Date: 2008 08 05
Docket: S-0001-CV-2004000184

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NICOLE RAE MERCREDI

Applicant

- and -

JAMES ANDREW HAWKINS

Respondent

MEMORANDUM OF JUDGMENT

[1] This case involves R., a 13 year old boy, who currently lives with his father during the school week, pursuant to a court order. His father has recently obtained employment in Alberta and wishes to move there with R. He seeks custody and day to day care of R. R.'s mother opposes the move. She wishes R. to remain here in Yellowknife.

Background

[2] The father and the mother had a common law relationship of which three children were born. They separated and in 2004 there was litigation over custody of the three children, in the course of which Minutes of Settlement were reached and consent orders filed. Pursuant to those orders, made November 15, 2004, the mother was granted custody and day to day care and control of R., with his primary residence to be with her. The father was granted custody and day to day care and control of R.'s younger brother T. and the father's parents were granted custody and care and control of R.'s younger sister, J.

[3] The Minutes of Settlement on which the consent orders were based are quite detailed and contain an acknowledgment by the father and the mother that R.'s school attendance is a very important issue that needs to see significant improvement. It was agreed that the mother would take steps to improve that situation and that if there was no improvement within a certain time frame, the issue of R.'s primary residence would be revisited.

[4] The consent order pertaining to R. also provides that the issue of R.'s primary residence shall be revisited by the parties if R.'s school attendance has not improved significantly and that either party can apply to vary his permanent residence.

[5] Thus, R.'s school attendance has been a live issue going back several years. The father applied for a change in R.'s custody in February 2007; that application was to go to trial but did not for reasons I will refer to below. In November 2007, the father applied for an order that R. reside with him during the school week. The materials filed in support of that application include a letter from the school principal indicating that R.'s performance at school had declined, partly due to poor attendance, and there was a need for drastic improvement. The order sought by the father was granted.

[6] Since that order issued, the father has been laid off from his employment. He says that he has sought employment in the Northwest Territories but has been unsuccessful. He has, however, obtained employment in Calgary, Alberta. He plans to move there with his fiancee, to whom he is to be married in a couple of week's time. He wants R. and T. to move with him. The mother does not object to T. relocating with the father, but she does not want R. to go.

Analysis

[7] The evidence provided from R.'s teachers satisfies me that R.'s previous dismal attendance at school has improved significantly since he started living with his father pursuant to the November 2007 order. His marks have also improved in most subjects.

[8] The mother suffers from Bipolar disorder and depression. These have led to sleep difficulties and she admits that she is often unable to wake up early to get R. up and off to school. She is hopeful that her condition will improve with treatment by a new psychiatrist and new medication.

[9] Some of the issues between the parties arise from communication difficulties and different parenting styles. The material filed indicates that the father is more strict

and maintains rules that R. must abide by. The mother, on the other hand, is less strict with R. and allows him more freedom to do as he wishes. The main effect of all this is on R.'s school attendance and performance. These issues were covered quite extensively on the application that resulted in the November 2007 order and I will not repeat the evidence in that regard.

[10] Rather than have R. move to Alberta with the father, the mother proposes that he live with her mother ("the grandmother"), who will ensure he attends school on time in the morning and that he observes a regular bedtime. The mother says she will help R. with his homework between the time he finishes school for the day and when he is picked up by the grandmother on her way home from work. R. would effectively live with his grandparents during the week and with his mother on the weekends. His mother expects that R.'s recent better performance at school will continue in these circumstances.

[11] The father points out that in the November court proceeding the mother said that one of the reasons R. was late for school when in her care was that he stayed overnight with the grandmother, who did not make sure that he got up and went to school. The father says that there is no reason to think things will be any different this time.

[12] Over the objection of the mother, I heard evidence from a counselor R. has been seeing since the November order. Apart from the short notice that the witness would be called, the only objection made by the mother to the Court receiving the counselor's evidence was based on the confidentiality of the communications between R. and the counselor.

