

CITATION: Lawrence v. Riley, 2017 ONSC 1731
COURT FILE NO.: FS-13-0813
DATE: 2017 03 23

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
SAMANTHA ABIGAIL LAWRENCE)
) Gary Gottlieb, for the Applicant
Applicant)
)
- and -)
)
NICHOLAS C. RILEY)
) Self-Represented Respondent
Respondent)
)
)
)
)
) **HEARD:** March 8, 2017

2017 ONSC 1731 (CanLII)

REASONS FOR JUDGMENT

VAN MELLE J.

[1] The respondent, Nicholas Riley, who resides in Baltimore, Maryland, scheduled this matter as a settlement conference returnable on March 8, 2017. He had some trouble arranging the date, as Mr. Gottlieb, counsel for the applicant, was somewhat uncooperative. Pursuant to the August 13, 2015 endorsement of Justice Emery this matter should actually have been proceeding

as a combined continuation of the settlement conference and a trial management conference.

[2] Justice Emery directed the parties to prepare trial management conference briefs and ordered that they were permitted to rely upon their previous filed settlement conference briefs. They were also directed to appear before me, as I was the case supervision judge. In fact, there was a note attached to the file that if any motions or conferences were scheduled they were to be heard by me.

[3] In any event, Mr. Riley communicated with Mr. Gottlieb by email. Mr. Gottlieb erroneously said that there had to be another settlement conference. He did not agree to any of the dates provided by Mr. Riley.

[4] On December 16, 2016 Mr. Gottlieb wrote to Mr. Riley and said:

First, regarding the settlement conference dates proposed, I have checked with the court and none of those dates are available. They are booking in April.

[5] As this matter was to be heard by me, this information was incorrect and indeed the dates proposed by Mr. Riley were available.

[6] In the same email communication Mr. Gottlieb advised Mr. Riley that he was going to be serving a motion for summary judgment and affidavit in support of same. The return date for the motion was March 9th, 2017.

[7] Notwithstanding being advised that a summary judgment motion was in the works, Mr. Riley confirmed the settlement conference date for March 8, 2017 with the court. Despite the fact that Mr. Gottlieb did not consent to this date, and in fact had other matters booked, he and his client were present at the settlement conference. It was not until after the commencement of the settlement conference that I was advised that there was a summary judgment motion, which was to be heard by me, scheduled for the following day. As a result of a mix-up in the trial office, this matter had not been drawn to my attention. Therefore, with the consent of the parties, I proceeded to hear the summary judgment motion on March the 8th. Mr. Riley had in fact, as part of his settlement conference brief, filed materials responding to the summary judgment. He filed them in the form of an Answer and attached documentation. All of the information that he wished to convey to the court in response to the motion for summary judgment was contained in those materials.

[8] In her motion for summary judgment, Ms. Lawrence seeks:

1. Custody of Solomon Harwood Riley, born July 22, 2010;

2. An order dispensing with the respondent's consent to obtain a Canadian passport and Nexus card for the child and an order permitting the applicant the final right to apply for and obtain and use the child's Canadian passport and Nexus card in order to facilitate the child's travel arrangements;
3. An order permitting the applicant to travel for vacation purposes with the child, without the consent of the respondent.

[9] In oral submissions, she also asked for an order dealing with retroactive and ongoing child support.

BACKGROUND

[10] The parties were married on May 7, 2006 and began to live together in Baltimore, Maryland. They separated on February 4, 2011. There is one child of the marriage, namely, Solomon Harwood Riley born July 22, 2010. He has been residing with Ms. Lawrence on a full-time basis since February 4, 2011, initially in Maryland, and since April 15, 2011 in Brampton, Ontario.

[11] At the time of the separation, the parties entered into a marital separation agreement. The parties signed the agreement without legal advice, and agreed that Ms. Lawrence could leave the United States for Canada.

[12] Since the separation, Mr. Riley has had sporadic supervised access visits with Solomon. He also has the right to Skype access under a temporary order that I made on January 28, 2014. Mr. Riley has not had any Skype visits since September, 2015.

