

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
HASSAN RICHARD MACCIE HAMID)	
)	James D. Singer, for the Applicant
Applicant)	
)	
– and –)	
)	
ANA HAMID)	Barry Nussbaum, for the Respondent
)	
Respondent)	
)	
)	
)	HEARD: July 27, 2016
)	

2016 ONSC 5013 (CanLII)

RULING ON MOTION

DOUGLAS J.

Overview and Background

- [1] This is the Applicant father’s motion within the context of a motion to change.
- [2] Upon this motion the father asks for an order that the child of the marriage Tristan Karl Hamid (born August 7, 2012) attend Kettle Lakes Public School in Richmond Hill commencing September 6, 2016.
- [3] The mother opposes the motion and advances her own proposal that Tristan attend Churchill Public School in Toronto commencing September, 2016.
- [4] On May 5, 2014 Justice Kaufmann made a final order including the following salient terms:
 - 1) The parties to have joint custody of the child, including equal time with each parent and equal input into decision making concerning religious, health,

education and extracurricular activities. Day to day decisions shall be made by the party with whom the child is residing at the time...

2) If the parties cannot agree on implementation of any component of the order, they will jointly retain a parenting coordinator, whose function shall be to resolve the holiday schedule, and resolve situations where the parties are at an impasse concerning the child's medical issues and any schooling issues. The parenting coordinator shall not adjust joint custody. The parenting coordinator's decision shall be final.

3) The ordinary schedule shall be as follows:

a. Alternating weekends, pick up at daycare on Friday and drop off at daycare on Monday mornings.

b. On weekends when child is with the applicant father, the respondent mother shall have the child on Mondays and Wednesdays;

c. On weekends when the child is with the respondent mother, the applicant father shall have the child on Mondays and Wednesdays;

d. The child shall be with the other parent on Tuesday and Thursday...

10) The Applicant father shall pay child support of \$495.00 per month. Daycare expenses shall be shared 50/50 commencing immediately...

[5] In essence according to the order Tristan's residence rotates each day, with alternating weekends and exchanges until recently taking place at Tristan's daycare near the Respondent mother's home. As Tristan no longer attends daycare, exchanges now occur at the parties' respective residences.

[6] It is important to emphasize that the only issue before me is what school Tristan will attend commencing in September. I have not been asked to adjust the care schedule and I do not intend to do so.

[7] Similarly, the issue of child support adjustment has not been placed before me on this motion although I would observe that if the original child support order included a component related to the daycare expense, an adjustment should be considered.

[8] Further it appears that the parties did engage a parenting coordinator to assist with this issue. The parties disagree as to why that process did not result in resolution. I make no findings in that regard and would note that the court cannot delegate final decision making authority to a parenting coordinator in any event.

Applicable Law

[9] The parties are agreed that the applicable test in determining which school Tristan should attend is Tristan's best interests.

[10] The parties further agree that the factors outlined in the case of *Askalan v. Taleb*, [2012] ONSC 4746 are a useful guideline in considering this issue. These factors include:

- 1) Assessing any impact on the stability of the child;
- 2) Examining how many years the child has attended his or her current school;
- 3) Whether there is any prospect of one of the parties moving in the near future;
- 4) Where the child was born and raised;
- 5) Whether a move will mean new child care providers or other unsettling features;
- 6) Decisions that were made by the parents prior to the separation or at the time of separation with respect to schooling;
- 7) Any problems with the present school.

[11] These factors are of course not meant to be exhaustive and indeed the parties identified additional factors for consideration.

[12] The choice of school should be made on its own merits and based in part on the resources that each school offers in relation to a child's needs, rather than on their proximity to their residence of one parent or the other, or the convenience that his attendance at the nearest school would entail (see *Wilson v. Wilson*, [2015] ONSC 479 at para. 110).

[13] Of paramount consideration is the school that will give the child the best competitive advantage, or provide the greatest confidence and motivation, or that will facilitate the child's relationship with others, including his parents and classmates, or best promote his all-around development (see *Schloegel v. McCroary*, [2012] BCSC 1606).

Timing, Including Proximity of Schools to Parties' Residences and Places of Employment

[14] Father resides at 21 Longwood Avenue, Richmond Hill. His place of work at Thornhill Secondary School is at 167 Dudley Avenue, Markham.

[15] The mother resides at 194 Parkhome Avenue, Toronto. Her place of work is at 4900 Yonge Street, Toronto.

[16] The father's proposed school, Kettle Lakes Public School, is located at 62 Kingshill Road, Richmond Hill.

