IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Quigley v. Willmore, 2008 NSSC 95

Date: 20080114
Docket:1207-003129 (STD 056344)
Registry: Halifax

Between:

KAREN AGNES QUIGLEY

Petitioner

v.

GARY WILLMORE

Respondent

Judge: The Honourable Justice R. James Williams

Heard: January 8, 2008 in Halifax, Nova Scotia

Written Decision: January 14, 2008

Counsel: Jane Lenehan, for the Petitioner

By the Court:

[1] Karen Agnes Quigley has brought *ex parte* applications. Her husband, Gary Willmore, lives in the United States. They have one son, Ryan Ross Quigley-Willmore born November 15th, 1999. Ryan is now eight. He is in grade 2.

[2] Ms. Quigley seeks *ex parte* Orders for:

(a) sole custody of Ryan;

(b) for the Court to order Mr. Whitzman, a counsellor seeing Ryan, to prepare a report; and

(c) for substituted service of documents in this proceeding on Mr. Willmore.

[3] The substituted service application is brought in the context of Mr. Willmore having apparently refused to sign the Petition for Divorce when it was served upon him, or to indicate an address or a manner of service upon himself, and in circumstances where counsel for Mr. Willmore in Texas, a Ms. Zimmerman, has indicated she would not accept service of documents on his behalf with respect to the current Nova Scotia process. Further, counsel for Mr. Willmore in an appeal process (in a separate but related proceeding here in Nova Scotia), Mr. Kelly, has indicated his retainer does not extend to the point that he can accept service for material in this process. Ms. Quigley has asserted in material filed that he travels a great deal and that service will be problematic.

[4] There are and have been a plethora of legal proceedings and events involving Ms. Quigley and Mr. Willmore over the past fourteen to fifteen months. They include but are not limited to the following:

(1) On November 6th, 2006, Karen Agnes Quigley filed in Nova Scotia a Petition for Divorce. That material also made claims under the **Maintenance and Custody Act**. Those documents were served on Mr. Willmore on November 8th, 2006. Mr. Willmore apparently also commenced a divorce in Texas that same date, November 8th, 2006.

(2) On December 22nd, 2006, an *ex parte* Order was made by Justice Douglas MacLellan of the Nova Scotia Supreme Court. That Order was made under the **Divorce Act** and **Matrimonial Property Act**. It is unclear from the material I have whether it was determined that Justice MacLellan did not have jurisdiction under the **Maintenance and Custody Act**, or whether the simply proceeded under the **Divorce Act** and **Matrimonial Property Act**(s).

In any event, *ex parte* Orders were granted giving Ms. Quigley interim sole custody of Ryan. The *ex parte* order had other wide-ranging provisions under both the **Divorce Act** and **Matrimonial Property Act**. Ms. Quigley says this interim Order was confirmed in subsequent appearances in the Nova Scotia Supreme Court.

Her affidavit of January 3rd, 2008, refers to these Orders, and states they are attached. They were not attached, perhaps through oversight. In any event, she says that these Orders were "confirmed" in appearances of January 30th and March 30th, 2007, in the Nova Scotia Supreme Court (the Orders were attached to her January 7, 2008 Affidavit).

Mr. Willmore did not participate in these Nova Scotia proceedings. It is unclear from the record before me at this time what notice he had of those proceedings or, for that matter, what the rationale for proceeding on an *ex parte* basis was on December 22nd, 2006. Subsequent events have affected these Orders in any event.

(3) On March 30th, 2007, an Order in Texas issued. It appears that Ms. Quigley had notice of that proceeding, but chose not to appear or participate. Her affidavit says that she chose "to rely on the Canadian Orders".

The Texas Order of March 30th, 2007, deals with Ryan's parenting. Page 3 of that Order states that Karen Quigley has the exclusive right to designate the child's primary residence, whether that be in Nova Scotia or Texas. The

Order goes on to deal with access provisions, and appears to be a standard form of Order. Her evidence is that she did not appear at the time the March 30th, 2007 Texas Order was granted. I am somewhat confused by her evidence today that suggested that Mr. Willmore had since January of last year (2007) been seeking to force her to live in Texas and to have Ryan in his custody - in circumstances where, when she does not appear, the Texas Order that arises is one that gives her primary care and lets her designate the child's primary residence, be it Nova Scotia or Texas.

In any event, the only logical conclusion that can be made by the events since March 30th, 2007 (as they are asserted by Ms. Quigley), is that Ms. Quigley has chosen to designate Ryan's primary residence as Nova Scotia.

The March 30th, 2007 Order, from Texas deals with access. It deals with issues such as travel where the parties live more than 100 miles apart. It deals with weekends, Christmas, summer, et cetera. The Christmas access designated in this Order would later become an issue in a proceeding in Texas on December 20th of 2007. Access has not occurred since the March 30, 2007 Texas Order.

