IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Quigley v. Willmore, 2008 NSSC 96

Date: 20080307
Docket: 1207-003129 (STD-056344)
Registry: Halifax

Between:

Karen Agnes Quigley

Petitioner

v.

Gary Willmore

Respondent

Judge:	The Honourable Justice R. James Williams
Heard:	March 6 and 7, in Halifax, Nova Scotia
Written Decision:	March 20, 2008
Counsel:	Terrance Sheppard and Tammy MacKenzie, for the Petitioner Gary Willmore, self-represented

By the Court:

[1] This is a matter concerning Ryan Quigley Willmore, born November 15, 1999. Ryan has been the subject of ongoing litigation between his parents, Karen Quigley and Gary Willmore. The litigation that concerned him directly and involves collateral issues.

[2] Ryan has resided here in Nova Scotia since effectively June of 2006. He has been in school here in Nova Scotia for the 2006-2007 and (thus far) in the 2007-2008 school years. He was born here.

[3] Prior to June of 2006 his parents lived a life that was, in terms of residence, unusual and difficult to pin down. Be that as it may, it is clear that since June of 2006 Ryan's ordinary residence has been here in Nova Scotia. He has had no in person contact with his father since November, 2006 until this hearing.

[4] Parallel proceedings to the matter before me include proceedings in Texas. On March 30, 2007, the Texas Court made an Order concerning Ryan's care and access. Ms. Quigley did not participate in that proceeding on that date. The Texas Court at that time gave her primary care of Ryan and allowed her to designate Ryan's residence as between Texas and Nova Scotia. As I indicated at the Ex Parte Application Ms. Quigley made earlier, it is clear that she has chosen to designate Nova Scotia as Ryan's residence. The March 30, 2007 Texas Order made provision for Ryan's access with his father, Gary Willmore, access that has, for the most part, not occurred.

[5] On December 20, 2007, the Texas Court made the observation that the Nova Scotia Court would take jurisdiction. At the time, the Texas Court was, I am sure, bedevilled by the situation in Nova Scotia. A Nova Scotia Divorce Petition had issued in November 2006. An Ex Parte Order followed. That order, perhaps, played a role in polarizing the proceedings. Eventually the Trial Court in Nova Scotia (in October of 2007) found that the Divorce Petition issued and the Ex Parte Order (and its successors) were made without jurisdiction. The effect was to void the Nova Scotia Orders and the November 2006 Nova Scotia Divorce Petition. The Order voiding the Nova Scotia Orders was subsequently appealed. That appeal is being heard on April 10, 2008 by the Nova Scotia Court of Appeal.

[6] On December 20, 2007 the Texas Court was then facing a landscape where it was told that “Nova Scotia” had acted but had decided it could not act, but might still be acting (if the appeal succeeded), and the situation from the Texas Court's perspective must have been and to some extent must still be rather confusing. Even then, though, the Texas Court expressed, in very explicit terms, the observation that the Nova Scotia Court would eventually take jurisdiction on the custody and access issues. To some extent I regard that observation as almost a plea from the Texas Court to the Nova Scotia Court to take jurisdiction and deal with this ongoing dispute which, at its core, is a dispute about access - and Mr. Willmore’s ability to secure and enjoy access.

[7] I conclude that Ryan's ordinary residence is here in Nova Scotia. I conclude that the Court in Nova Scotia should take jurisdiction over Ryan in relation to custody and access matters.

[8] I do so under two headings of jurisdiction. A “second” Divorce Petition, the one I am hearing these matters under, issued in December 2007. The status of it, and in turn my jurisdiction here today, is clouded by the appeal of the October 20, 2007 decision which found there was no jurisdiction under the first Divorce Petition. If successful, that appeal may or may not have the effect of terminating my jurisdiction under this second Divorce Petition (by giving life to the first Petition). I take jurisdiction under the existing Divorce Petition because, as I sit, it is the only Nova Scotia Divorce Petition that is in existence. If I am wrong in doing so, or I lose jurisdiction under this “second” Divorce Petition because the appeal I have referred to is granted and reinstates the first divorce petition, I am satisfied that Ryan's best interests allow me to invoke the *parens patriae* jurisdiction and to make orders concerning his custody and access.

[9] The Ontario Court of Appeal in its decision of *A.A. v. B.B. and C.C.*, 2007 Ont.CA 2, a decision of Justice Rosenberg released January 2, 2007, states at paragraph 27:

> The court's inherent *parens patriae* jurisdiction may be applied to rescue a child in danger or to bridge a legislative gap.

