

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2006 SKQB 386
Date: 2006 08 18
Docket: D.I.V. No. 417/2003
Judicial Centre: Regina, Family Law Division

BETWEEN:

WANDA MARY WEBSTER
PETITIONER
- and -

BRIAN LARRY WEBSTER

RESPONDENT

Counsel:
Ian D. McKay, Q.C. for the petitioner
R. Bradley Hunter for the respondent

FIAT SANDOMIRSKY J.
August 18, 2006

[1] An ex parte application was brought before the Court and dealt with by Madam Justice MacDonald on August 9, 2006. On that date Madam Justice MacDonald wrote:

Due to the conflicting nature of the material this matter should be set down for chambers on August 16, 2006 for argument. The children shall remain with the father until that date. Counsel to be advised of the date.

[2] The matter came before me in chambers on August 16, 2006, and was adjourned over to today's date, August 18, 2006, for argument.

[3] The ex parte application was brought by the respondent father seeking an order granting him interim primary residence of the children, Christopher Webster, born September

3, 1992, Zachary Webster, born February 4, 1995, Shelaine Webster, born July 6, 1996, and Aziza Webster, born March 12, 2001. In the alternative, Mr. Webster sought an order directing an expedited pre-trial conference and that pending the pre-trial conference the child reside with himself. In the further and final alternative, Mr. Webster sought an order abridging the time for service in which the matter might be heard in chambers.

[4] Mr. and Mrs. Webster separated from one another in August 2002. For three years and three months thereafter, the petitioner and respondent maintained their homes at Indian Head, Saskatchewan. In this manner the children had maximum contact with each parent by spending three days in one week and two days in the following week with their father and the remainder of each of the two weeks with their mother. This 14 day cycle repeated. The evidence discloses that the children were comfortable with that arrangement and discounting for the usual stress and emotional damage of a matrimonial breakup, they seemed to fair reasonably well. Some of the children experienced some difficulties in school which is understandable but by and large, their parents had worked out a co-parenting plan that served their best interests.

[5] Matters changed when Mrs. Webster moved to Fort St. James, British Columbia, in the month of November 2005. At that time she took each of the four children with her. The parties do have two older children, ages 23 and 20, both of whom remain in Saskatchewan and for all intents and purposes, were living independent of their parents. The children remained at Fort St. James until they completed their school year at the end of June 2005. By all indications they performed as well or better than their academic performances at Indian Head the previous year.

[6] By agreement, the children came to visit with their father at Indian Head from July 8, 2006 to August 11, 2006. Their mother showed up in Indian Head on July 31, 12 days in advance of the scheduled exchange date. This early arrival may have exacerbated problems as between the petitioner and respondent. Nonetheless, the respondent was sufficiently convinced that he should make an ex parte application and apply to this Court for custody of the children. He did so based upon certain representations that each of the four children made to him. Their mother has attorned to the jurisdiction of this Court as there were proceedings instituted prior to her departure to British Columbia. This Court still retains proper jurisdiction over the children as they were ordinarily resident in Saskatchewan and indeed had their place of residence in Saskatchewan when these proceedings were commenced in 2003.

[7] Counsel on behalf of the respondent father urges that I consider the circumstances of each of the four children individually. I propose to do so.

[8] The children were interviewed by Greg Petroski, a registered psychologist, and a transcript of his interview with each of the four children was provided in evidence. Flowing

from these interviews, one primary concern was shared by all four children. That was their mother's smoking and that of her present common law spouse. Mr. Petroski found that their focus upon the issue of smoking was somewhat of an oddity. All of the children shared their concern about secondhand smoke. I am satisfied that that concern emanated with Shelaine, the parties 11-year-old daughter and that her reasons have been adopted by each of the other three children.

[9] Christopher's second concern for expressing a desire to remain with his father in Indian Head was his familiarity with the Town of Indian Head as compared to Fort St. James. In his interview I am satisfied that Christopher displayed a certain sense of ambivalence. Like his siblings he would have hoped that his parents could have continued to reside at the same locale which would have accommodated the children's needs to have maximum contact with both parents. That is no longer a reality that could be remedied.

