parent will abuse the parenting opportunity as a result of anger or insecurity, for example. The parenting regime is often not changed to shared parenting because the parties are too conflictual, notwithstanding that the conflict may result from a power imbalance in the parents' relationship flowing from the parenting arrangement in place. Courts must be cognizant of this dynamic;

13. An assessment of the parenting styles. That assessment should consider the questions posed by Justice MacDonald in C.(J.R.) V. C.(S.J.) 2010 NSSC 85 (CanLII), 2010 NSSC 85, at paragraph 12:

> -- What does the parent know about child development and is there evidence indicating what is suggested to be "known" has been or will be put into practice?
>
> -- Is there a good temperamental match between the child and the parent? A freewheeling, risk taking child may not thrive well in the primary care of a fearful, restrictive parent.
>
> -- Can the parent set boundaries for the child and does the child accept those restrictions without the need for the parent to resort to harsh discipline?
>
> -- Does the child respond to the parent's attempts to comfort or guide the child when the child is unhappy, hurt, lonely, anxious, or afraid? How does that parent give comfort and guidance to the child?
>
> -- Is the parent emphatic [empathetic ?] toward the child? Does the parent enjoy and understand the child as an individual or is the parent primarily seeking gratification of his or her own personal needs through the child?
>
> -- Can the parent examine the proposed parenting plan through the child's eyes and reflect what aspects of that plan may cause problems for, or be resisted by, the child?
>
> -- Has the parent made changes in his or her life or behaviour to meet the child's needs, or is he or she prepared to do so for the welfare of the child?

[20] I must now consider what the evidence allows me to conclude when these factors are applied.

[21] Turning to an application of these criteria to the evidence, I am satisfied that the physical environment, approach to discipline and the availability of positive role models is comparable in the homes of both parties.

[22] I am satisfied that both parents will support the involvement of Tayler in recreational activities. Both will make an effort to attend events; to attend at school meetings and health care appointments involving the children. Both will support him financially and involve both extended families as required and they will involve each other.

[23] Neither parent herein has demonstrated poor decision making that involves Tayler.

[24] These parents live near each other. This proximity eliminates the risk of Tayler losing important relationships developed at school, at church or through recreational activities should shared parenting be ordered. The extended family in the area can easily be involved in Tayler's activities, as spectators at sporting events, for example, regardless of where they are residing in a given week.

[25] I am not satisfied however that each parent will maximize the parenting opportunity afforded to them. I am not satisfied that Mr. MacNutt is as available to meet the parenting obligation he asks for.

[26] I am satisfied on a balance of probabilities that Ms. Dorey will organize her life to manage the child's activities. I am satisfied that she is prepared to accept reduced employment so that she will be more available to the parties' son. This is a choice she is prepared to make. I am not satisfied it is a necessary choice.

[27] The training program she is currently pursuing is not onerous. It is not demanding in terms of class time or homework obligations. Ms. Dorey is more available for work currently than she acknowledges.

[28] In contrast, Mr. MacNutt's employment and business obligations make him less available to meet the parenting responsibility. He is responsible for eight employees employed by "Modern Mechanical Inc.", a small business, owned by Mr. MacNutt's family trust.

[29] The Court is concerned that Ms. Dorey will be empowered by her role as the primary care parent. She is cautioned against interpreting her role as the primary care parent as providing her with authority to dictate parenting decisions. Should a Court be satisfied that she can not responsibly meet the obligation to jointly parent Tayler, a Court may change primary care of Tayler.

[30] Nevertheless, I am satisfied that it is in the best interests of the parties' son that the parties have joint custody of him and further, that it is in his best interest that he be in the primary care of Ms. Dorey. Mr. MacNutt shall have parenting time with Tayler every other week-end from Friday after school until Monday morning when he shall be transported to his school directly. Should Monday be a holiday, he shall be dropped off at school Tuesday morning. I am satisfied this arrangement will result in predictability and stability for Tayler.

[31] During the school week, Mr. MacNutt will have parenting time Wednesday from after school until delivery to school the next day.

[32] The parties shall equally share other breaks during the school year, whether it be Christmas, Easter or the winter school break. They shall also equally share the summer break.

[33] The parties shall share, in a timely way, all information pertaining to the health, education and well being of their child.

[34] The parties shall consult one another prior to making significant parenting decisions including the child's participation in extra curricular activities. The parties are reminded that a schedule of activities may conflict with parenting time on occasion. They are directed to accept this reality and to not disregard this practical implication when planning logistics of extra curricular activities. Decisions as to the day to day care of Tayler shall be made by the parent in whose custody the child is, at the time the decision must be made.

[35] The parties shall consider, on a good faith basis, entrusting Tayler to the other parent when child care of Tayler is required. It is recognized that for periods of several hours it may be impractical to transfer Tayler to the other parent when child care is required.

[36] The parties shall support the relationship of each other with Tayler. They shall not permit him to be exposed to adult issues and in particular, not permit him to be exposed to conflict between them.

[37] Tayler shall be enrolled in counselling sessions as recommended by a health care professional.

[38] The parties shall keep each other informed of all appointments pertaining to the health care and educational needs of Tayler.