(4) October 5th to 11th (or thereabouts) of 2007, a hearing took place in the Nova Scotia Supreme Court in front of Justice Darryl Wilson. On October 22nd, 2007, Justice Wilson ruled (and I quote from paragraph 62 of his decision):

> Since the Court finds that the Petitioner was ordinarily resident in Texas from August 2005 to June 2nd, 2006, which includes the period of time from November 6th, 2005 to June 2nd, 2006, which is within the year proceeding the issuance of the Divorce Petition, the petitioner did not establish that she was ordinarily resident in Nova Scotia for at least one year immediately preceding the commencement of these proceedings.
>
> The Application to set aside the Petition for Divorce filed by the petitioner on the grounds that this Court has no jurisdiction is granted. The interim Order as issued in this proceeding are void.

Justice Wilson's decision was made October 22nd, 2007. The effect of this Order, as Justice Wilson has indicated, is to void the interim Orders made in Nova Scotia, and the Divorce Petition that was filed on November 6th, 2006.

(5) On December 6th, 2007, Ms. Quigley applied to the Nova Scotia Court of Appeal for a stay pending the appeal of this decision of Justice Wilson.

In effect, she was asking the Nova Scotia Court of Appeal to stay Justice Wilson's Order, and leave the interim Orders (made in Nova Scotia), which originated with the *ex parte* Order of December of 2006, in place and operative until the appeal was heard. The Nova Scotia Court of Appeal denied her application to stay the proceeding. Her appeal of Justice Wilson's Order is scheduled to be heard April 10th, 2008, according to the documentation which she has filed before me.

(6) On December 14th, 2007, Ms. Quigley issued a (second) Petition for Divorce here in Nova Scotia. It is this Petition under which she makes the Applications that are before this Court at this time. I cannot help but observe that the status of this Petition and, in turn, this proceeding is somewhat uncertain if the appeal she has undertaken is successful on April 10th.

The Petition for Divorce she filed on December 14th, 2007, was filed in Truro. Justice Ted Scanlan sits in Truro. The material before me, including the report of Mr. Whitzman, indicates that Mr. Justice Scanlan is in a relationship with Ms. Quigley. As Justice Scanlan sits in the Truro Judicial Centre, the file was assigned to me by Chief Justice Kennedy. Further filings in this process will be made at this Court, here in Halifax.

(7) On December 20th, 2007, a proceeding took place in Texas. A transcript of that proceeding has been filed. That proceeding appears to be a motion for enforcement, the issue before the Court being enforcement of the visitation Order (of March 30, 2007). Ms. Zimmerman, counsel for Mr. Willmore stated near the start of that proceeding at page 5 of that transcript, "I am not seeking to put Ms. Quigley in jail."

Ms. Quigley has asserted that some of what occurred December 20, 2007 in the Texas proceeding took place off the record. That said, it appears from

what is available to me that Justice Cain of the Texas Court encouraged the parties to resolve the matter. The transcript indicates that he encouraged the parties to discuss the matter on more than one occasion. The transcript contains no reference to Mr. Whitzman's letter of December 1st, 2007 (which is addressed to Ms. Quigley's Texas counsel (Mr. Gagnon)), and no reference to the various fears and allegations that Ms. Quigley has made concerning Mr. Willmore in Nova Scotia proceedings. It is unclear to me what Ms. Quigley put before the Texas Court.

There does not appear to be any motion from her counsel in Texas during the December 20th proceeding to address evidentiary issues. At page 16 of that proceeding, Ms. Quigley's counsel indicates, "My client will make the decision to comply with the Court Order." Access was to be exercised by Mr. Willmore December 26th to January 1st, 2008 in Texas. Flight details were provided on the record in Texas.

It is significant to note that Justice Cain of the Texas Court acknowledged at page 6 of that proceeding that, "At some point Canada will maintain dominant jurisdiction, but obviously according to the Canadian Courts not right now."

At the time Justice Cain was dealing with the matter, the only matter before the Canadian Courts to his knowledge appears to be the fact that the original Petition had been found to have been filed without jurisdiction, and the interim Orders in Canada voided. He presumably would have known or could have known that that was under appeal. It is unclear whether he knew that a new Petition had been filed on December 14th. The December 20th, 2007 transcript from Texas also indicates that there were undertakings to physically return to the Texas Court if the access did not occur.

[5] Ms. Quigley today applies on an *ex parte* basis for:

A. an Order for Substituted Service on Mr. Willmore. As I've indicated, Ms. Zimmerman, Mr. Willmore's Texas counsel, would not accept service on his behalf. That is part of the December 20th record in the Texas Court. Ms. Zimmerman is Mr. Willmore's counsel in the Texas proceedings.

