

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacKeigan v. Reddick 2007 NSSC 300

Date: October 19, 2007
Docket: 32262
Registry: Sydney

Between:

Richard MacKeigan

Applicant/Respondent

v.

Sandra Reddick

Respondent/Applicant

DECISION

Judge: The Honourable Justice Theresa Forgeron

Heard: April 12, 2007; May 10 & 11, 2007

Written Decision: October 19, 2007

Counsel: Daniel Burman, for Richard MacKeigan
David Campbell, Q.C. for Sandra Reddick

By the Court:

I. Introduction

[1] Brady Reddick is almost four years old. He is loved by his mother, Sandra Reddick and by his father, Richard MacKeigan. According to the last court order, Brady was to have the benefit of a joint custodial, parenting arrangement. The order required Brady's parents to work together to ensure that Brady's best interests were met. Unfortunately this did not occur. Brady has suffered as a result.

[2] Mr. MacKeigan seeks to vary the current order as he wishes to become the primary care giver of Brady. Mr. MacKeigan is not opposed to a continuation of the joint custody provisions.

[3] Ms. Reddick wishes the current order to continue with the exception of the "tweaking" of some of the access provisions. She likewise is not opposed to the continuation of the joint custody provisions.

[4] Each party seeks child support from the other based upon the provincial *Child Support Guidelines*.

II. Issues

[5] The following issues will be determined in this decision:

- (a) Has Mr. MacKeigan proved a material change in the circumstances to justify a variation of the current order?
- (b) What custodial designation is in the best interests of Brady?
- (c) Who should be designated as the primary care giver?
- (d) What parenting schedule is in the best interests of Brady?
- (e) What child support order should issue?

III. Background

[6] Brady was born to the parties on December 3, 2003. Ms. Reddick and Mr. MacKeigan ended their romantic relationship in 2004. Since Brady's birth, Ms. Reddick has been the primary caregiver of Brady. After the separation, and due to his circumstances, Mr. MacKeigan did not exercise regular or consistent access to Brady. After Mr. MacKeigan's circumstances improved, he sought more access.

[7] Ms. Reddick requested child support and custody on November 18, 2004. An interim child support order issued which required Mr. MacKeigan to pay maintenance of \$166 per month. The order on the parenting issues was resolved by consent on April 25, 2005. The order provides the parties with joint custody. Ms. Reddick is designated as the primary care giver and specified access is provided to Mr. MacKeigan. No final maintenance order was granted, and the parties continue to operate according to the provisions of the interim child support order.

[8] Mr. MacKeigan filed a variation application on December 19, 2005. A reply was filed by Ms. Reddick on March 29, 2007. An interim, ex-parte order issued on November 28, 2005 which prevented Brady from being moved from Cape Breton county. The variation hearing was held on April 12, 2007 and on May 10 and 11, 2007. The following people testified at the trial: Cst. Shane Allan MacKenzie, Mr. George Burrows, Mr. Richard MacKeigan, Ms. Allison Richards, Ms. Amber Binder, Dr. Norman Kienitz, Ms. Sandra Reddick, Ms. Florence Reddick, and Ms. Debbie Turner.

IV. Analysis

[9] **Has Mr. MacKeigan proved a material change in the circumstances to justify a variation of the current order?**

[10] Mr. MacKeigan argues that there has been a material change in the circumstances of a sufficient magnitude that the existing court order should be varied. Ms. Reddick states there is no such material change, and that the present parenting arrangement should continue with the exception of some minor revisions to the access schedule to take into account Brady's enrolment in preschool.

[11] *Law*

[12] Section 37 (1) of the *Maintenance Custody Act* provides the court with the jurisdiction to vary an existing custody order as follows:

37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

[13] Section 18 (5) of the *Act* confirms that the court must apply the best interests of the child test in a variation proceeding. Section 18 (5) states:

(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.

[14] An application to vary is not an appeal of the original order, nor is it an opportunity to retry a prior proceeding. I must treat the existing order as correct as of the time the order was made. I can only vary the existing order if Mr. MacKeigan has proved that a material change in the circumstances exists, and as a result of that change, the current order no longer meets Brady's best interests:

Gordon v. Goertz [1996] 2 S.C.R. 27 (SCC).

[15] A material change has been described as one where, had the facts existed at the time the order was made, the judge likely would have made a different order. A material change includes a circumstance where something unexpected happens or where something that was expected to happen does not. A material change must be more than a minor or temporary change. The change must be a substantial,

continuing change which impacts upon the foundation upon which the existing order was made and which affects the child or the ability of the parents to meet the needs of the child: **Watson v. Watson** [1991] CarswellBC 548 (SC).

[16] *Mr. MacKeigan's Position: Factors in Support of a Material Change*

[17] Mr. MacKeigan states that he has proven a material change in circumstances based primarily on two factors. First, Ms. Reddick has not consulted with Mr. MacKeigan on educational and medical matters as mandated in the consent order. Mr. MacKeigan states that Ms. Reddick's lack of consultation negates the very premise upon which the current order was based. This represents a material change in the circumstances.

[18] Second, Mr. MacKeigan states that Ms. Reddick has consistently made decisions not in Brady's best interests. Mr. MacKeigan notes that poor decision-making and judgement abound in the areas of nutrition, hygiene, and safety. Mr. MacKeigan alleges that Ms. Reddick's poor decision-making constitutes a material change in the circumstances.

