

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacIntyre v. Chaput, 2008 NSSC 201

Date: 20080418

Docket: SFSNMCA036751

Registry: Sydney, Nova Scotia

Between:

FRANCIS CHAPUT

Applicant/Respondent

v.

SHERRY MacINTYRE

Respondent/Applicant

DECISION

Judge: The Honourable Justice Darryl W. Wilson

Heard/Oral Decision: April 18, 2008

Written Reasons: June 24, 2008

Counsel: Darlene MacRury, Counsel for Mr. Chaput
David Raniseth, Counsel for Ms. MacIntyre

By the Court:

[1] Sherry MacIntyre (Applicant) and Troy Chaput (Respondent) are the parents of Braydon Troy Chaput, born May 23, 1999. Each parent is seeking a court order granting them custody of their son. Child support is also being sought by the Applicant. This proceeding is taken pursuant to the Maintenance and Custody Act.

BACKGROUND

[2] The mother, age thirty-two (32), and the father, age thirty-one (31) were never married. They began a dating relationship in 1997. At that time, the mother was the parent of Marie, age two (2), from a prior relationship. The father relocated to Alberta in the Fall of 1997 and the mother and her child, Marie, joined him a short time later. They lived together in Lloydminster, Alberta where both were employed. Braydon was born in May, 1999. The mother took maternity leave. She returned to Cape Breton in October, 1999 and resided here until January, 2000. The father returned to Cape Breton for the Christmas holidays in 1999 and the family returned to Alberta in January,

2000. The mother nursed Braydon and was primarily responsible for his care. The father assisted the mother with child care when they were together.

[3] After Braydon's birth, the parties experienced a "rocky" relationship while residing in Alberta. The mother relocated to Cape Breton in August, 2001 with her children. The father, who had a good job, remained in Alberta. However, he missed his son and in November, 2001 quit his job and relocated to Cape Breton.

[4] The parties resumed their relationship after the father's return to Cape Breton. It was described as an "on/off" relationship. They would live together for a few months and live apart for various periods of time. The father lived with his parents during these splits and the child continued to reside primarily with his mother. Although there was no fixed visitation schedule, the father had regular access including overnights at his parents' home during the times the parties were living apart. This on/off relationship continued until August, 2004, when the parties separated for the last time. They attempted to work out a parenting arrangement without going to court, but were not successful.

[5] Court proceedings were initiated by the mother on December 30, 2004 and the father on January 12, 2005. Both parties made ex-parte applications seeking substantive relief. The mother's ex-parte application of January 14, 2005 alleged the father was refusing to return the child after an access visit. Notice was given to the father of the mother's application and an interim order dated January 18, 2005 provided that the parents would have interim joint custody of their son, with the mother caring for him during the school week and the father caring for him from Fridays after school until Sunday at 6:00 p.m.

[6] The conciliator issued a child support order dated July 29, 2005 requiring the father to pay child support of \$224.00 per month. This order was replaced by a consent interim order dated August 21, 2007 requiring the father to pay child support of \$336.00 per month. The father's ex-parte application of June 23, 2005, which alleged frequent changes of residence by the mother and unacceptable living conditions in her home did not proceed to a hearing. A referral was made to the local child protection agency

concerning inappropriate supervision which was investigated but not substantiated.

[7] The mother presently is residing with her children on Dolphin Crest, Glace Bay. She is in good health. She graduated from high school and attended the Cape Breton Business College. She is in receipt of Social Assistance Benefits, Child Tax Benefits and child support. She plans on attending the Marconi Community College in the Fall of 2008 to take a welding course. Since returning to Cape Breton in 2001, she primarily has cared for her children. However, in 2006, she was employed on a casual basis at Sobey's and the Nova Scotia Liquor Commission. She became pregnant with her third child, who was born on March 7, 2007. She was not entitled to maternity benefits and has stayed at home providing child care to her children.

[8] In 2005, she was charged with fraud and in March, 2007 was convicted on seven (7) counts. Her sentence was two (2) years' probation which will expire in March, 2009. She cannot explain why she committed fraud. There was a time in early 2005 when she was estranged from her parents.

