

**IN THE SUPREME COURT OF NOVA SCOTIA  
(FAMILY DIVISION)**

**Citation: *MacDonald v. Schaller*, 2005 NSSF 16**

**Date:** 20050405

**Docket:** SFSNMCA 019183

**Registry:** Sydney

**Between:**

Margaret Ann MacDonald

Applicant

v.

Robert Schaller

Respondent

**Judge:** The Honourable Justice Arthur J. LeBlanc

**Heard:** June 23 & 26, 2003, October 8 & November 17, 2004 and January 12 & 13, 2005

**Counsel:** Alan Stanwick, Esq., for the applicant  
David Raniseth, Esq., for the respondent

**By the Court:**

[1] This is an application by Mrs. Mac Donald pursuant to the *Maintenance and Custody Act*, for sole custody and child support and supervised access by Mr. Schaller. Mr. Schaller applies for joint custody or greater unsupervised access.

**BACKGROUND**

[2] The child, Ryan MacDonald, was born [...], 2000.

[3] Ms. MacDonald and Mr. Schaller established a relationship in late 1999 or early 2000. At the time they were both residing in Sydney, Nova Scotia. The parties moved to Hamilton, Ontario and remained there as a couple until January 2002. Mr. Schaller was employed in an apprentice program with Kolona Aircraft.

[4] Their relationship deteriorated to the point that Ms. McDonald left Hamilton in January 2002 and returned with Ryan to Sydney, Nova Scotia. Mr. Schaller remained in Hamilton and continued to work with the same company.

[5] According to the evidence, after separation, Ms. McDonald was accessing Mr. Schaller's bank account in Hamilton, with his consent, for her needs and those of the child. This continued until August 2002. Mr. Schaller claims that he closed his account because he had other bills to pay and could not allow Ms. MacDonald to access this account while he was attempting to keep his bills current.

[6] Ms. MacDonald filed an application for sole custody of Ryan MacDonald, with supervised access to Mr. Schaller. This *ex parte* application was granted on an interim basis. A further application, upon notice, was filed and served on Mr. Schaller in September 2002. The hearing of this application commenced in July 2003.

[7] At the initial hearing, Ms. McDonald claimed that it was necessary for her to have sole custody and Mr. Schaller to have only supervised access because he had fits of anger both towards her and Ryan. Mr. Schaller testified that this was not the case and that he wanted joint custody with primary-care being given to Ms. McDonald and himself having unsupervised access to Ryan.

[8] At the hearing, the parties testified as to their financial circumstances. Ms. MacDonald stated that she was receiving child tax credit and Canada Pension Plan payments. Mr. Schaller stated that he had been laid off from his employment at Kolona Aircraft in October 2002 and was in receipt of employment insurance benefits.

[9] At the hearing, rather than making an order for supervised access, I ordered that Dr. Reginald Landry, a clinical psychologist, be retained to determine whether there was a need for Mr. Schaller to undergo anger management treatment.

[10] At the initial hearing, no order was made for child custody. This hearing was adjourned until Dr. Landry reported to the court. In his report, Dr. Landry stated that Mr. Schaller did not require anger management treatment as such. However, given some issues dating back to his childhood, Dr. Landry agreed to continue with his assessment with the view of directing appropriate treatment for Mr. Schaller, with the goal of Mr. Schaller having unsupervised access to the child. At the adjourned hearing, Ms. MacDonald agreed that should Dr. Landry, on an interim basis, conclude that Mr. Schaller was capable of having unsupervised access to Ryan, she would consent to unsupervised access visits taking place. The relevant Order omitted this provision.

[11] Despite a subsequent positive recommendation from Dr. Landry, Ms. MacDonald resisted Mr. Schaller exercising unsupervised access, claiming that Mr. Schaller had not completed his anger management treatment.

[12] The matter was returned to court and on that occasion I directed that supervised access visits by Mr. Schaller to Ryan take place on a limited basis until

the final hearing.

[13] This matter returned to me for final hearing on January 5, 2005 and at that time, I heard further evidence from both parties and additional witnesses.

[14] Ryan is currently living with Ms. MacDonald and, according to her evidence, he has some health issues. He needs to be on lactose-free milk and suffers from an irritable bowel. As well, he has an asthmatic condition and is prescribed medication for both ailments.

[15] Ms. MacDonald claims that she spends approximately \$20 per week on the special milk and approximately \$150 per year on drug medication. In addition, Ms. MacDonald is enrolled in a learning program which may assist her in securing employment. As a result, she placed Ryan in the Whitney Pier Day Care. The cost of this program is presently \$16.25 per week and will be increasing to \$18.75 per week effective April 1, 2005. In addition, in order to access the day care, the child requires transportation by taxi at a cost \$14 per week. Altogether, effective April 2005, daycare for Ryan will cost \$32.75 per week.

[16] Ms. MacDonald claims that Mr. Schaller did side work as a mechanic on motorcycles, lawnmowers and engines while they were living together in Sydney. He considered this to be private work and she claims he was paid for these jobs. She claims that only after they separated did she find out that he was unable to work, as he says he suffers from multiple sclerosis. However, she has some doubts about their claim because he had to pass a physical exam to work in Hamilton.

