

Date: 1999 02 02
Docket: CV 07927

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**JAMES O'REILLY, BERNADETTE UNKA,
and JOSEPH O'REILLY**

Applicant

- and -

SHAWNA SMITH

Respondent

Ruling on the jurisdiction of the Court to make an Order respecting custody of a child temporarily resident in the Northwest Territories.

Heard at Yellowknife, NT on February 1, 1999

Reasons filed: February 2, 1999

REASONS FOR JUDGMENT THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Applicant: Elaine Keenan-Bengts

Counsel for the Respondent: Glen Boyd

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**JAMES O'REILLY, BERNADETTE UNKA,
and JOSEPH O'REILLY**

Applicant

- and -

SHAWNA SMITH

Respondent

REASONS FOR JUDGMENT

[1] The within proceeding concerns an application for custody of a child born in Edmonton, Alberta, on August 17, 1998. There is a similar proceeding pending in the Alberta courts. The immediate issue is whether this Court ought to decline to exercise its jurisdiction.

[2] The father of the child is Joseph O'Reilly of Fort Resolution, NT, 16 years old. He is the son of James O'Reilly and Bernadette Unka. The mother of the child is Shawna Smith, of Edmonton, Alberta, 15 years old. She is the daughter of Iris Bone.

[3] The child was conceived in Edmonton, Alberta, at a time when Joseph O'Reilly and his parents were temporarily living in Edmonton, Alberta, and Joseph O'Reilly was dating Shawna Smith. Apparently Joseph O'Reilly and his parents returned to their home in Fort Resolution in March 1998. As stated, the child was born in Edmonton on August 17, 1998. The maternal grandmother Iris Bone was present with her daughter Shawna Smith at the child's birth. There is no evidence to indicate that the father Joseph O'Reilly or the paternal grandparents were present in Edmonton at the time of the child's birth.

[4] After the child's birth, the paternal grandparents invited Shawna Smith to bring the newborn child to Fort Resolution for two weeks so they could see the child. Bernadette

Unka apparently told Shawna Smith and her mother Iris Bone that they (the paternal grandparents) would pick up Shawna and the baby in Edmonton on September 1 and return them to Edmonton on September 14. Shawna accepted the offer and her mother Iris Bone agreed to this two-week visit. Shawna and the baby arrived in Fort Resolution on September 2, 1998.

[5] On October 16, 1998 counsel representing the father Joseph O'Reilly and the paternal grandparents made an *ex parte* application in this Court. Most of the evidence advanced by the applicants, *ex parte*, is in fact now contested. In any event, on October 16, 1998, the Chambers judge was advised, *ex parte*, that:

- a) Shawna Smith had problems arranging day care in Edmonton while she was to attend school there;
- b) Shortly after arriving in Fort Resolution, Shawna decided to stay there and not return to Edmonton;
- c) On October 1, 1998, Shawna moved out of the O'Reilly-Unka residence in Fort Resolution and left her baby in the care of the paternal grandparents;
- d) Shawna has demonstrated that she has little interest in caring for the baby and is incapable of caring for the baby; and
- e) Shawna was about to take her baby and return to Edmonton where a Court proceeding concerning the child's custody was scheduled for October 19.

[6] The Chambers judge issued an *ex parte* order directing that the child not be removed from the Northwest Territories, granting interim custody of the child to Joseph O'Reilly and his parents, and giving his parents the daily care and control of the child pending the return of the custody application, on notice, in this Court on October 23, 1998.

[7] On October 23, 1998, and on two subsequent occasions, the custody application in this Court was adjourned. I am advised by counsel that, similarly, in the Alberta courts, the competing applications for custody of the child have been adjourned, and that specifically, the Alberta proceeding is adjourned pending this Court's decision on the jurisdiction issue.

[8] In my view, this Court should decline to exercise jurisdiction with respect to custody of this child. It is more appropriate for that jurisdiction to be exercised by the Alberta courts.

[9] There are statutory provisions in the *Children's Law Act*, S.N.W.T. 1997, ch.14 with respect to the Court's exercise of jurisdiction in custody proceedings:

25(1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where

- (a) the child is habitually resident in the Territories at the commencement of the application for the order; or
- (b) the child is not habitually resident in the Territories, but the court is satisfied that
 - (i) the child is physically present in the Territories at the commencement of the application for the order,
 - (ii) substantial evidence concerning the best interests of the child is available in the Territories,
 - (iii) no application for custody of or access to the child is pending before an extra-territorial tribunal in another place where the child is habitually resident,
 - (iv) no extra-territorial order in respect of custody of or access to the child has been recognized by a court in the Territories,
 - (v) the child has a real and substantial connection with the Territories, and
 - (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in the Territories.

(2) A child is habitually resident in the place where he or she last resided with

- (a) both parents;
- (b) one parent under a parental or separation agreement or a court order or with the consent, implied consent or acquiescence of the other, if the parents are living separate and apart; or
- (c) a person other than a parent on a permanent basis for a significant period of time.

