SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *MacKinnon v. Billard*, 2017 NSSC 156

Date: 2017-06-02
Docket: *SFSNMCA* No. 050810
Registry: Sydney

Between:

Michelle MacKinnon

Applicant

v.

Brian Billard

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	April 27, 2017, in Sydney, Nova Scotia
Written Release:	June 2, 2017
Counsel:	Jennifer Anderson for the Applicant Alan Stanwick for the Respondent

By the Court:

FACTS:

[1] The parties were involved in a common-law relationship and have one child, E.B. who is now 11 years of age. Ms. MacKinnon filed a Notice of Variation Application under the **Maintenance and Custody Act**, R.S.N.S. 1989, c.160 (as amended) on May 2, 2014.

[2] The order of May 20, 2009 requires Mr. Billard to pay child maintenance in the amount of $189.00 per month, based on the Nova Scotia table and his income of $22,600.00.

[3] Ms. MacKinnon seeks increased child support based on the **Guideline** amount for Mr. Billard's income since the date of filing. Mr. Billard opposes her application, and seeks a reduction in the amount of support payable.

[4] Mr. Billard filed a Statement of Undue Hardship Circumstances on April 8, 2016. He has married since he and Ms. MacKinnon separated, and he now has a daughter and step-son who live with him.

[5] He requested income information from Kevin Guyomard, whom he alleges lives with or has lived, common-law with Ms. MacKinnon for purposes of his undue hardship claim.

[6] The parties agreed to proceed with a focussed hearing on the sole issue of whether Ms. MacKinnon is (or was) living common-law with Mr. Guyomard. The question of whether Mr. Guyomard should be required to provide financial disclosure for purposes of the undue hardship claim flows from that finding.

[7] A hearing was held on April 27, 2017. Both parties filed affidavits and testified, along with Mr. Guyomard, who appeared under subpoena.

[8] If Mr. Billard is able to establish a *prima facie* case of undue hardship, the court must conduct a comparison of household standards of living, to determine whether it will exercise its discretion to order him to pay less than the table amount of child maintenance to Ms. MacKinnon. The income, expenses, debts, and other legal obligations of each person in the household must be considered in evaluating the standard of living in each household.

[9] Section 2 of the **Child Maintenance Guidelines** made under s.55 of the **Maintenance and Custody Act** defines household to mean:

> "household" means a spouse and any of the following persons residing with the spouse
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> (a) any person who has a legal duty to support the spouse or whom the spouse has a legal duty to support;
>
> (b) any person who shares living expenses with the spouse or from whom the spouse otherwise receives an economic benefit as a result of living with that person, if the court considers it reasonable for that person to be considered part of the household; and

[10] Because I have been asked to answer only one question in this focused hearing, namely whether Ms. MacKinnon and Mr. Guyomard have been living common-law, I will not deal with the issue of whether Mr. Guyomard meets the definition of household member under the **Guidelines** otherwise.

ISSUE:

[11] Has Ms. MacKinnon been living with Mr. Guyomard common-law since May, 2014?

DECISION:

[12] Mr. Billard takes the position that Ms. MacKinnon and Mr. Guyomard have shared a common-law relationship from at least May, 2014 to the present time. Ms. MacKinnon denies this. She does acknowledge that she and Mr. Guyomard lived in a common-law relationship from May, 2016 to January, 2017. However, she denies that they shared a common-law relationship between May, 2014 and May, 2016 and from January, 2017 to date.

[13] The burden of proving, on a balance of probabilities, that Ms. MacKinnon has shared a common-law relationship with Mr. Guyomard since May, 2014 rests with Mr. Billard.

[14] The definition of "spouse" for purposes of the **Maintenance and Custody Act** and its **Child Maintenance Guidelines** is:

> (m) "spouse" means either of two persons who

> (i) are married to each other,
>
> (ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity,
>
> (iii) have entered into a form of marriage with each other that is void, if either or both of them believed that the marriage was valid when entering into it,
>
> (iv) are domestic partners or are former domestic partners within the meaning of Section 52 of the Vital Statistics Act,
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> (v) not being married to each other, cohabited in a conjugal relationship with each other continuously for at least two years, or
>
> (vi) not being married to each other, cohabited in a conjugal relationship with each other and have a child together. R.S., c. 160, s. 2; 1997 (2nd Sess.), c. 3, s. 1; 2000, c. 29, s. 3; 2012, c. 25, s. 1; 2015, c. 44, s. 3.
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> [emphasis added]

[15] According to this definition, Mr. Guyomard is considered Ms. MacKinnon's "spouse" because they shared a conjugal relationship and had a child together. I need not consider whether they lived together continuously for two years in a conjugal relationship to reach that conclusion. So the question still remains: for what period of time did they live together as common-law spouses ?