[19] Ms. Reddick's Position: No Material Change

[20] Ms. Reddick states that the circumstances have not changed materially. She argues that the current order should not be varied, with the exception of some fine tuning caused by the fact that Brady will be entering preschool. Ms. Reddick vehemently denies the allegations made by Mr. MacKeigan.

[21] In response to his first argument, Ms. Reddick states that she did advise Mr. MacKeigan of important matters impacting upon Brady's health and education for the most part. Ms. Reddick, however, acknowledges that there were a few occasions when she did not advise Mr. MacKeigan of important health and educational matters. Ms. Reddick states that on these occasions she forgot, and at other times it was impossible to do so because Mr. MacKeigan's attitude made communication impossible.

[22] In response to Mr. MacKeigan's second argument, Ms. Reddick denies that she makes poor decisions contrary to Brady's best interests. She states that she feeds Brady nutritional meals; Brady is clean; and Brady gets plenty of exercise.

Ms. Reddick states that Brady is washed and dressed appropriately, although she acknowledges that on occasion he gets dirty as he plays a great deal outside. She disagrees that there is a lack of structure within the home or that Brady is not progressing and developing appropriately. Ms. Reddick cites Brady's reading strengths as reflective of her parenting abilities.

[23] In summary, Ms. Reddick states that Mr. MacKeigan and his spouse have jumped to conclusions, exaggerated, and have blown occasional lapses out of proportion. She notes that Brady has always been in her care and that he is well looked after and loved. Therefore, Mr. MacKeigan's submission is without merit. He has failed to prove that a material change in circumstance has occurred.

[24] *Decision*

[25] I have reviewed the legislation, case law, and evidence. I have assigned the civil burden of proof to Mr. MacKeigan, which is proof on the balance of probabilities. I have also applied the best interests test in respect of this determination. I find that Mr. MacKeigan has proven a material change in the

circumstances such that the existing order no longer meets Brady's best interests. I base my decision on the fact that Ms. Reddick continuously failed to comply with the joint custodial provisions of the April 25, 2005 order. It is therefore unnecessary to canvass the second ground put forth by Mr. MacKeigan at this time.

[26] In **Garell v Habib** 2006 CarswellOnt 2740 (SCJ), Murray J. held that the unilateral repudiation of joint custody constitutes a material change in circumstances for variation purposes. Murray J. states at para 20:

20 When the judge ordered joint custody consistent with the agreement of the parties, there can be no doubt that he contemplated that the parties would cooperate together in making fundamental decisions relating to their children. Unilateral decision-making by one party without consultation or rational discussion with the other party is not within the reasonable contemplation of a judge who orders joint custody. I must say at this point that mother's assertion that she informs the father of the decisions falls well short of the legitimate expectations that father would have in the circumstances. Joint custody does not mean one parent informing the other about important decisions affecting the children. Joint custody means information is shared and consultation and discussion will occur prior to decision-making. A high level of cooperation based on ongoing mutual respect and the ability of both parents to decide important matters in the best interests of the children is necessarily implicit in any decision to award joint custody. Unilateral decision-making effectively is a repudiation of the joint custody arrangement. The de facto repudiation by mother

of the commitment to cooperate with the father in important decision-making is a material change which has occurred after the divorce judgment and which was not within the reasonable contemplation of the judge making the order.

[27] The April 25, 2005 order states that Ms. Reddick and Mr. MacKeigan shall have joint custody of Brady. It further provides that “the mother will consult with the father concerning education as well as any medical problems and/ or emergencies, but the mother shall make the final decision on these matters.”

[28] I find that Ms. Reddick has unilaterally severed the joint custodial provisions of the April order as evidenced by the following:

(a) Ms. Reddick unilaterally changed Brady’s doctor from Dr. Hanna to Dr. Cox without consulting with Mr. MacKeigan. Mr. MacKeigan first discovered that there had been a change in Brady’s doctor during the court hearing;

(b) Ms. Reddick did not consult with Mr. MacKeigan before enrolling Brady in a preschool program designed for children of African Canadian descent. Once again, Mr. MacKeigan first learned of this plan during the trial. Although Mr. MacKeigan is supportive of the plan, this support does not negate the obligation to consult;

(c) Ms. Reddick did not advise Mr. MacKeigan of the serious burns Brady suffered from an accident while in the care of Ms. Reddick's mother. Mr. MacKeigan first discovered the burns when he gave Brady a hug. Brady recoiled from the hug because of the pain he felt upon being touched. It was at this point that Ms. Reddick explained what had happened and the treatment which was to be carried out. Ms. Reddick made no attempt to contact Mr. MacKeigan earlier; and

(d) Ms. Reddick did not advise Mr. MacKeigan on numerous occasions that Brady had been ill prior to leaving for access. As a result, Mr. MacKeigan was not prepared to meet Brady's physical needs. Ms. Reddick should have informed Mr. MacKeigan if Brady had been ill before leaving for access so that Mr. MacKeigan could adjust the activities and food intake accordingly. I accept Mr. MacKeigan's evidence on this point where it is in conflict with Ms. Reddick's evidence.