[13] Mr. Riley commenced a Complaint For Absolute Divorce, dated July 13, 2012 in the Circuit Court for Baltimore, case number C-12-7256. He claimed joint physical custody of Solomon, sole legal custody of the child and visitation with the child. Ms. Lawrence defended with an Answer To Complaint For Absolute Divorce, dated November 5, 2012 and challenged the jurisdiction of the Maryland court with respect to custody and visitation.

[14] On January 24, 2013 the Honorable Timothy J. Martin determined:

The Court reserves jurisdiction and defers a ruling on the Motion and grants Mother 60 days from the judgment to file the appropriate action in Ontario. Perhaps this Court can discuss the matter with the Ontario court, but any way this Court observes this case leads to the conclusion that Father will have to go to Ontario to achieve and enforce his access.

[15] As I was the Regional Senior Judge at the time, I received a telephone call from Judge Martin. We discussed the issue of jurisdiction and agreed that Brampton was the appropriate jurisdiction to deal with all issues relating to Solomon.

[16] The Judgment of Divorce was granted on February 11, 2013. The Court granted an absolute divorce, incorporated the terms of the separation agreement with respect to alimony, property rights, counsel fees and court costs. It further ordered Ms. Lawrence to file an action in the Superior Court of Justice of Ontario raising the issue of jurisdiction over child related issues for Solomon. Further, Judge Martin said:

IT IS FURTHER ORDERED, by the express agreement of the parties that the Defendant [Ms. Lawrence] shall have custody of the minor child.

[17] Even though the Ontario Court remained the proper jurisdiction for dealing with all matters relating to Solomon, Mr. Riley decided to challenge the Ontario jurisdiction by commencing a Petition For Contempt Denial Of Visitation in the Circuit Court for Baltimore County, case number 03-C-12-7256. Ms. Lawrence brought a motion to dismiss and the Court, on October 19, 2016, dismissed Mr. Riley's case.

[18] In support of her claim for sole custody, Ms. Lawrence points out that she and Solomon are very close and that her immediate family lives nearby and supports her caregiving plan of Solomon.

[19] She states as well that Mr. Riley, who lives in Maryland, has not made much of an effort to be involved in his care and that Solomon does not know his father very well.

[20] Ms. Lawrence goes on to state that Mr. Riley's mental health has always been in question throughout these proceedings and that he refuses to get assessed. She says he makes plans to see the child or to speak with him but rarely keeps those plans.

[21] Solomon is attending Fairlawn Public School (French Immersion) where he is doing well and where he has friends. He is also involved in gymnastics, swimming and French club.

[22] Ms. Lawrence deposes that she and Solomon wish to travel to and from Florida and other locations. They have access to a timeshare in Fort Lauderdale and would like to take advantage of the opportunity. In the past, she has attempted to obtain Mr. Riley's consent to travel and deposes that this has often been a challenge to obtain. She received a temporary order dated January 28, 2014 allowing her to travel with Solomon without the consent of Mr. Riley and to apply for and obtain, when necessary, his Canadian passport. She wishes to have the order finalized and have it extended to include the Nexus card in order to facilitate worry free, easy travel to and from the USA and other destinations.

[23] Ms. Lawrence deposes that since April 15, 2011 she has received \$660 Canadian dollars in child support. By Court Order of August 13, 2015, Mr. Riley agreed to pay her on a without prejudice basis, commencing September 1,

2015, \$517 per month based upon his then disclosed income of \$47,496 per annum USD. He has not been complying with this order. He did give Ms. Lawrence a RUSHCARD prepaid visa from January 19, 2012 through October 1, 2013.

[24] She now seeks an order for retroactive support and ongoing support.

[25] In response to the motion for summary judgment Mr. Riley filed a Form 10 Answer and attachments. On page 3, paragraph 6.5, he states:

There exists no question of law that requires a trial and no substantial reason or explanation that can justify the granting of this motion.

[26] He seeks custody of and access to Solomon; and a revised draft order for child support.

[27] He states that he asks that the court make a final order of joint physical custody with primary custody to be recognized when Solomon is resident with either parent in their respective countries. Access is to include 6 weeks unsupervised access per year in the USA and joint legal custody of the child, Solomon Riley.