- [17] The mother's proposed school Churchill Public School is located at 188 Churchill Avenue, Toronto.
- [18] Regarding Kettle Lakes Public School, it is extremely close to the father's residence, approximately two minutes away. The driving time estimates from mother's residence to Kettle Lakes Public School vary depending on the time of day of travel given rush hour traffic and direction of travel, from 26 minutes to 60 minutes. In normal traffic the trip would be about 30 minutes.
- [19] In normal traffic the driving time from father's place of work to Kettle Lakes would be about 24 minutes. Mother estimates driving time from her place of work to Kettle Lakes Public School would be 28 to 80 minutes again dependent upon traffic conditions and timing of travel. I find with normal traffic conditions it would take approximately 30 minutes.
- [20] Regarding Churchill Public School the driving time from father's residence to the school would be approximately 31 minutes in normal traffic and from mother's residence to the school would be approximately two minutes in normal traffic.
- [21] Driving time from father's work to Churchill Public School would be approximately 15 minutes in normal traffic and from mother's employment to the school would be approximately five minutes in normal traffic. The father argues that he has inflexible work hours requiring that he be at work by 8:15 a.m. He departs work at the earliest shortly after 3:15 p.m. Conversely, it is argued, mother has flexible work hours, being entitled to work an eight hour shift any time between the hours of 6:00 a.m. and 6:00 p.m. and may work from home at times. According to the mother she can only work from home if the weather is inclement. It is submitted by father that given the inflexibility of father's employment demands the school related schedule should be constructed to accommodate this reality.
- [22] Junior Kindergarten at Kettle Lakes is from 8:30 a.m. to 3:00 p.m. At Churchill it is 9:00 a.m. to 3:30 p.m.
- [23] Father says that Tristan will have to wake up at 6:45 a.m. when in father's care in anticipation of departure at 7:30 a.m. for drop off at before school care at Kettle Lakes. When Tristan is with the Respondent mother father submits that because she has flexible working hours and allowing 45 minutes to one hour for getting ready for the day, mother can get Tristan up at the same time at 6:45 a.m. leave the house at 7:30 to 7:45 a.m. and drive Tristan to Kettle Lakes for arrival between 8:00 and 8:15 a.m. leaving her time to return to work for a 9:00 a.m. start.
- [24] Mother says Tristan cannot wake up at 6:45 a.m. while in her household as she would not be able to get into work at an early enough time to complete her eight hour shift to leave at a time that she can reach the aftercare facility before it closes. She says the disparity between wake up times is unavoidable but at least Churchill Public School offers the least amount of inequality between wake up times and arrive home times.

- [25] The records of the daycare facility confirm that the father was relatively consistent in dropping off Tristan at the daycare facility around 7:40 a.m. whereas when in mother's care Tristan was dropped off more inconsistently and later.
- [26] Mother submits that measured in terms of distance between Churchill Public School and the parties' respective residences and places of work, Churchill is closer to three of the four. Father submits that proximity to place of employment is less significant than proximity to place of residence.
- [27] Regarding proximity I am satisfied that neither parties' proposal represents a significant advantage over the other but that mother's proposal of Churchill Public School does offer a slight advantage given its closer proximity to both parties places of work. This represents an advantage in the event any issues arise with Tristan during his school day requiring the attendance of either or both parents at school.
- [28] Regarding Tristan's wake-up time father argues that if Tristan is enrolled at Churchill he would have to get up at 6:00 a.m. in order to be delivered by father to Churchill in time for father to return to commence work at 8:15 a.m. At the same time Tristan would not have to get up until 8:00 a.m. while in his mother's care in order to be at Churchill School on time. This is a significant problem as it will contribute to a two hour difference in Tristan's sleep patterns between the parties' respective residences and this difference would be emphasized given the current schedule of a day about exchange of care and control. As a consequence, I find there is a significant advantage to the Kettle Lakes proposal in this regard.
- [29] It might also be anticipated reasonably that Tristan would over time come to prefer the schedule at mother's residence and this could potentially lead to disruption in the pattern of care and control and the status quo.

Time for Extracurricular Activities

- [30] The father submits that as he finishes employment at 3:15 p.m. he is able to pick up Tristan from Kettle Lakes and have him home by 3:45 p.m., allowing him to bring Tristan to extracurricular activities in his neighbourhood after school and before dinner. The father argues he would not be able to do this if Tristan attends Churchill Public School which ends classes at 3:30 p.m. giving Tristan insufficient time to return to his father's residence for commencement of extracurriculars if scheduled for a 4:00 p.m. start. It is submitted that Respondent mother, having flexible work hours, could put in a 7:00 a.m. to 3:00 p.m. shift on the days where she is picking up Tristan from Kettle Lakes and have him home around 4:00 p.m. for participation in extracurricular activities in mother's neighbourhood.
- [31] Much of the parties' positions are predicated upon certain assumptions about driving times in rush hour and availability of extracurricular activities with respect to which I do not have any further detail at this time.
- [32] For these reasons I treat this issue as neutral in my deliberations.

