

SUPREME COURT OF NOVA SCOTIA

Citation: *Keay v. Keay*, 2018 NSSC 91

Date: 20180417

Docket: No. 1210-001200

SATD 086149

Registry: Antigonish

Between:

Rita Suzanne Keay

Petitioner

v.

James Douglas Keay

Respondent

Judge: The Honourable Justice Michael J. Wood

Heard: March 12, 2018, in Antigonish, Nova Scotia

Decision: April 17, 2018

Counsel: Daniel F. Roper, for the petitioner
Jonathan C. Gavel, for the respondent

By the Court:

[1] James and Suzanne Keay were married on August 8, 1998, and divorced on March 10, 2014. They have four children who are now ages 14, 12, 11, and 8. The Corollary Relief Order issued at the time of the divorce dealt with the parenting issues as follows:

- The parties would have joint custody with Ms. Keay having primary care.
- Mr. Keay was to have the children every second weekend from 3:00 p.m. on Friday to 7:00 p.m. on Sunday.
- There was a detailed parenting schedule for holiday and special occasions which divided the time equally between the parents over the course of a two-year cycle. In the summer the children would spend alternate weeks with each parent.
- Mr. Keay was required to pay child support in the amount of \$1,300 per month which was less than the amount provided by the *Child Support Guidelines*. The Order indicated that this had been agreed to by Ms. Keay based upon the “current financial circumstances”.
- Special or extraordinary expenses under s. 7 of the *Child Support Guidelines* were to be shared equally.

[2] Subsequent to their divorce, the parties changed the parenting arrangements by agreement so that Mr. Keay had the children for an additional evening each week and an additional Sunday each month. Starting in the summer of 2017 the parties agreed that the children would spend half of July with each parent and alternate weeks during the month of August. In September 2017 the parties agreed to a two-week parenting schedule whereby in week one Mr. Keay had the children from Thursday at 3:00 p.m. to Friday at 3:00 p.m. and in the second week from Thursday at 3:00 p.m. to Sunday at 7:00 p.m.

[3] In January 2017 Mr. Keay initiated an application to vary the parenting arrangements and child support on the basis that there had been a material change in circumstances since the date of the Corollary Relief Order. Mr. Keay was seeking a shared parenting arrangement, with the children spending alternate

weeks with each parent. Holiday and special occasions were to be shared equally on a two-year cycle. Child support would be calculated based upon the parties' income using the *Child Support Guidelines*.

[4] In February 2017 Ms. Keay filed a Notice of Contest which admitted that a material change in circumstances had occurred. She agreed that the Corollary Relief Order should be varied but only to require payment of child support by Mr. Keay based upon the *Child Support Guidelines* and clarify some ambiguities in the holiday parenting schedule.

[5] The application was heard March 12, 2018. Mr. Keay filed seven affidavits and Ms. Keay one. Both parties were cross-examined at the hearing. As was apparent from the affidavits and cross-examination, the parties have had significant difficulty communicating effectively. Both acknowledged as much. They agreed that it would be beneficial to participate in co-parenting counselling; however, they have been unable to agree on an appropriate counselor. The parties indicated that communication had improved somewhat over the period that Mr. Keay's application was outstanding. In addition, the parties had agreed to some adjustments in the parenting schedule. In January 2018 Mr. Keay began providing transportation on Monday evenings to assist in getting children to their activities.

Parenting

[6] Before the court can entertain an application to vary the parenting provisions of a Corollary Relief Order, s.17(5) of the *Divorce Act* requires that the judge be satisfied that there has been a change in the condition, means, needs or circumstances of the child or the ability of the parents to meet the parenting needs of the child. In this case, the Notice of Contest filed by Ms. Keay acknowledges that this threshold has been met. Aside from this acknowledgement, I agree that there has been a sufficient change in circumstances to permit the court to review the parenting arrangements. Most significant is the fact that the children are now four years older and on the cusp of their teenage years. They are becoming increasingly involved in activities that take significant time and resources. An example of the implications of this is the need for Mr. Keay to provide transportation assistance on Monday evenings.

[7] Having found that the threshold of a material change has been established, I must consider what parenting arrangements would be in the best interest of the children. This requires an understanding of the children and their circumstances as

well as those of the parents. Despite their inability to communicate effectively, both Mr. and Ms. Keay are good parents and love their children. They want to be involved in their lives as much as possible. Each also has a safe and comfortable home environment.

[8] Both parents acknowledge that the other is a good parent, but point out a number of examples where they disagree with the other's approach to a particular issue or incident. Clearly, they have different perspectives on many issues and are far from objective in their assessment of each other.

[9] Problems may arise from trying to treat the children as a single unit. They are different ages, personalities and enjoy a variety of activities. It is unrealistic to expect that it will be practical to consider them as a homogeneous group as they mature and become increasingly independent in their thoughts and interests. There may come a time when the fourteen-year-old boy is not interested in spending much time with his younger sisters and vice versa.