[10] This is a situation where, in one context, Ryan is healthy and achieving. His school has high regard for him, to them, he is socially well-adjusted. In the context of his placement in the conflict between his parents, however, he is unquestionably

in danger. Mr. Whitzman's evidence is that Ryan indicates that the conflict between his parents is so severe as to cause somatic symptoms such as headaches. Mr. Whitzman described Ryan as "experiencing emotional pain" and indicated that Ryan clearly wants contact with his father. Mr. Whitzman made it clear that the conflict between his parents was and is harmful to Ryan. I conclude that Ryan is in danger. I conclude that the *parens patriae* jurisdiction should be invoked. I conclude that there is a gap, if not a legislative gap, certainly a jurisdictional gap, in terms of remedies available for a Court to deal with the conflict between Ryan's parents. If my apprehension that the jurisdiction under the second Divorce Petition was in question as a result of the appeal (of the jurisdictional issue regarding the first Divorce Petition), the effect of the appeal being successful would also be to void any jurisdiction under the *Maintenance and Custody Act* because there would be existing divorce orders in place and we would have a situation where really no Court could act in accordance with the circumstances as they now are, today.

[11] My jurisdictional findings are, to summarize, based on the following:

1. Ryan lives here, goes to school here and has done so for a time frame approaching two years. This is where the hearing should be. There are significant issues with respect to access. If access needs to be enforced, this is where it can be effectively enforced.

2. I currently have jurisdiction under the second Divorce Petition that has been issued - though this may, if the appeal of the October 20, 2007 Order "voiding" the first (Canadian) Divorce Petition succeeds and restores that Petition.

3. There is *parens patriae* jurisdiction.

[12] Apart from jurisdiction, the issue before me is the question of making an interim order concerning Ryan's custody and access. There will be an Interim Order issue from today. The Interim Order will provide that Ryan be in the sole custody of Ms. Quigley. Her care or primary care of Ryan was not disputed by Mr. Willmore, except to the extent that he opposes her care continuing if the problems he has had (from his perspective) in exercising access are not resolved. Custody orders are always reviewable. As part of her responsibilities as a custodial parent, I am going to direct that Ms. Quigley prepare at the end of this month, and at the end of every month until the Court otherwise orders, a brief summary or report of

Ryan's activities and interests for Mr. Willmore. The report shall outline Ryan's activities and interests over the past month and what he (Ryan) is doing in the coming month or months. At this time I am going to direct that it be sent to Mr. Willmore in care of Ms. Zimmerman, his lawyer in Texas. Obviously it is my hope that at some point, hopefully in the not too distant future, it will be sent to Mr. Willmore directly. At this time there is a Recognizance prohibiting Mr. Willmore's communication with Ms. Quigley. I would not encourage any direct communication between them at this time.

[13] This is a situation that needs control more than it needs anything else. It needs to move forward. There are complaints (from the parties) back and forth various individuals who have touched this conflict. Those range from judges to lawyers. There is one complaint that emanates from a pre-trial which was held before me in this proceeding. Ms. Quigley complained to the Nova Scotia Barristers' Society after Ms. Zimmerman (Mr. Willmore's Texas lawyer) took part by telephone in two pre-trials before myself. I am directing, Mr. Sheppard, that you write the Nova Scotia Barristers' Society and advise them that the appearances referred to in the complaint concerning Ms. Zimmerman made by Ms. Quigley arise from two appearances before me that were made by Ms. Zimmerman by telephone and that I have directed you to inform the Barristers' Society that as the judge sitting on those appearances I see no reason for the complaint. I would ask that you copy the letter to myself and to Ms. Zimmerman.

[14] Mr. Willmore, I am recommending that you have no contact with Ms. Quigley or Justice Scanlan at this time. I am going to take steps through a request to Mr. Sheppard that appointments be made with Mr. Whitzman for the weeks of March 17th, March 31st and also for April 9th, 2008. I am going to ask, Mr. Sheppard, that you ask Mr. Whitzman if the appointment can be set in a fashion so that there could be telephone access from Ryan to his father in Mr. Whitzman's office. Not necessarily with Mr. Whitzman present, but with Ryan there privately. If necessary, Ryan can be provided with a cell phone and the number to call Mr. Willmore. Mr. Willmore, that may take some communication between you and Mr. Sheppard to arrange.

[15] With respect to access, until yesterday there had been no access, no face to face access between Mr. Willmore and Ryan for an extraordinary length of time - well over a year. Mr. Willmore saw Ryan at noon hour yesterday and last evening. Ryan's interests, in my view, dictate that the move to access, to more normalized

access be stepped. I believe also that the record demonstrates that it should be subject to control and review by the Court. The access, as I understand it, has now been agreed to be from approximately 6:30 p.m. to 9:00 p.m. tonight, Friday. On Saturday the access will be from twelve o'clock noon to a time between 8:00-8:30 p.m. I have discussed with the parties the pick-up and drop-off with respect to both. With respect to tonight, the drop off will be at the East Side Mario's Restaurant at the Mic Mac Mall. Mr. Willmore will ensure that he is there at six-thirty and he will ensure that Ryan comes out that exit at approximately nine o'clock. With respect to tomorrow, Mr. Willmore will be having coffee at Perk's Coffee Shop at the Halifax Waterfront at twelve o'clock noon. Ryan will be dropped off and enter. After the basketball game tomorrow night, Mr. Willmore will walk Ryan down there, visually identify that either Justice Scanlan or Ms. Quigley or a relative of Ms. Quigley's is in the coffee shop and ensure that Ryan enters the coffee shop.