[29] I find that Ms. Reddick rarely followed the obligations implicit in a joint custody order. She acted as a sole custodial parent. When questioned as to why she failed to discuss the change in Brady's doctor with Mr. MacKeigan, Ms. Reddick said that she simply did not think of it. Unfortunately, this cavalier attitude is indicative of Ms. Reddick's indifference toward the joint custody order. Ms. Reddick had absolutely no understanding of the importance of consultation to Brady's best interests. Ms. Reddick failed to appreciate that Mr. MacKeigan does have much to contribute to decisions impacting on Brady's welfare. Mr.

MacKeigan rightfully expected to be involved in such decision-making. Indeed the court mandated Ms. Reddick to do so. Ms. Reddick not only failed Mr. MacKeigan and the court, but most importantly by her failure to consult, she has failed Brady.

[30] As a result of Ms. Reddick's failure to consult, I find that Mr. MacKeigan has proved a material change in the circumstances. Had the court known in April 2005 that Ms. Reddick did not intend to consult with Mr. MacKeigan, nor operate in a joint custodial manner, the order would not have issued. Further, Brady's best interests have been negatively affected by the failure of Ms. Reddick to comply with the joint custodial provisions of the order. Brady has lost the benefit of input from both his parents in decisions which involve his welfare. Brady's health and general welfare have been compromised as a result. The current order thus no longer meets Brady's interests and it is appropriate that the court proceed to the next step of the variation application.

[31] **What custodial designation is in the best interests of Brady?**

[32] In their oral submissions, both parties suggested the continuation of the joint custody order. In light of these submissions, I must determine whether joint custody will be ordered despite the failure of Ms. Reddick to consult in the past and despite the polarization seen at trial. The focus must continue to be on the best interests of Brady.

[33] Where parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that such a situation will change, joint custody is ordinarily not appropriate: **Roy v. Roy** 2006 CarswellOnt 2898 (CA). This lack of effective communication, however, must be balanced against the realistic expectation, based upon the evidence, that communication between the parties will improve once the litigation has concluded. If there is a reasonable expectation that communication will improve despite the differences, then joint custody may be ordered: **Godfrey-Smith v. Godfrey-Smith** (1997), 165 N.S.R.(2d) 245 (SC).

[34] I have considered the legislation, case law, and the evidence in concert with the submissions of the parties. I will permit the joint custody order to proceed. I

find that it is in Brady's best interests to have both parents involved in the decision-making which impacts upon him. The parties have an obligation to Brady to learn skills which will enable them to communicate effectively in a child-focused manner.

[35] I also find that much, but not all, of the animosity which has developed between the parties has arisen from the litigation itself. Given the parties' apparent intelligence and love for Brady, I find that with professional assistance, communication will improve. Joint custody is workable and appropriate once parameters are established.

[36] The parties have argued over the designation of primary care parent. I infer this to relate, in part, to a debate over final decision-making authority. I have reviewed the evidence, legislation and law in this area. I have placed the burden of proof on Mr. MacKeigan. I have determined that it is in Brady's best interests to divide decision-making authority between his parents. I recognize that the division of decision-making authority is an unusual remedy. I also recognize that such an

order requires objective evidence of the unsuitability of the primary care giver to make final decisions: **Lamont-Daneault v Daneault** (2003), 177 Man. R. (2d) 235 (CA) and **Sawatzky v Sherris** (2002), 170 Man. R. (2d) 51 (CA).

[37] I have provided Mr. MacKeigan with final decision-making authority on matters relating to Brady's health. I have done so as I am not satisfied that Ms. Reddick has placed Brady's best interests in health matters ahead of her own personal agenda. Specifically, Ms. Reddick did not contact Mr. MacKeigan to advise of the serious burn which he accidentally received while being cared for by Ms. Reddick's mother. Mr. MacKeigan should have been informed as soon as reasonably possible in the circumstances. He was not. Further, Ms. Reddick did not discuss the change in Brady's medical doctor with Mr. MacKeigan. Ms. Reddick did not inform Mr. MacKeigan in advance of the many colds and flu which Brady had contracted. This lack of consultation jeopardized Brady's health. I do not accept that Mr. MacKeigan's attitude interfered with Ms. Reddick's obligation to consult.

[38] In addition, Ms. Reddick did not identify a need to have Brady's emotional needs assessed professionally, while Mr. MacKeigan did. I find that Brady should be assessed by a professional in light of the parental conflict to which he has been exposed, and to determine if there are any developmental needs which must be addressed. I accept the evidence of Mr. MacKeigan and Ms. Richards that Brady has displayed inappropriate, aggressive behaviors. Professional guidance should be accessed by the parties to assist Brady with this problem.

[39] I am further satisfied that Mr. MacKeigan is attuned to Brady's health needs. In addition to being open to professional assistance in respect of Brady's emotional needs, Mr. MacKeigan was quick to notice a painful, but passing health difficulty from which Brady suffered. Mr. MacKeigan took Brady to the hospital for treatment. Mr. MacKeigan is committed to Brady's health needs and is the best parent to have final decision-making authority in the event meaningful consultation produces an impasse.

