IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacDonald v. MacDonald, 2005NSSC75

Date: 20050311
Docket: SFHMCA-029966
Registry: Halifax

Between:

Deborah Faylene MacDonald

Applicant

v.

Alan Blair MacDonald

Respondent

Judge:	The Honourable Justice R. James Williams
Heard:	March 10, 2005, in Halifax, Nova Scotia
Oral Decision:	March 11, 2005
Written Decision:	April 13, 2005
Counsel:	Christopher Berryman, for the Applicant Alan MacDonald, on his own behalf

By the Court:

[1] This is the matter of MacDonald and MacDonald. It concerns applications made under the *Maintenance and Custody Act* and *Matrimonial Property Act*. It concerns principally four issues: the question of care and control of Jenna MacDonald; the question of retroactive child support; the question of ongoing child support; and the division of property between the parties.

[2] Deborah MacDonald and Alan MacDonald married June 16, 1984. They have two children: Erica, born January 10, 1986; and Jenna, born November 8, 1990. The MacDonalds separated July 25, 2002, after 18 years of marriage. At or around that time Ms. MacDonald left their then home. Jenna has lived with her mother since the time of separation. Erica lived with her father from at or around the time of separation to approximately April of 2003 at which time she moved to her mother's home. She lived there until July of 2004. Erica now lives independently in Florida. She is attending school there.

[3] There is no application for support on an ongoing basis before me in relation to Erica nor any application respecting her care and custody. There is a claim for retroactive support with respect to Erica's time with her mother to July of 2004.

[4] Both parties are seeking custody of Jenna, age 14. It appears she wishes to live with her mother. She is doing reasonably well in school. Mr. MacDonald has a litany of complaints and concerns about Ms. MacDonald's parenting, from smoking to her being lax on rules, to her mental health issues, to her not working as she is on a disability. His concerns go on and on. Nowhere in his evidence did he indicate what responsibility he personally had for the marriage breakdown or, for that matter, for the current state of his relationship with his daughter Jenna. He seems rigid. He at times was very petty in his approach to things, at one point questioning Ms. MacDonald as to why she did Jenna's paper route when it was obvious that the reason for doing the paper route was Jenna's commitments to Junior High sports or other programs.

[5] Jenna does not see him pursuant to any regular schedule. This is unfortunate. It is not the way it should be. It is the way both parties have allowed the matter to evolve for the better part of two and a half years. She is 14. She is involved in a number of sports and activities. The court's mandate is to make an order consistent with her best interest. I have considered the provisions of the *Maintenance and Custody Act* as they relate to these matters and the support matters. Jenna has been with her mother

since the separation of her parents in July 2002, some two and a half years. She sees her dad, it would seem, a maximum of some six or seven days a month. As I've suggested, ideally it should be much more than this. Mr. MacDonald would at least acknowledge that his parenting style is dramatically different from Ms. MacDonald's. Mr. MacDonald would say hers is wrong, however. He acknowledges that he and Ms. MacDonald communicate very poorly. The evidence again makes this clear. The evidence is clear in indicating that he (Mr. MacDonald) has little respect for her (Ms. MacDonald) as a parent. He suggested Jenna should be with him for four out of seven days but acknowledges that she would not, in all likelihood, want this, saying in part or at times that Ms. MacDonald should make her do this. The custody arrangement that Mr. MacDonald suggests would be better for him. Clearly it would be better for him in terms of his relationship with Jenna. It would, however, entrench Jenna in the conflict between her parents. There is really no indication I have from the day's worth of evidence available to me that convinces me that this couple at this time is capable of much, if any, constructive communication.