(3) The removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing process for the return of the child by the person from whom the child is removed or withheld.

26. Notwithstanding sections 25 and 34, a court may exercise jurisdiction to make or to vary an order in respect of the custody of or access to a child where

- (a) the child is physically present in the Territories; and
- (b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if
 - (i) the child remains in the custody of the person legally entitled to custody of the child,
 - (ii) the child is returned to the custody of the person legally entitled to custody of the child, or
 - (iii) the child is removed from the Territories.

27. A court having jurisdiction under this Division in respect of custody or access may decline to exercise its jurisdiction where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside the Territories.

28. Where a court may not exercise jurisdiction under section 25, has declined jurisdiction under section 27 or subsection 35(2) or is satisfied that a child has been wrongfully detained in the Territories, the court may do any one or more of the following:

- (a) make such interim order in respect of custody or access as the court considers is in the best interests of the child;
- (b) direct a party to the application to promptly commence a similar proceeding before an extra-territorial tribunal or make such other order as the court considers appropriate and provide that, when the application is commenced and the order otherwise complied with, the application under this Act is stayed;
- (c) order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or at the hearing of the application or of witnesses at the hearing of the application.

[10] It cannot be said that the child was habitually resident in the Northwest Territories at the commencement of the within proceeding on October 16, 1998.

[11] Firstly, the child has never resided with both parents. When this proceeding was commenced on October 16, the father Joseph O'Reilly was incarcerated at a youth detention centre in Hay River, NT. The evidence indicates he commenced such incarceration in July 1998, and that incarceration continues until November 1999.

[12] Upon the child's birth the parents were living separate and apart, and the child resided in Alberta with his mother Shawna Smith with the implied consent or acquiescence of the father.

[13] The child's habitual residence did not change to the Northwest Territories when mother and baby went to Fort Resolution for a two-week visit on September 2, 1998.

[14] There is no evidence that Shawna Smith decided, during the month of September 1998, that she and her baby would stay indefinitely in Fort Resolution. There is conflicting evidence in the affidavits of Shawna Smith and Bernadette Unka concerning the circumstances of Shawna moving out of the O'Reilly-Unka residence on October 1, 1998, and subsequent events. Ms. Unka acknowledges, however, that after October 1, Shawna asked for her baby and Ms. Unka refused to give him up. The evidence is also clear that as at the date that the within proceeding was commenced; i.e., October 16, 1998, it was Shawna's intention and desire to return to Edmonton with her baby.

[15] Accordingly, I find that this Court does not have jurisdiction to entertain the within application for ongoing custody of the child, by virtue of paragraph 25(1)(a) of the *Children's Law Act*. Nor does paragraph 25(1)(b) confer jurisdiction on this Court, because of the application for custody which was pending before the Alberta courts on October 16, 1998, to the knowledge of the applicants.

[16] Even if it were open to this Court to exercise jurisdiction under s.25, I would, with judicial discretion, decline to do so, pursuant to s.27 of the Act. As stated earlier, it is my opinion that in the circumstances of this case it is more appropriate that the Alberta courts exercise jurisdiction regarding custody of this young child. With hindsight, it is unfortunate that, through the mechanism of an *ex parte* order on an allegedly urgent application, the original custody proceeding in the Alberta courts was thwarted. That proceeding should now be allowed to continue.

[17] An *ex parte* application is, by its nature, founded on a one-sided version of the facts. Now that Shawna Smith has had an opportunity to answer the allegations against her, there is not a preponderance of evidence establishing a) any urgency, or b) any reason to not allow the Alberta custody proceeding to run its course.

[18] I hereby order as follows:

1. The *ex parte* order of this Court, dated October 16, 1998, is set aside.
2. The applicants shall forthwith deliver custody of the child Anthony Curtis Smith to his mother Shawna Smith, at a time and place as arranged between counsel for the parties.
3. This Court declines to exercise jurisdiction to make any further order for custody of or access to the child Anthony Curtis Smith, pursuant to s.27 of the *Children's Law Act*.
4. Upon the applicants' compliance with paragraph 2 of this Order, the within proceeding is stayed, pursuant to s.28 of the *Children's Law Act*.

[19] On a separate procedural matter, leave is granted *ex post facto* to the paternal grandparents, pursuant to s.20 of the *Children's Law Act*, to bring their application in the within proceeding, in order that the proceeding be regularized. The respondent consented to the granting of leave.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
2nd day of February 1999

Counsel for the Applicants: Elaine Keenan-Bengts
Counsel for the Respondent: Glen Boyd

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

BETWEEN:

**JAMES O'REILLY, BERNADETTE UNKA,
and JOSEPH O'REILLY**

Applicant

- and -

SHAWNA SMITH

Respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.E. RICHARD