[40] I have determined, however, that it is in Brady's best interests to allow Ms. Reddick final decision-making authority in educational matters in the event

meaningful consultation produces an impasse. I am confident that Ms. Reddick will now understand the importance of consultation and will no longer make unilateral decisions. I am also satisfied that Ms. Reddick will continue to make educational decisions in Brady's best interests. Ms. Reddick's decisions on educational matters have proven appropriate to date. I accept that Brady is reading and counting above his age level. I accept that Ms. Reddick has devoted much energy to ensuring that Brady meets and exceeds educational milestones. I find Ms. Reddick's choice of preschool appropriate. Ms. Reddick, however, must understand that final decision-making authority has only been granted to her on the condition that she will consult with Mr. MacKeigan and take his views into account prior to final decisions being made.

[41] I will not provide either party with final decision-making authority in other areas. Extracurricular activities have proven somewhat problematic and this is therefore addressed within the joint custody provisions as set out below. There were no other significant differences noted between the parties on the resolution of

other issues. Therefore if issues arise other than in the areas of health or education, the parties will consult with each other and reach a common decision.

[42] Although it may be argued that the following order creates a difficult and cumbersome parenting arrangement, Brady deserves no less. Brady's parents must pay more than lip service to his welfare. It is time for the parties to put recriminations behind them and to act as reasonable parents.

[43] The joint custody provisions will provide as follows:

(a) Sandra Reddick and Richard MacKeigan shall continue to have joint custody of the child Brady Douglas Richard Reddick born December 3, 2003.

(b) The parties shall consult with each other on all matters of importance affecting the health, education and general welfare of Brady. In the event of an impasse after meaningful consultation, Richard MacKeigan shall have final decision-making authority on matters surrounding the health (medical, dental, and emotional) of Brady. In the event of an impasse after meaningful consultation, Sandra Reddick shall have final decision-making authority on matters surrounding the educational needs of Brady. Neither party shall have final decision making authority in relation to all other matters impacting upon Brady's general welfare. In the event of an emergency, the party having physical care of Brady

shall be entitled to make decisions which are necessary to alleviate the emergency, and shall notify the other party as soon as possible as to the nature of the emergency and the treatment.

(c) The parties shall participate in individual and joint counseling with a child psychologist to a maximum of ten sessions. The counseling shall focus on effective communication skills to aid in the proper delivery of the joint custody order. Each party shall be responsible for 50% of the costs of all counseling sessions after insurance reimbursement, if any, is applied.

(d) Until the counseling sessions are complete, the parties shall communicate via email in a format which can be saved. All communication shall be child-focused and respectful. The communication shall report on the progress and issues which arise during the time that Brady is in his/her respective care and which relate to Brady's health, education or general welfare.

(e) Each party shall have the right to communicate with all professionals involved in Brady's care inclusive of medical professionals, educators and all social welfare professionals without the prior consent of the other party. Each party is permitted to attend parent teacher functions without the prior consent of the other party.

(f) Each party shall speak respectfully of the other, and of his/her extended family, in Brady's presence. The parties shall immediately remove Brady from the presence of any third party who is speaking disrespectfully of the other, or of his/her extended family.

(g) Each party may choose and enrol Brady in one extracurricular activity per season . If the extracurricular activity is scheduled at a time when Brady will be in the physical care of the other party, the party so enrolling shall be responsible for transportation to and from the activity. The party enrolling Brady in the extracurricular activity shall bear the expense. This provision is subject to vacations and holidays when Brady is not in the local area and is physically unable to attend the extracurricular activity.

[44] **Who should be designated as the primary care giver?**

[45] Each party seeks to be the primary care giver of Brady. Each party states that Brady's best interests would be served if Brady was placed in his/her respective care. The most significant factors which have been espoused by the parties in support of their positions, and which were examined by me, are as follows:

- (a) Status quo,
- (b) Poor decision-making,
- (c) Nutrition and hygiene,
- (d) Willingness to facilitate maximum contact,
- (e) Family attachments,
- (f) Home environment,
- (g) Time availability and parenting style, and
- (h) Cultural and moral development.

[46] *Status quo*: Ms. Reddick argues that the continuation of the status quo favors her. She relies upon the comments of Daley J. in **Neill v Best** (1995), 147 NSR (2d) 54 (Fam.Ct) who noted that access law “should not encourage risk taking and experimentation with the emotional and physical growth of an infant child.” Ms. Reddick states that Brady is happy and developing well in her primary care. The status quo should therefore be maintained.

[47] Mr. MacKeigan states that the status quo must not be assigned priority where it conflicts with Brady’s best interests. He states that the current parenting arrangement creates hazards involving safety, poor hygiene, and poor nutrition. Mr. MacKeigan submits that the status quo must change because of the serious problems facing Brady while in Ms. Reddick’s primary care.

[48] Generally speaking, courts do not vary existing parenting arrangements which are working in the child’s best interests. The status quo is an important feature in the life of a child as it represents stability and security. The status quo, however, must always bow to the child’s best interests. The court recognizes that the life of a child is not static. Changes in the needs and circumstances of children

and their parents occur on a regular basis. The importance of the status quo diminishes when the child no longer receives stability and security from the parenting arrangement.

[49] I therefore find that the status quo is but one factor which I must consider in the determination of the primary care giver. Whether or not the status quo will be displaced will depend upon the analysis of the other factors put forth by the parties.