[6] I conclude that it is not in Jenna's best interest to be placed in what is effectively a shared parenting situation between these two people. It is not

appropriate the court attempt to enforce (at this time) some sort of care-giving arrangement that approximates equal time between the parents. Such an arrangement would clearly require the parents to communicate on a regular basis around a variety of issues including, but certainly not limited to, the various activities Jenna is involved in. Attempting to force such an arrangement on Jenna at this time would, in my view, exaggerate the risk that she is at. I do conclude that the parenting situation she is in, and I include when I say parenting situation I mean that globally, including Mr. MacDonald and Ms. MacDonald, has and continues to put her at significant risk. I have concluded that it is in her best interest at this time to make an order as follows:

[7] She will be in the primary care of Ms. MacDonald. Ms. MacDonald will have the final decision making covering matters relating to Jenna's welfare. She will be in Mr. MacDonald's care at reasonable times as agreed by the parties and I would encourage Ms. MacDonald to attempt to implement some sort of arrangement that ensures that Jenna spends a minimum of six days a month with Mr. MacDonald at this time. And finally, I am ordering that there be a referral to the Assessment Services Clinic at the IWK Hospital to request a custody and access assessment that includes

psychological assessment of both parents, assessment of Jenna's wishes and request that they consider making recommendations for a longer term parenting arrangement. The evidence I have before me at this time is essentially simply the back and forth evidence of the two parties. I have considered simply making an order that ended the matter until the next applications or round of applications to the court and after consideration I have concluded that it is prudent that the court have more complete information before it and, quite frankly, that it would be a benefit to both parents (and their child) to receive independent information addressing their individual concerns with each other.

[8] The matter of custody and access will be scheduled for a review before me at the earlier of these two dates: a 15 minute review in the month of September of this year; or a review date scheduled approximately one month after the assessment is received.

[9] For the purposes of the assessment I would deem Ms. MacDonald's income to be $27,000 and Mr. MacDonald's income to be $28,000 per annum. Both will be required to contribute to the cost of the assessment in accordance with the fee scale of the court.

[10] The second issue between the parties relates to the division of assets pursuant to the *Matrimonial Property Act*. I have considered the provisions of the Act. In these circumstances I believe the court should be striving to achieve an equal division between the parties. Some of the evidence is less than totally complete concerning the nature of the debts before me. I have made conclusions based on the evidence as I find it before me. The assets and debts for division include the following: some $4,000 that was in a joint bank account at or shortly after the time of separation; a joint line of credit that approximated $3,370 at the time of separation; her VISA of $7,106 from a date shortly after the separation; his VISA in the amount of $6,198 from a date shortly after the separation; her pension, which is to be evenly divided between the parties for the years of cohabitation - this (the pension arrangement) has been agreed to by the parties.

[11] Mr. MacDonald has suggested that Ms. MacDonald should be responsible for a portion of a lease on the former matrimonial home. At the time Ms. MacDonald left the home they were in a rental accommodation with a monthly rent of some $1,000 a month. It is clear from the financial statements before me that accommodation expense of $1,000 a month was

probably a stretch for the parties at the time they were together and certainly would be an enormous amount of rent for one of the parties.

[12] Both parties have suggested that I also make adjustments in the payment of services and utilities that related to the home at or from the time that followed their separation. I have concluded that I would make no change in terms of the division of payment for the lease, service, utilities, et cetera, except as follows: Number one, with respect to the lease, Mr. MacDonald lived in the home and had the benefit of living in the home. I am concluding, essentially, that in terms of the marital breakup ultimately both parties are equally responsible for that. It is an 18 year marriage that ended. I am concluding that he should be responsible for the 13 months that followed their separation for $640 of the lease (that is the equivalent of his current rent). With respect to the remaining $360 a month, I would conclude that they should share that cost as one of the costs of the breakup of the marriage. Her share of that lease, then, is $180 times 13 months, or $2,340. Secondly, with respect to the power bill for September 2002, which is $103.21, and the insurance that Ms. MacDonald paid from January 2003 to May 2004 of $1,261.21, I am concluding she should be reimbursed those amounts. That totals $1,364.42. Setting off her reimbursement for that

power bill and the home and car insurance against her responsibility for the lease involves taking $2,340, the responsibility for the lease, subtracting the $1,364.42, the reimbursement for the services I referred to, leaving $995.58 payable by her. If one looks at the division of other assets and debts, we note that on his side of the ledger is $3,000 from the joint bank account, payment of $3,370 on the line of credit, payment of $6,198 on his VISA, a total of minus (-$6,568). On her side is $1,000 from the joint bank account she took and debts are VISA debt of $7,106, leaving a total of minus (-$6,106). The equalization payment between these amounts would be $231 payable by her to him.

