

In the Court of Appeal of the Northwest Territories

Citation: Nixon v. Beggair, 2007 NWTCA 06

Date: 2007 12 05

Docket: A-0001-AP-2006000010

Registry: Yellowknife, N.W.T.

Between:

Brent Nixon

Appellant

- and -

Elsie Beggair

Respondent

The Court:

**The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from part of the Judgment filed on May 8, 2006
Before The Honourable Justice J.E. Richard

**Memorandum of Judgment
Delivered from the Bench**

Costigan J.A. (for the Court):

[1] The appellant father and the respondent mother are the parents of two children. The mother has an older child to whom the father stood in *loco parentis*.

[2] A Consent Order in July 2002, ordered joint and shared custody with the children spending approximately fifty percent of their time with each parent on a flexible basis.

[3] The mother applied by Notice of Motion for sole custody and child support. The father did not file a Notice of Motion but argued before the trial judge that he should be awarded sole custody.

[4] The trial judge dismissed the mother's application for sole custody but varied the flexible aspect of the Consent Order to provide for more structure. He awarded child support of \$583.00 per month for the older child and \$798.00 for the two younger children.

[5] The father appeals arguing that the trial judge erred in not considering his request for sole custody; in failing to consider all the needs and circumstances of the children in determining their best interests; in finding no material change in circumstances and in calculating child support for the two youngest children without considering the child support ordered for the oldest child.

[6] The trial judge found the parties were good parents. He found that there had been a material change of circumstances in relation to the oldest child as he had stopped spending any time with the father and lived full time with the mother. He found that the actual care of the two younger children had evolved in part because of the children's wishes so that the father had actual care of them for 60-70% of the time.

[7] The trial judge was not satisfied that there had been such a material change as to justify awarding sole custody to the mother. However, he concluded that an unstructured custody arrangement was not in the best interests of the two younger children because of daily uncertainty as to the parents' responsibilities and because the parents did not communicate well.

[8] The trial judge found the father's guideline income was \$91,500.00 and imputed guideline income to the mother of \$35,300.00. When he calculated child support for the oldest child, the trial judge used the guideline amount for three children of \$1,749.00 and divided by three to produce a support payment of \$583.00 per month. However, when he calculated child support for the two younger children the trial judge used the guideline amount for two children of \$1,342.00. Consequently, after a set-off for the child support attributed to the mother, the trial judge ordered the father to pay child support of \$798.00 per month for the two younger children.

[9] The trial judge's decision was largely discretionary and fact based. Such decisions should be given considerable deference and should not be overturned unless there is an error in principle, a significant misapprehension of the evidence or unless the award is clearly wrong: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 10 and 11.

[10] It was not an error in principle to decline to consider the father's request for sole custody in the absence of a Notice of Motion from the father. In any event, the relevant inquiry on the custody issue was the best interests of the children which the trial judge found required structured shared custody.

[11] We are not satisfied that this determination would have been any different had the father filed a Notice of Motion seeking sole custody.

[12] We are also not satisfied that the trial judge failed to consider or weigh all the needs of the children. He expressly considered the children's wishes, the fact that the custody arrangement had evolved and the father's emphasis on education. Nor did the trial judge err in finding that the circumstances did not justify a sole custody award.

[13] However, the trial judge erred in principle in calculating the child support payment for the two younger children on the basis of the guideline amount for two children. In fact, the father is paying support for three children. Therefore, the trial judge should have based his calculations for the two younger children on the guideline amount for three children. By basing his calculations for the two younger children on the guideline amount for two children, the trial judge failed to give appropriate consideration to the totality of the child support award.

[14] Therefore we allow the appeal in part, set aside the child support payment for the two younger children and substitute a child support payment for those children of \$622.00 per month calculated as follows:

father's guideline income	\$91,500.00
child support for 2 of 3 children payable by father (\$1,749.00 ÷ 3 x 2)	\$1,166.00
Mother's guideline income	\$35,300.00
Child support for 2 children payable by mother	\$544.00
Difference (\$1,166.00 - \$544.00)	\$622.00

[15] This new Child Support Order is effective up until the oldest child turned 19 years old on July 1st, 2007.

Appeal heard on November 22, 2007

Memorandum filed at Yellowknife, N.W.T.
this day of December, 2007

Costigan, J.A.

Appearances:

Brian Asmundson
for the Appellant

Candace Seddon
for the Respondent

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OF THE NORTHWEST TERRITORIES

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Appellant

- and -

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MEMORANDUM OF JUDGMENT
