

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRENDAN RAY HAMILTON

Applicant

- and -

KRISTY LYNN HESSDORFER

Respondent

MEMORANDUM OF JUDGMENT

[1] This matter was before me in regular family Chambers on May 31, 2012.

[2] The parties were in a relationship from approximately 2002 to 2009. There are two children from the relationship: J.H., born September 4, 2004 and C.H., born May 14, 2006. The parties separated in 2009. After they separated, the children were in the care of their Mother until July 2011. In July 2011, the Father picked up the children in Edmonton and returned to Yellowknife with them. They have been in his care ever since.

[3] In his Originating Notice, the Father is seeking interim and permanent sole custody of the children with the Mother having reasonable access to the children. He is also seeking child support. The Mother has also filed a Notice of Motion seeking interim and permanent sole custody of the children, reasonable and generous access to the Father and child support.

[4] The application before me was with respect to interim custody, access and child support. The application was based upon Affidavit evidence and there are significant disagreements between the parties regarding what has happened to date and their conduct after separation. Both parties have filed Affidavits and I am

unable to determine some of the facts. Based upon the representations of counsel, it appears that this matter is heading for trial.

[5] While there are major differences in the Affidavits of each party, there are some areas of agreement and some matters that are not denied. At this interim application stage where the evidence is presented by way of Affidavit, the focus should not be on a minute, paragraph by paragraph examination of the Affidavits, but on a global view of the evidence before the Court: *Emerson v. Emerson*, [1991] O.J. No 1655 (Ont. Ct. (Gen. Div.)). There is limited evidence before the Court but because of the importance of ensuring stability for the children, it is in the best interests of the children to have an interim custody order in place.

Background

[6] The parties separated in 2009 while they were apparently living in Edmonton. The Father moved to Yellowknife in October 2009 to seek employment. The children remained with the Mother. The Father visited the children on several occasions and also brought them to Yellowknife for a visit.

[7] In July 2011, the Father picked up the children and returned with them to Yellowknife. The children have remained with their Father since then and are currently enrolled in school. J. has also attended Brownies and has been seeing the school counsellor. C. has neurofibromatosis and has seen a pediatrician for this as well as attended occupational therapy. Both girls are reportedly doing well.

[8] There is disagreement regarding the Mother's contact with the children since July 2011 and regarding when or if she requested that the Father return the children to her care.

[9] The Father is in a relationship with a new partner and they have a child together. His partner is employed and the children apparently get along well with each other. His new partner also has 2 other children from a previous relationship who reside with them on a two week rotation.

[10] The Father was employed but was laid off in September 2011. Since then, he has been receiving employment insurance while staying at home to care for his children. He is currently seeking employment.

[11] The Mother is employed full time at the Northern Store in Fort Smith working 40 hours a week and also works three evenings a week doing janitorial work. This employment is fairly recent, having commenced in the last month or so, and her counsel was unable to provide any information regarding her income.

[12] The Mother is now living in Fort Smith and taking steps to pursue her education, applying to Aurora College to take upgrading. She is also currently facing three criminal charges: 2 counts of Theft Under \$5000, contrary to section 334(b) of the *Criminal Code*, and one count of Break and Enter, contrary to section 348(1)(b) of the *Criminal Code*. The events are alleged to have occurred on April 18 and 20, 2012 and she has a Promise to Appear on July 16, 2012 in the Territorial Court in Fort Smith. She claims that she “made a bad choice recently by getting into a vehicle with a friend” and expects that the charges will be withdrawn.

[13] Both parties allege that the other party has been violent, has alcohol and/or drug issues, and has made poor parenting choices. As mentioned above, these issues cannot be resolved on the basis of Affidavit evidence. But they give context to the dispute between the parties and highlight, in my view, the need for stability for the children at this stage.

Interim Custody Orders

[14] In Interim Custody Orders, as in all situations of custody, the best interests of the child are the overriding concern. Section 17(2) of the *Children’s Law Act*, S.N.W.T. 1997, c.14 states:

The merits of an application under this Division in respect of custody of or access to a child shall be determined in accordance with the best interests of the child, with a recognition that differing cultural values and practices must be respected in that determination.

[15] Section 17(2) sets out the considerations that a court must have in mind when determining the best interests of the child. A court has to consider “all the needs and circumstances” of the child and a number of factors to consider are listed. The challenge on interim custody applications that occur in regular chambers is to make these decisions with limited information on the basis of brief arguments.