Mr. Kelly, counsel for Mr. Willmore on the appeal here (on April 10th, 2008) has indicated that he would not accept service on behalf of Mr. Willmore. The evidence before me indicates Mr. Willmore travels a good deal throughout the world, and service on him would be difficult.

The position of his two counsel in the two proceedings I've referred to does not suggest that he is or has been particularly cooperative in terms of facilitating service, nor for that matter does the fact that he refused to sign the Petition for Divorce upon its service on him in December, 2007.

I am satisfied that an Order of Substituted Service should be granted.

Ms. Quigley asks for substituted service via Mr. Willmore's e-mail address. I am not going to direct that substituted service be effected in that manner at this time. Mr. Kelly is an officer of this Court. He is a lawyer here in Nova Scotia. He is acting for Mr. Willmore in a separate proceeding that will be heard on April 10th of 2008.

It is reasonable for me to expect that Mr. Willmore will have contact with Mr. Kelly over the coming weeks and months, at least until April 10th. I'm ordering that service on Mr. Willmore be effected through personal service on Mr. Kelly.

I want to make it clear that I am not indicating that Mr. Kelly is receiving these documents as counsel for Mr. Willmore in this proceeding. He is receiving the documents in the same manner as a spouse, mother, grandfather, friend would receive them if the Court had a reasonable expectation that that person would have contact with the person who is to be served.

B. an Order directing that Mr. Whitzman to prepare a report concerning Ryan and the issues of custody and access. Mr. Whitzman is a counsellor who is/was apparently retained independently by Ms. Quigley through an Employment Assistance Plan. That at least is the suggestion made in the December 1st report of Mr. Whitzman that is filed with this Court and is addressed to Mr. Gagnon (Ms. Quigley's Texas counsel at the December 20th, 2007 appearance).

This Court has no jurisdiction over Mr. Whitzman at this point in time. Whether or not a report is prepared at this point would be between Mr. Whitzman and Ms. Quigley who apparently retained him. I would make no order of assessment without at least giving Mr. Willmore an opportunity for input to the nature of that report, assessment, and who would prepare the report. The request for an *ex parte* Order directing Mr. Whitzman to prepare a report is denied.

C. Ms. Quigley has also made an Application for interim sole custody. The Nova Scotia Court of Appeal in its decision in the **Attorney General of Nova Scotia v. Lohnes** (1982), 30 R.F.L. (2d) 360 indicated:

> That it is only in emergency or very unusual circumstances that any matter should be heard by any Court on an *ex parte* basis if the substantive rights of parties are affected. If an *ex parte* Application should be justified, then it is up to the Court to see that the other party receives notification immediately and is given an opportunity to contest the temporary ruling of the Court.

Given the lengthy background to these proceedings and their complexity, it is perhaps understandable why Ms. Quigley wants this Court to act on an *ex parte* basis. In my view, however, this is not an emergency justifying an *ex parte* Order. The child is within this jurisdiction. Mr. Willmore sought and obtained an Order that places the child in the primary care of Ms. Quigley and gave her the authority to designate the child's place of residence.

The Texas Court involved with this family has acknowledged that jurisdiction <u>will be taken</u> by a Canadian Court on the custody issue.

[6] There is a February 7th hearing date in Texas arising from the December 20th, 2007, appearance in Texas. Ms. Quigley was represented by counsel at that proceeding.

[7] She and that counsel made undertakings to the Court in that process. A transcript of that proceeding indicates that she and her counsel indicated that she would comply with the Order or expectations with respect to Christmas access discussed at the December 20th, 2007, appearance in Texas (arising from the March 30th, 2007 Texas Order).

[8] Yesterday, on January 7th, 2008, Ms. Quigley filed a copy of documentation from Texas indicating a contempt hearing has been filed for return on January 31st, 2008, in Texas. This contempt hearing appears to arise primarily from the failure of the Christmas access to occur. Mr. Willmore apparently seeks temporary care of Ryan as part of that claim.

[9] Together Ms. Quigley and Mr. Willmore have created a complex situation that has done and does little to advance Ryan's interests. This Court cannot sit in review of the Texas Court. Ms. Quigley apparently had notice of the March 30th, 2007, Hearing in Texas and did not appear. She was present on December 20th, 2007.

[10] In the Texas transcript of that appearance, she agreed through counsel in Court to abide by the Texas Interim Order. She has notice of further proceedings there. Justice Cain of the Texas Court has acknowledged that at some point the Court in Nova Scotia, Canada will maintain "dominant jurisdiction" on the custody issue over the child.

[11] Ryan is entitled to have both parents participate in a process that addresses his best interests. To this point, Mr. Willmore has in part, perhaps because of the *ex parte* nature of the previous proceeding, participated in the Canadian process only to the extent that he challenged (successfully - subject to Appeal) the jurisdiction of a Canadian Court on Ms. Quigley's original Petition for Divorce.