[50] ***Poor decision-making:*** Mr. MacKeigan argues that he should be designated as Brady's primary care giver because Ms. Reddick has consistently engaged in a pattern of poor decision-making. Mr. MacKeigan states that examples of poor decision-making occur when Ms. Reddick and her mother, who provides child care, engage in the following: (a) smoking in Brady's presence, (b) cursing in Brady's presence, (c) using inappropriate discipline, (d) failing to properly supervise Brady, and (e) allowing Brady to play in unsafe areas.

[51] Ms. Reddick, for the most part, denied the allegations made by Mr. MacKeigan. Ms. Reddick and her mother state that they do not smoke in Brady's presence. This was also affirmed by Ms. Binder and Ms. Turner. Ms. Reddick further notes that Mr. MacKeigan smokes, and that he smoked in Brady's presence in the past. In addition, Ms. Reddick indicated that Brady did not have bronchitis and that Brady had not used puffers since he was a baby.

[52] Ms. Reddick and her mother do not deny that they use vulgar language in Brady's presence. They, however, deny calling Brady inappropriate names. They further state that Mr. MacKeigan and Ms. Richards have exaggerated the extent of the inappropriate language use. Their position was supported by Ms. Binder and Ms. Turner.

[53] Ms. Reddick and her mother deny hitting Brady as a form of punishment. They state their preferred forms of discipline are talking about the issue, removing privileges, and using time outs. Ms. Binder and Ms. Turner state that they did not observe either Ms. Reddick or her mother use physical force as a form of discipline.

[54] Ms. Reddick and her mother state that Brady is always supervised appropriately in their care. They note that Brady's home is situated on a dead end street where neighbours are always looking out for all children playing in the area. Ms. Binder and Ms. Turner state that Brady is appropriately supervised based upon their observations. Ms. Reddick also relies upon the evidence of Mr. George Burrows from the Children's Aid Society who was unable to substantiate the allegations as reported by Mr. MacKeigan.

[55] Ms. Reddick states that Brady is being raised in a safe area. She acknowledged the unsafe condition of the swing set, but indicated that she had no control over the swing set, as it belonged to someone else.

[56] In respect of the arguments advanced under this issue, I find as follows:

(a) Brady did have bronchial problems and did use puffers for several years. This is confirmed in the evidence of Mr. MacKeigan and also by the emails which Ms. Reddick sent to Mr. MacKeigan in which she discussed puffers and breathing problems. Ms. Reddick's evidence was not credible on this issue. I prefer the evidence of Mr. MacKeigan to the evidence of Ms. Reddick.

(b) Neither party currently smokes in Brady's presence, although both have smoked in Brady's presence in the past. Both should give up smoking if they wish to be certain that Brady does not suffer from the negative effects of second-hand smoke. I am not convinced that Ms. Reddick's mother has given up smoking in Brady's presence. Ms. Reddick's mother was not a convincing witness and I find her testimony to be less than candid.

(c) Both Ms. Reddick and her mother use vulgar language in Brady's presence on a regular and frequent basis. This unfortunate circumstance has not surprisingly led Brady to use the same inappropriate language.

(d) Neither Mr. MacKeigan, nor Ms. Reddick use corporeal punishment as a form of discipline. Ms. Reddick's mother has slapped Brady on an infrequent basis. This is not appropriate.

(e) Ms. Reddick does properly supervise Brady. I find, however, that there have been occasions when Ms. Reddick's mother has not supervised Brady. I accept the evidence of Mr. MacKeigan and Ms. Richards. I find that Ms. Reddick's mother allows Brady to play outside without supervision and did so even when Brady was a toddler.

(f) Ms. Reddick's home is safe and appropriate for Brady. No more danger is found in Ms. Reddick's home than exists in Mr. MacKeigan's home. The danger lies in the lack of supervision, not the place of residence. The demolition of the swing set was outside of Ms. Reddick's control.

[57] *Nutrition and hygiene:* Mr. MacKeigan states that Brady does not receive proper nutrition while in Ms. Reddick's care. He cites the use of pop in Brady's milk bottle, and the over use of hot dogs and other non-nutritional foods. Mr. MacKeigan and Ms. Richards state that they follow the Canada food guide in their household to ensure that Brady receives proper nutrition including lots of fresh fruits and vegetables.

[58] Ms. Reddick states that she does feed Brady properly. She acknowledges some use of hot dogs, but also notes that Brady eats fruit, vegetables and meat. She did agree that sugared juice was provided in the baby's bottle. Ms. Reddick's mother, Ms. Binder and Ms. Turner supported Ms. Reddick's position.

[59] Mr. MacKeigan stated that prior to Ms. Binder acting as the access liaison, Brady was frequently inappropriately dressed for the weather. Mr. MacKeigan and Ms. Richards indicated that Brady lacked proper foot wear and outer wear at times. Mr. MacKeigan and Ms. Richards also stated that Brady was often dirty and his diapers full when they picked up Brady for access.