[13] I am concluding that the bank account, like the line of credit, was joint and presumptively should be divided. Taking the $231 from this equalization and adding it to the $995.58 payable by her I have referred to leaves her owing him, at this point in this process, $1,226.58.

CHILD SUPPORT

[14] The evidence before me leads me to conclude that considering his income in 2003 and 2004 it is reasonable to treat Mr. MacDonald to have income for the purpose of Child Support Guidelines of $28,000 per annum. There is no reason disclosed by the evidence or through my consideration of the law as

outlined in *Conrad v. Rafuse* not to award retroactive child support in these circumstances (subject, however, to the adjustment that I will make shortly).

[15] Jenna and Erica were in Ms. MacDonald's care from January of 2004 to July of 2004, some seven months. The Table amount for child support for two children for $28,000 is $408 per month times seven months is $2,856. Jenna has been in the care of Ms. MacDonald from August of 2004 to the present. To the end of February from August is seven months. The Table amount for one child at $28,000 is $243. Seven times $243 equals $1,701. The arrears to the end of February then are $2,856 plus $1,701 equals $4,557.

[16] I would discount the arrears for $1,000 for money spent on clothes for Jenna and other expenses itemized by Mr. MacDonald. I will caution him that once the child support order is made it is extraordinarily unlikely that any court would make a similar discount for payments to third parties. His duty is to pay the child support, not to say he's spending money on clothes or something else in lieu of child support. The child support obligation comes first. Taking off the $1,000 I am discounting from the arrears, the arrears is reduced from $4,557 to $3,557.

[17] I previously indicated that Ms. MacDonald owes Mr. MacDonald, through the asset division, $1,226.58. If we take the, what I will refer to as the net arrears of $3,557 and credit what Ms. MacDonald owes Mr. MacDonald to that, $3.557 minus $1,226.58 results in a total arrears of $2,330.42 owed Ms. MacDonald by Mr. MacDonald. The child support order commencing the last day of March and continuing the last day of each month thereafter until further order of the court would be the Table amount of $243.

[18] There are s. 7 claims before the court, extraordinary expense claims. The claim with respect to a contribution to the graduation dress of Erica is not, in my view, the sort of expense contemplated by the Guidelines or courts as a s. 7 expense. Nor is the soccer expense claimed. I conclude that neither of them are expenses that are reasonably included as s. 7 claims. The orthodontic expenses are.

[19] Mr. MacDonald is unhappy that he was not consulted about the orthodontic work and in an ideal world he would have been consulted. I've referred already to the inability of this couple to communicate with each other and the lack of communication concerning the orthodontic work is, in part, a result of that. There can be no question that Mr. MacDonald's attitude to Ms. MacDonald, his judgment of her and his critical manner would do little

to encourage her to initiate communication with him. The orthodontic expense, though, is an appropriate s. 7 expense.

[20] The cost of the orthodontic expense that is over and above what is covered by medical plans is $3,050. There are payments of $127.08 per month for 24 months. The order will provide as follows: the Table amount for child support based on an income of $28,000 will be paid, as I've indicated, commencing the 31st of March, 2005, and continuing on the last day of each month thereafter until further order of the court. That amount is $243/month. Commencing on the last day of March and continuing for a period of 24 months, Mr. MacDonald will pay an additional sum of $63.54, being his contribution to the s. 7 expense for orthodontics. Commencing the 25th month Mr. MacDonald will pay $50 per month as a contribution to payment on the arrears of $2,330.42, which are fixed as of today's date. In making this order I have considered the reality that both of these people have limited income. The Child Support Guidelines are mandatory and direct the court as to the amounts based on income. The orthodontic cost is being shared and the arrears will commence to be paid once the orthodontic expense has been paid.

Williams, J.