[10] The children obviously have opinions about the current parenting arrangements and the affidavits include some information about this. However, that information is filtered through the lens of the two parents and for this reason I put little weight on it. The reality is that no matter what formal parenting order is put in place, the children will essentially make their own decisions about how much time they want to spend with either parent as they get older. Since the parties' homes are only a few minutes apart, it should be relatively simple for scheduled and unscheduled visits to take place.

[11] Mr. Keay's request for a co-parenting arrangement would involve two primary changes to the current situation. The first is that during the school year the children would spend alternate weeks with each parent. The other change would be an increased role for him in decision-making with respect to the children and their activities. His argument on why this would be in the best interests of the children is based upon the principle that children should have maximum contact with both parents.

[12] Ms. Keay says that the parenting arrangement which is currently in place should remain with more specific details on scheduling for holidays and special occasions.

[13] While I agree with the principle that maximum parental contact is generally a good thing, I would note that there are a variety of ways in which that contact can

take place. Particularly with older children it does not necessarily mean that the child has to sleep at the parent's home. The evidence in this case indicates that the 11, 12, and 14-year-old children are all very active and involved in things such as band, basketball, and dance. Both parents are able to attend the public aspects of these activities such as recitals and games. As is becoming evident, transporting the children to and from events will frequently require more than one person. All of these present opportunities for parental contact.

[14] On the evidence before me, I am not satisfied that having the children spend alternate weeks with each parent during the school year is necessarily in their best interests. First of all, it is a change to the situation which has existed for some time and which appears to have generally worked well for the children. There are also a variety of opportunities for Mr. Keay to have interaction with his children when they are not in his care. In addition to attending events and providing transportation, electronic and telephone communication is available. As the children get older they will be able to decide how much additional time to spend with him at his house.

[15] I am encouraged by the fact that communication has improved somewhat since Mr. Keay initially filed his application more than a year ago. The parties have made some adjustments to parenting and Mr. Keay is assisting with transportation to activities. Despite this, I am not satisfied that the parties' relationship is at the point where co-parenting would be practical. Providing an additional opportunity for dispute and disagreement does not seem like the right thing at this time. Having said this, I would encourage the parties to participate in co-parenting counseling.

[16] The parenting provisions of the Corollary Relief Order are varied to provide as follows:

- (a) The parties shall have joint custody of their four children who shall be in the primary care of Suzanne Keay.
- (b) During the school year James Keay shall have parenting time on a two-week schedule as follows:
 - Week 1: Thursday at 3:00 p.m. to Friday at 3:00 p.m.
 - Week 2: Thursday at 3:00 p.m. to Sunday at 7:00 p.m.
- (c) Parenting time on holidays and special occasions shall be as set out in paragraph 38(c) of the pre-hearing brief filed on behalf of Mr. Keay.

- (d) On occasions where either party requires child care or transportation for any of the children, that party will first offer the other party the opportunity to assume child care or transportation responsibilities before seeking other arrangements.
- (e) Ms. Keay will engage in meaningful consultation with Mr. Keay before registering or enrolling any of the children in an extra-curricular activity or event. Upon registering or enrolling a child in such activity or event, she will ensure that the organizer, instructor or coach has been provided with contact information for Mr. Keay.
- (f) Prior to the first day of each month, Ms. Keay will provide Mr. Keay with a schedule showing all activities or appointments scheduled for each of the children for that month. She must advise Mr. Keay immediately upon becoming aware of any changes to the schedule.

Child Support

[17] The Corollary Relief Order required Mr. Keay to pay child support of \$1,300 per month which was less than the *Child Support Guidelines*. The order said that Ms. Keay accepted this amount based upon the parties' current financial circumstances. At the hearing, the parties provided evidence about what they understood this phrase referred to. Each had a different explanation. There is no independent record of the basis for the amount of support other than the Order itself.

[18] It is clear from the wording of the Corollary Relief Order that the amount of child support was negotiated between the parties based upon the financial situation which existed at that time. There was nothing to indicate that it was intended to be permanently fixed at that level. Circumstances have changed and the financial implications of the divorce have been dealt with. I am satisfied that it is appropriate for Mr. Keay to pay support based upon the *Child Support Guidelines* using his current income.

[19] Ms. Keay sought retroactive support on the basis that she initially requested an increase in late 2016. An order for retroactive support is discretionary and, in the circumstances, I am not prepared to do so in this case. I have no evidence to suggest that the children suffered any material deprivation as a result of Mr. Keay not paying more child support in 2017. In addition, the Order setting the support at the reduced figure of \$1,300 was based upon an agreement which took into account the financial consequences of the divorce. Ms. Keay has not satisfied me

that those consequences had been sufficiently resolved as of late 2016 so as to justify an increase at that time. The new support amount will be effective May 1, 2018.

[20] With respect to s. 7 expenses, these shall be shared equally by the parties.

Costs

[21] Both parties agreed that there had been a material change in circumstances and that the issues of parenting and support should be revisited. Neither party was completely successful and I will therefore exercise my discretion and award no costs to either of them.

[22] I would ask Mr. Gavel to prepare a form of order reflecting this decision and send it to Mr. Roper for his consent as to form.

Wood, J.