[16] Ms. MacKinnon cites a number of cases which have reviewed the factors to be considered in determining the separation date between spouses. Such factors include the sleeping arrangements between the parties, their outward presentation to family and friends, and financial considerations (see **Volcko v. Volcko,** 2013 NSSC 342 (affirmed on this point 2015 NSCA 11, leave to appeal denied [2015, SCCA No. 141])

[17] In **K.L.S. v. D.R.S.**, 2012 NBCA 16, the court cautioned that any list purporting to be *indicia* of separation cannot be exhaustive, as each case depends on its own facts. The court also noted that no one factor should be given undue weight. Instead, a determination whether parties are living separate and apart must be based on the "whole of the evidentiary record."

[18] As noted in Ms. MacKinnon's brief, the leading Ontario decisions on *indicia* of separation are **Taylor v. Taylor**, 1999 CanLII 14969, **Oswell v. Oswell**, 1990 CanLII 6747 (ONSC) and **Tesfatsion v. Berhane,** 2013 ONSC. In the latter case, the court noted:

> [50] As noted by Whitten J., all relationships are different and all or some of the criteria listed in the jurisprudence may exist within what that particular couple considers to be a normal relationship. What was normal for this particular couple and their usual pattern of married life must be carefully considered in order to determine what would constitute a departure.

[19] In **Wittich v. Wittich**, 2005 NSSC 265, B. MacDonald, J. had to determine what constitutes a common-law relationship in unusual circumstances. The applicant wife married her second husband, with whom she'd had a child several years prior. She and her second husband lived with her first husband, who was named as the child's father on the birth certificate.

[20] Justice MacDonald concluded that the wife had not met the burden of proving a common-law relationship prior to marriage. In doing so, she noted:

> **16** In Soper v. Soper (1985), 44 R.F.L. (2d) 308, 67 N.S.R. (2d) 49, 155 A.P.R. 49 (C.A.) Mr. Justice Morrison of the Nova Scotia Supreme Court, Appeal Division, approved of the decision of County Court Judge Hall in Jansen v. Montgomery (1982), 30 R.F.L. (2d) 332, 54 N.S.R. (2d) 267, 112 A.P.R. 267 (Co. Ct.) regarding common law relationships beginning at p. 314 where he quoted from Jansen:
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> > "From the foregoing it will be seen that to 'live together as husband and wife' connotes an element of permanence and commitment to each other by the parties to the relationship to a substantial degree. Certainly it should not be thought that every arrangement where a man and woman share the same living accommodations and engage in sexual activity to some extent should be regarded as living together as husband and wife. In these times men and women have a much more casual attitude toward sexual conduct than was prevalent even two decades ago.
> >
> > Now it is not unusual for a man and woman to live in the same apartment, sharing expenses, and engaging in sexual activity with each other, knowing full well that the relationship will not last for the rest of their lives and will likely end when another person comes along or circumstances change. In my opinion such a relationship does not come within the definition of 'spouse' as set out in the [Family Maintenance] Act."
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> **17** Mr. Justice Morrison then observed:
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> > "I think it would be fair to say that to establish a common law relationship there must be some sort of a stable relationship which involves not only sexual activity but a commitment between the parties. It would normally necessitate living together under the same roof with shared household

> duties and responsibilities as well as financial support. I would also think that such a couple would present themselves to society as a couple who were living together as man and wife. All or none of these elements may be necessary depending upon the intent of the parties." [emphasis added]

[21] The difficulty for Mr. Billard is that a party who pleads undue hardship, and claims that a former partner is living common-law with someone else, has little ability to assess the situation and provide evidence to satisfy the factors enumerated above. He was not privy to the details of Ms. MacKinnon's new relationship. Instead, he relies on circumstantial evidence, from which he asks the court to draw certain inferences.

[22] Mr. Billard disputes Ms. MacKinnon's claim that between February, 2013 and July, 2013 she lived in the basement of Mr. Guyomard's home. He acknowledged on cross-examination that although he'd seen his daughter's room in the home, he cannot say whether there are self-contained living accommodations in the basement. Not surprisingly, he advanced no evidence on factors such as whether Ms. MacKinnon shared a bed with Mr. Guyomard, or how they presented in social settings during that period.

[23] Instead, he bases his claim that there has been a continuous common-law relationship since at least May, 2014 on the following:

- Ms. MacKinnon enrolled their daughter in school in Westmount in 2014, using Mr. Guyomard's address.
- On several occasions when he called Ms. MacKinnon's apartment in Halifax after she moved there in June, 2015, Mr. Guyomard answered the phone.
- Ms. MacKinnon and Mr. Guyomard had a joint bank account together.

[24] Mr. MacKinnon asks the court to infer from this evidence that Mr. Guyomard was living common-law with Ms. MacKinnon after May, 2014.