[9] The father resides in his own home, a one-story two-bedroom residence located on Donkin Highway, Donkin, Nova Scotia. After returning to Cape Breton in 2001, he applied for entry into the military and for a position with Casino Nova Scotia-Sydney. He was able to obtain employment at the casino, which turned into a full-time position after two (2) months. He also has been employed as a correction officer for the last four (4) years. Although this work is classified part-time, he works three 12-hour shifts a week. His work schedule varies depending on the season. He left his position at Casino Nova Scotia last year because the work demands of two (2) jobs left little time to be with his son. He earned \$38,543.00 in 2007, which includes \$31,784.00 as a correction officer and \$6,759.00 from Casino Nova Scotia.

[10] The mother initiated criminal proceedings against the father in 2004 and the father agreed to an Undertaking. The parties had reconciled by the date of the court hearing and the criminal charges against the father did not proceed to trial. According to the father, he has always been an active parent. After his return from Alberta in 2001, he assisted the mother with child care and when the parties were living separate and apart, he frequently cared for Braydon at his parents' home. Since the parties' final separation in the Fall

of 2004, Braydon has resided with him on a regular basis each week in accordance with the terms of the interim order. He said he attempted to remain friends with the Applicant after their separation for their son's sake. There is very little communication between them at this time. He speaks to the mother's parents more frequently than he speaks to the mother about Braydon's care.

[11] The father is concerned about the mother's parenting practices. According to him, she changed residences five (5) or six (6) times in the last two (2) years. She allows Braydon to spend a great deal of time with her parents. On occasion, she leaves him alone at home while she goes to a coffee shop. She does not see that Braydon gets the extra help he needs with his school work. She allows him to spend three (3) days a week with his grandparents, who are not able to provide the help he needs. Media reports of the mother's fraud trial indicated that she told the Court drug use was the reason why she committed fraud. The mother has denied telling the Court drug use was the reason she committed fraud.

[12] The father knows Braydon receives good care when he is with his maternal grandparents. However, he wants to be Braydon's primary caregiver if the mother is unable or not willing. The father is actively involved in his son's activities. He speaks to his teachers at Parent Teacher, and helps with his homework. He attends his ice hockey and floor hockey games and practices. Braydon has been baptized catholic and he takes him to church. He has a basketball net for him in his driveway and enrolls him in baseball during the summer months. The mother is not able to attend Braydon's activities because she of her responsibility of caring for a young children at home. The father has medical coverage for Braydon through his work and has taken him to the doctor and dentist.

[13] Braydon is described as a very likeable child who has several good friends, both in Glace Bay in the area where his maternal grandparents reside and in Donkin where his father's family reside. Braydon has attended school at St. Ann's in Glace Bay and Mt. Carmel in New Waterford. At present, he is attending St. Ann's School in Glace Bay. If he was placed in the custody of his father, he would attend school in Donkin.

[14] The interim order indicated the mother was to provide transportation. At present, either the father, his parents or his sister or the mother's father provide transportation.

[15] The father is concerned that the mother still engages in risky behaviours despite being on probation for fraud. The father said that he provides a series of post-dated cheques when paying his child support order. His January, 2008 cheque was returned NSF. The date of the cheque had been altered and the cheque cashed three (3) weeks prior to its usual date. The father's initials on the cheque, altering the date were not put there by him. The mother endorsed the back of the cheque, which was cashed at an ATM using the maternal grandmother's bank account. The mother denied altering the date on the cheque. There was no explanation as to why this child support cheque was cashed on an earlier monthly date than the other child support cheques.

[16] Braydon has a close relationship with his parents' families. The mother's father, Michael MacIntyre, testified that Braydon is with him and his wife three (3) days a week. They give him a lot of attention. He drives

Braydon to school when he does not take the bus and either he or the father take Braydon to hockey practices and hockey games. Braydon has a very good friend who lives next door to Mr. MacIntyre.

[17] There was a time Mr. MacIntyre was concerned about his daughter's mismanagement of money and spending too much time out of the home. He does not have these concerns now because recently she obtained a regional housing unit which has fixed rent and heat costs based on her income and she is home more to care for Braydon. Mr. MacIntyre described Braydon as a healthy kid who is polite and follows the rules. His daughter's other children visit but do not spend as much time with them as Braydon. When the mother was evicted from her apartment in Dominion earlier this year, she and the children stayed at a friend's home for a short period of time.

