

CITATION: Hernandez v. Nikas, 2017 ONSC 162
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DATE: January 31, 2017

ONTARIO

**SUPERIOR COURT OF JUSTICE
FAMILY COURT**

B E T W E E N :

Hector Luciano Hernandez

Applicant

- and -

Nikki Maria Nikas and Kelsie Stewart

Respondents

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) Hector Luciano Hernandez in person
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) Imran Khan for Nikki Maria Nikas
) Alexandra Kirschbaum for Kelsie
) Stewart
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) **HEARD:** September 21, 22, 23, 29, 30,
) 2016; October 3, 4, 5, 6, 7, 17, 18, 19,
) 20, 21, 24, 25, 26, 27, 28, 2016

HENDERSON J.

[1] This decision determines who among three people shall have custody of the child, Adriel Constantino Luciano (“Adriel”), born December 9, 2008. The facts of this case portray a saga of shifting allegiances, absent parents, drugs, sex, domestic violence and religious conversion.

[2] Adriel's father commenced these proceedings in July 2013, seeking custody. By trial, he was supporting the claim of Kelsie Stewart in her claim for custody and did not attend every day of trial. She was a longtime caregiver of Adriel and was added as a party in August 2015. Adriel's mother, Nikki Nikas, opposes the claims of the other two parties and seeks at least primary care of the child.

Background

[3] Mr. Hernandez and Ms. Nikas met in the Dominican Republic when Ms. Nikas was 17. Mr. Hernandez is 12 years her senior.

[4] In 2007 and over the next two years, they had an on again, off again, relationship. On the evidence, they never cohabited in any long term meaningful way.

[5] The relationship was tumultuous, with the police being called to intervene several times. At one occurrence, the police laid an assault charge against Mr. Hernandez. He pled guilty, for which he says he received an absolute discharge.

[6] Adriel was born of the relationship. Mr. Hernandez testified that he was an involved father in the early months of the child's life. However, Ms. Nikas would withhold the child at her whim depending on whether she believed Mr. Hernandez was seeing someone else or she was otherwise annoyed at him. He believed at the heart of the issues between them was Ms. Nikas' need for control and her inclination to be manipulative, even to the point of using their son to get to him.

[7] Ms. Stewart entered the picture in 2009 when she answered an advertisement placed by Ms. Nikas on Kijiji, who was looking for a babysitter. From 2009-2011, Ms. Stewart provided *ad hoc* childcare services. While the exact amount of time is unclear, it is apparent that the time she provided childcare services for Ms. Nikas increased significantly. This was especially so with Ms. Nikas' mother's diagnosis of cancer in 2010 and her subsequent death in early 2011. Her mother had provided some additional childcare as her mother believed the child should not be left with non-family caregivers. It is clear by her actions that Ms. Nikas did not share this view.

[8] Initially, according to Ms. Stewart, the child was being left with her one to three times per week, including overnights. This gradually increased. She said that Ms. Nikas was leaving the child with several caregivers, which she felt was not in the child's best interest. At this time, Ms. Stewart described Ms. Nikas as young with her focus more elsewhere than on the child.

[9] From 2011 and into early 2012, Ms. Stewart was working for another family as a nanny in Toronto. She testified, and was not challenged, that on many weekends when she was home, she spent time with the child simply because she enjoyed spending time with him.

[10] On Ms. Stewart's return to London in 2012, she moved in with her boyfriend, living at his mother's home. The child had his own room there. Ms. Stewart would take him to daycare and he was spending long stretches of time in Ms. Stewart's care, to the point where Ms. Stewart was voicing her concern to Ms. Nikas that she should be spending more time with her son and needed more stability and routine in her life.

[11] Sometime in the spring of 2012, Ms. Nikas began working in Toronto from Wednesday to Sunday. Initially, she told Ms. Stewart that she was doing hair extensions but after a month she confessed that she was an exotic dancer and providing escort services.

[12] In September 2012, Ms. Nikas left for Fort McMurray, Alberta to continue as an exotic dancer. She said the money was better and she had bills to pay and hoped this would stabilize her life.

[13] Ms. Nikas expected her stay to be temporary and she approached Ms. Stewart to care for Adriel in the meantime. Ms. Stewart readily agreed, as much to provide some support to Ms. Nikas as to ensure some stability to Adriel.

[14] Ms. Stewart said that at this time she and Ms. Nikas got along well. They were friends, not so much in a social way but focusing on the child. There was easy communication between them and this characterization was not challenged by Ms. Nikas.

[15] Because of their easy relationship and the expectation that Ms. Nikas' stay in Alberta was going to be temporary, the two women never entered any kind of formal arrangement. As a professional nanny, Ms. Stewart was familiar with the common contracts between the family and nanny but, in this case, there was none of that.

[16] Consequently, there was considerable dispute as to the terms of the arrangement between Ms. Nikas and Ms. Stewart. Ms. Nikas pressed hard that Ms. Stewart was never more than a paid babysitter. This resulted in extensive productions of bank records and many days of evidence.

[17] Ms. Stewart admitted that monies were received, certainly covering many, but not all, of the child's expenses. She also admitted to receiving gifts from Ms. Nikas, although not always in the amounts Ms. Nikas represented.

[18] Ms. Stewart never declared any income on her tax returns, which of itself would not be conclusive. However, Ms. Stewart's and Ms. Nikas' records do not assist in clarifying the issue. There is no doubt money was being transferred in and out but it is rarely a consistent amount as one would expect, and is further complicated by the reimbursement of personal expenses that Ms. Stewart paid for Ms. Nikas, for example her rent.

[19] In the end, the nature of the commercial relationship between the parties on these particular facts is irrelevant. This matter needs to be approached from the child's perspective and whether or not there was a commercial relationship between these two women is wholly immaterial to him. What is significant to Adriel is that, over the next three years, his primary caregiver became Ms. Stewart, with his mother playing only a minimal parental role.

[20] It is what happens after Ms. Nikas got on that plane to Alberta that determines who ends up with custody of Adriel.

[21] What was initially expected to be a temporary stay lasted three years. Ms. Nikas intended to return home to care for her son frequently but the gaps between her stays became longer. It reached a point in 2014 that she did not see her son from the end of August until Christmas for a couple of weeks, and then again not until May 2015 for a couple of days.

[22] She became caught up in the lifestyle of an exotic dancer. She worked nights, starting at about 10 p.m. The money was good, with fringe benefits. In July 2013, she availed herself of a \$30,000 U.S.D. 'gift' from a client to have breast enhancement and other cosmetic surgery.

[23] Ms. Nikas became a daily user of marijuana that lasted until early 2016. In the fall of 2014, she became addicted to cocaine and fentanyl and, as a result, she became frequently sick and lost a great deal of weight.

[24] In an exchange of texts between Ms. Stewart and Ms. Nikas in June 2016, Ms. Nikas said she wanted to take Adriel to Alberta. Ms. Stewart was aware of Ms. Nikas' lifestyle and thought it inappropriate for child-rearing. She berated Ms. Nikas and said she would not let him go. Ms. Nikas responded by saying she understood the concern and was "getting things together."

[25] In July, Ms. Nikas advised Ms. Stewart that she was coming for a visit. There was no indication that she would stay beyond a few days as usual and then return to Alberta. Within a couple days, Ms. Nikas told Ms. Stewart that she was going to stay in London and Adriel would remain in her care.

[26] Litigation ensued. Ms. Stewart was added as a party but, by my order of August 26, 2015, her access to Adriel was significantly reduced to one 24 hour period every third weekend. In my endorsement, I wrote the intention was to provide Ms. Nikas with an opportunity to parent her son.

