

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Marchand v. Boudreau, 2011 NSSC 276

Date: 20110707

Docket: SFPAMCA-068129

Registry: Port Hawkesbury

Between:

Betty-Anne Marchand

Applicant

v.

Adrian Boudreau

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

May 18, 2011, in Port Hawkesbury, Nova Scotia

Counsel:

Wayne MacMillan, for the applicant
Adam Rodgers, for the respondent

By the Court:

[1] This application made by Ms. Marchand on the 4th day of May, 2010, identifies three issues:

1.The parenting strategy, that is: should the parties have joint custody or shared custody of their child who is the subject matter of this proceeding;

2.Retroactive and prospective child support;

3.Section 7 expenses.

[2] Ms. Marchand seeks joint custody with primary care and child support in accordance with the guidelines. She wishes the parties to share the child care costs.

[3] Mr. Boudreau seeks a shared parenting arrangement on a 50/50 basis.

History

[4] The parents of Mackenzie Paige Lawson Boudreau (date of birth - November 16, 2006) had a relationship from July, 2004, to November, 2009.

[5] The mother and child live in a home purchased by the mother subsequent to the separation. The mother lived in the home since September 12, 1990, well prior to the separation. This is the home the child has known since her birth.

[6] The father now lives with his parents. The parents live close to one another. Regardless of which home in which the child is residing, she attends school close by and is able to be transported by bus from both residences.

[7] Both parents work at a local seniors facility and both work shift work. Their schedules are fairly complicated.

[8] The mother works in a six week rotational schedule that includes both day and night shifts. The father works on a two week rotational schedule of day shifts.

[9] The mother earned an income in 2010 of \$34,673.17. She receives the child care benefit of \$1,200.00. The father, in 2010, shows employment income of \$32,822.70.

[10] By acquiescence, if not implied consent, the mother works out the child parenting schedule. The parents testified they discussed how to make the schedule and agreed that the mother would work out the first draft and they would make concessions thereafter.

[11] The father complains that there have been no positive responses to his requests for additional time.

[12] Since the date of separation, the father has not paid a base amount of child support. He wishes to have a shared parenting arrangement and is waiting for the Court to rule on this.

[13] He has paid his share of child care costs. The mother's calculates his contribution to child care costs. She advises him what he is to pay and he pays forthwith.

[14] The mother has calculated a schedule that has occurred defacto since December of 2009 to February of 2011. This schedule has not been contested by the father except to say that he has never agreed with her having primary care and has argued for a shared parenting arrangement from the beginning, including in the conciliation period. The records support this.

[15] According to the mother's calculations, the child was in each parent's care as follows:

November, 2009	Mother - 21 nights	Father - 9 nights
December, 2009	Mother - 21 nights	Father - 10 nights
January, 2010	Mother - 19 nights	Father - 12 nights
February, 2010	Mother - 19 nights	Father - 9 nights
March, 2010	Mother - 24 nights	Father - 7 nights
April, 2010	Mother - 17 nights	Father - 13 nights
May, 2010	Mother - 26 nights	Father - 5 nights (These numbers would have resulted

		from a vacation the mother took in Alberta)
June, 2010	Mother - 19 nights	Father - 11 nights
July, 2010	Mother - 21 nights	Father - 10 nights
August, 2010	Mother - 17 nights	Father - 14 nights
September, 2010	Mother - 21 nights	Father - 9 nights
October, 2010	Mother - 21 nights	Father - 10 nights
November, 2010	Mother - 22 nights	Father - 8 nights
December, 2010	Mother - 21 nights	Father - 11 nights
January, 2011	Mother - 21 nights	Father - 10 nights
February, 2011	Mother - 20 nights	Father - 8 nights

[16] The defacto status quo is that the mother has been the primary care giver since the separation and in ordinary circumstances the father would be required to pay child support.

[17] The mother has the control over the schedule and, according to the father, has not been agreeable to increase his contact. While waiting for a trial, he had no way of altering the defacto situation without taking arbitrary action.

[18] There is no doubt that both of these parents are genuinely loving and caring, competent with respect to parenting this child and each considers the other a good parent.

