

2015 ONSC 4554
Ontario Superior Court of Justice

De Matos v. De Matos

2015 CarswellOnt 10819, 2015 ONSC 4554, [2015] W.D.F.L. 4602, 256 A.C.W.S. (3d) 137

Marcia de Matos v. Nelson de Matos

Fragomeni J.

Heard: July 13, 2015
Judgment: July 15, 2015
Docket: FS-12-76328-01

Counsel: Paula Bateman, for Applicant
Shawn M. Philbert, for Respondent

Subject: Family

Table of Authorities

Cases considered by *Fragomeni J.*:

Askalan v. Taleb (2012), 2012 ONSC 4746, 2012 CarswellOnt 10344 (Ont. S.C.J.) — considered

Bandas v. Demirdache (2013), 2013 ONCJ 679, 2013 CarswellOnt 17078 (Ont. C.J.) — considered

Jantzi v. Jantzi (2003), 2003 CarswellOnt 5370, [2003] O.T.C. 1139 (Ont. S.C.J.) — considered

APPLICATION by mother for order to change location of children's school and for order clarifying term of earlier order.

***Fragomeni J.*:**

1 The Applicant mother seeks an order with respect to changing the location of the children's school in September 2015. The mother also seeks an order clarifying the interpretation of a "right of first refusal" clause in Justice Ricchetti's order of June 26, 2013, paragraph 14.

2 The Respondent father seeks the following relief in his cross motion:

1. That the children be permitted to remain in the school they currently attend;
2. That the Office of the Children's Lawyer be appointed;
3. That the entirety of the CAS records be released to the parties; and,
4. That summer access be fixed.

Overview of the Facts

3 The parties were married on June 17, 2000. They separated on August 18, 2012 and were divorced in October 2014.

4 There are two children of the marriage, namely Sienna Madeline De Matos, born September 26, 2002, and Ethan Reilly De Matos, born May 20, 2005.

5 The parties entered into a consent order on June 26, 2013 that dealt with custody, access and the distribution of property. The order did not deal with support as the father was not working at that time.

6 The parties have joint custody of the children.

7 Justice Ricchetti's order of June 26, 2013 sets out the following, in part:

Para. 1: The parties shall have joint custody of the children, namely, Sierra De Matos, born September 26, 2002, and Ethan De Matos, born May 20, 2005.

Para. 14: The party who is not caring for the children shall have the right of first refusal with respect to caring for the children in the case that the party who is supposed to care for the children is unavailable to care for the children.

8 On March 3, 2015 Justice Wein made the following endorsement:

After School This is an interim application pending a long motion on July 13. I agree with the Father that the existing after school pickups should continue for this school year, & pending any decision about where the children should reside & attend school next year. So, until the end of this school year in June, F or his parents will pick up & care for children after school to 7 p.m. Mon — Thurs, plus Friday on his access weekend.

Children spend weeknights at Mother's, so even on an hourly calculation, F. does not (*L.L. v. M.C* 2013 ONSC 1801) have 40% of the time. At this stage, he is now employed & will pay CS amount of \$1,010 (2C, 68K/yr.) commencing March 1, 2015. Parents agree to share s.7 expenses 50-50.

Bal. adj. to L.M. July 13.

Mother's Position:

9 The mother asks that the children be enrolled at Lester B. Pearson Elementary School which is located in her catchment area for the school year commencing September 2015. This school is a five minute walk from the mother's residence. The mother states that she has confirmed that all of the same resources to assist the children with their special needs will be available at the new school.

10 The mother states that the father falsely claims that he resides with his parents while his current wife resides in a home that he owns. The mother asserts that the father is making such claims regarding his residency in order to support his position to have the children continue to attend St. Lucy's School, which is located in the catchment area of the paternal grandmother's residence. The mother also takes the position that the father makes that claim of residency to allow him to argue that he has the children 50 percent of the time thereby setting up a situation in which he need not have to pay support.

Father's Position

11 The father submits that it is in the best interests of the children to remain at their current school, St. Lucy Catholic Elementary School. The children have been attending this school since 2010 and are doing well. Their special needs are being met. The husband maintains his position that he resides with his parents and therefore the children do reside within the school's catchment. In any event the current school is not directing that the children cannot attend at the school.