[28] In lieu of costs, Mr. Riley asked that all arrears of support in this case be dismissed with prejudice. He denies Ms. Lawrence's allegation that he suffers from severe mental health issues. He states that while he has acknowledged seeking out-patient treatment for depression, he has not been confined to any mental health institution nor has he been diagnosed with Schizoaffective Disorder. Although he includes as an exhibit to his materials a letter from a licenced psychologist in the state of Maryland attesting to Mr. Riley's stability and ability to function as a competent parent to Solomon, he does not attach an actual psychological assessment.

[29] He goes on to say:

In sections 12-13, the Applicant touts her credentials and rationalizes why her behavioural observations should be given weight. In reality she represents a wounded healer who has confessed to receiving treatment for depression in the Greater Toronto Area in the mid 1990's and has also attended to mental health treatment as late as 2011... She has presented with symptoms of several personality disorders which have made her emotionally manipulative, vindictive, prone to poor hygiene, overeating, overspending, and, at times, violent. It is this instability and not a concern for the well-being of Solomon that is the origin of this motion. The applicant has consistently projected her own mental health issues upon others and uses her training and education to justify this behavior. The Respondent has also worked in community psychiatry and held credentials as a substance abuse treatment counselor and a special educator with the Baltimore City School System.

[30] Mr. Riley goes on to detail his visits with Solomon on six occasions. He states that he visited with Solomon on November 13, 2011 in Canada; June

10, 2012 in Buffalo, New York; February 11, 2013 in Baltimore, Maryland; January 28, 2014 in Canada; April 15-16, 2015 in Canada and August 13, 2015 in Canada. He states that it is Ms. Lawrence who has discontinued all contact on Skype since September 21, 2015 and has denied or restricted his access to Solomon since April 17, 2011.

[31] Mr. Riley takes issue with the ADHD diagnosis made of Solomon, saying that this is a diagnosis typically given to boys who are seen as exhibiting the symptoms as set out by the Diagnostic and Statistical Manual of Mental Health Disorders, 5th Edition. He wishes to have legal custody so that he can seek a second and third opinion (on the frequently over diagnosed ailment).

[32] Mr. Riley seeks a custody agreement as follows:

(a) Joint custody should be awarded to both parents with Ms. Lawrence maintaining primary custody in Canada and Mr. Riley maintaining primary custody in the USA;

(b) Access will be as follows: Solomon will reside with his father in the USA without prejudice for a total of 6 weeks per year. Four of those weeks will be over the summer vacation from school, with the others commencing over the spring break and a combination of vacation days such as the Christmas break and/or Easter days;

(c) Solomon will reside primarily with Mr. Riley and will attend to a number of activities while in the USA. The YMCA of Metropolitan Washington and Central Maryland, where Mr. Riley was a youth mentor, has a number of activities geared for school-age children on break from school as well as hosting afterschool activities that are fully supervised and age-appropriate. Solomon will also have the option of attending the summer programs of the Community College of Baltimore County and Howard County during the summer months, which are also age-appropriate, and future week-long workshops on everything from coding to drama.

(d) Solomon's maternal grandmother is present in Baltimore to provide care and support. He will also visit with his aunt and cousins in Baltimore or New York City during the spring and summer.

(e) Solomon will have the option of attending church while resident with Mr. Riley. This will be arranged and Solomon will attend a Seventh-day Adventist Church on a Saturday for consistency.

(f) Transportation will be achieved by means of air travel from Buffalo, New York. Solomon will initially travel with his father from

Buffalo, New York to Baltimore, Maryland via an available air carrier, with costs handled by the respondent. Eventually he will travel as an unaccompanied minor in this manner, which is a designation that the airlines are familiar with and have made accommodation for. Mr. Lawrence will be responsible for transporting him to and from the airport in Buffalo.

(g) Joint legal custody will be for the purpose of inquiring about Solomon's well-being to include education, healthcare, social interaction, et cetera. If a decision is made unilaterally, then the matter should be mediated by other means to save the time and attention of the court.

(h) Mr. Riley is not contesting the plan of care that has been presented by Ms. Lawrence.

[33] Mr. Riley takes issue with the claim that he has not paid support. He details an occasion where he attempted to pay support and the cheque was returned to him. He uses this as a justification not to pay any more support. As well, he says he offered to transfer the necessary funds to an RBC cross border account. However, Ms. Lawrence did not wish to use that method of payment. He

acknowledges that an alternate arrangement should be crafted using a revised order and integrating the Family Responsibility Office.

