

Date: 19980420
Docket: CV07514

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF an application pursuant to the
Domestic Relations Act, R.S.N.W.T. 1988, c.D-8

IN THE MATTER OF an application pursuant to the
Child Welfare Act, R.S.N.W.T. 1988, c.C-3

BETWEEN:

DORA HEAD

Applicant

- and -

LESTER GLEN LEDOUX

Respondent

MEMORANDUM OF JUDGMENT

[1] These proceedings were commenced by Originating Notice in January of this year, when the Applicant, Ms. Head, applied for permanent sole custody of the parties' 8 year old son, Devon, as well as child support. At the time the proceedings were commenced, the Applicant and Devon were living in Yellowknife.

[2] The information about the current situation is found in the Respondent's affidavit material, as the Applicant has not provided an affidavit as to her circumstances since leaving Yellowknife. The Applicant and Devon left Yellowknife and moved to Saskatchewan in March. Devon has spent much of his life in Saskatchewan and from time to time was in the care of the Respondent since the parties ceased living in a common law relationship. The Applicant and Devon now live on the Mistawasis Reserve, which is where the Respondent also lives.

[3] The Respondent indicates that Devon is currently enrolled in school in Saskatchewan and is "back and forth" between the Respondent's residence and that of the Applicant. The Respondent states that Devon usually comes home with him on weekdays following school and that occasionally he stays over or the Respondent brings him to the Applicant's residence later in the evening. He also states that Devon spends all or part of the weekend with him. He says that he has purchased new clothes for Devon since the child returned to Saskatchewan and has been providing for him when he is at the Respondent's home.

[4] The Respondent indicates that he intends to pursue a claim for custody of Devon in the courts of Saskatchewan. He asks this court to order that the province of Saskatchewan be declared the proper and most convenient forum in which this matter should be heard. His counsel argued that the facts disclosed indicate that the child has had in the past and now has a close connection with Saskatchewan and that Saskatchewan is therefore the most convenient forum in which to hear the issues of custody and child support.

[5] Counsel for the Applicant acknowledged that her client and the child are presently ordinarily resident in Saskatchewan and that any proceedings for a final order should be taken there. She argued, however, that the issue of the convenient forum is not relevant on an interim application and that this court should proceed to make an interim order for custody and child support in favour of the Applicant. She also submitted that her client's position has been prejudiced by a representation made by Saskatchewan counsel for the Respondent (not the counsel who appeared on this application) that the initial adjournment of the custody and support application in February would be without prejudice to her application for child support. As I understand her submission, it is that the Applicant relied on this representation in not opposing the adjournment and possibly in leaving this jurisdiction. Counsel who appeared for the Respondent before me did not agree that the representation had been made and there is no affidavit evidence before me from the Applicant that her move to Saskatchewan was affected by any such representation. In the absence therefore of any evidence (as opposed to disputed submissions) on that point, I will disregard the submission about prejudice.

[6] Since this is not a divorce action, there is no statutory power to transfer these proceedings to Saskatchewan. The only question is whether I should exercise this court's jurisdiction and make custody and child support orders in favour of the Applicant. The factors to be considered on an application in a non-divorce situation were set out by Vertes J. in *Boros v. Boros*, [1997] N.W.T.J. No. 77 and are as

follows: the child's physical presence in the jurisdiction, the ordinary or habitual residence of the child in the jurisdiction and a real and substantial connection of the child to the jurisdiction. A court may exercise its jurisdiction on the basis of any of those factors.

[7] None of the above factors are satisfied on the evidence before me. However, counsel for the Applicant pointed out that *Boros* was a case about to go to trial and submitted that the same factors should not be applied on an interim application and that it should be sufficient that the Applicant and Devon were ordinarily resident in the Northwest Territories at the time the application was filed in this court. Assuming, without deciding, that they were ordinarily resident at that time, I am not satisfied in the circumstances of this case that ordinary residence is significant or that it should outweigh or replace the factors cited in *Boros*. I say that for the following reasons.

[8] The Applicant and Devon lived in this jurisdiction very briefly, for approximately six months. Devon was at that time in her sole care. Prior to their arrival in Yellowknife he had been in the care of the Respondent for several months. Now things have changed. The parties live very close to each other. Devon is spending time with both parents and the Respondent is contributing to some extent to his support. There is no basis upon which I can conclude that the Applicant disputes the facts set out by the Respondent and those facts suggest that the parties are cooperating in their responsibility for Devon. Nothing before me suggests that custody and child support need to be dealt with on an urgent basis. The Respondent has indicated that he will be pursuing a claim for custody of Devon in Saskatchewan. The Applicant I expect will do the same. Certainly all of the evidence which is likely to be significant on even an interim application is in Saskatchewan.

[9] In these circumstances, in my view, it is appropriate that the issues of custody and child support be dealt with in Saskatchewan. Accordingly, I grant the declaration sought by the Respondent and I decline to exercise jurisdiction over custody and child support in this matter.

[10] Dated at Yellowknife, this 20th day of April, 1998.

V. A. Schuler
J.S.C.

To: Tracey Foster
Counsel for the Applicant

Catherine Stark
Counsel for the Respondent

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HONOURABLE JUSTICE V. A. SCHULER