[25] Mr. Guyomard filed an affidavit and testified. He says that:

- He and Ms. MacKinnon lived common-law for a period of time before 2013 but separated in February, 2013 for the first time.
- She moved into the basement of his home in February, 2013.

- He returned to work in Alberta shortly after separation in 2013.
- He paid child maintenance after separation, through a joint bank account.
- Ms. MacKinnon lived in the home until July, 2013 when she moved out to pursue a romantic relationship with a new partner. She lived with her mother in Bras D'Or from July, 2013 to January, 2014.
- Ms. MacKinnon moved back into his Westmount home in January, 2014 at his request.
- The home was vacant and had been damaged by ice and water. He needed someone to monitor and maintain the property.
- He allowed her to live in the home rent free while he worked out west. When he came home on rotation, she would vacate and stay with her mother.
- He did not move to Halifax with Ms. MacKinnon, nor did he live with her while home on rotation.
- Between December, 2015 and May, 2016 Ms. MacKinnon travelled back and forth from Halifax when he was home on rotation in Westmount, in an attempt to reconcile.
- They reconciled and she moved back to his Westmount home in May, 2016.
- They separated again in January, 2017.

[26] The evidence with respect to the "norm" when Ms. MacKinnon and Mr. Guyomard were living together as a couple is scant.

[27] They appear to have shared a fluid relationship which does not necessarily fit the "norm". I accept that they lived together in a conjugal relationship during two separate periods of time (early 2012 – February, 2013 and May, 2016 – January, 2017), and that they shared the same home at other times, while separated. As noted in **Taylor** (*supra*), what is unusual for one couple may be normal for another. And while certain factors may be *indicia* of a common-law relationship, not all relationships operate the same.

[28] Mr. Billard suggests it defies logic that Ms. MacKinnon and Mr. Guyomard were sharing a home after January, 2014, yet claim they were separated. While it may seem unusual to an outside observer, I accept that Mr. Guyomard offered his

home to Ms. MacKinnon on a rent free after January, 2014 because he needed someone to live in it. This arrangement benefitted him. He wasn't leaving the home vacant, and he was providing a home for his child. As he described it in his affidavit, this was a "win win" situation for him.

[29] Mr. Guyomard knew that Ms. MacKinnon was involved in new relationships during their separation. He says he had no problem with her inviting new partners into his home. I accept his evidence in this respect. Mr. Guyomard presented as a credible witness. He testified in a strait-forward manner, did not prevaricate, and he has no motive to mislead. He firmly rejected the suggestion that he and Ms. MacKinnon lived together as a couple between May, 2014 and May, 2016.

[30] No doubt there are cases where there is a motive to deceive. This could include a desire to assist a former spouse in obtaining child maintenance or to avoid financial disclosure. However, Mr. Guyomard acknowledged in his affidavit that he and Ms. MacKinnon were (as of July, 2016) living together as common-law spouses. So that motivation is absent.

[31] And he has not expressed an unwillingness to disclose his private financial records. In fact, Mr. Guyomard attached a copy of his EI benefits statement, as well as his record of Employment, to his affidavit. He also made disclosure of his bank account records voluntarily. The subpoena compelling his attendance did not require him to bring any documents to court. Again, such a motivation to mislead is absent.

[32] Mr. Guyomard testified that he opened a separate bank account in December, 2016, just shortly before the parties separated the second time. He acknowledged that, prior to opening this account, he and Ms. MacKinnon shared a joint account into which he deposited funds for child support after separation.

[33] Mr. Billard suggests that an inference should be drawn that Mr. Guyomard and Ms. McKinnon shared a joint bank account until recently, because they were still living common-law. I am not persuaded.

[34] Mr. Guyomard provided statements to show that he stopped depositing his payroll to the joint account in February, 2014. He also provided statements to show that when he deposited funds to the account, Ms. McKinnon would withdraw them. I am satisfied that the only reason Mr. Guyomard and Ms. McKinnon left that account open after their first separation was for payment of child support. I do not accept or infer that it proves their ongoing common-law relationship.

[35] Mr. Billard suggests that when couples break up, one party always leaves. But that ignores the realities of the situation. Ms. MacKinnon did not have her own home, and when she was not living in Mr. Guyomard's home, she was either living with her mother or with her boyfriend. Financially, the arrangement made sense for both her and Mr. Guyomard.

[36] It is not a reasonable inference to conclude that all separated couples live under different roofs. Many couples live in the same home after separation for financial reasons. It does not mean they are still living in a conjugal relationship. During their separations, Mr. Guyomard was pursuing new relationships. He had no problem with Ms. McKinnon doing the same. He did not have to share the home with Ms. McKinnon and her new partner when he was home, so it caused no friction.