[27] Despite being provided this opportunity, Ms. Nikas returned to Alberta to resume her work within a few days and left the child with her brother, George. She returned at the end of October and has been living with her grandfather since.

[28] In the spring of 2016, Ms. Nikas and her son, who had been raised in the Greek Orthodox faith, converted to Islam. Ms. Nikas wears a hijab and abides by the diet prescribed by the tenets of that faith. This includes avoiding pork and the eating of halal meat.

[29] Pursuant to further motions, on June 1, 2016, I issued an order stating that Adriel shall remain in the primary care of his mother. I also expanded Ms. Stewart's access and provided for access for Mr. Hernandez through Ms. Stewart.

[30] Among other terms, I also ordered that "each party may impart their religious and cultural values when the child is in their care, save that the child shall not be fed any pig meat or meat that is not halal." This term was included on the consent of the parties.

[31] At trial, Adriel was living with his mother in her grandfather's home. She earns some income doing undefined office work for the family restaurant.

The Evidence

i) Credibility

[32] Where there is a discrepancy between the evidence of Ms. Nikas and Ms. Stewart, I prefer that of Ms. Stewart.

[33] Ms. Nikas' testimony was prolix and vague. Her favoured expression in cross-examination was "I cannot definitely recall/say." She apologized so often about the poor decisions she has made that she lacked sincerity. This lack of sincerity was highlighted by her tendency to blame everyone else for her problems: Mr. Hernandez, Ms. Stewart, child protection workers, the doctors and her family. She even blamed Adriel to explain why she did not raise the issue of the consumption of pork and halal meat before my June 1, 2016 order and not in the context of the nine previous court orders since August 2015. According to Ms. Nikas, she raised it in June and not earlier because it was then that Adriel raised the issue. She bore no responsibility.

[34] Nor did she bear any responsibility for hitting her son in the face, an incident she admitted to the clinical investigator for the Office of the Children's Lawyer (OCL) in 2016. While she said she could not defend it, she blamed it on stressful times. It was not the only time she had administered physical discipline. This came in stark contrast to her statement earlier in her evidence that she "would never harm a child."

[35] During some of her evidence, I had the distinct impression Ms. Nikas was making it up as she went along. In cross-examination, she was confronted with the same questions that had been put to her in oral questioning. Her answers, which were not qualified in oral questioning, became qualified at trial. A long and vague explanation followed. Similarly, Ms. Nikas, on several occasions, had difficulty giving straight

answers even to questions that were hardly determinative of the case. When asked why she did not come earlier than planned to take care of Adriel when Ms. Stewart went into labour early with her second child, Ms. Nikas embarked on a long explanation about fluctuations in her income and air flight fares.

[36] Ms. Nikas also minimized the difficult aspects of her life, such as the extent of the conflict in her family. She hid behind her Greek ethnicity, saying like all Greek families they were close but with ups and downs. I cannot comment on the Greek aspect but records show that police were involved several times in incidences in 2010 and 2011. More recently, the police were called twice after Ms. Nikas returned from Alberta at the end of October to sort out conflict between Ms. Nikas and one of her brothers. In January 2016, Ms. Nikas was charged with assaulting her father and subsequently convicted. The extent of police involvement suggests issues more serious than normal familial disputes.

[37] I also note that, although Ms. Nikas and her father apparently have subsequently reconciled, he was not called as a witness to confirm this or to provide any background to his daughter's upbringing. Her only sibling (of four) who was called was her brother, George (not the brother involved with the police), but even his evidence reflects the family's ups and downs at least as they involve Ms. Nikas.

[38] At the beginning of the proceedings involving Ms. Stewart, George was supportive of his sister's claim for custody. His sister put forward his name as a collateral source for the OCL clinical investigator to contact in 2016. To the investigator's surprise, rather than providing positive information, he described his sister as manipulative and having a history of unstable behaviour. He said she was extorting money from their father and has denied the family access to Adriel. They did not speak to each other from January to August 2016 during which period Ms. Nikas withheld access to Adriel. At trial, in a further change of heart, he testified on her behalf because he now believes she has rehabilitated herself.

[39] A final concern I have regarding Ms. Nikas' testimony arises from my order of August 26, 2015, leaving Adriel in her care and significantly curtailing the access of Ms. Stewart to the child. The order was made on the basis of her representations that she was straightening her life around and needed the opportunity to parent Adriel. Nevertheless, within days of the order, she had returned to Alberta to resume dancing. The reason she gave was to earn money to pay her outstanding lawyer's bill. If the court had been aware of her intent, the outcome would likely have been different. She clearly misled the court as to her plan.

[40] As a result of Ms. Nikas' misrepresentations, the child suffered considerable disruption to his life. He had to change schools and was removed from the care of the

person who had been his primary caregiver over the previous three years and placed with someone who had never cared for him before, his uncle George.

[41] In contrast to Ms. Nikas' testimony, Ms. Stewart answered her questions directly and honestly, even when against interest. Her tone was measured, although emotional at times, but appropriate for the occasion.

[42] I note she has been compliant with my order of August 26, 2015, even though it severely restricted her contact with Adriel and no doubt caused her considerable pain.

[43] Her position on issues has always been moderate and, unlike with Ms. Nikas, she saw this litigation from a child-focussed perspective and not a contest to be won.

[44] I have not specifically addressed the credibility of Mr. Hernandez, the other principle player. He is not seriously contesting custody and supports Ms. Stewart in her claim. He seeks only access that is reliable and regular. He has not played a significant role in the child's life until recently. In view of this, I will address his evidence as may be pertinent.

ii) OCL Reports

[45] There were two OCL reports filed in this trial: the first investigated by Kristian Wilson dated July 25, 2014 and the second by Michelle Gibson dated February 11, 2016.

[46] The 2014 report focused on the custody contest between Mr. Hernandez and Ms. Nikas. As reflected in their relationship, the litigation was highly conflictual.

[47] At the end of her report, Ms. Wilson recommended sole custody to Ms. Nikas, with specified access to Mr. Hernandez. Adriel was to stay with his mother when she was home from Alberta and with Ms. Stewart when she was away.

[48] As Ms. Nikas had stated an intention to take Adriel to Alberta, there were also recommendations to address some underlying concerns Ms. Wilson had about this plan. Ms. Nikas was to meet with Dr. Joan Clayton (Ms. Nikas' psychologist, whom she had seen since she was 18 to manage stress and anxiety) regarding Adriel's ongoing needs, the potential relocation to Alberta and its timing. Further, Ms. Nikas was to attend a parenting course specific to Adriel's age and development, and to demonstrate an ability to have him in a consistent routine before any move to Alberta.

[49] Although the 2014 report has been rendered somewhat irrelevant by the subsequent involvement of Ms. Stewart in this litigation, it does contain important information:

1. Ms. Nikas was described as the child's primary caregiver from birth until 2009 when he began spending time in the care of Ms. Stewart. Ms. Stewart was child-focussed and close to Adriel.
2. Because Adriel was living most of the time with Ms. Stewart, the clinical investigator conducted a separate observation visit with Ms. Stewart and her fiancé, Mr. Bray.
3. None of Ms. Nikas' family members were offered as collateral sources. The history disclosed some significant family conflict, especially with her father after her mother died. At that time, he cut off all financial support to her.
4. Both in her report and oral testimony, Ms. Wilson noted the relative sparseness of Adriel's room compared to his room at Ms. Stewart's home.
5. According to the records Ms. Wilson reviewed from the Children's Aid Society of London and Middlesex ("CAS"), there were nine referrals between December 2008 and December 2013.
6. Ms. Nikas raised a concern about the reliability of Mr. Hernandez exercising access to Adriel. He blamed the lack of access on the whims of Ms. Nikas. At that time, Ms. Stewart supported the concern of Ms. Nikas. Adriel was close to his father and worried about not seeing him.
7. Ms. Wilson observed that Ms. Stewart was an important support for Ms. Nikas in the context of several gaps in her parenting skills. She wrote that "Ms. Stewart currently attends to all Adriel's medical needs and educational needs while maintaining routine and structure in his life."
8. In her report, Ms. Wilson described Ms. Stewart as Adriel's psychological parent. At page 14, she writes:

She (Ms. Stewart) has been in his life since his birth and as the regular caregiver consistently for the past two years. She takes care of all his educational needs while Ms. Nikas is in Alberta. Ms. Stewart registered Adriel in school, keeps him in a steady appropriate routine and loves for him like her own son. Ms. Stewart has attended to Adriel's medical needs, including surgery and complications from surgery while Ms. Nikas was out west. Ms. Nikas did not return from Alberta when these complications occurred.

