Date: 1999 04 01
Docket: 6101-03054

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRADFORD JOHN PELLERIN

Petitioner

- and -

KRYSTAL LYN PELLERIN

Respondent

Application for an order directing an expert assessment in a child custody case.

Heard at Yellowknife, NT on March 19, 1999

Reasons filed: April 1, 1999

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

Counsel for the Petitioner: Elizabeth Hellinga

Counsel for the Respondent: Mark Seebaran

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REASONS FOR JUDGMENT

[1] The parties are contesting the custody of their two children. The respondent (mother) brought an application for an order appointing a psychologist to conduct an assessment of the children and the parents. The petitioner (father) opposed the appointment. After the hearing of this application I issued the following order:

1. Dr. Beatrice Norrie, certified psychologist, is hereby appointed to assess and report to the court on:

    (a) the needs of the children of the marriage and the ability and willingness of either party to satisfy same;
    (b) the psychological impact on the children of separation from the primary care and control of either party; and
    (c) the custody and access needs of the children.

2. The parties will attend, in their respective residences with the children, for assessment by Dr. Norrie, and will participate to the extent required by Dr. Norrie.

3. The assessments shall be conducted at such times as may be arranged by Dr. Norrie with each party.

4. Dr. Norrie shall file her report, in a sealed envelope, with the Clerk of the Court. The report shall not be accessible without an order of a judge.

5. Dr. Norrie shall deliver one copy of her report to each party's solicitor forthwith after filing of the report with the Clerk.

6. Notwithstanding subparagraph 1(c), the report shall not contain a specific recommendation as to whom custody or access should be granted.

7. The fees and expenses of Dr. Norrie, up to and including the filing of her report with the Clerk, shall be paid by the parties in equal portions, subject to the ultimate determination of the trial judge.

8. Nothing in this order precludes either party from calling their own experts at trial or submitting other expert evidence, subject to the direction of the trial judge.

9. Costs of this application will be in the discretion of the trial judge.

I said that written reasons would follow. These are those reasons.

[2] The parties separated in 1997. Up until recently they shared custody of the children, two boys ages 6 and 3, on a week-by-week basis. In January of this year the parties appeared before Justice Schuler of this court on an interim custody application. At that time the respondent was considering a move to Hay River. Her employer had offered her a promotion but taking the job required her to move. After hearing evidence, Justice Schuler found both parents to be good parents, thoughtful and cooperative with respect to the needs of their children. Nothing I heard suggests otherwise. On January 27th, my colleague issued an order providing for interim joint custody with day-to-day care being shared by the parties in Yellowknife. Justice Schuler was satisfied that a move to Hay River was not in the current best interests of the children.

[3] At the hearing before Justice Schuler, the respondent said that if she could not move with the children then she would turn down the job promotion. Since the hearing, the respondent learned that if she stayed in Yellowknife she would likely be unemployed in a few months since her job position is to be eliminated. She therefore decided to take the job promotion and moved to Hay River on February 15. The parties have agreed

that, until the trial of this action, the children will remain with the petitioner in Yellowknife with extended visits to the respondent in Hay River. It is apparent that the issue at trial will be whether the children's best interests are served by living with their father in Yellowknife or with their mother in Hay River.

[4] The request for an assessment was premised on the basis that there is now a totally new situation, one that the children and the parents have not confronted previously, and thus an objective assessment would aid the courts' and the parties' understanding of the dynamics of it. That new situation is the fact that now one parent (the petitioner) will have primary childcare responsibility with the children having only periodic contact with the other parent. Up until now the children have been in a shared parenting context, both before and since their parents' separation. The ability of the parties as individuals to be a parent to the children in a sole custody and access arrangement, and the reaction of the children to such an arrangement, has never been considered. Thus an assessment will provide valuable information so as to enable the ultimate trial judge to ascertain the best interests of the children. Furthermore, the children are too young to articulate their interests so an assessment should assist in determining their wishes (as best as such can be ascertained with such young children). The respondent has also stated that she has noticed some behavioural changes in the children and fears that they may be adversely affected by the alteration in their lives.

