

Case Name:

K v. K

**RE: C.D.K., and
K.G.K.**

[2009] O.J. No. 3976

Court File No. FS-08-344970

Ontario Superior Court of Justice

E.M. Stewart J.

Heard: August 4, 2009.

Judgment: September 23, 2009.

(34 paras.)

Family law -- Custody and access -- Considerations -- Best interests of child -- Custody -- Sole custody -- Practice and procedure -- Orders -- Interim or interlocutory orders -- Application by the mother for temporary sole custody of the two children of the marriage allowed -- The mother resided in Toronto with the children while the father resided in Dubai -- The children were doing well in Toronto under their mother's care -- Moreover, a joint custody arrangement would be extremely difficult considering the significant distance between the parties and their unresolved conflict -- Therefore, it was in the children's best interests for their mother to have temporary sole custody with liberal and generous access to the father.

Statutes, Regulations and Rules Cited:

Hague Convention,

Counsel:

Steven Benmor, for the Applicant.

Paul Rausch, for the Respondent.

ENDORSEMENT

1 E.M. STEWART J.:-- In my endorsement of August 5, 2009 in this matter, I indicated that I would provide reasons for my decision to grant temporary custody of the children of the marriage to the Applicant wife.

2 In addition, issues of child and spousal support in dispute remain to be addressed. All other issues raised on this motion have been agreed upon by the parties, as set out below.

Custody and Access

3 The parties were married in Toronto, Ontario on May 21, 1989 and separated on June 20, 2008. The Applicant presently resides in Toronto, Ontario with the two children of the marriage: J, age 15 and N, age 10.

4 Prior to separation, the Applicant had been residing with the Respondent and their children in Dubai in the United Arab Emirates. She moved back to Toronto with the children when she and the Respondent separated.

5 The Respondent continues to reside in Dubai where he is Head of the Executive Chairman's Office and Chairman Legal Representative to A.A.F., the Executive Chairman of A.F.H. LLC/P.G. LLC.

6 Since the birth of her first child, the Applicant has been a homemaker and caregiver to the children. Although she was employed for a short time in schools in the Middle East attended by the children, the Applicant spent the significant majority of her time as a full-time wife and mother. Throughout the marriage, the Applicant was the parent who made whatever arrangements necessary to care for the children and ensure their emotional and physical health and well-being.

7 The children now reside with the Applicant in Toronto. She looks after them in all respects.

8 The Applicant was and continues to be the parent responsible for dropping off and picking up the children at and from school, before/after school programs, day camps and extracurricular activities. The Applicant is the only contact person designated for school and at after-school programs and extracurricular activities. The Applicant is actively involved with the children's homework and regularly participates and attends the children's social activities at school.

9 Approximately fifteen months have passed since the Applicant and children moved back to Canada. Since then, the children have seen the Respondent in Canada on a few occasions. Recently, the parties agreed that he could take the children to Florida for a brief holiday, on certain terms provided for in their agreement.

10 Although it may have been contemplated initially that the parties would share joint custody of the children, the Applicant asks now for a temporary order of sole custody of the children, citing reasons of safety, stability and continuity of care for the children. The Applicant also wants all necessary and unchallenged legal authority to permit her to deal easily with their teachers, doctors and dentists. Such an order is also necessary to prevent any possible removal of the children from her care and, in particular, to Dubai which is not a signatory to the Hague Convention.

11 The Applicant states that she truly believes that the Respondent loves the children dearly and only wants the very best for them. The Applicant is agreeable to an order that the Respondent have liberal and generous access to the children by telephone, by e-mail, by video-conferencing and at such times and places in Ontario when the Respondent visits Ontario, provided that such times do not conflict with the children's school or camp schedule and provided that the Respondent provides at least 21 days advance notice to the Applicant.

12 In my view, it is in the best interests of both children that the Applicant be granted temporary sole custody and that the Respondent have liberal and generous access to the children on the terms agreed to by the parties in the event sole custody is granted to the Applicant. The children are in Toronto and doing well under their mother's care. An order for joint custody would be difficult in the extreme to implement in this case, given the significant distance between the parties and the unresolved conflict which exists. Although the parties are able to communicate with one another to some degree, the material before me suggests that they do not display the level of cooperation required to make joint custody work effectively in such a situation and where one of the parents is residing so far away from where the children reside. The absence of Hague Convention protection is a factor which influences my decision in that regard, although it is the day-to-day welfare of the children which is the overwhelmingly primary reason for this decision.

13 Accordingly, the Applicant shall have temporary sole custody of the children, subject to any further order of the Court or agreement of the parties.

14 On consent, the Respondent shall have liberal and generous access to the children by telephone, by e-mail, by video-conferencing (all at the Respondent's expense) and at such times and places in Ontario when the Respondent visits Ontario provided that such times do not conflict with the children's school or camp schedule and provided that the Respondent provides at least 21 days advance notice to the Applicant.

Income of the Respondent

15 The Respondent is being paid his salary in the currency of the United Arab Emirates in an amount equivalent to approximately (Cdn.) \$277,599.00 per year. Because of his place of residence, the Respondent pays no income taxes.

16 When the tax-free nature of his income is taken into account, the Respondent actually earns the equivalent of approximately (Cdn.) \$518,000 per year.