9. Ms. Wilson interviewed Dr. Clayton, who described Ms. Stewart as 'exceptionally mature, competent, responsible and child focused.' Dr. Clayton had observed that

Adriel felt comfortable in Ms. Stewart's presence. She further noted he was very attached to her.

10. When Ms. Wilson interviewed Adriel, who was five at the time, she observed that he always put Ms. Stewart's name before his mother's. For example, when asked to whom he would speak if he did not feel well, Adriel replied "Kelsey or Mommy."
11. There was a concern about the contrasting routines at Ms. Stewart's and Ms. Nikas'. This is best exemplified by Adriel's answer to what were the rules in each house. At his mother's, he could stay up to "12 or 13." At Ms. Stewart's, bedtime was 7:30 p.m.
12. Ms. Wilson was concerned with the impact of a move to Alberta on Adriel. At page 17 of her report, Ms. Wilson notes:

Ms. Nikas has advised that she and Mr. Cossar have rented a home in Alberta and they wish to relocate Adriel there. Ms. Nikas would like to take him for a visit in the summer to show Adriel their home.

Relocation would have to take many factors into account such as Ms. Nikas's ability to provide structure and routine to Adriel; visitation of Adriel with Mr. Luciano [Hernandez]; relationship and loss of a primary caregiver regarding Adriel with Ms. Stewart; loss of relationships with family members including Adriel's maternal uncles and Ms. Stewart's extended family as well as school peers and supports. These issues would all have to be carefully thought out and planned in consultation with a professional. Dr. Clayton has advised that she would be prepared to help the family with this transition should it occur and be appropriate in the future. Dr. Clayton stated that 'solid attachments are fundamental for children to be healthy and stable, and help to ensure that a child develops mentally and emotionally.' Adriel currently has a solid attachment with Ms. Stewart and her fiancé. At this time the primary caregiver for Adriel has been Ms. Stewart. There have also, as aforementioned, been concerns about Ms. Nikas's ability to have Adriel in a proper routine and structure for his age and stage of development.

[50] In her oral testimony, Ms. Wilson said Ms. Stewart did not voice any concern regarding Ms. Nikas' use of drugs or profession in Alberta. Rather, her main concern

was the irregularity of Ms. Nikas' visits and her lack of routine for the child when she did visit.

[51] A second OCL report was completed by Ms. Gibson on February 11, 2016. She recommended sole custody to Ms. Stewart, with specified access to Ms. Nikas. There was no reference to Mr. Hernandez, as the clinical investigator did not believe he was still involved. Ms. Gibson acknowledged in cross-examination that this was an oversight. However, I do not find it had a significant impact on her report given Mr. Hernandez's position with respect to Ms. Stewart and his evidence at trial.

[52] Some of the highlights of Ms. Gibson's investigation are as follows:

1. There was a significant shift in Ms. Nikas' view of Ms. Stewart from the initial report. Whereas for at least three years Ms. Stewart played a significant role in the life of Adriel, Ms. Nikas now perceived the relationship as unhealthy. Ms. Nikas viewed her as simply a paid babysitter. Ms. Gibson found nothing unhealthy in the relationship between Ms. Stewart and Adriel.

To some extent, although not surprisingly, Dr. Clayton's view of Ms. Stewart in 2016 also changed in contrast to the glowing terms she described Ms. Stewart in 2014.

According to Dr. Clayton, the quality of care Ms. Stewart provided to Adriel changed when she had her own child and stated that he was not "overly attached" to Ms. Stewart.

Dr. Clayton did not testify and so could not provide an explanation for her change of view. Dr. Clayton was asked to testify as an expert. After a *voir dire*, I said she could not, for reasons given, but could testify as Ms. Nikas' attending psychologist. Dr. Clayton was not called to testify in that capacity.

Ms. Gibson did not agree with Dr. Clayton's view of Ms. Stewart and, at page 9 of her report, she observes:

While Dr. Clayton is a support person for Ms. Nikas, her disclosure is inconsistent with information from other collateral sources and fails to acknowledge the attachment developed between Ms. Stewart and Adriel.

She continued, in fact,

It is recommended that Ms. Nikas complete all recommended services from CAS and that she continues to participate with CAS. It is also recommended that she participate in a parenting program

that is group or individually facilitated. She would benefit from individual counselling to address her concerns related to substance use and interpersonal relationships.

There was also a shift in the support from Ms. Nikas' family to the extent she had it (in addition to her four siblings, there is her father and grandfather in her immediate family). Her brother, George, was the only one who supported his sister, initially, against Ms. Stewart. However, I have already referred to the harsh criticism he levied against his sister when interviewed by Ms. Gibson (he has since again changed his view).

2. At the observation visit, Ms. Gibson noted that when focused on Adriel, Ms. Nikas was attuned to him and that she displayed an ability to be child-focussed. However, Ms. Gibson wrote that she had to be redirected several times. In the presence of the child, Ms. Nikas shared that the CAS had arrived unannounced and that she had marijuana out. Despite Ms. Gibson's attempt to move Ms. Nikas off the topic in the presence of the child, she continued to talk about the CAS.

At Ms. Stewart's home, Adriel interacted well with Ms. Stewart, her fiancé and their daughter. He was obviously comfortable in the home and Ms. Stewart engaged appropriately.

3. Based on the disclosures from Adriel during her interviews with him, Ms. Gibson concluded that he was being influenced by his mother. Adriel said that Ms. Stewart was trying to 'take' him away from his mother and that she is mean to his mother. He said he was told this by his mother. Also, despite enjoying the three years with Ms. Stewart, he now did not want to see her because she was causing his mother "too many problems in court."

In his second interview, Adriel relayed how his mother is often mad and that she speaks a lot about Ms. Stewart. In contrast, he said Ms. Stewart does not speak about his mother.

Finally, Ms. Gibson related Adriel saying he was told by his mother that Ms. Stewart had hit him even though he had no recollection of the event.

4. In the discussion portion of her report, Ms. Gibson concluded that, despite the changes in Adriel's life, he had a close relationship with both his mother and Ms. Stewart.

However, she also concluded that because of Ms. Nikas' efforts to distance Adriel from Ms. Stewart, joint custody was not recommended. She had serious concerns about the child's awareness of the adult issues affecting his life and the court process and the resulting stress on the child. She was also concerned about the

lack of stability in her life as evident in her involvement with police, CAS and the turmoil in her family. In her oral testimony, Ms. Gibson also took issue with Ms. Nikas' lack of insight into the impact her absences had on the child.

In recommending sole custody to Ms. Stewart, she wrote at page 10 of her report:

The clinical investigation revealed Ms. Stewart's strong relationship and history with Adriel. She has demonstrated an ability to make child focused decisions and, as a result, Adriel fared well in her care. Ms. Nikas, while making an effort by moving back to London, has continued to display concerning behaviour that is not child focused. She is encouraged to engage the recommendations to establish a healthy relationship with her son and to gain an appreciation for the role Ms. Stewart has played in her son's life.