[60] In respect of the arguments advanced under this issue, I find as follows:

(a) Mr. MacKeigan ensures that Brady is provided with healthy foods and snacks while in his care. Ms. Reddick also provides Brady with healthy foods and snacks while in her care. Both parties provide Brady with less nutritional foods on occasion. I note that Mr. MacKeigan mentioned taking Brady to a fast food restaurant when exercising week day access. This is not unusual. Brady is not harmed by the occasional use of chips, french fries or hamburgers. Ms. Reddick, however, should not have placed pop or sugared drinks in Brady's milk bottle when he was a baby.

(b) Brady does have proper outer wear and clothing. On occasion, and before Ms. Binder facilitated access, Ms. Reddick's mother did not always provide Mr. MacKeigan with proper clothing for Brady. On various occasions, Ms. Reddick's mother did not properly clean Brady before access.

(c) Brady is an active, little boy who likes to play. It would be unusual if he did not get dirty.

(d) Ms. Reddick's mother suffers from health difficulties and is likely not able to meet all of the demands required to care for an active little boy on a regular basis. Further Ms. Reddick's mother was less than cooperative and cordial with Mr. MacKeigan and Ms. Richards in Brady's presence during access exchange.

(e) Mr. MacKeigan and Ms. Richards have exaggerated their claims about hygiene and the lack of nutrition while Brady is in the care of Ms. Reddick.

[61] *Willingness to facilitate maximum contact*: Mr. MacKeigan states that Ms. Reddick has done little to facilitate maximum contact between Brady and him. Mr. MacKeigan testified that he had to contact the police to enforce access on several occasions. He also stated that Ms. Reddick refused to allow him to take Brady to the extracurricular activities which he had arranged. Mr. MacKeigan noted that Ms. Reddick originally agreed that he could have Brady for the additional times necessary to allow Brady to attend the extracurricular activities. Mr. MacKeigan said that Ms. Reddick changed her mind as she was actively thwarting access.

[62] Ms. Reddick states that she has been following the court order. She notes that Mr. MacKeigan and Ms. Richards are difficult and it was best to follow the court order in the circumstances to avoid unnecessary conflict. Ms. Reddick also states that Mr. MacKeigan is not exercising all of the access to which he is entitled under the current order.

[63] I cannot fault Ms. Reddick for following the current order. Adherence to a court order cannot be used to support the submission that Ms. Reddick is seeking to limit the relationship between Brady and Mr. MacKeigan.

[64] *Family attachments*: Ms. Reddick states that Brady is emotionally attached to his maternal family unit. Ms. Reddick notes that Brady and his half sister, Shanta have a healthy and loving bond. She states that any squabbles between the two are no more than what is expected between siblings. She further states that Brady and her mother have a loving relationship as Ms. Florence Reddick has supplied child care since birth.

[65] Ms. Reddick harbours significant concerns about the impact a change in primary care will have upon Brady's emotional well-being given the long term attachments which Brady has with his maternal family. Ms. Reddick expressed concerns about Mr. MacKeigan's lack of experience as a primary care parent. Ms. Reddick questioned Mr. MacKeigan's ability to successfully fulfill the role of a primary care giver. She cites Mr. MacKeigan's lack of involvement with Brady following their break-up, and Mr. MacKeigan's belated involvement in his first son's life.

[66] Ms. Reddick also notes that Mr. MacKeigan's family unit has recently expanded and its long term stability is unknown. She is concerned that if Brady is tossed into the mix, he could suffer emotionally.

[67] In contrast, Mr. MacKeigan and Ms. Richards state that Brady is very attached to them, and to their extended family which includes grandparents and other siblings. Mr. MacKeigan acknowledges that his first son has only recently entered his life, but that all have adjusted well. He further states that Brady has benefitted from the presence of his half brother and step sister. Brady loves his paternal family unit.

[68] I find that Brady has a healthy attachment to both his father and mother. He loves them both. Brady also loves the other people who form his extended maternal and paternal family units. Brady is fortunate to have so many people to offer him love, guidance, stability and a sense of belonging.

[69] *Home environment:* Each party stated that his/her home was well suited for Brady's needs. Mr. MacKeigan expressed concerns about Ms. Reddick's residence.

I have already dealt with these allegations. I find that the homes of Mr. MacKeigan and Ms. Reddick are both safe and adequate to meet Brady's needs and best interests.

[70] *Time availability and parenting style:* Mr. MacKeigan states that he is employed and now works from his home. He states that he and Ms. Richards, who is a teacher, are able to arrange their schedules so that he will work some evenings and will be free during some week days to provide care for his step-daughter and Brady if the court so orders.

[71] Mr. MacKeigan states that he and Ms. Richards are committed to a wholesome, family life and that they place the needs of their children as their first priority. Mr. MacKeigan and Ms. Richards describe a family unit which is structured, where routine is valued, and where there are opportunities to develop talents through extracurricular activities and family time.

[72] Ms. Reddick states that she continues to be employed on a full time basis and that she currently works day shifts, from Monday to Friday. She states that

although she has employment opportunities throughout the world, she feels that it is best for Brady to live in Cape Breton. Ms. Reddick states that she has no current plans to move Brady's permanent residence.

[73] Ms. Reddick also describes a home which is full of activity and where Brady is given an opportunity to develop reading and math skills, and to play with his neighbourhood friends.

[74] I find that both parties are committed to raising Brady in a manner which will allow him to develop his skills and talents. While Mr. MacKeigan's home is likely more structured, Ms. Reddick's home is also a loving environment.