12 The father argues further that the mother has the onus to establish that it is in the children's best interest to change schools and she has not presented to the court any compelling reasons why a change is necessary or appropriate.

Analysis and Conclusion:

Issue No. 1: In which school should the children be enrolled during the upcoming school year?

13 In her August 22, 2014 Affidavit the mother sets out the following at para. 12:

12. I have tried since July 2013 reasoning with the Respondent to relocate the children to a school closest to their current primary residence, located at Unit #1011, 5 Lisa Street, Brampton, Ontario. I agreed to keep the children at St. Lucy Catholic Elementary School for the 2013/2014 school year, so that we as parents could work as a team together to discuss with the children the change of residence, and assist them with adjusting to this change. I also did not want to introduce too much change too soon, as we had just sold the family home, and had recently separated. As I had already registered the children at St. Lucy's Catholic Elementary School, in June 2013, prior to the change in residency, the location of the children's residence, in particular the fact that the residence was now outside the school boundary, was not an issue. Please see attached as Exhibit "F" a copy of the letter my counsel sent to the Respondent advising him of the move, and a copy of the email I sent to Respondent advising him of the change in residence.

14 Sierra and Ethan have been attending their current school, St. Lucy Catholic Elementary School, since 2010. Sierra is in grade 7 going into grade 8 and Ethan is in grade 4 going into grade 5.

15 Both children have been diagnosed with learning disabilities. They are doing well. At para. 51 of his February 26, 2015 affidavit the father produces Sierra and Ethan's grade 6 and 3 report cards as of June 25, 2014, respectively. With respect to Sierra, the report card demonstrates that she is doing well with marks predominantly ranging from B to A-. With respect to Ethan, the report card demonstrates he is doing well with marks predominantly ranging from C to B+.

16 The mother does not assert in her material that the children's current school is not meeting their academic or social needs.

17 In *Askalan v. Taleb*, 2012 ONSC 4746 (Ont. S.C.J.) (CanLII), Justice Spies sets out the following at paras. 32 and 33:

[32] The Mother's factum sets out a helpful summary of the law drawn from *Travis v. Travis*, 2011 CarswellSask 546 (Queen's Bench) at para. 16:

Where a court is asked to consider whether or not a child should change schools, the following considerations may be drawn from the case law:

(a) In situations of joint custody the court is most reluctant to dictate where a child should go to school and the parents should be encouraged to resolve this matter amongst themselves. If they cannot agree the best interests of the child will govern.

(b) In the event a parent suggests changing schools, it must be demonstrated the change will be in the best interests of the child.

(c) While each instance is very fact specific, factors which may be taken into account by the court in determining the best interests of the child include assessing any impact on the stability of the child. This may include examining how many years the child has attended his or her current school; whether there is any prospect of one of the parties moving in the near future; where the child was born and raised; whether a move will mean new child care providers or other unsettling features. The court will also look to any decisions that were made by the parents prior to the separation or at the time of separation with respect to schooling. Any problems with the present school will be considered.

[33] I intend to apply this approach to the issue. Considering all of the evidence, the onus is on the Mother to demonstrate that changing Omar's school now as she proposes will be in his best interests.

18 In *Bandas v. Demirdache*, 2013 ONCJ 679 (Ont. C.J.) (CanLII), the court stated the following at paras. 21 and 22:

[21] If an aspect of a child's life, such as school placement, is to be disrupted by an order of the court, there must be good reason for the court to do so. Thus, before a court will order a child to transfer schools, there must be convincing evidence that a change of schools is in the child's best interests (*Perron v. Perron*, [2012] O.J. No. 5502, 2012 ONCA 811 (CanLII), 301 O.A.C. 313, 113 O.R. (3d) 600, at para. 38).

[22] Other cases have made this point by reference to the need for cogent evidence to show that a change of schools is in the child's best interests. The reason for this is understandable from the child's perspective. A school age child will likely have already formed attachments to the school he or she attends. Continuing the child's existing school placement promotes stability in the child's life. (*Ursic v. Ursic* [2006] O.J. No. 2178, 32 R.F.L. (6th) 23, 49 A.C.W.S. (3d) 38, 2006 CanLII 18349 (ON CA), 2006 CanLII 18349, 2006 CarswellOnt 335, at para 32).