5. Because these issues were raised to a level of significance at trial, it is to be noted that, for the purposes of this report, Ms. Nikas did not reference any issue with Adriel being lactose intolerant or asthmatic. Nor was there any indication from Ms. Nikas regarding the eating of pork or any other religious dietary restrictions. She did say to Ms. Gibson she had concerns regarding sugar and dyes in food.

[53] I acknowledge that Ms. Gibson wrote her report amidst a particularly turbulent period in Ms. Nikas' life in which she was experiencing considerable instability. There were several police involvements, including one that resulted in her being charged with assault. CAS was also involved.

[54] I acknowledge as well that, since Ms. Gibson's report was released, there have been no further police attendances and the CAS has closed its file. Ms. Nikas has also taken some positive steps, including completing a parenting course and working towards completing her high school credits. Adriel has remained in the same school since January 2016. Further, Ms. Nikas converted to Islam in the spring, which may have the benefit of providing her with some direction and discipline in her personal life.

[55] I found both reports well investigated, balanced and helpful. I have relied on them considerably in my decision.

Adriel

[56] Before proceeding further with this decision, a description of Adriel is important for any discussion regarding his best interests.

[57] Adriel has shown normal development and is currently healthy. In his earlier years, he had dental issues arising from neglect but were remedied by Ms. Nikas with the

intervention of the CAS. In his early years, he also suffered from numerous ear and throat infections. These were addressed with surgery in 2013.

[58] In 2014, Ms. Nikas described Adriel to Ms. Wilson, the OCL clinical investigator, as a ‘dreamer’ who had a zest for life. He enjoyed talking about sports. Ms. Wilson observed that he disliked conflict and was protective of her.

[59] In 2016, Ms. Gibson, for the OCL, wrote in her report that Adriel was social and had to be reminded to stay on task. He was progressing well in school, except in English.

[60] For the purposes of Ms. Gibson’s report, Ms. Nikas described Adriel as having a loving nature. He was creative and honest. She mused that he may have ‘ADD’ and said that he needs to be busy and stimulated. She told Ms. Gibson that she thought he was confused by the current situation involving Ms. Stewart and his father.

[61] Ms. Stewart told Ms. Gibson that Adriel was energetic, lovable and smart. He loves sports. She also advised Ms. Gibson that he is guarded in what he says, which she surmised was related to the ongoing dispute.

[62] Adriel lived with his uncle George for two months in the fall of 2015. In his testimony at trial, Mr. Nikas said he was concerned about Adriel’s emotional state then. He was either happy or sad. At his niece’s birthday party in October, Adriel broke down and cried. He felt Adriel was just overwhelmed keeping everything inside, which he too related to the ongoing dispute.

[63] Ms. Meghan Potts, Adriel’s current school teacher, testified that early in the school year Adriel was struggling academically and socially. Academically he is below average, especially in reading and writing. His homework is completed three-quarters of the time, with it either being done or not.

[64] Behaviourally, Adriel is physical and has a difficult time keeping his hands off other students, resulting in discipline. Consequently, he is having difficulty making friends as the children do not want to associate with him. Ms. Potts described Adriel as lacking confidence, having low self-esteem and afraid to share his thoughts in class. Ms. Potts said she could not attribute this to any particular cause.

[65] While his academic and behavioural issues are consistent with his report card from June 2016, his attendance and tardiness, which were serious problems from January to June, have significantly improved.

[66] There was no evidence of any insights into the child provided by Mr. Hernandez, except to say they enjoy each other’s company.

Analysis

i) Facts

[67] I make the following findings of fact:

1. Starting in 2009, Ms. Stewart began providing childcare services for Adriel on an *ad hoc* basis. The time he spent in her care gradually increased to cover many overnights on a weekly basis. By 2011, Ms. Stewart was spending considerable time with the child and was a significant person in the child's life.
2. Ms. Nikas and Mr. Hernandez, since they met each other, have had a tumultuous relationship. The fallout of that relationship continues today in their mutual mistrust and dislike, which results in a complete inability to communicate with each other.
3. Until recent court orders, Ms. Nikas has controlled Mr. Hernandez's access to Adriel, at her whim, depending on her feelings towards him. Mr. Hernandez could have been more reliable in exercising his access but this may be partially explained by a desire to avoid conflict with Ms. Nikas. In any event, until the present, Mr. Hernandez has not played a significant role in Adriel's life.
4. Between 2012 and 2015, both of Adriel's parents abdicated their parental roles. Mr. Hernandez did commence this action in 2013 but it did little to change his involvement in the child's life.

Ms. Nikas began working in Toronto as an exotic dancer and escort in the spring of 2012. Ms. Stewart cared for Adriel from Wednesday to Sunday each week. In September, Ms. Nikas left for Alberta to continue her work and, although initially intended to be temporary, her plan lasted three years. Her absences grew longer and her stays in London shorter. Although she was in contact with Ms. Stewart nearly daily, it was more to narrate the drama of her life as to talk to her son. She did talk to him via some medium a few times a week, not daily. Nevertheless, Adriel, for his part, did not forget who his mother was.

But for a few occasions over this period, Ms. Nikas exercised no meaningful parental authority. She did authorize the surgeries on Adriel and she attended with Ms. Stewart to register the child for school. Through Ms. Stewart, she also controlled access to Adriel by his father or her family. All other decision making (even in the area of controlled access, Ms. Stewart ignored Ms. Nikas' wishes and encouraged access with Adriel's father and her family) devolved to Ms. Stewart.

When Ms. Nikas was home, life with Adriel was, in her words, 'a circus.' He was either going to school late or, more often than not, did not attend at all. He had no bedtime and homework was an afterthought. Despite Ms. Nikas' repeated

commitments to maintaining a routine, it never happened. The lure of the lifestyle in Alberta distracted her from her parental responsibilities.

5. Into this parental vacuum stepped Ms. Stewart. She did not do so intentionally but to help out her friend get over a hump. Like Ms. Nikas, Ms. Stewart anticipated the Alberta plan to be temporary. There was no formal arrangement between them, financial or otherwise.

However, as time went on, it became clear to Ms. Stewart that it fell to her to provide Adriel with stability and routine. She fed him, clothed him and decorated his bedroom. She determined what extracurricular sports he could play and registered him. He endured numerous throat and ear infections and it was Ms. Stewart who took him to the walk-in clinic without his mother's authorization. Ms. Stewart attended the surgery to remove his tonsils and adenoids and the emergency surgery after to address complications. His mother attended neither. Ms. Stewart attended with Ms. Nikas to register Adriel for school. She signed the parental permission forms, dealt with the teachers and received the child's report card, which she sent to Ms. Nikas. She helped him with his homework and reading. More importantly, Ms. Stewart and Adriel developed a close emotional bond. He went to her when he was hurt or troubled. As Ms. Wilson wrote in her 2014 OCL report, Ms. Stewart was Adriel's "psychological parent." She treated him as her own son. I agree with Ms. Gibson that there was nothing 'unhealthy' in the relationship between Adriel and Ms. Stewart.

6. Ms. Stewart is not, nor ever was, motivated by money, as Ms. Nikas accused her of. Her only motivation has been Adriel's best interest, in its broadest, most objective sense and not as some parents define it in their own narrow self-interested terms. She is mature, child-focussed, sensible and reasonable. Her intention has never been to 'take' (in Ms. Nikas' term) Adriel from his mother but to ensure that the three most important people in Adriel's life continue to be involved in his life.
7. In contrast, I found Ms. Nikas to be narcissistic, leading a self-indulgent lifestyle of drugs and ignoring her responsibility to her son with her long absences. She repeatedly confessed to Ms. Stewart that she would try to straighten herself out.