PREVIOUS COURT ORDERS

[34] On January 28th, 2014 I made an order, on consent, that Mr. Riley was to contact Solomon by Skype on Tuesdays and Fridays at 7:00 p.m. Each party was to give the other 24 hours' notice if the Skype visit could not take place. The 7:00 time was changed by the parties to accommodate Solomon's earlier bed time period. However, it appears that Ms. Lawrence has on many occasions cancelled the Skype visit.

[35] On that same day, I made an order permitting Ms. Lawrence to apply for a Canadian passport for Solomon, without Mr. Riley's consent, and permitting her to travel with Solomon provided she gave Mr. Riley an itinerary 48 hours in advance. This was not a temporary order.

[36] At the same time, I ordered Mr. Riley to produce his last three years of income tax returns and notices of assessment as well as his December 31, 2013 and current paystubs within 30 days.

[37] I ordered Ms. Lawrence to furnish her up-to-date income tax returns as well. Although Ms. Lawrence complied by filing her income tax returns as ordered, Mr. Riley never made the ordered financial disclosure and in fact, has

never filed a financial statement. This is indeed troubling and it is only in Mr. Riley's settlement conference brief that he states that his income for 2016 was \$43,023 USD. For the time being, I am prepared to order child support based on that amount. I will, however, require the production of the documentation that I ordered produced on January 28, 2014. In addition, I will require a sworn financial statement from the respondent along with evidence corroborating his present income.

SUMMARY JUDGMENT

[38] Rule 16 of the *Family Law Rules* deals with the court's ability to deal with summary judgment motions. The court is allowed to make a final order on all or part of any claim made or defence presented in the case. The party making the motion must show that there is no genuine issue requiring a trial. The court is to consider the evidence submitted by the parties; weigh the evidence; evaluate the credibility of the deponent and draw any reasonable inferences from the evidence.

[39] In reviewing all of the evidence, I find that there is indeed no real issue for trial regarding custody and travel permission. The evidence is not contradictory, and the parties agree on what has transpired over the years. The only issue is Mr. Riley's mental health and the effect this would have on his access to Solomon. There is no dispute that Solomon has been in Ms.

Lawrence's primary care since the separation. Regarding the custody order itself, it is noteworthy that although Mr. Riley asks that joint custody pursuant to the original separation agreement be implemented, on February 11, 2013 on the Judgment for Divorce and as set out by Judge Martin, Mr. Riley agreed that Ms. Lawrence would have custody of Solomon.

[40] The order that Mr. Riley is seeking wherein he have legal custody while Solomon is with him in the USA and Ms. Lawrence have legal custody while Solomon is with her in Canada is not tenable in law. Mr. Riley is not exercising access on a regular schedule. It would be unworkable to impose the custodial arrangements that Mr. Riley is seeking.

[41] Given the physical distance between the parties and the unresolved issues around access, it is appropriate to award custody of Solomon to Ms. Lawrence. The plan that Ms. Lawrence has outlined for Solomon's care along with Solomon's situation at the present time, demonstrate that Solomon's best interests are served by remaining in the primary custody of his mother. I am concerned, however, by what could be characterized as Ms. Lawrence's actions in this matter regarding Skype visits. I have reviewed the emails and documentation regarding the cancellation of Skype visits and find that many of them were cancelled by Ms. Lawrence for no apparent reason. I am going to change the Skype visits to one time per week, Tuesdays at 6:00 p.m. for 30

minutes. These Skype visits are to take place every Tuesday. “Skype” or “FaceTime” can easily be accommodated no matter where Solomon is. It is critical that Mr. Riley be given an opportunity to try to rebuild his relationship with Solomon.

[42] In any event, as stated earlier, I did in fact make an order in that regard on January 28, 2014 and that order is still in effect.

[43] Regarding Mr. Riley’s access to Solomon, the materials do raise some issues regarding Mr. Riley’s mental health. The letter from Dr. Howard Hines, a licensed psychologist, is not sufficient to establish that Mr. Riley should have unsupervised access at this time. If, however, he participates in a psychological assessment, he is entitled to put that information before the court with a view to transitioning to unsupervised access.