19 In *Jantzi v. Jantzi* [2003 CarswellOnt 5370 (Ont. S.C.J.)], 2003 CanLII 2138 the court stated at para 33:

[33] The focus of the inquiry that follows a determination that the material change threshold has been met is not the interest and rights of the parents. And it certainly must not begin with any legal presumption in favour of the primary custodial parent, although that parent's views are entitled to great respect. Rather, that inquiry must focus only on the best interests of the children, assessed from a child-centred perspective.

20 In his affidavit sworn February 26, 2015 the father states the following at paras. 61 and 63:

61. The children have gone through a big change due to our marital separation; it would not be in their best interest to have their stable educational environment removed in order to accommodate Marcia's desire.

...

63. The children have voiced their opinion that they do not want to change schools. The children have confirmed that the thought of changing schools causes them stress and anxiety. Marcia has inappropriately included the children in the discussion regarding the change of school.

21 The evidentiary record does not support the mother's position on this issue. The mother has not demonstrated that there is good reason to order a change in schools. The evidence to support the mother's position is less than convincing that it is in the children's best interests to change schools.

22 The children have been attending this school since 2010. The children are doing well and this is supported by the evidentiary record filed.

23 The position of the mother that they will be closer to her residence if they changed schools is not a sufficient reason to make the change. The paternal grandparents will continue in their role in picking up the children as set out in Justice Wein's order.

24 I agree with the father's position that the stability of the current school is critical. The children have undergone significant changes and a level of transition due to the marital breakdown and separation. The stable educational environment should be maintained so that the children will not be exposed to yet another disruption or transition especially since they are doing well at their current school and their needs are being properly met.

25 The focus of the inquiry is not what is more convenient for the parent. Neither is it an inquiry into how the parents are getting along with each other. Whatever conflict the parties have, they have to understand that those conflicts have to be resolved and they cannot expose the children to those conflicts. The focus of this inquiry is the children.

26 Sierra is going into grade 8. This is a graduation year for her. She will be doing that with friends she has had at the school for some time. She will also be doing that with the teachers she has had in an environment that is familiar to her. It would not be in her best interests to change schools now and have to go through her graduation grade 8 year having to make new friends in a new environment. This is not in her best interests.

27 With respect to Ethan, it is also not in his best interests to change schools for the upcoming year.

28 I am not satisfied that the mother has met her onus.

29 An order shall issue therefore that the children shall remain at their current school, namely St. Lucy Catholic Elementary School, for the school year commencing September 2015.

Issue No. 2: Access

30 The mother's position is that the right of first refusal term in Justice Ricchetti's order no longer applies. The mother seeks an order that the access terms of Justice Ricchetti's order continue. The mother argues that the father can have a Wednesday and Thursday visit from after school to 7 p.m. With respect to the summer months the mother agrees to the father having Wednesdays and Thursdays from 7 a.m. to 7 p.m. in addition to the alternating weekends.

31 The father seeks Wednesdays and Thursdays overnight for the summer months.

32 An order shall issue as follows:

1. That the father have access to the children on alternating weekends as set out in paragraph 2(i)(a) of the order of Justice Ricchetti of June 26, 2013, with the addition that the father have a mid-week visit on Wednesday from after school until 7 p.m. when the children are returned to the mother.

2. For the summer of 2015 the children shall be with the mother on Mondays, Tuesdays and Fridays (only on Friday to 4 p.m. when it is the father's weekend) and alternate weekends. The children would be with the father on Wednesdays from 7:30 a.m. to Thursday at 7:00 p.m. (this results in one overnight, namely the Wednesday night) with either the father or his parents returning the children to the mother by 7:00 p.m. on the Thursday, and alternating weekends from Friday at 4:00 p.m. to Sunday at 9:30 p.m., extended to Monday at 9:30 p.m. in the event of a long weekend with the father returning the children to the Applicant.

Issue No. 3: CAS Records

33 The parties advise the court that the CAS is prepared to release the entire file but require a court order to do so.

34 An order shall issue, therefore, that the CAS provide a full copy of their file to the parties.

Issue No. 4: Appointment of the OCL

35 An order shall issue appointing the OCL in the usual form.

Issue No. 5: Costs

36 The parties shall file written submissions on costs within 10 days.

Application dismissed.

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