17 However, the Respondent also argues that the high cost of living in Dubai is a consideration to be taken into account in determining the appropriate amounts for child and spousal support. I note that part of the Respondent's income structure is designed to address this cost-of-living disparity. This consideration has the effect of reducing the disposable income available to him to some degree. I therefore am prepared to consider this disparity as a factor to be taken into account when determining the Respondent's income for purposes of calculation of interim child support. When this factor is taken into account, I am of the view that a fair and reasonable amount at which to assess the Respondent's income, for these present purposes, is \$450,000.00 per year.

Income of the Applicant

18 The Applicant is a former real estate agent who gave up her position when she moved to the Middle East so that the Respondent might pursue job opportunities there. She now has obtained temporary employment at entry level and earns \$26,000.00 per year. Although she has attempted to obtain more remunerative employment, and is seeking to regain her real estate licence, there are few employment opportunities immediately available to her given her age, limited work experience and obligation to attend to the needs of two growing boys. I am not persuaded that the Applicant's university education and real estate or teaching experience are such that her income should be imputed to be any higher than that stated by her, given her current circumstances. This determination is without prejudice to the ability of the Respondent to pursue this argument as the Applicant becomes more established, her children get older and her employment prospects improve.

19 On a consensual interim basis pending determination of this motion, the Respondent has been paying the Applicant the sum of \$5,000.00 per month on account of spousal and child support and has also paid for certain other additional expenses. As of the date of hearing, these amounts totalled slightly more than \$54,000.00. The Applicant agrees that the Respondent should be given credit for such payments.

20 The Applicant is alleged by the Respondent to be collecting rent on certain rental properties in Toronto owned jointly by the parties. The issue of the amount of income available to her as a result is yet to be determined. The Applicant presumably also pays the carrying costs and other expenses associated with those rental properties out of the rental income received.

21 Further, any issue with respect to the alleged removal of GIC's as referred to in the Respondent's materials or other financial considerations raised by the Respondent can be dealt with as part of the balance of these proceedings and are not significant factors in my consideration of the question of child or spousal support at this time.

Child and Spousal Support

22 The Applicant seeks the amount of \$6,262.00 per month for interim child support, apparently in accordance with the Table amount for two children under the Child Support Guidelines, based on an assumption that the Respondent's income is \$518,000.00 per year.

23 The Applicant also asks for a temporary order of spousal support in the amount slightly in excess of \$12,015.00 per month, again based upon an assumption that the Respondent's income is \$518,000.00 per year.

24 For reasons set out in his factum, the Respondent argues that the amounts of child and spousal support requested are excessive. He points out that, because he pays no income tax in Canada or United Arab Emirates, he receives no tax relief for any payments made by him for spousal support.

25 Given the clear obligation of the Respondent to provide support for his children, as well as his considerable ability to provide spousal support and the demonstrated need of the Applicant for such support in light of her current circumstances, interim support shall be paid to the Applicant by the Respondent in the amount of \$10,000.00 per month, retroac-

tive to June 20, 2008. Credit shall be given to all sums paid by the Respondent to the Applicant to date, including those sums referred to in paragraph 19 herein.

26 In light of the respective tax concerns advanced by both parties, I consider it preferable that these payments not be allocated specifically as between child and spousal support at this time, but that such determination be made retrospectively on a fuller record after questioning has taken place. Therefore, these monthly payments shall continue (subject to any further Court order) until questioning has been completed and disclosure has been provided by both parties, at which time the matter will be returned to Court for review if not otherwise resolved by the parties. At that time, any appropriate adjustments for the amount of either child or spousal support may be made and all necessary allocation on account of each determined. In the meantime, the Respondent shall also pay his proportionate share of all special and extraordinary expenses for the children based on the assessment of the Respondent's income at \$450,000.00 and the Applicant's income at \$26,000.00. Such payments are to be made retroactive to June 20, 2008.

Issues Agreed Upon

27 On consent of the parties, each party is restrained from communicating with the children any information regarding this litigation (including schedule of access) and neither party shall make any derogatory remarks to the children regarding the other or his/her family.

28 On consent, there shall be a preservation order restraining either party from depleting any family property under her/his control and requiring her/him to preserve all such property until further order of this Court pursuant to section 12 of the *Family Law Act* and, specifically, the four properties known municipally as: (1) 44 J.S. Unit 1601, Toronto, Ontario; (2) 44 J.S., Unit 1402, Toronto, Ontario; (3) 44 J.S., Unit 1404, Toronto, Ontario; and (4) 500 D.A., Unit 730, Toronto, Ontario, except to permit the Applicant to solely manage such properties including collecting the rental monies and pay for the mortgages, condominium fees, property taxes, utilities and for which she will provide the Respondent with a full accounting of same on a reasonable basis and at the time of the settlement of the issue of equalization.

29 On consent, each party shall deliver to the other party's counsel with 21 days the remaining disclosure that was sought in each party's Request for Information.

30 On consent, mutual questioning of the parties shall occur in Toronto, Ontario at a date to be agreeable to both counsel and no later than December 22, 2009.

31 Unless the support order is withdrawn from the Office of the Director of the Family Responsibility Office, it shall be enforced by the Director and amounts owing under the order shall be paid to the Director, who shall then pay them to the person to whom they are owed.

32 This order bears interest at the rate of 5% per annum on any payment or payments of which there is a default.

33 This matter shall return to Court for a Settlement Conference on a date to be arranged by counsel for the parties prior to December 31, 2009.

Costs

34 If the parties cannot agree on costs, brief written submissions may be delivered by the Applicant within 15 days of the date of release of this decision, and by the Respondent within 10 days thereafter.

E.M. STEWART J.