I find no evidence that Ms. Nikas suffers from any serious mental health ailment beyond the anxiety/depression that Dr. Clayton is treating. Nevertheless, she has attracted considerable 'chaos and conflict' in her life. A brief review of the police records, aside from the assault charge against Mr. Hernandez, discloses a history of conflict with Mr. Hernandez, her family, members of the public and an incident with her fiancé from Alberta. This concludes with the assault on her father in January 2016.

In respect of her parenting skills, while she loves her son, Ms. Nikas continuously displays a lack of fundamental understanding of what it means to be child-focussed. She claimed many times that she was his mother and therefore knew him better than anyone else. However, simply having that status, even with a parenting course, does not qualify her.

Time and again, from the child's infancy, she has shown little or no insight into how her decisions impacted on Adriel: leaving Adriel with several babysitters to accommodate her lifestyle before settling on Ms. Stewart; her absences from the child during his important developmental years; her withdrawing the access of Adriel to his father and her family; the 'circus' she created when she was in London for her visits; disrupting Adriel's routine and removing him from school; enrolling Adriel in three different schools between June 2015 and January 2016; upon receipt of an order keeping the child in her care in August 2015, returning to Alberta for two months and leaving Adriel with his uncle; not appreciating the relationship that had naturally developed between Ms. Stewart and Adriel and going so far as bringing a motion to terminate all contact between the two of them; continuously talking about her drug use and CAS involvement in Adriel's presence, despite cautioning by Ms. Gibson.

Other decisions also had an impact on Adriel. Ms. Nikas did not tell Adriel that it was her intention to stay when she came for her visit in July 2015. She offered the perplexing explanation that he was young and she saw no need to discuss for how long. I would have thought, of all people, Adriel would be most interested in knowing.

Amidst all the turmoil swirling around, Ms. Nikas' sudden conversion to Islam added another layer of confusion for Adriel. Early morning prayers, new dietary restrictions and Islamic school fundamentally altered the lifestyle Adriel had always led. His mother could not understand his naturally resulting confusion, which had nothing to do with any perceived Islamaphobia by Ms. Stewart.

When Ms. Nikas was unsuccessful in the courts preventing access by Adriel to Ms. Stewart, she tried to control the access. She placed Adriel in Islamic school that took up most of the limited time Ms. Stewart had access with him, on the expectation that she would take him to the school.

Ms. Nikas also tried to control the terms of access by trying to dictate the child's diet. Despite my court order of June 1, 2016 that contained the term regarding the consumption of pig meat and halal meat, Ms. Nikas tried to expand the term to prohibit the consumption of pig byproducts. She sent Ms. Stewart an email within days of my order, setting out the prohibited by-products. The issue was not raised at the motion and no subsequent motion was brought to include this as a term.

Similarly, Ms. Nikas has tried to dictate that Adriel not eat dairy because she believes he is lactose intolerant. No medical assessment was produced at trial. Ms. Stewart was skeptical (a skepticism I shared) of the child's purported condition as he had never exhibited any symptoms while in her care but she said she would comply with any recommendations if the child was formally tested. I ordered testing at the end of the trial.

Finally, and very troubling, is Ms. Nikas' continued involvement of Adriel in the court proceedings. Ms. Gibson, in her OCL report, concluded Adriel had been unnecessarily involved. Despite Ms. Gibson's concern, two court orders and my caution during the trial, Ms. Nikas continued to involve the child in these proceedings. Late in the trial, Mr. Hernandez indicated that he had Adriel for access that weekend and the child was questioning him regarding his purported income from a moving company owned by his common-law wife. The issue had been raised by Ms. Nikas the week before and the only source of Adriel's questions would be Ms. Nikas.

8. Ms. Nikas has a mercurial relationship with her family. I have already noted the police involvement. The strained relationship with her father goes back to at least 2011. Following her mother's death that year, her father cut off the financial support she had been receiving. The poor relations reached their apex in January 2016 when she assaulted him. They have apparently since reconciled but, as I noted above, her father did not appear as a witness.

Ms. Nikas has received some limited support from her family. Her mother was a strong figure and she, along with the rest of the family, suffered a great loss with her death. Her grandfather has supported her financially over the years and continues to do so, permitting Ms. Nikas and Adriel to live in his home. As already noted, her brother, George, has not been consistent in his support. Prior to the commencement of Ms. Stewart's claim, he testified he had concerns about his sister's lifestyle and stability but never did anything meaningful for various excuses. As I indicated above, none of Ms. Nikas' siblings testified, nor her grandfather.

9. I find no evidence that Ms. Stewart or her fiancé or any member of her family have exhibited any behaviour that may be Islamophobic, as alleged by Ms. Nikas. In a text from Ms. Stewart to George Nikas, Ms. Stewart did express some surprise how quickly Ms. Nikas had become involved in the religion. It would be stretching a reasonable interpretation to say this was proof of Islamophobia.

Ms. Nikas did take great offence when Ms. Stewart took the child to a pig roast in July. It was an annual family event and Ms. Stewart ensured that Adriel did not eat pork, which evidence I accept. While I can see where Ms. Nikas could take

offence at the insensitivity, I do not see it as an example of Islamaphobia, nor an intended insult. To Adriel, it was not likely offensive at all as he had been exposed to the tenets of the faith for only about three months and, in any event, he did not eat any pork at the event.

ii) The Law

[68] The *Children's Law Reform Act*, R.S.O. 1990, c. C.12 governs. Section 21 provides that a parent or any other person may apply for an order for custody or determining any aspect of custody of the child.

[69] Section 24(1) states that the merits of the case are to be determined on the basis of the child's best interests. Subsection (2) expands on this by directing the court to consider all the child's needs and circumstances and lists a number of considerations.

[70] Taking into account the facts as I have found them and the law, I find it to be in the child's best interest that Ms. Stewart be granted sole custody of Adriel for the following reasons.

[71] This is not a competition about who loves Adriel more. Love in itself is difficult to quantify but I do accept that all three parties love Adriel and he them. But is love alone enough to determine his best interests? That is the only question.

[72] At the outset, I will address the child's views and preferences. During the course of the trial, all parties related statements made by Adriel. Taking into consideration the child's age and the overall picture, I do not attribute great weight to his stated views and preferences.

[73] To the extent Adriel's statements favour Ms. Nikas, I give them no weight at all. Ms. Gibson, in her February 2016 report, concluded that he was being influenced by his mother. Further, despite court orders cautioning against the involvement of the child in these proceedings, Ms. Nikas has continued to do so even during the course of the trial.

[74] Ms. Nikas takes the position that she is the child's biological mother and that should take precedence over Ms. Stewart's non-biological connection to the child.

[75] As s. 24(2)(h) of the *Children's Law Reform Act* states, a consideration for determining a child's best interest is "the relationship by blood or through an adoption order between the child and each person who is a party to the application."

[76] It is to be noted that this consideration comes at the end of a long list of factors the court is to take into account. It is accorded no special status that suggests it should take precedence over any other consideration when determining the child's best interests. In other words, it is but one factor the court should consider. The Court of Appeal in *Law*

v. Siu, 2009 ONCA 61, upheld the trial judge’s decision granting the children’s maternal grandparents custody over a claim by their father in a situation where their mother had died. The Court of Appeal agreed with the trial judge’s interpretation that blood relationship was but one factor and that she had otherwise correctly decided in the children’s best interests.

[77] In support of a contrary interpretation, Ms. Nikas’ counsel cited the decision of *Foster v. Allison*, 2003 CanLII 2369 (ONSC), 44 R.F.L. (5th) 78 (S.C.J.). This matter came before Aston J. as an interim motion for custody of a child in a contest between the child’s mother and paternal grandparents. The decision does not refer to blood relationship in s. 24(2)(h) but looks solely at the custodial status of the mother.