[19] It is primarily the mother that attends to the medical appointments, hiring babysitters for employment purposes, addressing any emergency situations, whether they be child care situations or issues relating to scheduling of babysitters, attending pre school orientation for the child, etcetera. She has taken steps to ensure that babysitters are consistent, including her sister, her niece, her nephew's girlfriend and one other.

[20] The father has hired babysitters when the child has been in care but that has been largely to accommodate any social activities he wishes to attend in the evenings.

[21] This is the division of labour that existed prior to and since separation. This does not diminish that father's significant involvement with the child.

[22] The mother has advised that when the father has had to cancel visits and she is scheduled to work, she is the one who incurs the costs of obtaining babysitters to provide for the daughter's care or taking time off work.

[23] The mother also has two daughters, one of whom is 22 years old and helps with her sister's care whenever a gap occurs in babysitting needs.

[24] The mother's major contention with respect to the father is that he does not take the initiative in any issues regarding the child's care or in participating in making himself available on short notice, as one would expect of a shared parenting arrangement. He relies on her to schedule babysitters and attend activities relating to the daughter.

[25] The mother has indicated that between January, 2011, and the present, their daughter has been sick and school has been cancelled due to snow storms on at least seven occasions. On all of these occasions, it has been the mother who has taken time off work or hired a babysitter to provide care for her daughter on those dates.

[26] The mother has endorsed the father's presence in the child's life and on occasion has provided transportation when the father has been unable to transport himself for access visits. Largely however, the father provides his own transportation.

[27] The mother testified that the father has not responded to her requests to increase his time with the child on occasions when she has needed assistance. For example, in or about April, 2010, when he was asked to take extra time with his daughter in order to allow the mother to attend to her own mother's illness, he did not respond to her request.

[28] The father testified he would have had he been asked. He acknowledges that he was asked once, but no more.

[29] The respondent does not have a cache of babysitters to address child care needs when he is working. He relies largely on his father and step mother and if they are not available to babysit or care for the child when issues arise, he does not have and has not developed alternate babysitters. He relies on the mother to make the arrangements.

[30] That is not to say that the father has not been generous.

[31] During the period of time the parties lived together from July, 2004, to November, 2009, the respondent gave the applicant \$15,000.00 to pay down largely her credit card bills. They shared the costs of laminate flooring for the house they lived in. The respondent believes he paid \$2,500.00 for the flooring, the applicant believes he paid one half of that.

[32] In May of 2009, shortly before the separation, he borrowed \$5,000.00 in order to have renovations done to the home in which the mother and child now live, this would include new bathroom windows and doors. He makes monthly payments on this loan.

[33] In November, 2009, after the separation, he transferred ownership of the 2005 Chev Malibu, valued at approximately \$8,000.00, to the applicant for her use.

[34] Since November, he has paid \$1,600.00 to cover half of the babysitting expenses.

[35] The biggest difficulty with the current arrangement, from the father's perspective, is that the mother controls his schedule and that there is little flexibility. He is asking first for a shared parenting arrangement and, at the very least, for defined access that will allow for flexibility and for increased parenting time for himself.

[36] The evidence in totality causes me to conclude that the mother is the one who has been the primary parent. She sees her role as one in which she is responsible for organizing the activities around the child's life.

[37] To some extent, the father has acquiesced in that. He has relied on the mother's scheduling, contracting babysitters and addressing issues when he is working and can't find a babysitter. He has taken less of a leading role with respect to the day to day care. He is by no means simply an access parent, he has simply acquiesced to the mother's scheduling.

[38] There is no indication in the evidence that either party had difficulties looking after the child. Each have support. The mother has her extended family

and her daughters and the father has his father and step mother, with whom he lives and whom apparently have a significant relationship with the child.

[39] Both the applicant and the respondent shall share joint custody of their child. They shall ensure that they consult with one another and shall make major decisions by consent. The mother has asked for final say. I decline to direct that she have final say.

[40] Both parties wish to retain the right to make decisions with respect to the child in relation to major issues which would include educational, spiritual, emotional, and physical well being of the child, as one would see in a joint custody relationship.

[41] It is the sharing of parenting time that is the most contentious issue.

Schedule

[42] On a regular basis, the father has the child after school every second Wednesday returning the child to school Thursday morning. He then picks the child up after school Thursday afternoon at 2:30 p.m. and keeps the child at his home until 7:30 p.m. When the mother gets off work she picks up their child to return her to the mother's home. This occurs every second Wednesday and Thursday.