[18] Mr. MacIntyre and Braydon's father communicate about Braydon's care and although they don't always agree, he acknowledges that Braydon has a very good relationship with his father. He worries about who will care for Braydon when his father is at work, that Braydon will have to change schools and will lose regular contact with his sisters if the father is granted custody.

[19] The father's parents and sister live in close proximity to him in Donkin. His mother, Wendy Chaput, and his sister, Tammy Chaput, testified that they are available to care for Braydon if requested by his father. Braydon has spent time, including overnights, at each of their residence. They also testified that the father is the one responsible for caring for Braydon and Braydon and his father have a very close relationship. They agree that Braydon is a well-mannered and polite child, who is loved by both his mother's and father's families. Braydon participates in sports in Donkin during the summer vacation and spends time with his cousins and friends when staying with his father each weekend.

[20] The mother acknowledges residing at several residences in the last two years, including two (2) in New Waterford, as well as in Dominion and Glace Bay. In most cases, she moved to save money. Earlier this year she was forced out of a home in Dominion which she rented from people who did not inform her the mortgage on the home was being foreclosed. She is now living in an apartment owned by the Regional Housing Authority and expects to have a stable residence for the future.

[21] Her relationship with the father of her youngest child ended two (2) years ago when he assaulted her. Braydon was present when the assault occurred. She has not had a long-term relationship with anyone since that time.

[22] The mother agreed that Braydon has a very good relationship with his father. Most of her communication with Braydon's father is through her own father, Michael MacIntyre. Braydon spends time at his grandparents' home because he wants to be there and has a good friend who lives in the neighbourhood. The mother's residence is only five (5) minutes from her parents' residence.

[23] Her oldest daughter acted as a babysitter when she went on short trips to the grocery store only after her daughter received a certification by the St. John's Ambulance Society in October, 2007 for attending a babysitting course.

[24] **THE LAW**

Section 18(5) of the **Maintenance & Custody Act** states as follows:

(5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration. R.S., c. 160, s. 18; 1990, c. 5, s. 107.

[25] Justice J. McIntyre of the Supreme Court of Canada, noted the following in **KING v. LOW** (1985), 4 R.F.L. (2d) (.C.C., McIntyre, J.) p. 126:

I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate, must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion, where it is clear that the welfare of the child requires it, however, they must be set aside.

CONCLUSION

[26] I find that it is in Braydon's best interests that the parties be granted joint custody with primary physical care and control to be with the father, subject to the mother having reasonable periods of physical care and control set out

hereinafter in this decision. Although the parties have not communicated much in the last three (3) years, both parents have been involved in his care on a consistent basis over the years and Braydon has been able to develop a positive relationship with each of his parents' family. The parties are to consult with regard to all decisions involving Braydon, however, in the event of disagreement, the ultimate decision shall be that of the father. Each party is entitled to make emergency decisions regarding the child while he is in their physical care and then notify the other party promptly of the circumstances. Neither party was opposed to a joint custody order being issued. Each was seeking primary care of Braydon.

[27] I find both parents love Braydon and are capable of providing Braydon with the care required. However, I find the father is more attentive to Braydon's needs, including his schooling, activities and medical care, whereas the mother seems more inclined to allow the father and her parents to care for Braydon.

[28] Since the interim order has been issued, the father has provided a stable home, has maintained regular employment and has shown an active

and consistent interest in Braydon's activities and well-being. The mother, on the other hand, has placed the children's need for stability and security at risk by changing her residences on several occasions, committing fraud and being subject to a criminal sanction, involving herself in a relationship in which Braydon was exposed to an assault on her, and allowing her parents to assume a primary role caring for Braydon when he is in her custody.

[29] Although the interim order provided that the mother would have primary care of Braydon five (5) days per week and the father on the weekends, Braydon's care during the week has been split between her and her parents. Braydon is now nine (9) years of age and entering a new phase of his life where he needs structure and stability. Braydon is described as a polite, well-behaved child who gets along with both his mother and father's family. The father has been an active and involved parent in Braydon's life and has cared for him on a weekly basis for many years. He has the support of his parents and sister to assist him in the care of Braydon.