[12] Ms. Quigley has participated in the Texas proceeding only when forced to. I do not have any information beyond some general statements she gave orally in testimony as to what material was before the Texas Court on December 20th, 2007.

[13] How can Ryan's interests be addressed at this point in time?

1. Mr. Willmore should have notice of the process here.

2. The matter will be set down for a pre-trial on February 19th, 2008 at 9:30 a.m. As he resides outside the province, Mr. Willmore is entitled under our rules to 30 clear days' notice of an appearance. If, upon receiving notice, Mr. Willmore and Ms. Quigley agree the matter should proceed on a date

earlier than February 19th, 2008 at 9:30 a.m., this Court will do everything it can to expedite that date.

3. Dates for an interim hearing on outstanding issues, be they *forum conveniens* or the issues of interim custody and access or others, will be set from the pre-trial date of February 19th. The dates of March 6th and 7th will be tentatively held on my docket.

   Mr. Whitzman's report of December 1st, 2007 indicates in part that: "Ryan is a very mature and articulate young man who loves his mother a great deal and wants to have regular and consistent contact with his father."

   There are a number of very important issues at play. They include the concerns and allegations that Ms. Quigley has expressed concerning Mr. Willmore. Access is also a very important issue. It needs to be resolved. I will hold the March 6th and 7th dates on my docket until February 19th. I note that these dates are prior to the Nova Scotia March Break.

4. The multiple proceedings involving Ryan's care must be resolved.

[14] If Mr. Willmore is successful in changing Ryan's primary care in the Texas proceeding, it could lead to a complex inter-jurisdictional dispute. Delay would be inevitable.

[15] If Mr. Willmore objects to the jurisdiction of this Court despite Justice Cain's comments, he will presumably make appropriate motions. If he does not and he wants an opportunity to be heard on custody and access issues in the jurisdiction where Ryan resides (as a result of the Order obtained on March 30th, 2007, in Texas) Mr. Willmore will have that opportunity through the process that is being initiated with this decision.

[16] If Ms. Quigley's appeal of Justice Wilson's Order is successful, it will potentially affect the viability of this proceeding and create further delay and uncertainty.

[17] I have no control over the decisions Ms. Quigley and Mr. Willmore make in this regard, but can only attempt to set a course in this proceeding that has the

potential of dealing with the issues the parties put before the Court as they relate to Ryan's care in particular in an efficient manner.

[18] In my view, Ryan does need to be protected and stabilized within this jurisdictional and procedural quagmire. While I am not prepared to make an Order of custody in the proceeding, I am subject to further Order by this Court making an Order providing that Ryan will not be removed from the Province of Nova Scotia by either party unless both parties agree in writing and - I want to be clear that I'm using the word "and," not "or" - and such removal is expressly approved by this Court.

[19] It is not my intent to limit the process in Texas. I have no control over that proceeding or what that Court may impose on Ms. Quigley or Mr. Willmore. If the Court there determines that there should be consequences visited upon either Mr. Willmore or Ms. Quigley as a result of the events in December, 2007 or before, I would express the hope that those consequences would not involve a change in Ryan's primary care. Doing so would potentially complicate an already overly complex proceeding, and inevitably impact on the ability of this Court to move the matter to a full hearing in an efficient and fair manner. It would have the effect of diverting everybody's concerns and focus to technical legal issues about jurisdiction as opposed to the practical aspects of getting on with a determination of issues of custody and access.

[20] I am confident that the Court here can, and if the parties allow it will, hear the matters concerning Ryan's care and access in a timely fashion, giving both parents an opportunity to present evidence and put their positions forward. I have focussed on the issue of custody and access here, as that is the issue before me. I take no view as to the appropriate jurisdiction to hear other issues between the parties. I have referred to the comments of Justice Cain re: custody jurisdiction.

[21] Finally, I am directing that a transcript of this decision and indeed the entire appearance today be prepared immediately, that three certified copies be provided to each party. Six copies will be provided to Ms. Lenehan. She will presumably provide three copies to Mr. Kelly, and I would direct that she do so. I also direct that Ms. Lenehan file copies of this transcript and decision with the Nova Scotia Court of Appeal and with the Texas Court through Ms. Quigley's Texas counsel, Mr. Gagnon.

DISCUSSION

[22] As to the issue of whether or not this material is appropriately before the Nova Scotia Court of Appeal or the Texas Court, I am confident that those Courts can make that determination independently. My direction is to ensure that, should they wish to have information concerning the events that have occurred today in this Court, that that information is available to them in as full and detailed and accurate a manner as is possible.

J. S. C. (F. D.)

Halifax, NS