[13] The counselor's evidence was heard in a *voir dire*. She testified that R. was told that what was said in the counseling sessions was confidential except that his father would be given information about the sessions. The father and his fiancee were also present at some of the sessions. I am satisfied on consideration of the confidentiality issue and the factors set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 that the evidence should be considered. R. was not guaranteed blanket confidentiality and the injury that might arise from disclosure of information from the sessions is not greater than the benefit to be gained by its disclosure in this litigation. Both the father and the mother included in their affidavits evidence about what they think R. wants or what he has told them about his wishes. That evidence conflicts so it is helpful to have evidence from an objective third party who has dealt with R. about these issues.

Counsel's submissions after the *voir dire* were directed at the weight of the evidence rather than its admissibility.

[14] The counselor's evidence indicates that R. understandably feels himself caught in the middle of this dispute. He is very close to his mother and very concerned about her. He is a bright child who can understand why certain things may benefit him even though he does not like them.

[15] The counselor's evidence does not indicate that R. has expressed any strong wish to live with one parent rather than the other. What I take from her evidence is that R. is very concerned about the prospect of leaving his mother, while also looking forward to some aspects of the proposed move. He likes the freer environment at his mother's and does not like his father's rules although he can see how they benefit him.

[16] The governing principle is the best interests of R. and where they may conflict with the interests of one of his parents or their wishes, it is his best interests that must prevail. Although R. is at an age where his own wishes should be taken into account, they are not determinative.

[17] On all the evidence it is clear to me that R. does better at school, both in attendance and performance, when he is living with his father. R. has just completed grade 7 and the information from the school attached to the father's affidavit indicates that his absentee rate at the beginning of the school year, when he lived with his mother, was 58%, which decreased to 4.6% for the period after he began living with his father.

[18] The coming years are important ones for R. as he moves toward highschool. Although, as his mother points out, other factors are also important for a child's well-being, education is one of the most important for his future. The counselor noted that R. is a bright child; it will be tragic if he does not realize his full potential because of poor school attendance or not enough attention to his school work. Although it seems R. can appreciate that there are benefits for him in the rules he does not like at his father's home, the evidence does not suggest that he has yet reached a level of maturity where he can set and abide by rules by himself. He still needs the guidance and discipline that, on all the evidence, his father has been more successful at giving him.

[19] There is, of course, some uncertainty associated with the proposed move. The father acknowledges that R. had difficulty adjusting to the move to his home after the November 2007 order, so much so that the father arranged the counseling to help R. with that. A move to Alberta, away from his mother and friends, school and community, will no doubt require an even greater adjustment by R., which could have an impact on his attitude toward school.

[20] On the other hand, R. has coped quite well with the adjustment to living with his father, as evidenced by his better attendance and performance at school, so there is reason to expect that he will also adjust well to a move to Alberta. He will also have the company of T., his younger brother.

[21] It may be that if the mother's health and circumstances change, she will also be able to provide the structure and discipline required for R. to succeed at school. On the evidence before the Court at this time, however, I am not convinced that her situation or the proposal that R. live with his grandmother are likely to ensure that R. does not fall back into his previous pattern with regard to school. Instead, the evidence indicates to me that R. is more likely to continue his successful efforts at school while in his father's care.

[22] For the above reasons, and having considered the factors set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, I am satisfied that it is in R.'s best interests that he move to Alberta with his father. If this is to be considered an interim order, which I will discuss below, I am satisfied that the concerns about R.'s education amount to "compelling circumstances" so as to justify the move even on an interim basis: *Comeau v. Dennison*, [2006] O.J. No. 5088 (Ont. Ct. Jus.); *Plumley v. Plumley*, [1999] O.J. No. 3234 (Ont. Fam. Ct.), cited in *Ivens v. Ivens*, 2008 NWTSC 18.

