Date: 1998 01 26
Docket: CV 07346

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Domestic Relations Act*,
R.S.N.W.T. 1988, c.D-8, as amended;

IN THE MATTER OF the *Judicature Act*,
R.S.N.W.T. 1988, c.J-1, as amended;

BETWEEN:

EDITH WELLIN

Applicant

- and -

BOBBY DRYBONES

Respondent

MEMORANDUM OF JUDGMENT OF THE HONOURABLE
JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories on January 23, 1998

Reasons filed: January 26, 1998

Counsel for the Applicant: Olivia Rebeiro
Counsel for the Respondent: Paul Bolo

[1] When this matter was heard in Chambers on January 23, 1998, on consent of counsel I granted orders amending the style of cause to show the respondent's surname as Drybones and providing that the applicant have interim custody of the children. I also made an order that the respondent pay to the applicant interim child support in the sum of $229.00 per month for the younger child. An order will also issue granting the respondent generous access to the younger child as may be agreed upon by the parties. I reserved on the issue whether the respondent stands *in loco parentis* to the older child, Roxanne, and whether he should pay interim child support for her.

[2] The applicant and the respondent never formally married. After living together for some time, they separated. The applicant subsequently had a relationship with another man and became pregnant with their child. Before the child was born, the applicant and the respondent reconciled. The child, Roxanne, was born on November 14, 1987. Approximately a year later, the applicant and the respondent had another daughter of their own. In October of 1992, they separated and the two children remained with the applicant, who has now brought this application. She is now in a new relationship and says that her new partner has a close relationship with the children.

[3] In her affidavit, the applicant indicates that before their reconciliation and Roxanne's birth, the respondent promised to accept Roxanne as his own child. The respondent indicates that it was his wish that the child be put up for adoption and that the parties had discussions about this. He says that he decided to stay with the applicant because of his feelings for her and that he decided to accept Roxanne so as not to make her feel unwanted.

[4] There is no information in the affidavit material about the role, financial and otherwise, played by the respondent with respect to Roxanne while the parties lived together. There is very little information about what role, if any, is played by Roxanne's natural father or whether he has ever paid or been approached for child support. The respondent says that Roxanne knows who her natural father is.

[5] The applicant says that the two children refer to the respondent as "Daddy" or "Daddy Bobby" and that the respondent has always treated Roxanne as his own child. The respondent agrees that he is "somewhat like a father" to Roxanne but he is not seeking permanent custody of her, although he does intend to claim custody of the younger child. Both children occasionally approach him for money, which he sometimes gives them. On occasion he has bought clothing for the two children, although there is some dispute about the extent to which that has happened. He has not paid support for

either child. He sees both children around town but does not exercise overnight access to them.

[6] The relevant time for determination of whether a person stands *in loco parentis* is the time of the application. The determination requires consideration of what happened in the past, particularly whether the respondent provided financial support for the child and whether he intended to step into the natural father's shoes, as well as what the situation is now and whether, if the respondent was *in loco parentis*, he has now terminated that position: *Eschak v. Biron*, [1993] N.W.T.R. 255 (S.C.); *O'Neil v. Rideout* (1975), 22 R.F.L. 107 (Ont. Surr. Ct.).

[7] In *Laraque v. Allooloo*, [1993] N.W.T.R. 124 (S.C.), De Weerdt J. pointed out that it takes "a properly informed and deliberate intention to assume parental obligations for support of a child, on an ongoing basis, to bring the in loco parentis status in law into being". He also held that the adult cannot unilaterally withdraw from that relationship.

[8] In this case, it appears to me that the issue is whether the respondent's relationship with Roxanne can be characterized as *in loco parentis* or whether it is a relationship which was based solely on his wish to maintain a relationship with the applicant and has continued to the extent it has for the last five years only because he has chosen to treat the child with kindness and in a way similar to the way he treats her sister, and not because he has taken on a legal obligation for her. In some cases the fact that a party treats the child to whom he is alleged to stand *in loco parentis* the same way he treats his own child might be a significant factor in favour of finding that the relationship exists. In this case, however, there is little detail about the relationship he has with the children, which may simply indicate that he does not have much of a relationship with either child. It is difficult, however, to assess this on the basis of affidavit material.

[9] It has been pointed out that a finding of *in loco parentis* should not be lightly or too readily made: *Laraque v. Allooloo*, and see *Williamson v. Williamson* (1991), 31 R.F.L. (3d) 378 (N.B.Q.B., Fam. Div.); *Lopez v. Lopez* (1993), 48 R.F.L. (3d) 298 (Ont. Ct. Gen. Div.). This is so particularly on an interim application where the affidavit evidence does not cover all of the family circumstances and is in some respects contradictory.

[10] Another issue that arises and that could not be fully canvassed on this interim application is the status of the applicant's common-law spouse. The affidavit material suggests that she and the children have lived with him for several years. It is not clear

whether he now stands *in loco parentis* to Roxanne and, if he does, whether that should have any bearing on the respondent's status or obligations.

[11] In my view this issue should be tried by way of a summary hearing so that the parties can present evidence and more fully canvass the issues. That hearing may include the issues of permanent custody of the younger child if the parties are not able to agree on that. Accordingly, I direct a trial of the issue of whether the respondent stands *in loco parentis* to Roxanne.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, Northwest Territories
this 26th day of January 1998

Counsel for the Applicant: Olivia Rebeiro
Counsel for the Respondent: Paul Bolo

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