[5] The respondent's counsel relied on s.29 of the *Children's Law Act*, S.N.W.T. 1997, c.14, as the enabling power to order an assessment. That section provides in part as follows:

> 29.(1) The court before which an application is brought in respect of custody of or access to a child may, by order,
>
> (a) appoint a person who has the technical or professional skill necessary to assess and report to the court on
>
> (i) the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child, or
> (ii) any particular issue respecting the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child specified by the court;
>
> (b) give directions on the methods to be used for the assessment; and

> (c) require the parties, the child or any other person who has been given notice of the proposed order to attend for assessment by the person appointed by the order.
>
> (2) An order may be made under subsection (1) on or before the hearing of the application in respect of custody of or access to the child and with or without a request by a party to the application.
>
> (3) The court shall appoint a person under subsection (1) who is agreed on by the parties, but if the parties do not agree, the court shall chose (*sic*) and appoint a person it considers appropriate.
>
> (4) The court may not appoint a person under subsection (1) unless the person has consented to make the assessment and to report to the court within the period of time specified by the court.
>
> . . .
>
> (6) The person appointed under subsection (1) shall not make any recommendation as to whom custody or access should be granted.

[6] This legislation applies to custody and access disputes under the Territorial statute. Strictly speaking, it does not apply to this case since this proceeding is one brought under the *Divorce Act (Canada)*. Nevertheless, the terms of s.29 set out above are ones that are normally taken into account and applied in a request for this type of order. The court, in the general exercise of its civil jurisdiction, has authority to appoint experts pursuant to Part 18 of the Rules of Court and in particular Rule 278(2):

> (2) In any case where independent technical evidence would appear to be required, including the evidence of an independent health practitioner, the Court, on its own motion or on the application of any party, may appoint a person agreed on by the parties, or failing such agreement, nominated by the Court, as an independent expert for the purposes of a proceeding.

[7] Counsel for the petitioner disputed the need for an assessment. It was submitted that the request for an assessment is nothing but a fishing expedition. Justice Schuler recognized that both parties are good parents and nothing has changed that. The petitioner says that he has observed no problems with the children who, in his opinion, have adjusted well to the new living arrangements. His counsel argued that there is no

evidence suggesting necessity for an assessment, the cost is exorbitant, and an assessment would be intrusive.

[8] The proposed expert is a psychologist with suitable qualifications. She recognizes the role of an expert in this process, as evidenced by the following extracts from her "Bilateral Assessment Retainer Agreement":

> 3. The focus of the assessment is to determine what is in the best interests of the children, or in the alternative, what is least detrimental to the children. In particular, the assessment will report on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child, or any particular issue respecting the needs of the child and the ability and willingness of the parties or any of them t (*sic*) satisfy the needs of the child specified by the Court [*Children's Law Act*, S.N.W.T. 1997, c.14, s.29(1)(a)(i) and (ii)].
>
> 4. The role of the Psychologist is to provide a comprehensive, impartial, balanced and objective assessment of the parenting skills of the parties involved to aid the court in it deliberations of the children's best interests.
>
> 5. The information in the report provides the judge with some of the information needed to make a decision. The judge also hears other testimony which will influence his/her judgment.
>
> 6. The Psychologist makes recommendations to the court and does not make custody decisions. Decisions are made by the trier of fact. These recommendations flow from the terms of paragraph 3 but shall not include a recommendation as to whom custody or access should be granted.
>
> (emphasis in original)

The cost of the assessment is estimated to be in the range of $6,000.00 to $8,000.00. Both parties earn approximately $40,000.00 per year. I am told that the fees can be paid in instalments.

[9] Both counsel agree on the general principles applicable here. An assessment is without doubt an expensive, intrusive and time-consuming process. One should not be ordered automatically and without good reason. The test is whether an assessment is in the best interests of the children. It is if it is likely to provide helpful and relevant evidence as to the welfare of the children, evidence that may not be discoverable otherwise or at least not easily discerned: *Saffin v. Saffin* (1991), 35 R.F.L. (3d) 250

(Alta.Q.B.); *Linton v. Clarke* (1994), 21 O.R.(3d) 568 (Div.Ct.); *D.M.M. v. D.P.L.*, [1999] A.J.No.30 (Q.B.).

[10] Not so long ago, an expert was appointed almost automatically if a party asked for it. More recently, concerns developed over the possibility that experts may be usurping the role of the court (or, perhaps putting it more accurately, the courts were abdicating their decision-making to experts). Further, the assumption that experts could extract deeper insights from children's behaviour than their parents has also been questioned. This more cautious approach is reflected in the judgment of the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3, where the majority expressed the view that expert evidence is not necessarily required to establish the best interests of a child. Although dissenting in the result, Justice L'Heureux-Dubé agreed on this point (at pages 86-87):