[39] Mr. MacNutt is ordered to pay the table amount of child support effective September 15, 2013. The parties agree that for the purpose of determining the quantum of child support, Mr. MacNutt's income is $60,000. The Court does not

have sufficient information upon which to determine whether Mr. MacNutt's grossed up dividend income would yield a different number. Should the parties wish to address this issue further, they may do so in a final hearing.

[40] Mr. MacNutt shall pay $507 per month as child support commencing September 15, 2013. He shall pay this amount on the 15th of each month thereafter until further order of the Court.

[41] The issue of retroactive child support is deferred until the final hearing. Ms. Dorey seeks retroactive child support to July 2012, the month the Notice of Motion for Interim Relief was filed.

- Spousal Support

[42] The issue of spousal support has two potential aspects: entitlement and quantum if entitlement is established.

[43] Section 15.2 (4) (a)- (c), (5) & (6) (a)- (d) of the *Divorce Act, supra*, requires the court to consider the condition, means and circumstances of each spouse and provides that a spousal support order should address four statutory objectives:

> 15.2(1) Spousal support order - A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse
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> (4) Factors - In making and order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse including:
>
> (a) the length of time the spouses cohabited
> (b) the functions performed by each spouse during cohabitation; and
> (c) any order, agreement or arrangement relating to support of either spouse
> . . . . .
>
> (6) Objectives of spousal support order - An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should:

> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above an obligation for the support of any child of the marriage;
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> (d) in so far as practicable, promote the economic self sufficiency of each spouse within a reasonable period of time.

[44] The words of Justice McLaughlin in *Bracklow* [1999] S.C.J. No. 14 at paras. 30-31 are on point:

> (30) The mutual obligation theory of marriage and divorce, by contrast, posits marriage as a union that creates interdependencies that cannot be easily unravelled. These interdependencies in turn create expectations and obligations that the law recognizes and enforces ...
>
> (31) The mutual obligation view of marriage also serves certain policy ends and social values. First, it recognizes the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly. When this happens, it is not unfair to ask the partners to continue to support each other (although perhaps not indefinitely). Second, it recognizes the artificiality of assuming that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life, indicating the potential necessity to continue support, even after the marital "break". Finally, it places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls.

[45] Justice L'Heureux Dube in *Moge v. Moge* 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107 directed that spousal support must strive to achieve some equitable sharing upon the dissolution of the marriage. At paragraph 73, she stated:

> The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse

[46] Nevertheless, in the words of Justice MacLachlin in *Bracklow*, 1999 CarswellBC 532 :

> 21. When a marriage breaks down, however, the situation changes. The presumption of mutual support that existed during the marriage no longer applies. Such a presumption would be incompatible with the diverse post-marital scenarios that may arise in modern society and the liberty many claim to start their lives anew after marriage breakdown. This is reflected in the Divorce Act and the provincial support statutes, which require the court to determine issues of support by reference to a variety of objectives and factors.

[47] I am satisfied that entitlement to spousal support has not been established. Spousal support does not arise solely by virtue of or as a product of cohabitation and economic disparity between separating partners.

[48] The parties were married in 2003 after having lived together from 1999 to 2003. They separated on three occasions: 2007, 2010 and finally in March of 2011.

[49] There is clearly no contractual basis upon which to base entitlement to spousal support. Nor can this couple be described as having implicitly or explicitly agreed to support each other. A non compensatory basis for finding an entitlement to spousal support does not exist.

[50] The parties lived together in Mr. MacNutt's parents' home from 1999 until 2002. Each attended community college and obtained certifications that qualified them for skilled employment. Ms. Dorey studied information technology and Mr. MacNutt HVAC (heating, ventilation and air conditioning). The parties moved into their own place in February 2002. Their time "together" included two separations for periods of months in 2007 and 2010. In these circumstances, each clearly understood they could not depend on the other for support. The history of their time together was evidence that the contrary was true. Their relationship was characterized by financial problems and dependency on extended family. I find no basis to order spousal support on a non compensatory basis founded on the evidence. Ms. Dorey did not prejudice her position in the work force as a consequence of her relationship with Mr. MacNutt. Nor did she confer a benefit on the career or earning capacity of Mr. MacNutt. His current economic circumstances are not attributable to his relationship to Ms. Dorey in any way.

[51] Ms. Dorey's earning capacity is better now than when the parties met. Most recently, she has chosen to retrain. Ms. Dorey is employable and capable of earning more than $20,000. While attending school she receives generous

training support. I am satisfied, based on all of the evidence, that Ms. Dorey is not motivated to work full time. It is difficult to accept that her current training program is designed to ensure her employability. She currently has a variety of work experience and training and available employment. Her retraining is not necessary. Mr. MacNutt should not be asked to bear any of the burden flowing from her decision to seek more training. Her decision to do so is not reasonable, particularly given her responsibility to provide for herself and her child.

[52] Given this conclusion, I need not go further and quantify spousal support.

Conclusion

[53] Primary care of Tayler is conferred on Ms. Dorey effective Friday, August 30, 2013. The scheduling of parenting outlined above shall be effective that day with the week end of August 30, 2013 being a time Ms. Dorey will have responsibility for Tayler.

[54] Mr. MacNutt shall pay child support of $507 per month effective September 15, 2013.

[55] No entitlement to spousal support is found.

ACJ