[75] *Cultural and moral development:* Mr. MacKeigan states that he and Ms. Richards discuss moral issues with Brady and attempt to teach him right from wrong through discussion and example. Mr. MacKeigan indicates that his in-laws are regular church attendees and that they frequently take Brady to church with them. Mr. MacKeigan and Ms. Richards plan to raise Brady in their faith.

[76] Ms. Reddick did not put forth any particular plan for Brady's moral development. Ms. Reddick did put forth a plan for Brady's cultural development which was supported by Mr. MacKeigan.

[77] ***Decision on the Primary Care Giver:*** I have considered the existing order, the legislation, the law and the evidence. I have assigned the burden of proof to Mr. MacKeigan, which is proof on the balance of probabilities. I have considered the changes in circumstances and the best interests of Brady. I have balanced the various factors which compose the best interests test in light of the changes in circumstances. I have determined that it remains in Brady's best interests to continue in the primary care of Ms. Reddick at this time, subject to the significant changes in the parenting schedule which I will discuss in the next issue.

[78] I make this decision despite some of the frailties in Ms. Reddick's plan. I do so as I find that Brady has a greater attachment to Ms. Reddick than Mr. MacKeigan because Ms. Reddick has been Brady's primary care parent since birth. It is also hoped that Ms. Reddick will make the necessary changes in her parenting to improve upon the parenting that she has delivered thus far. I am hopeful that Ms.

Reddick will clean up her language in Brady's presence and will encourage others to use less colourful language in Brady's presence. I encourage Ms. Reddick to utilize more structure as children generally benefit from structure and routine.

[79] In addition, I find that Ms. Reddick's mother is unable to provide safe and properly supervised care to Brady. This is less of a concern now because Brady is attending preschool while Ms. Reddick is working. Nonetheless, and in Brady's best interests, the parenting plan will require Ms. Reddick to notify Mr. MacKeigan when Ms. Reddick intends to use her mother for child care. In such a case, Mr. MacKeigan shall be given first opportunity to care for Brady in the place of Ms. Reddick's mother.

[80] I also find that Mr. MacKeigan would benefit in making some changes to his parenting style. Both he and Ms. Richards appear to be overly rigid and dogmatic at times. Some flexibility is appropriate.

[81] Finally I find that Mr. MacKeigan's new household has not had time to adjust to the substantial changes which have occurred. It is inappropriate to gamble with Brady's emotional health by making a change to his primary care giver at this time.

[82] **What parenting schedule is in the best interests of Brady?**

[83] The existing court order does not meet Brady's best interests and current needs. Brady has too little time in his father's care. Brady is no longer an infant. His needs have changed. The ability of Ms. Reddick and Mr. MacKeigan to meet Brady's needs have changed. The parenting schedule which I have adopted will ensure the following:

(a) that Brady's best interests are met in light of his schedule, the schedules of the parties, and Brady's development and emotional needs;

(b) that Brady has sufficient time with each parent and with each parental family unit to enhance healthy attachments;

(c) that a predictable schedule is adopted to reduce the need for interaction between the parties;

(d) that some flexibility is provided to ensure that Brady has the opportunity to participate in special events and activities despite the schedule;

(e) that as much advance notice as possible is provided to permit vacation and holiday planning; and

(f) that the parenting schedule will provide for larger block periods to reduce the number of transitions per week between homes as Brady had difficulty with transitions in the past.

[84] The parenting schedule will commence on October 26, 2007 and will provide as follows:

(a) **Regular Schedule:** The parties shall follow a two week rotation during the regular parenting schedule. During week one, Mr. MacKeigan shall have Brady in his care from Friday at 3:00 pm until Tuesday at 2:00 p.m. During week two, Mr. MacKeigan shall have Brady in his care from Sunday at 3:00 pm until Tuesday at 2:00 p.m. At all other times, Ms. Reddick shall have Brady in her care. Week one shall commence on Friday, October 26, 2007. Mr. MacKeigan shall be responsible for transporting Brady on Friday of week one and on Sunday of week two. Ms. Reddick shall be responsible for transporting Brady on every Tuesday. Each party shall be responsible for Brady's transportation to preschool and school during the times Brady is in his/her care.

(b) **Special Occasions and Holidays:** The regular schedule shall be suspended for special occasions and holidays. Mr. MacKeigan shall be responsible for transporting Brady for visitation at the beginning of all special occasions and holidays. Ms. Reddick shall be responsible for transporting Brady at the conclusion of the visitation during all special

occasions and holidays. The parties shall follow the following schedule at such times, unless they agree in writing to a different schedule:

(I) **March Break:** After Brady starts school, March break is deemed to cover a nine-day period from Friday at 5:00 pm on the last day of school until Sunday at 5:00 pm before school recommences. Ms. Reddick shall have Brady in her care for the March break of every even-numbered year. Mr. MacKeigan shall have Brady in his care for the March break of every odd-numbered year. The parties shall revert back to the regular schedule at the conclusion of March break.