[30] The Court is aware that altering primary care of Braydon to his father will impact on the amount of time he has with his siblings. The mother has

already reduced Braydon's contact with his siblings by allowing Braydon to spend significant time without his siblings at her parents' home. A generous access order will provide for continuing sibling contact. I find there is minimal risk of harm to Braydon by altering the current parenting arrangement considering Braydon's age and the active involvement of his father and his father's family in his life during the last few years.

ACCESS

[31] At the conclusion of the hearing in April, the Court indicated that the interim order would continue until the end of June at which time the primary care of Braydon would change. It also allowed the parties time to work out their own access arrangement given this change in primary care of Braydon. The Court was recently advised that the parties were unable to arrive at an agreement with respect to access. The Court, therefore, determines the following access with his mother to be in Braydon's best interests:

[1] Beginning with the first Friday after the start of school in September, 2008, every second weekend beginning Friday at 5:00 p.m. until Sunday at 6:00 p.m.

[2] One overnight per week from after school until school the next morning. The mother will be responsible for pick-up and drop-off of Braydon from school.

[3] The mother shall be entitled to have four (4) weeks during each summer, between July 1st and September 1st, with no more than two (2) weeks at a time, excluding the week before the start of school, unless otherwise agreed between the parties. If Braydon is participating in activities during the time he is in the care of the mother, she is to ensure that he attends these activities.

[4] March Break 2009, and each March Break thereafter shall commence the Friday preceding the March Break week at 5:00 p.m. and extend until the Sunday ending March Break week at 5:00 p.m. March Break shall be alternated yearly, commencing with the father in 2009. The parties may wish to consider splitting this time if the parents do not intend to travel.

[5] Easter shall be alternated, beginning in 2009 with the father and shall extend from 5:00 p.m. on Holy Thursday until Easter Monday at 5:00 p.m.

[6] Commencing on Mothers' Day 2009 and every Mothers' Day thereafter, Braydon shall be with the mother and should Mothers' Day fall on a weekend in which Braydon is with the father, Braydon shall be returned to the mother at 9:00 a.m. on Mothers' Day.

[7] Commencing on Fathers' Day 2009 and every Fathers' Day thereafter, Braydon shall be with the father and should Fathers' day fall on a weekend Braydon is with the mother, he shall be returned to the father at 9:00 a.m. on Father's Day.

[8] Commencing on the father's birthday and every birthday thereafter, Braydon shall be with the father and should his birthday fall on a weekend or time when Braydon is with the mother, Braydon shall be with the father from 9:00 a.m. to 5:00 p.m., and if during a weekday, from 5:00 p.m. to 8:00 p.m.

[9] The same provision shall hold true with respect to the mother's birthday.

[10] Each parent shall have at least a 3-hour period with Braydon on his birthday.

[11] The mother shall have the right to review the medical and educational records of Braydon and to speak directly with teachers, caregivers, doctors and others involved with Braydon and to ask and receive information relating to his health, education and welfare from professionals involved. The father is to ensure that the mother is kept informed about Braydon's activities including providing her with copies of all school, education, medical and other reports.

[12] Braydon shall be able to communicate with his mother or father when in the care of the other parent and each parent shall facilitate him in contacting the other parent by phone, email, etc.

[13] Christmas shall be alternated so that each party shares Christmas Eve and Christmas morning, commencing December 24, 2008 at 9:00 a.m. until December 25th at 1:00 p.m. and with the other parent from December 25th 1:00 p.m. until December 26th at 5:00 p.m., and the rest of Braydon's Christmas holidays during the school year shall be divided equally between the parties. Braydon shall be with his father on Christmas Eve/Christmas Day 2008.

[14] The mother shall have such other parenting time with Braydon as the parties may mutually agree upon.

[15] Except for Paragraph [2] above, transportation is to be provided by the father at the start of each visit and by the mother at the end of each visit, unless the parties agree otherwise.

[32] There will be no order for child support. The interim order is rescinded effective June 30, 2008.

Justice Darryl W. Wilson