[78] The child’s parents had separated four years previously and, on the basis of s. 20(4), Aston J. found ‘custody’ had vested in the mother as a result of the father’s ‘consent, implied consent or acquiescence.’ The question then was whether she had relinquished or abandoned her custodial rights.

[79] Justice Aston found that she had not. Despite delegating extensive responsibility for day to day decisions to the grandparents over an extended period of time, she “continued to assert her decision-making authority.”

[80] He then found that there was ‘no evidence to substantiate a present inability on her part to properly look after the child.’ He had serious concerns, if they obtained custody of the child, the grandparents would marginalize the mother.

[81] Justice Aston concludes:

6 The child has thrived in the past arrangements but a continuation of the stable *status quo* does not inevitably trump the mother's *prima facie* right to custody. Continuation of a stable *status quo* in which the child has thrived is a factor of great importance, but not the only factor.

[82] While this decision is persuasive, it is not determinative. I am not convinced that a reading of s. 20(4) grants the custodial parent a ‘leg up’ on an opposing claim. It speaks only to a situation where a mother and father separate. It sets out a presumptive rule presumably to reduce the possibility of conflict which would be contrary to the child’s best interest. There is no reference to possible third party claimants which are permitted later in s. 21.

[83] Further, there is nothing in s. 24(2) that accords a custodial parent any special status. With reference to s. 24(2)(h), custodial and blood relationship are not necessarily the same but they do overlap. There is no other section in the *Children's Law Reform Act* that provides a dominant position for a custodial parent. It is reasonable to conclude that

on this reading the Legislature did not intend that the presumptive rule regarding custody as between mother and father trump the considerations in s. 24(2).

[84] Section 24(2) is clear that any decision made pursuant to Part III of that *Act* must be made on the basis solely of the child's best interests.

[85] Justice C. Nelson, in *Khan v. Kong*, 2007 CarswellOnt 8983, 50 R.F.L. (6th) 31 (S.C.J.), provides a helpful history in the transition from the parental preference doctrine to the best interests doctrine:

236 Traditionally, in cases involving a custody dispute between biological parents and non-biological parents, the courts were guided by the 1950's Supreme Court trilogy of *Martin v. Duffell*, [1950] 4 D.L.R. 1, [1950] S.C.R. 737; *Hepton v. Maat* (1957), 10 D.L.R. (2d) 1, [1957] S.C.R. 606, and *McNeilly v. Agar* (1958), 11 D.L.R. (2d) 721, [1958] S.C.R. 52 ("the trilogy"). The trilogy emphasized parental rights and held that biological parents were *prima facie* entitled to custody unless by reason of some act, condition or circumstance affecting them, they were deemed "unfit".

...

Departure from Parental Rights

238 Since the landmark decision of *Re Moores and Feldstein* (1973), 12 R.F.L. 273 there has been a discernable movement away from the common law rule as enunciated in the trilogy. The Ontario Court of Appeal in *Moores* regarded the child's welfare as the paramount consideration in a custody dispute between a parent and non-parent. The Supreme Court decision of *Racine v. Woods* [1983] 2 S.C.R. 173 definitively demonstrates this shift in the law. In that case, a custody award to the foster parents by the trial judge, based on his consideration of the best interest of the child, was upheld. Wilson J., delivering the judgment of the court, did not apply the parental preference doctrine:

This appeal emphasizes once more ... that the law no longer treats children as property of those who gave them birth but focuses on what is in their best interest (p. 174).

[86] Later in the decision, Nelson J. considered the Supreme Court decision in *K.(K.) v. L.(G.)*, 1985 CarswellOnt 58 (S.C.C.):

247 The appellant, an unwed mother, gave her infant son up for adoption to a carefully chosen couple a few days after his birth.

Approximately two and half months later she sought the return of the child.

248 The Supreme Court dismissed the biological mother's appeal holding that the court:

In exercising its *parens patriae* jurisdiction in questions of contested custody, including contests between a natural parent and adoptive parents, must consider the welfare of the child the predominant factor and give it effect in reaching its determination.

249 The court further stated that while "parental claims must be seriously considered" they must be set aside "where the welfare of the child requires it." In that instance, the benefits to the child of maintaining ties with his biological mother were outweighed by the maintenance of his present home stability and his existing parental bonds to his adoptive parents.

[87] In this context, I also cite an earlier decision of Aston J. in *Vanderhoek v. Stark*, 1999 CarswellOnt 3858 (S.C.J.), which suggests there are limits on the way one might interpret his later decision in *Foster*.

[88] Once again in a contest between a mother and grandparents, Aston J. held that:

6 ...

Section 20 of the Act provides that the father and mother are equally entitled to custody of a child. Although this section speaks to the rights of the parents as between themselves, the section does amount to statutory recognition of what most people assume; that unless there is an agreement or court order to the contrary, parents automatically have custody of their children;

...

[89] He concluded, more importantly, at para. 7:

7 I do not accept the proposition that there is any legal presumption in favour of the parent or any heavier onus or burden of proof on the grandparents. Notions of onus or presumption in custody cases have been expressly rejected in cases such as *Carter v. Brooks* (1990), 30 R.F.L. (3d) 53 (Ont. C.A.) and *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.). But the fact that parents are a degree closer to children than grandparents in the family constellation may be taken into account under the rubric of the "best interests of the child", even if it

is not specifically listed as a factor under section 24(2) of the *Children's Law Reform Act*.

[90] In light of this conclusion, *Foster* cannot be read beyond stating that the mother is the presumptive custodial parent in that case but not having any advantage necessarily on that account alone against any other claimants for custody.

[91] Justice Wilson, in the Supreme Court of Canada decision in *R.(A.N.) v. W.(L.J.)*, [1983] 2 S.C.R. 173, best described the proper analysis when she wrote:

... It [the child's tie with its natural parent] is obviously very relevant in a determination as to what is in the child's best interests. But it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about. ...
(p. 185)

[92] There is no doubt in the present case, on the facts, that from Adriel's birth to 2012, Ms. Nikas was the presumptive custodial parent.¹ I believe in the end in any determination of Adriel's best interests, to rework Aston J.'s quote above, being a custodial parent is "a factor of great importance, but not the only factor." Even in *Foster*, Aston J. went on to consider several other factors. To ask whether the custodial parent has abandoned or relinquished their status is, respectfully, the wrong question. The only question is what is in the child's best interests.

[93] In the present case, between 2012 and 2015, Ms. Nikas, if not abandoning completely, sorely abdicated her responsibilities. Over that time, her exercise of authority was limited to providing two signatures: one to register Adriel in school; and the other to permit his surgery in 2013.

[94] Unlike in *Foster, supra*, I find also that she has not the capabilities to properly parent Adriel. Since his birth, her life has been in turmoil virtually up to the beginning of trial. It has been a life without stability, replete with conflict, drug addictions and a self-indulgent lifestyle. As I have acknowledged above, Ms. Nikas has made some strides towards self-improvement but, given her history, I am skeptical that she can sustain it.

[95] Although Ms. Nikas declares her love for her child, she displays a worrisome lack of insight into his needs. When she came home from Alberta, her time with Adriel was a 'circus.' She permitted him to stay up late and skip school, upsetting his routine despite complaints from Ms. Stewart. I do not doubt that her conduct was motivated by guilt for

¹ There is evidence that Ms. Nikas was the custodial parent based upon minutes of settlement between she and Mr. Hernandez dated July 30, 2015. An order based on those minutes was never taken out and during the trial there was little reference to them and even less reliance placed on them by either party.

having left the child, as she testified, but this does not justify this lacking of parenting responsibility.