(ii) **Easter:** Easter is deemed to cover the period from Holy Thursday at 5:00 pm until Easter Monday at 5:00 pm. Mr. MacKeigan shall have Brady in his care on the Easter weekend of every even-numbered year. Ms. Reddick shall have Brady in her care on the Easter weekend of every odd-numbered year. The parties shall revert back to the regular schedule at the conclusion of the Easter holiday.

(iii) **Queen's Birthday:** The Queen's birthday weekend is deemed to cover the period from Friday at 3:00 pm before the long May weekend until Monday at 5:00 pm. Ms. Reddick shall have Brady in her care on the long May weekend of every even-numbered year. Mr. MacKeigan shall have Brady in his care on the long May weekend of every odd-numbered year. The parties shall revert back to the regular schedule at the conclusion of the long May weekend.

(iv) **Vacation:** Each party shall have Brady in his/her care for fourteen consecutive days during the period from July 1 until August 31 of each year. Ms. Reddick shall provide

Mr. MacKeigan with written notice of the fourteen-day period she has chosen as summer vacation no later than May 1 of each year. Mr. MacKeigan shall have from May 2 to June 1 to provide Ms. Reddick with written notice of the fourteen-day period he has chosen as summer vacation. The parties shall revert back to the regular schedule at the conclusion of their summer vacation.

(v) **Labour Day:** The Labour Day weekend is deemed to cover the period from Friday at 3:00 pm before the Labour Day weekend until Monday at 5:00 pm. Mr. MacKeigan shall have Brady in his care on the Labour Day weekend of every even-numbered year. Ms. Reddick shall have Brady in her care on the Labour Day weekend of every odd-numbered year. The parties shall revert back to the regular schedule at the conclusion of the Labour Day weekend.

(vi) **Thanksgiving:** Thanksgiving is deemed to cover the period from Friday at 3:00 pm before the Thanksgiving weekend until Monday at 5:00 pm. Ms. Reddick shall have Brady in her care on the Thanksgiving weekend of every even-numbered year. Mr. MacKeigan shall have Brady in his care on the Thanksgiving weekend of every odd-numbered year. The parties shall revert back to the regular schedule at the conclusion of the Thanksgiving holiday.

(vii) **Hallowe'en:** Hallowe'en is deemed to be from 4:00 pm until 8:00 pm of every October 31. Mr. MacKeigan shall have Brady in his care for Hallowe'en on the even-numbered years. Ms. Reddick shall have Brady in her care for Hallowe'en on the odd-numbered years. The parties shall revert back to the regular schedule at the conclusion of Hallowe'en.

(viii) **Brady's Birthday:** If one party is not scheduled to have Brady in his/her care for a portion of December 19, that party shall be entitled to have Brady from 3:00 pm until 4:30 pm on December 19;

(ix) **Christmas:** Christmas is deemed to cover the period from December 23 to January 3 . Ms. Reddick shall have Brady in her care from 3:00 pm on December 23 until December 25 at 3:00 pm and from 3:00 pm on December 28 until 3:00 pm on December 31. Mr. MacKeigan shall have Brady in his care from December 25 at 3:00 pm until December 28 at 3:00 pm and from December 31 at 3:00 pm until January 2 at 3:00 pm. at which time the parties shall revert back to the regular schedule.

(x) **Ad hoc Special Family Events:** The parties shall use their best efforts to accommodate any special family reunion, wedding, anniversary, or event which is scheduled at a time when Brady is in the care of the other party. Advance, written notice shall be provided to the other party to determine if the regular schedule can be altered to permit Brady's attendance at the special function. The parties shall be as flexible as possible in such circumstances. If accommodation cannot be made, the other party shall provide written reasons to the party so requesting.

[85] **What child support order should issue?**

[86] The parenting schedule which I have ordered brings into play s. 9 of the provincial *Child Support Guidelines*. As this possibility was not argued, is inappropriate for me to make a ruling at this time. I urge the parties to attempt to resolve the child support issue in light of the provisions found in s. 9. If the parties are unable to resolve this issue, then a half day should be obtained from the scheduler. Evidence will be by way of affidavit only, subject to cross examination. Briefs are due fourteen days in advance of the hearing. If the parties wish to participate in a settlement conference, arrangements should likewise be made through the scheduling office.

[87] In the meantime, Mr. MacKeigan shall continue paying child support pursuant to the provisions of the interim order.

V. Conclusion

[88] The following relief is hereby granted:

(a) A material change in the circumstances is found in Ms. Reddick's unilateral repudiation of the joint custody provisions of the existing order;

(b) The joint custody order will continue to operate. A variation of the final decision-making provisions is granted. Ms. Reddick shall have final

decision-making authority in matters involving Brady's education. Mr. MacKeigan shall have final decision-making authority in matters involving Brady's health. Specific conditions, as set out in this decision, will be followed by the parties to ensure the joint custody order will operate in Brady's best interests;

(c) Ms. Reddick will continue as Brady's primary care giver, but the parenting schedule will be varied to reflect a shared arrangement in keeping with Brady's best interests; and

(d) Maintenance will be set, in the absence of agreement, after further evidence and submissions are provided.

[89] Costs will not be considered until the maintenance issue has been resolved and submissions on costs are provided. Mr. Burman will draft the variation order noting the court has reserved on the issues of maintenance and costs. The order should be drafted as quickly as possible as it will be effective October 26.

Justice Theresa Forgeron