[43] The father also has his child with him Sunday nights to Monday mornings, he takes the child to school; the child returns with him after school Monday overnight to Tuesday morning. After school Tuesday afternoon, the mother has the child until the following Friday. This Sunday/Monday to Tuesday morning parenting schedule occurs every second week.

[44] The father's work schedule is on a two week rotation, in the first week he works 7 a.m. until 7 p.m. on Monday, Tuesday and Friday as well as 7 a.m. until 3 p.m. on Saturday. In the second week, he works from 7 a.m. to 7 p.m. on Sunday, Wednesday and Thursday. He works one weekend and is off the second weekend.

[45] The applicant works on a six week schedule and is off the same weekends as the father. She works night shifts the weekend that the father works day shifts.

[46] The child has been cared for by the same sitters in the mother's home on two days every second weekend since the mother returned to work. The father is not always available and does not always have his father and step mother available as sitters on the weekends that he works.

Weekends

[47] From the child's perspective, the proposal that the parents each have the child during one weekend when they are off, Friday to Sunday, and each have the child one weekend when they work makes sense when the parents have the same weekend off.

[48] Each shall take responsibility for arranging child care with a view to trying to keep the child care providers as consistent as possible.

[49] If the father, as a result of increased hours, is going to require babysitting, he shall first determine if it is possible to use the same babysitters as the mother is currently using in order to reduce the number of sitters to whom the child is exposed.

[50] If the mother is not able to get consent from the babysitters to babysit for the father during his work time, should that become necessary, the father shall provide to the mother the name of a babysitter he has contacted to be on hand in the event that he has to be absent for a work period during his increased contact.

[51] During the week that the father works, if his father and step mother are not available, the father should make an arrangement and pay for the sitter normally used by the mother. He can do that directly or he can arrange it through the mother. That would mean less transitions for the child and each parent would be responsible for the weekends when this four year old child is with them.

[52] If that does not work, the parties are free to consent to an arrangement that better accommodates their weekend schedule with a view to making sure that there are as few transitions as possible for this child and equal sharing of weekends. They must, however, each agree to a change from the order and their consent to a specific arrangement must be in writing.

[53] The current arrangement, alternating days on their off weekends, does have it's advantages. It appears to give this child access to both families and extended families on a fairly even basis.

[54] However, the parties must both agree to retain that previous schedule should they not wish to move to the schedule directed by the Court, that is, one weekend when they are working and one weekend when they are off.

Midweek Parenting Time

[55] I direct that the child, on every second week when the father has the child after school on Wednesday to Thursday morning and the child returns with the father from 2:30 p.m. to 7:30 p.m, shall remain with the father that Thursday evening and be returned to school the Friday morning.

[56] While the current work schedules remain this shall occur every second week leaving the remaining two weeks in the month with the schedule as it currently stands.

Additional Thursdays

[57] The father should have the child every sixth Thursday night when the mother is working.

Christmas

[58] The parties have agreed to alternating Christmas. Since the mother had Christmas Eve in 2010, the father shall have Christmas Eve in 2011 and all odd number years hereafter.

[59] When the child is with him on his year for Christmas he shall have the child from noon on Christmas Eve until 5 p.m. Christmas Day and the mother shall have the child from 5 p.m. Christmas Day until 5 p.m. Boxing Day and thereafter Christmas school vacation shall be split evenly between the parties.

Easter

[60] In 2012, given the father had Christmas in December, 2011, the mother shall have the opportunity to have the child at Easter, 2012, and every second year thereafter from noon on Easter Saturday to 5 p.m. Easter Sunday. The father shall have the child from 5 p.m. Easter Sunday until 5 p.m. Easter Monday and thereafter the Easter vacation shall be split.

[61] In odd numbered years, the father shall be entitled to have the child on Easter as above noted.

March Break

[62] March break shall be split equally unless the parties agree to an alternating year arrangement and that agreement shall be in writing.

Summer

[63] This child will be four in the summer of 2011. A two week period during the summer is too long for the child to be away from one parent or the other.

