CITATION: Julie Bobbie v. Lee Bernard Newby, 2011 ONSC 4977
COURT FILE NO.: FS-10-16858
DATE: 2011-08-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Julie Bobbie, Applicant

AND:

Lee Bernard Newby and Maureen Newby, Respondents

BEFORE: Mr. Justice Aston

COUNSEL: *Diane L. Evans,* for the Applicant

Douglas J. Spiller, for the Respondents

Catherine Bellinger, Office of the Children's Lawyer for Madison Lee Newby

HEARD: August 18, 2011

ENDORSEMENT

[1] On August 12, 2010, Frank J. rendered a decision on a contested motion concerning temporary custody of the child Madison, who was about to turn 12. She ordered joint-custody and a routine bi-weekly schedule for the school year which gave each parent equal time as the primary caregiver. In the case of the father, his parenting responsibilities were assisted by his aunt Maureen, the co-respondent in this case. Frank J. observed, under a summary of non-contentious issues, that "everyone is in agreement that the aunt has been a great help and is an important person in Madison's life and should continue to be involved with Madison".

[2] The parties were able to work out arrangements for holidays and special occasions. The joint custody arrangement was working quite well until about eight weeks ago when the mother brought a motion to allow her to move from Etobicoke to Welland, Ontario and assume primary responsibility for the child. Because Madison will either attend school in Welland or Etobicoke, the shared parenting arrangement is no longer viable.

[3] Though she moved to Welland in June 2011, the mother did not technically breach the joint custody order because the summer schedule was maintained. She apparently expected her motion would be heard before the start of the next school year. Although she acted unilaterally in presenting a "fait accompli" and was less than forthright about her plan to move, the present motion is not about punishment for litigation misconduct.

[4] The issue, to be decided solely on the test of the client's best interests, is which parent ought to assume Madison's day-to-day care during the school week.

[5] Madison will turn 13 this week. Given her age, Madison's own wishes and preferences are an important aspect of the determination of her best interests. The Office of the Children's Lawyer, as usual, has been of great assistance to the Court on this evidentiary issue and in submissions on the motion.

[6] When first presented with prospect of moving to Welland with her mother, Madison consistently and unequivocally expressed her positive approval of that plan. Madison was steadfast in that preference until a few days before this motion was heard on August 18, 2011. She changed her mind, and now wants to reside with her father. Her reasons are set out in the affidavit of August 16, 2011 filed by Office of the Children's Lawyer. I am satisfied that neither parent has overtly pressured Madison and that her expressed preferences are genuine. In deciding how much weight to attach to her expressed wishes, I find her wishes only modestly important in deciding the issue I need to determine. I expect her preference will continue to be equivocal. The preference for Welland was expressed before she moved there, or at least before she had really experienced living there. Her most recent preference, based on a better understanding of her choices is probably more significant, but it is not determinative.

[7] The mother's motion relied principally upon Madison's support for her plan. There is little else to commend it. Her submission now rests on renewal of the contest from a year ago over who has better parenting skills and who is more available to act as a parent.

[8] There was a suggestion the applicant would commute from Welland to Toronto to maintain her employment, but apparently she is now off work and receiving sickness and accident benefits. Presumably that is short term. Her hours of employment, including commuting time if she does not find new work in Welland, are obviously problematic and the solution to that problem speculative.

[9] The father has rearranged his work schedule from when the matter was before the Court a year ago. He now often works a regular day shift which ends at 4:00 or 4:30 p.m. I also accept the evidence of Maureen Newby that she is not moving to Windsor and that Madison misunderstood her intention to do so. Maureen will be moving in with the father when her current residence is sold and she undertakes to the court to be available to Madison in that home before and after school if the father himself is absent. Specifically, I accept Maureen Newby's evidence at paragraphs 6, 9 and 10 of her affidavit of July 9, 2011 and rely on it as a significant factor in deciding this motion.

[10] The father's ability to adequately attend to Madison's day-to-day needs is corroborated by the history of the past year.

[11] In *Plumley* v. *Plumley*, [1999] O.J. No. 3234, at para. 7, Marshman J. aptly summarizes the legal test as follows:

It appears to me that the following factors are or ought to be important in deciding the mobility issue on an interim basis:

1. A court will be more reluctant to upset the status quo on an interim basis and permit the move when there is a genuine issue for trial.

2. There can be compelling circumstances which might dictate that a justice ought to allow the move. For example, the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial or the best interests of the children might dictate that they commence school at a new location.

3. Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong possibility that the custodial parent's position will prevail at trial.

[12] Preservation of the status quo certainly favours the father and is an important factor on this motion.

[13] There are no "compelling circumstances" supporting the mother's proposal. She does not present any reason for moving now that is based on the child's best interests or better advantages.

[14] Both parents seem to be capable and loving parents and the father's day-to-day involvement in Madison's life over the past year under the shared parenting regime negates any conclusion at this stage of a "strong probability" the mother's position will prevail at trial.

[15] A temporary order is granted as follows:

1. The child Madison shall reside primarily in the home of the father, Lee Newby;

2. Maureen Newby shall be available to personally attend to Madison's needs and care before and after school whenever the father is unavailable or unable to do so;

3. The mother, Julie Bobbie, shall have Madison in her primary care as follows:

    a. Alternate weekends in her own home;

    b. Two additional times each month, for up to six hours per occasion, on a Saturday or Sunday of the mother's choosing, upon giving 12 days advance notice to the father;

c. Up to two hours each week on a weekday, after 3:30 p.m., and on condition it does not interfere with homework or any regularly scheduled extra-curricular activity; and

d. Such other times as the parents agree, including holiday time, and special occasions which should be shared in a manner consistent with the arrangements made after the August 12, 2010 order of Frank J.

4. Julie Bobbie shall deliver an updated financial statement and give particulars of her employment plans and prospects so that an appropriate order for temporary child support may be made, hopefully without necessity of a further motion.

5. The present temporary order for child support is terminated.

6. All other claims for relief in the motions are dismissed.

7. If counsel are unable to agree on costs of these motions, brief written submissions may be exchanged and filed within the next 30 days.

Aston J.

Date: August 22, 2011