> I agree with my colleague that expert evidence should not be routinely required to establish the best interests of the child. In my view, it is a modern-day myth that experts are always better placed than parents to assess the needs of the child. Common sense requires us to acknowledge that the person involved in day to day care may observe changes in the behaviour, mood, attitude and development of a child that could to unnoticed by anyone else. The custodial parent normally has the best vantage point from which to assess the interests of the child, and thus will often provide the most reliable and complete source of information to the judge on the needs and interests of that child. . .
>
> Many legal commentators have noted the degree to which custody and access disputes have become a contest between experts, involving increasing amounts of time and money. . . . In the absence of clear legal presumptions about the best interests of children, judges have increasingly come to rely on the recommendations of experts to determine custody and access issues, believing that such experts possess objective, scientific knowledge and can in fact "know" what is in the best interests of the child. However, expert testimony, while helpful in some and perhaps many circumstances, is often inconclusive and contradictory. . . . That this should be so is not surprising, since such assessments are both speculative and may be affected by the professional values and biases of the assessors themselves.
>
> Even where such expertise is valuable, there are impediments in such reliance. Assessments may occasion delays in resolving proceedings and may at times constitute a significant disruption in the lives of both parents and children. The cost involved in routinely hiring experts to establish the best interests of the child only increases the expense of custody litigation and is far beyond the resources of most divorcing couples. Furthermore,

> as Professor Bala *supra* points out, at p.224, "much of what assessors ultimately recommend may simply be a matter of 'common experience and common sense.'"

[11] I agree with the sentiments expressed in this extract. However, it is also undeniable that experts can often provide helpful, objective and independent advice for a trial judge. This point was made by Conrad J.A. in *Tucker v. Tucker*, [1998] A.J. No.961 (C.A.):

> Child custody cases are unique. For many years, the courts appointed an *amicus curiae* (paid for by the Government where necessary) to act on behalf of the child. The *amicus* hired a lawyer, obtained home study reports or psychological assessments for the use of the court, and called evidence on behalf of the child. Funding became an issue, making this practice largely unavailable. In its place, courts have frequently resorted to ordering bilateral assessments to assist in the objective establishment of facts and opinions that should be presented to the court in the interests of the child.
>
> This dispute is not one that involves the interests of the litigants only. It involves a child. The adversarial system does not always apply to custody issues in the same strict sense that it applies to other matters because of the courts' overriding duty to children. The appointment of an expert to perform an assessment in a custody case has the same objective as the appointment of an *amicus curiae*. It is to ensure that the court obtains objective evidence to assist in its determination of custody and access issues. . . .
>
> . . . Determining a child's welfare is difficult if reliance is based solely on descriptions offered by the parents who are in a state of conflict. An assessment of best interests involves appreciating and understanding the implications of the behaviour of each of the involved parties on each other. No legal yardstick is available to measure the consequences of hostile parental behaviour on the development of a child. The effect on the child of being exposed to his parents' hostile behaviour over a period of years is not known at the time of the original order. Each case turns on its own facts, including an assessment of the parties involved, their personalities, their actions, their maturity levels, their selflessness, their relationship to one another, and the effect of their actions on their child. An expert's opinion is often helpful in assessing those facts. . . .

[12] The concern expressed by the petitioner's counsel as to this being a "fishing expedition" is worthy of consideration. In an annotation to the *Saffin* case (noted above), Professor James McLeod makes an appropriate comment on this point (at page 251):

> One of the dangers of assessments is that they may become "fishing expeditions". If a party wants custody but has no evidence that a long-term stable status quo is not working, he or she may request an assessment largely as a "fishing expedition." . . . Assessments should not be ordered as fishing expeditions. If there is a real parenting or child-care concern that the mental health profession is better equipped to deal with, the assessment should be ordered. It should not be ordered simply to find evidence or make a case, nor should it be used to force a settlement on a party.

See also *Farmakoulos v. McInnis*, [1996] N.S.J. No.263 (S.C.)

[13] In my opinion, this is not merely a "fishing expedition". First, there is no stable *status quo* here. The *status quo* known to everyone until just recently was shared parenting. That has changed. I cannot blame the respondent by simply saying, in effect, it was her choice to move so any change is her fault and she should live with it (something hinted at by counsel in argument). She was faced with a difficult decision and made what she undoubtedly thinks is the best one under the circumstances. I at least have to assume that at this point. But the primary fact is that there is now a new and different dynamic, one not under consideration at the time of the hearing before Justice Schuler. A significant change has occurred in the children's environment which needs to be examined. The parenting abilities of each party in a sole parenting role needs to be examined. How the children function in each parent's home needs to be examined. All of these points, which will have to be examined at trial, would likely benefit from the proposed assessment.

[14] I therefore concluded that an assessment would be a useful aid to the trial judge in determining the best interests of these children. Accordingly, I issued the order outlined at the beginning of these reasons.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this
1st day of April 1999

Counsel for the Petitioner: Elizabeth Hellinga
Counsel for the Respondent: Mark Seebaran

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