6101-02056

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KAREN MARY WILLIAMS

Petitioner

- and -

CALVIN KENNETH WILLIAMS

Respondent

Application for variation of Corollary Relief Order respecting child custody. Dismissed.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on June 11, 1996

Reasons filed: June 14, 1996

Counsel for the Petitioner: Joanne E. Torrance

Counsel for the Respondent: James R. Posynick

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REASONS FOR JUDGMENT

1 This is an application to vary the terms of a Corollary Relief Order respecting child custody.

2 The parties are the parents of a boy who is now just over 4 years old. The parties were married in 1986 and separated in early 1993. On April 1, 1993, an interim order was issued providing for joint custody of the child with the petitioner, his mother, having day-to-day care and control. The parties then agreed to alternate custody on a week-by-week basis. On October 7, 1994, the parties executed Minutes of Settlement whereby they agreed that the respondent, the child's father, would have sole custody with the petitioner having generous and liberal access. Both parties had the benefit of independent legal advice in the negotiation of this agreement. The terms of settlement were later incorporated into a Corollary Relief Order, consented to by the parties, issued on their divorce on September 5, 1995. The petitioner now seeks to vary this order so that she will have sole custody of the child.

3 The *Divorce Act*, s. 17(5), requires that, before a custody order is varied, the court satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child occurring since the making of the order. Recently, in *Gordon* v. *Goertz*, [1996] S.C.J. No. 52, Madam Justice McLachlin, on behalf of a majority of the judges of the Supreme Court of Canada, noted that the parent applying for a change in the custody order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child. For that threshold to be met, the judge must be satisfied of (1) a change in the condition, means, needs or circumstances of the child or in the ability of the parents to meet the needs of the child, (2) which materially affects the child, and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. Only the change in circumstances since the initial order is to be considered. Only if the threshold test is met does the court go on to consider what are the best interests of the child with respect to custody.

4 The *Gordon* case also re-emphasizes the point that a variation application is not to be used as an indirect method of appealing the initial order. The correctness of the initial order is assumed. And where, as in this case, the initial order was issued on consent and as the result of a negotiated agreement, the burden of proof on the applicant seeking a variation is a high one. That is because, as between the parties, the agreement operates as strong evidence that at the time each regarded those terms as providing adequate and acceptable conditions. Where those terms are then embodied in an order they will not be departed from lightly. This was the ruling of the Supreme Court of Canada in reference to variation of child support orders in *Willick* v. *Willick*, [1994] 3 S.C.R. 670 (per Sopinka J.), and in my view it applies with equal force to custody terms.

5 The policy reasons behind the imposition of this burden on a parent seeking a variation were expressed by Vancise J.A. in *Talbot* v. *Henry* (1990), 25 R.F.L. (3d) 415 (Sask. C.A.), at page 425:

> The purpose of the [legislation] is to ensure a more stable environment for the children once custody orders have been made. The effect is that custody orders ought not to be lightly reopened but can and will be reopened where there has been a material change in children's needs and circumstances and where it is in the best interests of the children to vary the order. That stability must always be viewed from the perspective of the best interest of the child in the broadest sense.

6 In this case the petitioner puts forth a number of facts that she says amount to a material change in circumstances.

7 The petitioner submits that there have been changes in the child's health. She points to the fact that he has been diagnosed as suffering from an asthmatic condition. In addition, the child suffers from eczema. The petitioner claims that the respondent does not adequately deal with these health concerns.

8 The evidence submitted to me reveals that the child's asthmatic condition is due to certain allergies. The doctors recognized this and gave appropriate advice to the respondent. He has acted on that advice. Further, these allergies as well as any other health problems were things that both parents were aware of at the time the agreement was negotiated and the Corollary Relief Order was issued.

9 The petitioner submits that the respondent has changed his work schedule and has intentions of relocating. The evidence reveals that the respondent is required to work shift work but that he makes appropriate child care arrangements. Changes in work

schedules are things that are to be expected on an ongoing basis. The respondent has not embarked on a radically new way of life nor does he have present plans to relocate. I find no material change in circumstances on this ground.

10 The petitioner submits that her health has changed and she is now able to handle custody. The evidence is that the petitioner was going through serious health problems at the time the agreement was negotiated. But this is a change in circumstance solely of the petitioner, not of the child. It is certainly a significant factor but there is no evidence that the petitioner's health was the sole factor in negotiating the agreement nor that her recovered health was not contemplated at the time.

11 The petitioner also submits that she did not fully understand the ramifications of agreeing to the Minutes of Settlement. It is important to recognize that she is not saying that she did not appreciate what she was signing or that she was improperly advised by her counsel at the time; she says that she did not know the legal burden she would have to meet if she wanted to change custody in the future. There was no evidence to support this assertion. Therefore this court must assume that she received competent advice. I also note that if her intention, at the time she signed the Minutes of Settlement, was that it would be a temporary measure, I would have expected to see some reference to possible future variation in the agreement itself. On the contrary, the agreement and the subsequent order set out detailed terms as to custody, access and ongoing communication, all of which suggest to me that great thought was put into what was anticipated to be a long-term regime.

12 Finally, the petitioner submits that there has been a change in circumstance due to the respondent's unwillingness to facilitate her access to the child. I note that the respondent argues, not without some justification, that any problems with access may be more apparent than real.

13 The unwillingness of a parent to facilitate access, if it is persistent and deliberate, may be a factor in considering whether there has been a material change in circumstance: *Rose* v. *Rose* (1989), 22 R.F.L. (3d) 72 (Alta. Q.B.). I put the issue on the basis of breach of an implied representation, i.e., one of the factors inducing the non-custodial parent to sign a settlement agreement is an implied representation by the custodial parent that she or he will facilitate access in accordance with the agreement.

14 In this case I am not satisfied that the respondent's conduct has been so grave or so persistent as to amount to a material change. There have obviously been problems. It seems to me that the terms set out in the agreement and the order are specific enough that there should be no problems. I also point out that the entitlement of the petitioner to "generous and liberal" access entails a high degree of co-operation on the part of the respondent. It is also consistent with the presumption that extensive access with the non-custodial parent is in the best interests of the child.

15 I have concluded that the petitioner has failed to satisfy the threshold test in this case. The child has now been in the custody of the respondent for the past 20 or so months. At his young age there is much to be said for maintaining stability in his home

environment in the absence of a material change affecting his best interests. For these reasons, therefore, the application is dismissed.

16 The petitioner sought, as alternative relief, directions with respect to access. No evidence as to what directions may be necessary was presented so I decline to impose any unilaterally. The petitioner is always at liberty to apply for directions in the future if necessary.

17 The respondent seeks costs. The petitioner is apparently earning a good income. I see no reason why the respondent should not have his costs. The respondent will have costs on the basis of Column 3 on a party-and-party scale.

18 My appreciation to both counsel for their helpful submissions.

J. Z. Vertes

J.S.C.

Dated at Yellowknife, Northwest Territories
this 14th day of June, 1996

Counsel for the Petitioner: Joanne E. Torrance

Counsel for the Respondent: James R. Posynick

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