Before and After School Care

- [33] It is common ground that before and after school care is required.
- [34] In particular it is strictly necessary for the Applicant father given his inflexible work hours and start time of 8:15 a.m. There is some dispute between the parties as to requirement of before and after school care for the Respondent mother but I am satisfied that both parties will require at least some before and after school care on the evidence before me.
- [35] The mother's evidence is that before and after school care for Churchill Public School is \$33.00 per day for four and five year olds and \$21.00 per day for six to ten year olds. Thus for a month with 21 school days Churchill would cost \$693.00.
- [36] By contrast Kettle Lakes provides before and after school care at \$25.50 per day and thus for the same 21 days the cost would be \$535.50, the difference being \$157.50 per month roughly.
- [37] The father notes that Kettle Lakes differs in that it only charges for instructional days where as Churchill charges for March break, Christmas break and summer holidays whether a child attends or not, with the summer per diem increasing to \$48.00. Mother submits that the differential rests in the fact that the rate for Churchill includes care during the summer and all breaks while the daily fee for Kettle Lakes does not.
- [38] Another variable on this issue is availability of the parties during the child's holidays. The father, who is a teacher with the York Region District School Board, has full holidays at Christmas, March break and summer whereas the mother has a more standard set of holiday entitlements. She cannot always take time off during school breaks because her ability to do so depends on the business needs at her place of work.
- [39] Another significant difference between the before and after care facilities is that at Kettle Lakes the program is available up to age 12 whereas at Churchill the program is available up to 10 years of age.
- [40] On balance I find that the Kettle Lakes before and after school program is marginally more advantageous than the Churchill before and after school plan given the more modest fees associated therewith (although I find that it is not as dramatic as suggested by the father) and by the fact that it is available to age 12 rather than age 10.

Minimizing Changes to School

- [41] The Applicant father submits that as schooling is based on where a parent lives residential stability is an important factor.
- [42] The Applicant father says that the Respondent mother has lived in seven different homes in four different school catchment areas and that as a tenant she is naturally more transient than a homeowner.

[43] The mother's lease at her current residence expires in 2019. Renewal thereafter is uncertain.

[44] The father does not have an ownership interest in the residence in which he resides. He is cohabiting with his fiancé, who owns the residence.

[45] I am not prepared, on the evidence before me, to find that it is more likely that the Respondent will be moving frequently in the future than the father. I have no statistical evidence upon which to base such a finding.

[46] I treat this component of my analysis as neutral.

“Intangibles”

[47] The father submits that there are intangible benefits to Tristan being enrolled in Kettle Lakes as it is within the jurisdiction of the York Region District School Board by whom the father, his brother and his fiancé are all employed as teachers. It is submitted that this offers advantages to Tristan, namely “an understanding of the board's policies, initiatives, access to contacts and access to information before it is made public that can be used and shared with the mother, as permissible, throughout Tristan's education at YRDSB.”

[48] It is further submitted that holiday schedules will always mesh between the father as an employee of YRDSB and Tristan as a student within that school board. Father submits that there are seven or eight days throughout the school year that differ as between the YRDSB and the Toronto District School Board which governs Churchill Public School.

[49] Mother says that the discrepancy lies within one professional activity day where York Region has one more than Toronto throughout the year.

[50] On the disputed evidence regarding the conflicting calendars, I am not prepared to find that the discrepancy between the YRDSB and TDSB school board calendars differ by more than one professional activity day in favour of YRDSB.

[51] Having said that, in addition to that singular difference in calendars, I do see some advantage to Tristan being a student within the same school board that employs one of his parents. For example while the current discrepancy between YRDSB and TDSB regarding professional activity days may at present be limited to one day, if Tristan is a student within YRDSB he would not be susceptible to discrepancies between the two school boards assuming he is at Kettle Lakes.

[52] Beyond this advantage I am not prepared to speculate on the evidence before me on this motion.

[53] I therefore conclude that there is a slight advantage to Kettle Lakes in this context.

Tristan's Friends/Classmates

[54] Mother submits that if Tristan attends Churchill Public School he will be sharing a classroom with friends he has made at his former daycare centre known as "Churchill Chums".

[55] Father submits that this is speculative as it is unknown which of Tristan's daycare classmates, if any, will be enrolled at Churchill Public School.