[10] Shelanie's second concern was that she had been punished by Ms. Webster's present spouse. She identified three instances in which she was strapped with a belt. One instance was for setting a fire in the family home in Fort St. James. The second was for swearing and the third was for being mean to one of the children of Ms. Webster's current spouse. I agree with counsel for the respondent that the use of a belt to discipline a child, regardless of the circumstances, is not acceptable in this day and age.

[11] Zachary was concerned with the effects of secondhand smoke and may be adopting or mimicking his sister Shelaine or other siblings. Otherwise Zachary expressed his happiness with his newfound situation at Fort St. James, British Columbia and his preference to return and go to school there this fall.

[12] Aziza, at the age of five, is too young to have expressed any meaningful opinion when interviewed by Mr. Petroski. She mimics the question of secondhand smoke but generally is naive. I found nothing turns on her interview.

[13] The children's mother had been their primary caregiver not only when she resided in Indian Head but also at Fort St. James. This is an interim application which appears to have all the earmarks of proceeding to at least a pre-trial if not a trial. In an interim disposition of custody pending pre-trial or trial, the court examines the status quo as it existed at and prior to the date of application. If the children are managing or even flourishing under the status quo, the court should not interfere with the parenting arrangements as they exist. There is no excuse for Harlin Fry to punish Shelanie with a belt. The children's concern about secondhand smoke, while legitimate, is not so compelling a complaint as to disturb the status quo. That can be addressed effectively with this interim order and that is what I intend to do.

[14] On balance, the children are managing and it would appear that their immediate best interests are being served by being returned to their mother's care and to resume their

schooling at Fort St. James. I direct that the respondent turn the children over to the petitioner no later than 3:00 p.m. Saturday, August 19, 2006.

[15] While the children are under the primary care of the petitioner, she shall not permit the children to be exposed to secondhand smoke. Specifically, there shall be no smoking within the family home at Fort St. James nor the family vehicle. This eliminates the children's primary concern. Second, there shall be no use of corporal punishment to discipline any of the children. All further discipline of the children pending further order of this Court, shall be administered by the petitioner and not by her consort, Harlin Fry. This effectively addresses Shelanie's second reason for being hesitant to return to her mother's care.

[16] I have come to this conclusion taking into consideration all factors found at ss. 6(5) and 8 of The Children's Law Act, 1997, S.S. 1997, c. C-8.2 as well as s. 16(8) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). As this order is urgently required this afternoon, I am not able to elaborate upon jurisprudence which supports this interim order.

[17] The petitioner and respondent were represented very ably by two of the most senior and respected lawyers in the Regina Family Bar. They understand the law and what is necessary to move this case forward in a meaningful fashion.

[18] I am advised that there are pre-trial dates available as early as August 31, 2006. If the parties are of that frame of mind, they might agree that this matter proceed to pre-trial on August 31, 2006. Child custody cases are best resolved through mediated or facilitated negotiation as opposed to a bitter custody trial. I am also advised that the opportunity to fast track the matter to trial exists. However, there should be a minimum of disruption to the children's lives. Therefore, they are to return to their ordinary residence and to the schools from which they left last June.

[19] Generally, the respondent should not take the opportunity while the children are visiting under the pretense of a summer holiday to attempt to withhold them.

[20] The Voices of the Children as represented by the transcribed interviews with Mr. Petroski do not raise any compelling reason to vary the status quo.

[21] The respondent shall have reasonable telephone access with each of his children for no less than five minutes twice a week, Wednesday and Sunday. These telephone calls may be placed by the respondent to the petitioner's residence at 8:30 p.m. on each of the said evenings. The telephone calls must respect the children's privacy. They shall not be monitored by the other parent or any third party. The children shall be given their privacy so that they are not unduly influenced or interfered with in their conversations with Mr. Webster.

[22] It is further ordered that the parents are to refrain from discussing these proceedings and the issues they represent with any one of the children. This prohibition applies to all third parties. The parents should not attempt to curry or win the favour of any one of their children with promises so as to allow the children to remain free of the conflict and contest over their ultimate custody.

[23] The petitioner should permit the children to display pictures of their father and extended paternal family or their older siblings in their bedrooms to supplement their contact with their father.

[24] Costs will be in the cause.

J.

N. S. Sandomirsky