[37] I make the following findings of fact and draw the following inferences based on the evidence:

1. After Ms. MacKinnon and Mr. Guyomard separated in February, 2013 she lived in the basement of his home, which comprises separate accommodations within the home. They no longer shared a conjugal relationship.
2. Ms. MacKinnon moved out of the home in July, 2013 when she became involved with a new partner. That relationship ended in April, 2014.
3. She moved back to the Westmount home in January, 2014 at Mr. Guyomard's request, and enrolled her daughter E.B. in the local school, using Mr. Guyomard's Westmount address.
4. While living in Westmount, Ms. MacKinnon paid no rent, but paid her own utilities and other costs of living.
5. While living in the Westmount home, Ms. MacKinnon vacated to live with her mother during Mr. Guyomard's periods of residence. He lived in the home and exercised access with his daughter while home on rotation.
6. Ms. MacKinnon moved to Halifax in June, 2015 where she established an apartment in her own name, and paid her own utilities and bills.

7. In May, 2016 Mr. Guyomard and Ms. MacKinnon reconciled and she moved back to his Westmount home. They resumed their conjugal relationship.

8. Ms. MacKinnon and Mr. Guyomard separated again in January, 2017. They no longer shared a conjugal relationship. Ms. MacKinnon is now dating a new partner, with whom she lives from time to time.

9. Ms. MacKinnon's older daughter E.B. was enrolled in school for the 2016-2017 academic year in Westmount after the parties reconciled, and she continues to attend school there.

[38] The fact that Ms. MacKinnon's child remains enrolled in school in Westmount this year does not detract from my conclusion that the parties separated again in January, 2017. Ms. MacKinnon testified that E.B. stays with Mr. Guyomard during the week, while she stays with her new boyfriend in Louisdale. Again, while this arrangement may seem unusual, it makes sense. E.B. has been transferred from Westmount to Bras D'Or schools on two occasions. One of those transfers was in the middle of the school year. Allowing E.B. to complete the school year in Westmount avoids the disruption of transferring her to a new school when Mr. Guyomard and Ms. MacKinnon separated again in January, 2017. I do not infer from this decision that Ms. MacKinnon and Mr. Guyomard are continuing their common-law relationship.

[39] I further decline to draw an inference, from the fact that Ms. MacKinnon lived at the Westmount home from time to time and used that address for the child's school records, that she and Mr. Guyomard shared a common-law relationship continuously from May, 2014 to present.

[40] Mr. Billard argues that, looking at all of the facts objectively, one must reasonably conclude that Ms. MacKinnon and Mr. Guyomard lived common-law much earlier than May, 2016. I do not accept that as the only reasonable (or most likely) conclusion based on these facts.

[41] Justice Rosinski addressed the drawing of inferences in civil cases in **Boyce** v. **Abousamak,** 2014 NSSC 258, in which he cited Richard, J. in **High Land Fisheries Ltd. v. Lynk Electric Ltd.** [1989] NSJ no.323 [SCTD] at paragraphs 33 and 34:

> 'I find that, in the opinions of [2 expert witness electrical engineers] ,there are just too many unanswered questions to permit me to bridge the gap between speculation and probability...
>
> The burden of proof rests with the Plaintiff and in this case the burden has not been met... I adopt, as did MacIntosh J. in *Italian Village Limited v. J.A. Moulton & Son Limited* (1981) 47 NSR(2d) 14 the following comment of Doull J. in *F.G. Spencer Company Limited v. Irving Oil Company Limited* (1951) 28 MPR 320 at 363:
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> "In civil cases, it is usually sufficient that as between the parties, the plaintiff prove his case by a preponderance of evidence. In applying this rule to cases which depend upon inference from facts, the plaintiff must show that the inference upon which the case depends, is a reasonable inference and in order to turn the scale, he must be prepared to weigh that inference against any other suggested explanation and show that his explanation is more reasonable. If it appears that some contrary explanation is equally reasonable, the plaintiff must fail." [emphasis added]

[42] Inferences should only be drawn where there is a solid evidentiary basis. They may be drawn to "connect the dots", but not to plug any holes in the evidence. Inferences must be reasonable, given all of the evidence (or the absence of evidence). Where other reasonable inferences can be made, a trier of fact in a civil case must engage in a balancing exercise by asking: is the conclusion the court is asked to draw the more likely conclusion or not ?

[43] In this case the answer is no, the inference the court is asked to draw is not more likely. Instead, there is clear and cogent evidence to support the conclusion urged upon me by Ms. MacKinnon, namely that she and Mr. Guyomard did not live together as common-law spouses continuously after May, 2014. Mr. Billard has not met the onus on him of proving otherwise. The only period after May, 2014 during which she and Mr. Guyomard shared a common-law relationship for purposes of Schedule II of the **Guidelines** is May, 2016 through to January, 2017.

MacLeod-Archer, J.