[96] Between July 2015 and trial, the child was put through a dizzying amount of change. Starting in July 2015, Ms. Nikas arrived in London for a typical visit without telling Adriel (or Ms. Stewart) beforehand that she was going to remain. She cut off all contact between the child and Ms. Stewart, with whom it was recognized by all that he had developed a strong and loving bond. In fact, she had been the only parental figure in his life for the prior three years.

[97] Within days, Ms. Nikas took off again for Alberta, leaving Adriel with an uncle that had never care for him for any length of time. It meant a change of schools and routine. Then, at the end of October, Ms. Nikas reappeared and another change of schools in January 2016. Intermingled with this is more familial conflict, police and CAS involvement. Adriel was in a car outside the restaurant and could see the argument between his mother and grandfather, resulting in her assaulting him.

[98] For the first half of 2016, Ms. Nikas admitted she was having difficulty adjusting to a daytime schedule. The impact on Adriel shows in his attendance record over that period, showing 10.5 days absent and 30 days late.

[99] Then amidst all this change, Ms. Nikas converted to Islam. As I stated above, her conversion may provide her with discipline and direction. However, Adriel appears to have been taken by surprise. To him it meant a whole new routine: early morning prayers; strict dietary rules; attendance at Islamic school. According to Ms. Nikas, Adriel is asking lots of questions and is confused. She attributes this to what she says are Islamophobic comments by Ms. Stewart and Mr. Bray.

[100] I have found above that there is no convincing evidence of Islamophobia. In view of the rate of change in Adriel's life, his questions and confusion are natural.

[101] Ms. Nikas also lacks insight into the damage she is causing Adriel by withholding contact with his father, Ms. Stewart and her own family. Ms. Gibson noted how she lacks insight into the impact of her absences. As observed, she has continued to involve Adriel in the conflict.

[102] It is not surprising that Adriel is displaying signs of stress. His teacher related his difficulties at school academically and behaviourally. He has no friends.

[103] Ms. Nikas talked about Adriel's upset stomachs and his clinginess and neediness. These are signs of insecurity and worry but Ms. Nikas is not prepared to assume any responsibility for it. She blames Ms. Stewart, Mr. Hernandez, Ms. Stewart's mother and Ms. Nikas' family. She blamed his upset stomach on undiagnosed lactose intolerance.

[104] A final concern is Ms. Nikas' lack of direction in her life. Although she has taken some positive steps in her personal life, she still lacks a plan. She relies on financial support from her family. She says she is working towards completing her high school credits but no timeline was provided. There was no plan beyond that.

[105] In stark contrast, Ms. Stewart is child-focused and sincerely works in Adriel's best interests. She is better able to provide Adriel with needed routine, structure and direction. She was aptly described by Dr. Clayton in the 2014 OCL report, I noted above, as being "exceptionally mature, competent, responsible and child focused."

[106] Ms. Stewart's personal life is also significantly more stable. She lives with her fiancé, Mike Brady, whom she has known since 2007. He has a strong loving relationship with Adriel. They have two young children, whose company Adriel enjoys.

[107] Adriel should have no difficulty re-inserting himself into Ms. Stewart's home. Ms. Gibson, in her report, observed how Adriel felt comfortable in her home and moved freely throughout the home. In order to minimize any further disruption to Adriel's life, Ms. Stewart has committed to keeping him in his present school.

[108] The one quality that distinguishes Ms. Stewart from Ms. Nikas is her selfless commitment to ensuring the important people in Adriel's life – Ms. Nikas, Mr. Hernandez and Ms. Nikas' family – stay involved in his life. His contact with them would not be prone to his mother's fickleness. I fear that if Ms. Nikas were granted sole custody, none of these people would see Adriel before long, regardless of any court order. Her history proves it.

[109] This is not a case for joint custody. The ability to be civil, cooperative and jointly parent, that the jurisprudence requires, is simply not present. Although her draft orders reflected a conciliatory approach, Ms. Nikas has shown herself to be a formidable foe when provoked. In her testimony she revealed her true self: uncompromising; self-centred; and aggressive. While Ms. Stewart has expressed a willingness to consult and inform Adriel's parents, she must have the final say in any decision.

[110] I will render my full order at the conclusion of my decision. However, I wish to address one issue that concerns access by Ms. Nikas. Early in the trial, Ms. Nikas tendered three draft orders in which it was proposed that she have at least primary care of Adriel on the basis of different variations. In all they included the following paragraph:

That each party may impart their religious and cultural values when the child is in their care save that the child shall not be fed any pig meat or meat that is not halal.

[111] Although not specifically argued by Ms. Nikas, I think it could be reasonably anticipated that she would expect Ms. Stewart and Mr. Hernandez to comply with a similar provision even if Ms. Stewart were granted custody.

[112] There has been a long line of cases which have considered, under different legislation, religious practices as they may be imposed by either the custodial or non-custodial parent, starting with the Supreme Court of Canada decision in *Young v. Young*, [1993] S.C.J. No. 112, 49 R.F.L. (3d) 117. The courts have demonstrated a consistent reluctance to become involved in preferring one religion over another.

[113] The courts have said time and again that the only principle that governs is the best interests of the child. In the application of this criterion, the courts have not imposed restrictions on either parent to follow the other parent's religious faith.

[114] In the present case, neither Ms. Stewart nor Mr. Hernandez subscribe to any particular faith. Ms. Nikas is a recent convert to Islam. It has become an important part of her life. I find nothing contrary to Adriel's best interests that he be exposed to the tenets of the Islamic faith when he is in his mother's care. With reference to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) c.3 [as am. by S.C. 1997, c.1], but which is equally applicable to situations as the present where that *Act* is not applicable, Sopinka J., in *Young v. Young*, *supra*, wrote at para. 178:

... The long-term value to a child of a meaningful relationship with both parents is a policy that is affirmed in the *Divorce Act*. This means allowing each to engage in those activities which contribute to identify the parent for what he or she really is. The access parent is not expected to act out a part or assume a phony lifestyle during access periods. ...

[115] By the same token, I find nothing contrary to Adriel's best interests that require Ms. Stewart or Mr. Hernandez to comply with Islamic dietary restrictions or any other tenet of that faith while the child is in their care. That decision rests entirely within their discretion.

Child Support

[116] Ms. Stewart did not request child support. Nevertheless, s. 31(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 imposes a positive obligation on both parents to support their child.

[117] Mr. Hernandez is currently paying support to Ms. Nikas for the support of Adriel the sum of \$148 pursuant to the order of Aston J. dated April 25, 2016 and based on an annual income of \$18,720. This was a reduction from \$305 per month ordered by Heeney J. November 19, 2013 based on an annual income of \$35,000. Both orders were

made on consent. An arrears statement from the Family Responsibility Office shows Mr. Hernandez owes child support arrears in the amount of \$3,353.40 as of October 6, 2016.

[118] Mr. Hernandez works for an auto parts company earning \$12 per hour. In 2015, he earned \$2,024, in 2014 \$6,773 and \$19,040 in 2013. At trial, he produced a pay slip that disclosed year-to-date income of \$8,464 as at September 10, 2016, which would translate into an annual income of \$13,337.

[119] In 2013, Mr. Hernandez owned and operated a moving company but, according to Mr. Hernandez, because it was financially unsuccessful, he ran it for only a year. His unaudited financial statements supported his statement, showing a loss of \$11,424 on gross income of \$37,543. He then transferred the company to his common-law spouse. He testified he is not involved in the company and earns no income from it.

[120] There was some evidence that, despite his denials, Mr. Hernandez still remains involved in the company. The fact alone that he transferred the company to his common-law spouse would raise some suspicions. However, because of the paucity of evidence, I am unable to draw any firm conclusions. Even if Mr. Hernandez did remain involved in the company, based on the only firm evidence of the company's performance, any income would not be significant.