[16] With respect to Mr. Willmore's passports, arrangements have been made for Mr. Sheppard to hold them and Mr. Sheppard and Mr. Willmore are making arrangements to deliver those to Mr. Willmore on Sunday morning when he is leaving. Mr. Willmore voluntarily surrendered the passports for the time(s) he has (had) access.

[17] With respect to April, 2008, I am going to suggest that Mr. Willmore, if he is able, have access with Ryan from 3:00 p.m. on April 7th, which is a Monday, to 7:00 p.m.; from 12:30 p.m. on April 8th to 8:30 p.m.; that there be an attempt to make an appointment with Mr. Whitzman on April 9th for Ryan; that Mr. Willmore have access with Ryan again on Thursday, April 10th (the day of the Appeal I have referred to) from 3:00 p.m. to 8:00 p.m. and that this matter be reviewed in this Court at 9:30 a.m. on Friday, April 11th. Mr. Willmore shall also have access with Ryan on Friday night, April 11th to Sunday morning April 13th. That would be the first overnight access.

[18] We will address the matter of summer access on April 11th. If Mr. Willmore is unable to come early (before the April 10th appeal), then obviously the access will not occur as I have outlined. If his work dictates that he is unable to come, this Court will not make any assumption or inference about it. I assume that he has made arrangements to take time off next week and he has indicated that on two or three weeks notice he can make adjustments. I am hoping he can do so for these April dates.

[19] The review will address summer access and I hope focus on the future. I have attempted to be generous in allowing the parties to explore the past in and through their evidence. I know that I have been impatient at times and, to the extent that I have been, I apologize. I am very concerned about Ryan's welfare in this situation. I think the conflict between the adults here is or approaches the most serious that I have seen. This is my twentieth year on the Bench, my twentieth year doing family law matters. I have not seen anything like this before. I have given serious consideration to making a referral to child welfare authorities. I have decided not to do that - in part because I am ordering an assessment. I believe that that will play itself out. If the conflict continues, that is where this is headed. There is not any doubt in my mind.

[20] An edited copy of my decision will be prepared and provided to the parties. I am going to direct Mr. Sheppard, and Mr. Sheppard to some extent I apologize - you're the only counsel I have here so you are receiving the directions I am giving - I'll direct that you provide a copy of it to the Texas Court, a copy of it is to be faxed to Ms. Zimmerman and, a copy will be sent by this Court to the Registrar of the Court of Appeal. As I indicated with my previous decision, it is not for me to decide or to assume that the Texas Court or the Court of Appeal here will or will not look at my decision. My intent is to make sure that it's available to them if they want it. If they choose not to look at it, that is their prerogative.

[21] I have considered the evidence that the parties have given. Much of it relates to the relationship they have with each other; some of it relates to Ryan. I have considered, in particular, the anxiety that has been described by Justice Scanlan and Ms. Quigley that Ryan has around some of the visitation. I have also considered the very, very clear evidence of Mr. Whitzman indicating that Ryan wants to see and have a relationship with his father. In the circumstances, at this point, I think the access that I have ordered is structured; it is limited; and it gets things moving after they have been stalled for an extraordinarily long time.

[22] In April, prior to his access, Mr. Willmore shall file his passports with my office here at the Court and we will deal with their return on the Friday (April 11, 2008) when we appear.

[23] With respect to issues concerning Ryan's custody and access, the *forum conveniens* is Nova Scotia.

[24] I want to make it very clear. I have no control over the Texas Court, nor do I want any control over the Texas Court or the proceedings there. The Texas Court, I believe, has been concerned with getting or re-establishing Mr. Willmore's relationship with Ryan. I believe we have started that and we will continue to move forward on that. I certainly have no control over what happens with respect to the Texas Court proceedings as they relate simply to Ms. Quigley and Mr. Willmore. It is, however, very unlikely, Mr. Willmore, that I would order that you could take Ryan to Texas if there was an outstanding Writ of Attachment for Ryan in Texas. I will indicate that. That can be addressed down the road.

[25] There will be a transcript of all of the evidence called prepared and I will request that that be available by the end of March. It will be considered each time I review this matter. I consider myself seized with the matter. I am adjourning the interim custody and access matter for review. We will also address the issue of trial dates when we come back on April 11th. We will either have a decision from the Court of Appeal or we will have a reserve decision from the Court of Appeal and we will deal with the matter accordingly.

[26] Mr. Sheppard will prepare and file the Order.

J. S. C. (Fam. Div.)

Halifax, Nova Scotia