[56] It should be noted that there was a dispute between the parties as to the location of Churchill Chums daycare in relation to Churchill Public School. Counsel for father submitted that the address for Churchill Chums was 5350 Yonge Street in Toronto whereas the mother submitted that it is located within the same premises as Churchill Public School at 188 Churchill Street in Toronto.

[57] I find the mother's evidence more reliable in this regard given the evidence at Exhibit C to the mother's affidavit sworn July 18, 2016 which confirms the street address of 188 Churchill Avenue, Toronto. This is confirmed as well by Exhibit G to the father's affidavit sworn June 22, 2016 which shows the same street address as for Churchill Public School.

[58] I do not consider it speculative to find that it is more likely than not that at least some of Tristan's daycare classmates will share a classroom with Tristan upon commencement of Junior Kindergarten at Churchill Public School.

[59] At the same time it is reasonable to expect that friends that Tristan has made in his neighbourhood where he resides with his father will find a way into a classroom at Kettle Lakes which would be shared by Tristan were he to attend Kettle Lakes.

[60] I therefore find that there is no significant advantage to either proposal in this regard. The effect of this factor is therefore neutral.

Consistency/ Stability

[61] The mother submits that Churchill Public School represents consistency in that Tristan would be attending classes within the same facility with which he is familiar through his daycare experience. He has been attending this address for several years.

[62] The father submits that the daycare facility is separate and distinct from the school facility. There are different teachers, different classrooms, different subjects been taught, etc. In his materials the father describes the daycare as being in a separate building from the proposed public school advanced by mother. As indicated above I conclude that the daycare facility and the school are essentially in the same premises at 188 Churchill Avenue in Toronto. Although the teachers may be different and the classrooms different, there can be no escaping the conclusion that Tristan would view the building as familiar and consistent with his prior years of attendance there.

[63] As well, Tristan and the parties can be expected to have become familiar with the rhythm of travelling to and from the 188 Churchill Avenue address in Toronto.

[64] This is a significant factor favouring the mother's proposal.

Decisions Made at the Time of Separation

[65] The mother submits that the father's choice to move 34km away triggered this motion and the father participated in the decision resulting in Tristan's attendance at the Churchill Chums Daycare facility at the time of separation.

[66] Father refers to an email dated May 31, 2014 wherein he communicates clearly to the mother that it is his desire for Tristan to attend the York Region District School Board.

[67] I do not take the father's agreement to Tristan's attendance at Churchill Chums Daycare Centre as agreement for Tristan to attend Churchill Public School.

[68] Although the daycare and the school appear to be operated from the same municipal address, they appear to be separate corporate entities.

[69] Therefore I find that the father's earlier agreement to Churchill Chums Daycare Centre does not represent agreement to Churchill Public School.

Fairness

[70] Father submits that it would be fair for his proposed school to be accepted by the court because it would result in less driving for him and he has borne the lion's share of the burden of driving since separation given the daycare at Churchill Chums close to the mother's residence.

[71] I reject his argument as it focuses on the interests of the father and not Tristan's best interests.

The Schools Themselves

[72] On the evidence before me I see no basis to conclude that either school represents any significant advantage over the other in relation to facilities, curriculum and program quality

Conclusion and Order

[73] In summary:

- a. Churchill has a slight advantage regarding proximity;
- b. Kettle Lakes has a significant advantage regarding consistency in Tristan's wake-up times;

- c. Kettle Lakes has a slight advantage regarding fees associated with before and after school care and program availability;
- d. Kettle Lakes has a slight advantage as a result of it being within the same Board that employs the father;
- e. Churchill has a significant advantage regarding Tristan's familiarity with the location and the routine of traveling to and from;
- f. The other factors outlined above were neutral in my assessment, or not relevant.

[74] In my assessment the most important factor is Tristan's relationship with his parents, who have implemented a day-about care schedule, one which I am not invited to change. This is the most significant component of Tristan's status quo. In my view the greatest threat to stability of this status quo would come from the two hour difference in wake-up time were Tristan to attend Churchill Public School, as outlined above. This, combined with the other less significant advantages of Kettle Lakes leads me to conclude that Tristan's attendance at the father's proposed school, Kettle Lakes, is more consistent with his best interests, on balance. Accordingly, the father's motion should be granted in this regard. So ordered.

[75] If unable to agree on costs the parties may provide written submissions to me through my assistant at Barrie restricted to three pages excluding offers and Bills of Costs. Father's submissions within 30 days. Mother's submissions within 45 days.

Douglas J.

Released: August 5, 2016