[23] Counsel were not in agreement as to whether this order should be final or interim or as to the nature of the order made in November 2007.

[24] As indicated above, the father brought a previous application for custody of R. in February 2007. The court record indicates that in chambers on March 9, 2007 the parties agreed that a trial with *viva voce* evidence was required. They were directed by the presiding Judge to take the required steps to set the matter for trial on the issue of custody.

[25] It appears from one of the affidavits of the father that after March 2007 arrangements were made for examinations for discovery. These did not go ahead because of a change in counsel acting for the mother. That happened shortly before the application which resulted in the November 2007 order. That application was evidently brought on an urgent basis when the father learned about R.'s poor school attendance and performance.

[26] Although the transcript of that application shows that counsel for the father referred in his submissions to the possibility of the matter going forward for trial at some point, the formal order does not refer to the November 2007 order as an interim one. Nor is there any indication that either party took steps after that order to move toward trial.

[27] This application also has an element of urgency because of the father's impending move to Alberta and the need to enrol R. in school for September.

[28] It is clear that the parties contemplated a trial on the issue of R.'s custody and were directed to proceed to trial. The issue of R.'s day to day residence has been driven by his problems at school and both the November 2007 order and the order I am now making have been based on affidavit evidence, with the exception of the *viva voce* evidence heard from R.'s counselor. They are interim orders in the sense that they were and are designed to deal with a specific situation without a full trial.

[29] In a sense, orders for child custody or care are never final in that it is open to a party to seek variation of such an order upon showing that there has been a material change in circumstances that affects or is likely to affect the best interests of the child: s. 22(1) *Children's Law Act*, S.N.W.T. 1997, c. 14.

[30] In the rather unusual circumstances of this case, I have decided that the most appropriate thing to do is to grant the father interim custody of R., who will have his residence with the father. I am making the order as to custody so as to avoid any confusion or difficulty which might arise from custody and care being vested in different persons.

[31] I would urge counsel and the parties to consider that if these issues are indeed to go to trial, the best time for a trial may be soon after R. has completed his school year in Alberta so as to have the benefit of full information as to his progress and not

disrupt his school year. R. is entitled to some certainty in his life and it will likely not benefit him to leave the issues unresolved, so it would be best if a decision is made sooner rather than later as to whether his future custody and residence will go to trial or can be resolved by agreement.

[32] Access for the mother should be as generous as possible. Only access to R. was specifically addressed in argument but the notice of motion refers also to access to T, so the access provisions will apply to both boys.

[33] The mother will have reasonable and generous access to include half of the Christmas break each year, half of the school March break with a minimum of one week and half of the summer holidays. She will also be entitled to access at least two long weekends each year that are not included in the Christmas, March and summer access. She will also be entitled to reasonable access on reasonable notice if and when she is in Alberta.

[34] The mother will also have unlimited email and telephone access, the latter at reasonable hours.

[35] As for the costs of access, the mother asks that they be borne by the father since she is unemployed and without means and he has chosen to move. On the other hand, the father is responsible for the financial support of R. and T.; he does not receive any contribution from the mother, so to have him bear all of the access costs as well is not reasonable. I order that the father pay half of the travel costs for the Christmas, March and summer access (or, alternatively, the full travel costs for one of those trips and half for one of the others).

[36] Accordingly:

(i) the orders of November 15, 2004 and November 15, 2007 are varied and the father is granted interim custody of R., who will have his residence with the father;

(ii) the father has leave to relocate R. and T. to Alberta;

(iii) the mother will have reasonable and generous access to the children as set out above;

(iv) the father will contribute to the costs of the mother's access as set out above.

[37] If any of the access provisions require further clarification, counsel may arrange to speak to that issue before me.

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

Dated at Yellowknife, NT, this
5th day of August, 2008

Counsel for Nicole Rae Mercredi: D. Jane Olson
Counsel for James Andrew Hawkins: Karina Winton

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