S.C.A. No. 02675

NOVA SCOTIA COURT OF APPEAL

Chipman, Roscoe and Freeman, JJ.A.

Cite as: MacSween v. MacSween, 1993 NSCA 10

BETWEEN:

CYNTHIA JOANNE MACLEOD-MACSWEEN Elizabeth Cusack Walsh Appellant	for the Appellant
- and -	Theresa M. Forgeron for the Respondent
GLEN NEIL MACSWEEN Respondent	
	Appeal Heard: January 29, 1993
	Judgment Delivered: February 11, 1993

THE COURT: Appeal allowed in part, without costs, per reasons for judgment of Roscoe, J.A.; Chipman and Freeman, JJ.A. concurring.

ROSCOE, J.A.:

The appellant mother appeals the decision of County Court Judge Ryan awarding custody of the child of the marriage to the respondent father pursuant to the **Divorce Act**, 1985. The child, Neil, is five years old.

Mrs. MacLeod-MacSween is thirty-six and Mr. MacSween is thirty-eight years old. The parties married in January 1985 and separated in August 1991. The mother is a full time school teacher and the father is an electrical apprentice, who is generally unemployed in the winter months. The mother has upgraded her education by taking summer courses for three, five week sessions in Truro, Nova Scotia. The father has similarly taken training away from home for a period of six weeks.

There was conflicting evidence presented at the trial respecting which parent performed the majority of the child care and household chores. Evidence was presented by the four grandparents who each described their contributions.

Friends and other relatives also testified about their observations of the parenting activities of the parties.

In his decision, the trial judge indicated that the question of custody had to be determined on the basis of the best interest of the child. He found that "the parties cannot relate to one another in the manner necessary to make joint custody work". After reviewing the evidence he found as a fact that the father performed many of the household chores and the child care duties as a result of his having more time at home. He was very impressed with the father's parents and their contribution as babysitters. Their support and involvement in their son's plan was an important factor in awarding the father custody. The trial judge also appeared to have accepted the evidence of Mr. MacSween's sister and her husband and his cousin about the positive interaction of Mr. MacSween and the child. They all referred to him as "Mr. Mom".

The appellant lists five grounds of appeal which can be summarized as contentions that the trial judge improperly considered the conduct of the appellant and her father, disregarded or gave insufficient or undue weight to some of the evidence and failed to appreciate the significance of or misinterpreted other evidence.

This court has stated on many occasions that the question of custody is a matter which lies within the realm of the discretion of the trial judge who has the opportunity of seeing and hearing the parties and his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded the evidence. See for example **Routledge v. Routledge** (1987), 75 N.S.R. (2d) 103.

The appellant argues that the trial judge has simply accepted the respondent's evidence without subjecting it to a critical analysis and suggests that this court must therefore re-assess the evidence. Although this court must review the record carefully to ensure the trial judge did not make findings in the absence of evidence or fail to consider material evidence, we cannot substitute our opinion or assessment of the evidence for that of the trial judge. In custody matters, perhaps more so than in any other type of case, the trial judge's advantage of seeing and hearing the parties while testifying must be respected. We cannot assess credibility or sincerity or detect hostility or exaggeration from the words on a printed page. That is a function reserved for the trial judge.

This court cannot re-try the issue. Even if a different emphasis were given to factors considered by the trial judge or a different conclusion were reached by this court, we must not interfere unless there is an error in law or an overriding error which affected his assessment of the facts.

We have carefully reviewed the record and the extensive arguments and are unable to find that the trial judge proceeded on a wrong principle or made any error in law on the custody issue.

The appellant also seeks increased access which takes into account the fact that she has a two month summer holiday annually, a request that was not strenuously opposed. While the trial judge in his access order gave specific reasons for his decision in respect to all the other detailed access ordered, he did not explain why the summer vacation access was limited to two weeks plus the regular bi-weekly weekend access.

In order to give effect to the requirement of s. 16(10) of the **Divorce Act** that a child should have as much contact with each parent as is consistent with his best interests, and taking into account that the mother has all summer

off from work, while the father does not, it is my view that summer access to the mother should be extended. I would order that the appellant have access in the summer each week from Sunday at 8:00 p.m. to Friday at 5:00 p.m., effective the first Sunday following the end of the school year and continuing until the Friday before Labour Day. This summer access shall be suspended during the vacation access specified for each parent in clauses 1.2(c) and 2.1(d) of the Corollary Relief Judgment.

In all other respects the decision and orders of the trial judge are confirmed.

The appeal is allowed in part, without costs.

J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.