[121] That said, I do believe Mr. Hernandez can earn more income than \$13,337 a year. He says he works 20-35 hours per week as he is called in. I heard no evidence why he could not maximize his hours or obtain a fulltime job. He did say he had some back pain but did not provide any medical evidence confirming this or saying that it impaired his ability to work.

[122] I am able to impute income pursuant to s. 19(1) of the Ontario *Child Support Guidelines*, O. Reg. 391/97 and I do so. I impute an income of \$21,000 and, on that basis, I order Mr. Hernandez to pay child support to Ms. Stewart the sum of \$168 per month commencing February 1, 2017. Any arrears accruing pursuant to prior court orders shall remain payable to Ms. Nikas.

Order

[123] I order as follows:

1. The respondent, Kelsie Stewart ("Ms. Stewart"), shall have sole custody of the child, Adriel Constantino Luciano, born December 9, 2008.
2. Ms. Stewart shall consult with both the applicant, Hector Luciano Hernandez ("Mr. Hernandez"), and the respondent, Nikki Maria Nikas ("Ms. Nikas"), before making any major decision affecting the child's health, education or welfare. In the event of a disagreement, Ms. Stewart shall make the final decision.

3. The parties shall have access to the child as follows:

a) Ms. Nikas shall have access:

- i. every first and third weekend from Friday after school to Monday morning drop-off at school;
- ii. each Wednesday with pickup from school to Thursday morning drop-off at school. In the event there is no school, access shall be from 4:00 p.m. Wednesday, returning 9:00 a.m. on Thursday;
- iii. in the event that Ms. Nikas' access on the first and third weekend falls on a holiday Monday weekend, then the access shall be extended to Tuesday morning drop-off at school;
- iv. in the event that Friday of Ms. Nikas' access on the first and third weekend is a professional development day, then the child shall be with Ms. Nikas from Thursday at 4:00 p.m. to Monday morning drop-off at school;
- v. over the summer break, for one full week in July and one week in August, and Ms. Nikas shall advise Ms. Stewart of her requested weeks by June 1st of each year;
- vi. Mother's Day from 10:00 a.m. to 6:00 p.m., regardless of the usual access schedule;
- vii. the single day of Eid each year, regardless of the usual access schedule; this access shall commence from after school (or 4:00 p.m. if there is no school) the day before, returning the child to school the day following (or 9:00 a.m. if there is no school) and Ms. Nikas shall advise Ms. Stewart and Mr. Hernandez by January 1st of each year when Eid falls that year;
- viii. one week of the child's Christmas school vacation, as may be agreed upon between Ms. Stewart and Ms. Nikas.

b) Mr. Hernandez shall have access:

- i. every fourth weekend from Friday at 5:30 p.m. to Sunday at 6:00 p.m., or as agreed upon by Ms. Stewart and Mr. Hernandez;

- ii. in the event that Mr. Hernandez's access on the fourth weekend falls on a holiday Monday, then the access shall be extended to Monday at 6:00 p.m.;
 - iii. over the summer break for one full week in July and one week in August and Mr. Hernandez shall advise Ms. Stewart of his requested weeks by June 1st of each year;
 - iv. Father's Day from 10:00 a.m. to 6:00 p.m., regardless of the usual access schedule;
 - v. Subject to paragraph 3(a)(viii), the child shall be with Ms. Stewart for the Christmas school vacation each year; however, Ms. Stewart shall set aside either Christmas Eve, Christmas Day or Boxing Day for Mr. Hernandez to have access, regardless of the usual access schedule;
 - vi. the child shall be with Ms. Stewart on Easter each year; however, Ms. Stewart shall set aside either Good Friday or Easter Monday for Mr. Hernandez to have access, regardless of the usual access schedule; and
 - vii. the child shall be with Ms. Stewart Thanksgiving weekend each year; however, Ms. Stewart shall set aside one day that weekend for Mr. Hernandez to have access, regardless of the usual access schedule.
- c) At all other times, the child shall be in Ms. Stewart's primary care.
 - d) If there is a conflict over summer holiday time between Ms. Nikas and Mr. Hernandez, Ms. Stewart shall determine which party shall get which weekend, preferring Ms. Nikas' choices in odd years and Mr. Hernandez's choices in even years.
 - e) Ms. Stewart shall encourage access to Ms. Nikas' family and shall accommodate access requests as may be reasonable.
 - f) The parties may attend the access exchanges themselves or they may appoint a responsible adult known to the child to act as their designate, such adults shall include Mike Bray and Heather Tiley.
 - g) Ms. Stewart shall be responsible for the child's school lunch, save on Thursdays when Ms. Nikas returns the child to school. On those days, Ms. Nikas shall send the child with his lunch when she returns him to school.
 - h) Each party may impart their religious and cultural values when the child is in their care.

- i) No party shall speak negatively about any other party or their religious or cultural practices or permit anyone else to do the same in the presence of the child.
 - j) Ms. Stewart, in consultation with the child's doctor, shall ensure the child receives counselling as may be necessary. Dr. Joan Clayton shall not be his counsellor.
 - k) No one shall smoke any substance in the home where the child resides or any vehicle in which he drives.
 - l) The child may communicate with either parent by telephone as he wishes; either parent may communicate by telephone with the child once a week, not exceeding 15 minutes, as may be arranged with Ms. Stewart.
 - m) Both parents may attend the child's school functions and extra-curricular activities.
 - n) All parties shall refrain from the consumption of illegal substances while in a child caregiving role.
4. Mr. Hernandez shall pay support to Ms. Stewart for the child in the amount of \$168 per month, commencing February 1, 2017, based on an imputed income of \$21,000 pursuant to the *Child Support Guidelines*.
 5. By June 1st of each year, commencing 2016, Ms. Nikas and Mr. Hernandez shall provide to Ms. Stewart all information required by s. 24.1 of the *Child Support Guidelines* (Ontario), including their previous year's income tax return and notice of assessment.
 6. Any arrears in child support up to January 31, 2017 shall remain payable to Ms. Nikas.
 7. Ms. Stewart shall be permitted to apply for a passport for the child, Adriel Constantino Luciano, born December 9, 2008, and the parents shall sign all documents for that purpose. Ms. Stewart shall hold the passport and be permitted to use the passport for the purpose of travelling outside of Canada with the child. Ms. Stewart shall provide the passport to the other parties if they require it for the purpose of taking the child outside of Canada. The passport shall be promptly returned to Ms. Stewart upon the child's return.
 8. The child may not travel outside of Canada with any of the parties without the consent of the parties, whose consent shall not be unreasonably withheld. Fifteen days prior to leaving, the departing party shall provide the other parties with a

detailed itinerary including destination, accommodation, airline and dates of departure and return.

9. Ms. Stewart shall maintain the enrollment of the child in St. Pius X Catholic School until the end of the current school year and for long as she deems in the child's best interest.

[124] As Ms. Stewart is the successful party, she shall make her cost submissions, limited to 5 pages, within 20 days. Each of the other parties shall have 20 days thereafter to respond.

“Justice Paul J. Henderson”
Justice Paul J. Henderson

Released: January 31, 2017

CITATION: Hernandez v. Nikas, 2017 ONSC 162
COURT FILE NO.: F1417/12-01
DATE: January 31, 2017

ONTARIO
SUPERIOR COURT OF JUSTICE
FAMILY COURT

B E T W E E N :

Hector Luciano Hernandez

Applicant

- and -

Nikki Maria Nikas and Kelsie Stewart

Respondents

REASONS FOR JUDGMENT

HENDERSON J.

Released: January 31, 2017