[17] Mr. Schaller claims he was laid off at Kolona Aircraft due to a

downturn in the aircraft industry. Ms. MacDonald claims that this is inaccurate as there was never any question of Mr. Schaller losing his employment. She claims that it was a permanent job, and suggests the timing is suspicious, based on the fact that he was laid off about the same time he received a copy of the application for sole custody and supervised access.

[18] Ms. MacDonald stated she started receiving Canada Pension Plan benefits in the early part of 1990. She is receiving \$695.57 per month, as well as child tax credit of \$283.56 per month.

[19] Ms. MacDonald is seeking retroactive child support to the date of the filing of the application.

[20] Mr. Schaller is unemployed and is receiving social assistance from the Department of Community Services in the amount of \$649 per month. His income in 2002 was 38,205 of which \$1239 was employment insurance. His 2003 income was \$17,759 (\$412.80 x 43 weeks) of employment insurance. He has been in receipt of social assistance since January 2004. After being laid off by Kolona Aircraft in 2002, he received an additional amount representing termination pay, which is included in his 2002 income.

[21] In the preceding paragraph, I calculated the pre-tax amount of Mr. Schaller's employment insurance benefits by adding 20% for income tax.

[22] Mr. Schaller claims that he is not purposely unemployed or underemployed and says he has been looking for work despite his medical disability. He believes that he will be able to obtain work if he continues to search.

[23] Mr. Schaller testified that he is unable to pay any child support because he very little income on which to live and meet basic expenses. His rent alone is \$475 per month. Without the financial assistance of his girlfriend, he would not be able to manage all of the expenses with the amount he receives from the Department of Community Services.

[24] He claims that he is not disabled from work, and, as he is still searching for work, he has not made an application for benefits under the Canada Pension Plan for long-term disability.

[25] He agrees that he has not paid any support since August 2002.

### **Issues**

[26] Is Mr. Schaller required to pay child support and if so, in what amount?

[27] Is Mr. Schaller required to pay extraordinary expenses?

### **Legal Analysis**

[28] Under the *Maintenance and Custody Act*, the Federal *Child Support Guidelines* have been adopted with minor modifications. As a result, the non-custodial parent is required to pay child support for the child in accordance with his income.

[29] In this case, the applicant is seeking support from the date of the

application, which was filed in August 2002 and served on Mr. Schaller in September 2002. Up until the end of October 2002, Mr. Schaller was earning \$3,300 per month. From October 2002 to October 2003, he received employment insurance benefits of \$344 net each week. Mr. Schaller started receiving social assistance in January 2004.

[30] Based on my calculations, Mr. Schaller should have been paying child support in the amount of (i) \$303 per month from October 1, 2002 to October 30, 2002, (ii) \$159 per month based on an annual income of \$20,000 from November 1, 2002 to October 30, 2003 and (iii) \$28 per month from January 1, 2004.

[31] Mr. Schaller is in no financial position to pay arrears and consequently the payment of arrears is suspended until his financial circumstances improve. However, from and including January 1, 2005, Mr. Schaller is directed to pay the amount of \$28 per month to the maintenance enforcement program in Sydney, Nova Scotia or such other appropriate authority.

[32] The claim for extraordinary expenses is, for specialty milk of \$1000 per year, day care and associated transportation of \$3000 per year and special drugs or medication in the amount of \$200 per year for a total of \$4,200 per year.

[33] Under Section 7 of the *Nova Scotia Child Maintenance Guidelines*, provision is made for the payment of extraordinary expenses such as those claimed by Ms. MacDonald. The underlying test of whether the non-custodial spouse should pay a portion of these expenditures is set out in paragraph 7 (1). It provides as follows:

In a child maintenance order the court may, on a parent's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and, where the parents cohabited after the birth of the child, to the family's pattern of spending prior to the separation[Emphasis added].

[34] The important issue is, whether Mr. Schaller should be required to make a contribution towards the extraordinary expenses, given his income.

[35] The amount received by Ms. MacDonald as a child tax credit shall be included in her total income, resulting in her receiving \$979 per month while Mr. Schaller receives \$649.

[36] As necessary as these expenditures may be, I am satisfied on the evidence that Mr. Schaller is unable to meet these expenditures in any manner until his financial condition improves. As a result, Mr. Schaller shall not be required to contribute to these extraordinary expenses until such time as his financial condition improves. Although I do not have any evidence as to the exact breakdown of the expenses he is incurring each month, I am inferring that the amount of social assistance Mr. Schaller is receiving is predicated on a close examination of his expenditures. I would add there is no surplus available to Mr. Schaller to pay any extraordinary expenses of any kind. His monthly payment is \$644. His rent alone is \$475, leaving slightly more than \$170 to cover his remaining expenses.

[37] Consequently, given the level of income he is currently receiving I am not prepared to order that Mr. Schaller pay any extraordinary expenses and I am not making any order as to arrears. I have no evidence before me to establish what these extraordinary expenses were in 2002, 2003 or 2004.



[38] I have indicated to the to the parties that I will adjourn these proceedings until September 2005 to determine whether there is a basis for Mr. Schaller to have Ryan on overnight access visits, and, secondly, to determine what efforts that Mr. Schaller has made in securing employment in order to avoid any possible finding of underemployment or unemployment under Section 7 of the *Guidelines*.

[39] As the parties have had mixed results with both of their applications, I decline to award costs.

**J.**