[44] Regarding support, I see no reason to reduce the support or to waive the support. It was Mr. Riley’s obligation all along to make support payments in accordance with his income for his son. It seems that the issue with the cheque he forwarded to Ms. Lawrence was that it was in the wrong name. He did not correct this issue. He knew that the obligation existed, and could have put that amount of money aside each month until the manner of payment was sorted out.

[45] On September 1, 2015 Mr. Riley was ordered to pay \$517.00 per month based upon a then disclosed income of \$47,496.00 USD per annum.

[46] It is reasonable to assume that for 2017 Mr. Riley's income is \$48,000.00 USD, which today is \$64,594.00 Canadian. This results in a child support obligation of \$590.00 per month. Given the lack of financial disclosure and, in particular, Mr. Riley's failure to comply with my disclosure order, it is indeed appropriate to order the respondent to pay \$590.00 per month for the support of Solomon, commencing January 1, 2017.

[47] Again, without the disclosure as ordered and indeed as required by the *Family Law Rules*, I am prepared to make a support order for 2016 based on Mr. Riley's self-declared income of \$47,496.00 USD, which today is \$63,923.44, which produces a child support obligation of \$583.00 per month.

[48] Ms. Lawrence seeks retroactive support for the period of February 24, 2011 to August 1, 2015. Without the disclosure that the respondent was ordered to make, I attribute income of \$55,000.00 CAN to Mr. Riley and order him to pay \$500.00 per month for that period (March 1, 2011 to August 1, 2015).

[49] Mr. Riley has asked that the support be reduced by 30% to take into account his costs of exercising access. He has not demonstrated that he has any costs in this regard and I will not make such an order at this time. If, in the future

he decides to renew his order for a reduction based on the cost of exercising access, he **must** provide appropriate financial disclosure, included but not limited to a sworn financial statement.

[50] I have calculated Mr. Riley's outstanding and retroactive support as follows:

a)	March 1, 2011 to August 1, 2015:	\$26,000.00
b)	September 1, 2015 to December 1, 2015:	\$ 2,068.00
c)	January 1, 2016 to December 1, 2016:	\$ 6,996.00
d)	January 1, 2017 to March 1, 2017:	\$ 1,770.00
		<hr/>
	TOTAL:	\$36,834.00

[51] Ms. Lawrence acknowledges receiving support of \$660.00 which reduces the arrears to \$36,174.00. Mr. Riley will have to deal directly with the Family Responsibility Office to come up with a payment plan.

[52] An order will issue as follows:

1. The applicant will have sole custody of Solomon Riley.
2. My order of January 28, 2014 regarding the applicant's ability to travel with Solomon is still in full force and effect.
3. The applicant may apply for a Nexus card for Solomon without the respondent's consent.

4. The respondent is to have access by Skype or FaceTime to Solomon every Tuesday at 6:00 p.m.
5. The respondent is encouraged to arrange access to Solomon. He is to communicate with the applicant to make those arrangements. The applicant is to agree to any reasonable requests for access. Access is to be supervised by the applicant or her father or any other person she agrees to.
6. The respondent may communicate directly with Solomon's school and medical practitioners regarding Solomon's well-being. He may contact Solomon's school to arrange to have Solomon's report cards sent to him directly.
7. The respondent is to pay child support in the amount of \$590.00, commencing April 1, 2017. Support Deduction Order to issue.
8. The respondent is to pay retroactive child support up to and including March 1, 2017 in the amount of \$36,174.00. This takes into account his total support obligation to that date.
9. The applicant may take out this order without the respondent's approval as to form and content.

[53] Regarding costs, despite the Regional Practice Direction obligating the party seeking costs to provide a cost outline at the actual hearing of the motion, Mr. Gottlieb did not come prepared with such an outline. He asked for costs of \$5,000.00. Without a cost outline, I am not prepared to award costs of \$5,000.00. The applicant has 20 days from today to provide a written submission, not to exceed 3 pages, plus a cost outline. The respondent has 20 days within which to provide a reply to the costs submission.

Van Melle J.

Released: March 23, 2017

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