[16] The jurisprudence has developed so that stability has emerged as a focal point. In *Kimpton v. Kimpton*, [2002] O.J. No. 5367 (Ont. S.C.J.) at para. 1, the Court stated:

There is a golden rule which implacably governs motions for interim custody: stability is a primary need for children caught in the throes of matrimonial dispute and the de facto custody of children ought not to be disturbed pendent lite, unless there is some compelling reason why in the interests of the children, the parent having de facto custody should be deprived thereof. On this consideration hangs all other considerations. On motions for interim custody the most important factor in considering the best interests of the child has traditionally been the maintenance of the legal status quo.... By status quo is meant the primary or legal status quo, not a short lived status quo created to gain tactical advantage.

Custody

[17] In this case, the children have been with their Father since July 2011. There is some dispute regarding how they came to be in the custody of the Father but both parties agree that the father was going to have custody of the children over the summer months. There is a dispute about when and if the Mother sought the return of the children. I cannot determine these issues, but the children have remained with the father since July 2011.

[18] The Father has lived in Yellowknife since October 2009. He lives with his new partner and their family. He has enrolled the children in school and they have participated in activities and J. has seen the school counsellor, and C. has seen the pediatrician and started occupational therapy. The children are reportedly doing well.

[19] The Mother has recently relocated to Fort Smith. It is not clear when she made this move but she has secured employment in Fort Smith. She is also facing criminal charges that she believes will be withdrawn. As she has not yet had her first appearance, this appears to be an expression of hope rather than a definitive belief. All of these developments are recent and give me some concern about the stability in the Mother's life. I do not believe that, at this time, she can offer the stability that her children need. As such, I do not see a reason to disturb the status quo at this time.

Access

[20] It does not appear that the Mother has had access to the children since July 2011. While there may have been telephone conversations, the contact, if it has occurred, has not been regular.

[21] Both parties are in agreement that there should be access but there is some disagreement about where access should occur and the costs for access. The Mother had been the primary caregiver for much of the children's lives until recently. To have access between the mother and children disrupted for approximately 11 months is not in the best interests of the children. They are still young and it is important to ensure that access be re-established between the Mother and her children.

[22] In the circumstances, the Mother is to have reasonable access to the children by telephone. Further, she is to have reasonable access to the children, such access to be exercised in Yellowknife. Costs of access are to be borne by the Mother.

Child Support

[23] The Father seeks child support for the children and has provided Affidavit evidence regarding the median income for an adult female in Fort Smith from Statistics Canada in 2005. That amount is \$54,812 per year.

[24] The Affidavit of the Mother indicates that she has recently secured full-time employment but does not provide any financial information. Counsel for the Mother advised that she had only recently been retained and had not been able to secure the financial information to date. The Affidavit of the Mother was sworn on May 28, 2012, three days before the application.

[25] I am reluctant to order child support on the basis of the Median income when the mother is represented by counsel and has employment, both of which occurred recently. In the circumstances, I am going to adjourn the issue of child support to allow the Mother additional time to gather financial information.

Removal from Yellowknife

[26] The Order of Justice Richard, dated March 29, 2012, prohibited either party from removing the children from Yellowknife until further Order of the Court. The

Father is requesting that the children be permitted to visit their paternal grandmother in Edmonton this summer. He has not yet determined specific dates but wishes the Order to be amended to permit this to occur.

[27] Allowing the children to visit their grandmother seems to be an appropriate exception to the Order preventing their removal from Yellowknife. However, it should not be a blanket exception. The Father should provide suggested dates and a proposed length of time for their visit. As such, this issue will also be adjourned to allow the Father to provide more specific information regarding the proposed trip.

Conclusion

[28] Based on the above reasons, there will be an Interim Order granting Mr. Hamilton interim sole custody of the children of the relationship: J.H., born September 4, 2004 and C.H., born May 14, 2006.

[29] Ms. Hessdorfer will have reasonable access to the children by telephone and in person in Yellowknife, the costs of which are to be borne by Ms. Hessdorfer.

[30] The issues of child support and the children's trip to Edmonton are adjourned to June 14, 2012 or such other date as can be agreed upon by the parties.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
04 day of June 2012

Counsel for the Applicant:
Counsel for the Respondent:

Charlene Doolittle
Jeannette Savoie

FM-2012 000020

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