

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KERRI LOU RIEHL

Petitioner

- and -

DARYL WILLIAM KEY

Petitioner

MEMORANDUM OF JUDGMENT

A) INTRODUCTION

[1] Mr. Key and Ms. Riehl were married in 1989, and have two children, aged 10 and 12. They filed a Joint Petition for divorce in this Court in 2004 and a Divorce Judgment issued on May 18th, 2004. Mr. Key relocated to Alberta in March of 2005. He currently lives in Grand Prairie. Ms. Riehl had also relocated to Alberta in 2005, but she moved back to Yellowknife in January 2007.

[2] In their Joint Petition, the parties agreed to “shared and equal custody” of the children, and that “Access to the children be based on a [sic] alternating week period basis, starting at 12:00 noon on the Sunday and continue until 12:00 noon the following Sunday on a continuous basis”. This regime is not suitable to the current circumstances given the distance between the parties’ places of residence. The parties are not in agreement about what the new custody regime should be.

[3] Mr. Key seeks to have the custody proceeding transferred to Alberta, which has been the children’s place of residence for the last two years. Ms. Riehl opposes this request. When this matter was heard in Chambers on June 7, 2007, the parties agreed that the question of jurisdiction should be dealt with first, so I heard submissions on that issue only.

B) ANALYSIS

[4] Transfers of applications dealing with custody issues are governed by section 6 of the *Divorce Act* R.S.C. 1985, c. 3 (2nd Supp.) (“the *Act*”), which reads as follows:

6(1) Where an application for an order under section 16 is made in a divorce proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the order is sought is most substantially connected with another province, the court may, on application by a spouse or on its own motion, transfer the divorce proceeding to a court in that other province.

(2) Where an application for an order under section 16 is made in a corollary relief proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the order is sought is most substantially connected with another province, the court may, on application by a former spouse or on its own motion, transfer the corollary relief proceeding to a court in that other province.

(3) Where an application for a variation order in respect of a custody order is made in a variation proceeding to court in a province and is opposed and the child of the marriage in respect of whom the order is sought is most substantially connected with another province, the court may, on application by a former spouse or on its own motion, transfer the variation proceeding to a court in that other province.

(4) Notwithstanding sections 3 to 5, a court in a province in which a proceeding is transferred under this section has exclusive jurisdiction to hear and determine the proceeding.

[5] Both parties’ affidavits read as though there exists an Order of this Court dealing with custody of the children. Paragraph 7 of Ms. Riehl’s Affidavit sworn May 24, 2007, refers to the parties’ “Corollary Relief Order”. Paragraph 4 of Mr. Key’s Affidavit sworn March 23, 2007 also refers to an “Order” dealing with the children’s place of residence.

[6] There is no indication on this Court’s file that any Order was ever issued to deal with the question of custody of the children. Neither party has produced a copy of such an Order and at the time of the application, neither counsel had been able to find one. I do not think anything turns on this because section 6 of the *Act* sets out the same test for the transfer of variation proceedings and the transfer of custody proceedings brought for the first time: the Court has the discretion to transfer proceedings to

another province or territory if the children in respect of whom the order is sought are most substantially connected to that jurisdiction.

[7] This test has been interpreted to require a two step analysis. The first question is whether the children are most substantially connected to Alberta. If so, the next question is whether the transfer of the custody application to Alberta is in their best interests. The focus and overarching consideration in any custody proceeding, including a transfer application, are the best interests of the children. *Shields v. Shields* [2001] A.J. No.761 (Alta CA), at paras 6 and 20.

[8] The children lived in Yellowknife for two years before they moved to Alberta. There is no evidence about where they lived before that. Their parents were both police officers employed with the Royal Canadian Mounted Police, and presumably that is what brought the family to Yellowknife. There is no evidence before me that suggests that the children have any connection to the City of Yellowknife, or to the Northwest Territories, apart from what developed as a result of them having lived here for those two years. They have now lived in Alberta for slightly more than two years. Mr. Key deposes that he plans to remain in Alberta indefinitely. The children are attending school and involved in sports and other activities in Alberta. In my view, on the basis of the evidence before me, Alberta is where the children are most substantially connected at this point in time.

[9] The next question is whether transferring the proceedings to Alberta would be in the children's best interests. The best interests of the children will generally be served by ensuring that the court that hears the custody proceedings has the best possible evidence before it. *Shields v. Shields, supra*, at para. 22. The current place of residence of the children is not determinative, but it is a factor: a significant body of evidence about the children, at this point, is in Alberta, because that is where they have lived for the past two years. There likely also is relevant evidence in the Northwest Territories, since the children lived here for a period of time and were back for a visit in recent months. There will also necessarily be an ongoing connection with the Northwest Territories now that Ms. Riehl has moved back to Yellowknife.

[10] On balance, I have concluded that the best interests of the children would be better served by having the proceedings transferred to the jurisdiction where they are currently living. I am mindful that transferring these proceedings to Alberta will bring some inconvenience to Ms. Riehl. It might also result in some additional delays arising

from the parties having to retain new counsel in Alberta. I understand why delays are of concern, particularly from Ms. Riehl's point of view. I think it is in the children's best interests to have the question of custody dealt with as soon as possible and hopefully the parties will make every effort to ensure that this can happen.

[11] The application to have these proceedings transferred to the Court of Queen's Bench of Alberta, Judicial District of Grand Prairie, is allowed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
12th day of June 2007

Counsel for Kerri Lou Riehl: Terri Nguyen

Counsel for Daryl William Key: Trisha Soonias

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