[64] Should each party have a week of vacation during which they intend to take vacation in the summer of 2011, each may have the child for one week, during which time the ordinary access schedule will be suspended.

[65] For the summer of 2011, the father shall have first choice and he shall make that choice in writing on or before July 20th. In the event that he fails to advise the mother in writing by July 20th, the mother shall have first choice by default.

[66] Thereafter, in each succeeding year, the parties shall advise each other on or before May 15th of when they intend to take vacation.

[67] In the year 2012, and in every even numbered year thereafter, the mother shall have first choice and she shall advise the father in writing on or before May 15th. In the event she does not do so, by default, the father will then have first choice in that year and he shall have first choice in every odd numbered year thereafter.

[68] The number of weeks may increase as the age and stage of development of the child advances so that the parties may consider a two week period when the

child is of an age to comfortably be away from the other parent for that period of time.

Additional Parenting Time

[69] The parties are free to enter into such other additional vacation or parenting time schedule as is possible and appropriate for the child.

Father and Mother's Day and Birthday's

[70] The child shall be with the father on Father's Day, with the mother on Mother's Day; with the father on his birthday and with the mother on her birthday.

Snow Days

[71] On snow days, if the mother is not off with the child, the father shall have first option of having the child with him during the day.

[72] In reviewing the total schedule, I recognize the child's school schedule and the need to attempt to moderate the transitions. I also recognize the desirability of adding some certainty to the father's parenting time.

[73] For the extra storm days and the one Thursday every six weeks, the father, if available, shall be with the child. If he is not available, the child shall remain with the mother and the babysitters as arranged by the mother. This increased parenting time is to facilitate extra time **with** the father.

[74] That gives the father the possibility of snow days, an extra day every sixth week and two extra overnights per month. It also gives the father the option of having a full weekend from Friday until Sunday at 6 p.m.

[75] Should the parties change their schedules, certainly this will have to be reviewed. Should the parties consent in writing, they may make adjustments to this schedule.

[76] This is by nature of their jobs, and the changing age and stage of development of their child, a work in progress and may need revision in future, either by consent or by court order.

[77] Each parent shall have access to all third party service providers on a reasonable basis for information concerning their child, that should include educators, medical and health professionals, etcetera.

[78] Each parent shall keep the other parent informed of the child's school activities and shall not make arrangements to have activities scheduled on the evenings when the child is with the other parent without that expressed consent of the parent.

[79] Each parent shall advise each other of their schedules one month in advance and shall advise forthwith of any changes to that schedule.

[80] In the event of an emergency, the parent with whom the child is with shall attend to the emergency immediately and thereafter, as soon as practicable, ensure that the other parent is advised.

[81] The mother shall provide the father with after tax costs of day care and they shall share those costs equally.

Medical Plan

[82] The mother has the child on her medical plan. The father does not. Both parties work for the same employer. I have directed them to determine whether it would be an advantage for the father to add the child to his current medical plan in light of the fact that they both work for the same employer.

[83] If the parties determine that there is no advantage to the father adding the child to his insurer given the insurer is through the same company as insured by the mother, the parties shall share all the uninsured costs associated with health and medical necessities.

Child Support

[84] Current child support shall be in accordance with the 2010 income, less union dues, in accordance with the guidelines in the amount of \$286.00 per month and payable through Maintenance Enforcement.

[85] Respecting retroactive child support, the respondent earns slightly less than the applicant. The separation has placed him in a position where he is carrying a loan to cover renovations to the house in which the mother and child live.

[86] He has increased contact with his child as a result of this decision.

[87] In consideration of his current financial circumstances and the fact that he is now living, as a result of the separation, at his father's home and that a retro active lump sum may limit his ability to provide currently for his child, I order a retro active sum for 12 months; ie: a total retro active award of \$3,432.00.

[88] He shall make a proposal regarding repayment. If not accepted by the applicant, enforcement shall be through the Maintenance Enforcement Program.

[89] His current payments are to begin on the 1st and the 15th of the month should the respondent wish to pay twice monthly. Counsel will verify this. If once monthly, he shall do so on the 15th of each month.

[90] The parents are to exchange their full income tax returns together with schedules and income slips whether file or not, such exchange to occur on or before May 15th of each year.

[91] Counsel for the applicant shall draft the order.

M. Legere Sers, J.