McLaren v. Brunner, 2006 NWTSC 02 Date: 2006 01 11

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JO-ANN MARY McLAREN

Applicant

-and-

RONEY EUGENE BRUNNER

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application for an Order under the *Divorce Act* varying earlier orders of the Ontario Court with respect to custody, access, child support and related matters. The material that is before the Court on this application is unsettling to say the least. Although the record of the entire proceedings in the Ontario Court is not before this Court, it is evident that each parent has acted in flagrant breach of existing Court Orders. If the focus of the present application were not the best interests of children, I would be inclined to disallow either parent an audience in this Court in these circumstances. The Orders of the Ontario Court which are before this Court are the Order of August 8, 2002 and the Order of January 23, 2004. Both Orders purport to have been issued by agreement of the parties, or upon the consent of both parties. Any such agreement or mutual consent was illusory, fleeting, mistaken, and/or misleading, in my respectful view. For example, the mother swears in an affidavit filed in this Court, with respect to the provisions of the January 23, 2004 Order, that "I was willing to agree to any terms at all rather than risk any chance of losing my children". This averment is not refuted by the father in his affidavit material. The record does not indicate that there has been any independent judicial consideration of the merits of the issues between the parties respecting their children.

[2] I have read and re-read the entirety of the materials provided to this Court by the parties on this application, and have considered carefully the written and oral submissions

of their counsel, and I make the following findings and determinations with respect to the matters before the Court, guided by the *Divorce Act* and its provisions and binding case law.

[3] Material change in circumstances: There has been a material change in circumstances since the issuance of the January 23, 2004 Order. The structure of the Order, as it turns out, is unworkable. For example, because of its words prohibiting its registration with the Maintenance Enforcement office (a provision which is probably void in any event as being against public policy), one parent (the father) is able to unilaterally reduce the Court-ordered child support payments in accordance with his own view of the world, without the other parent having any recourse except to return to Court. It is also unworkable, as it turns out, because it allows the payor parent to, in effect, decide to re-direct child support payments which are intended for the "general" expenses of the children's upbringing, sustenance, development, support and benefit to one aspect only of those expenses, i.e., access costs, to the detriment of the best interests of the children. There has been a material change of circumstances also by virtue of the fact that one parent has unilaterally decided that the eldest child is no longer a child of the marriage and has ceased making Court-ordered child support payments with respect to that child for that reason. And (on this the parties are in agreement), since the commencement of this variation proceeding, there has been a material change of circumstances inasmuch as the middle child, 14 year old Kali, has moved from the care of her mother in Fort Smith, NWT to the care of her father in St. Catherines, Ontario.

[4] Registration with Maintenance Enforcement office: Paragraph 1(h) of the January 23, 2004 Order prohibiting the registration of that Order with the Maintenance Enforcement office ought to be struck. By the conduct of the parents, reasonable or unreasonable, it operates unfairly against the payee parent. In my respectful view it is void as being against public policy.

[5] Deduction of access costs from child support payments: That portion of paragraph 1(h) of the January 23, 2004 Order, allowing the non-custodial parent (the father) to deduct from the Court-ordered child support payments all children's travel expenses paid by him in exercising access, without restriction as to amount, ought to be struck. Notwithstanding that it was originally the mother's decision to relocate with the children from Ontario to the NWT in 2002, it is patently unreasonable a) for one parent to make all decisions as to the details and costs of the children's travel for access purposes and for the other parent to bear 100% responsibility for these expenses, and b) for such unlimited costs to, in effect, substantially delete Court-ordered child support payments which would otherwise be available to the custodial parent for the benefit of the children in her custody. This provision shall be deleted, but prospectively from January 1, 2006.

[6] Non-payment of child support for September 2004: The father unilaterally decided that he need not pay Court-ordered child support for this month because he had purchased certain "necessities" for the children while they were with him on an access visit. The affidavit evidence with respect to these purchases is conflicting, and I am unable to accept the father's preferred version. In any event, no such deduction was authorized by the terms of the January 23, 2004 Order. This amount ($1327) shall be paid forthwith to the mother.

[7] Move of 14 year old Kali from NWT to Ontario: In the circumstances described in the affidavit material provided by both parties, I find it was inappropriate and contrary to the spirit of the January 23, 2004 Order for the father to take the steps he did to arrange for Kali to travel from her mother's home to his home in September 2005. Without the explicit consent of the mother as custodial parent, which I find he did not obtain, he acted in contravention of the Court Order. At a minimum he ought to have sought a variance of the Court Order; however, consistent with his other conduct, he acted unilaterally in disregard of the existing Court Order. I say this notwithstanding the provision of the August 8, 2002 Order to the effect that the mother will not oppose the children's desire to return to Ontario. A 14 year old child has no veto over a Court Order with respect to her custody, no more than either parent has.

[8] Although the mother on this application originally sought an Order compelling the return of the child to the NWT, she now withdraws that request and agrees for the time being that the child Kali remain in the father's care in Ontario. The Court Order regarding Kali's day to day care will be varied effective December 31, 2005, and the father's child support obligations to the mother under the January 23, 2004 Order continue until December 31, 2005.

[9] Children's veto re custody arrangements: Paragraph 9 of the August 8, 2002 Order provides that "should any of the children at any time while they are residing in the NWT express a desire to return to Ontario to reside with the Respondent then the Applicant shall permit them to do so". This is inappropriate in the case of young children such as 10 year old Adam. That provision shall be deleted.

[10] Whether the child Kira remains a child of the marriage: The child Kira attained the age of majority on her 18th birthday on December 24, 2005. Child support payments ordered under the *Divorce Act*, including the August 8, 2002 and January 23, 2004 Orders, are only payable for the benefit of children of the marriage. A "child of the marriage" is specifically defined in the *Divorce Act* as follows:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

There is an issue whether Kira remains a child of the marriage. There is evidence before the Court that Kira has been living with her boyfriend in Fort Smith since October or November 2004. There is also affidavit evidence from the mother to the effect that Kira still has her own bedroom in her mother's home in Fort Smith, that Kira has stayed with her mother on an irregular basis, that her mother has continued to provide financial and in-kind assistance and support to Kira. Kira continues to attend high school in Fort Smith; however she is pregnant and due to give birth in February 2006 and will accordingly have to discontinue her school studies, at least temporarily.

[11] The father did not make application to the Court for a determination that Kira was no longer a child of the marriage - he simply unilaterally ceased making Court-ordered child support payments for her, and indeed made retroactive adjustments of the child support payments to October 2004.

[12] The onus is on the father to establish to the satisfaction of the Court that Kira, while under the age of majority, has withdrawn from her parents' charge. He has not discharged that onus and accordingly Kira remained a child of the marriage until her 18th birthday.

[13] Having attained her 18th birthday, Kira is now the adult child of these two parents. She is only considered a child of the marriage for purposes of child support payments under the *Divorce Act* if it is established that she is unable to withdraw from her parents' charge. No such evidence has been placed before the Court by either party. It is open, of course, for Kira or either parent to make such application in future, as advised.

[14] Ongoing custody and child support: The January 23, 2004 Order shall be varied to provide that the parents shall have joint custody of Kali, with the father to have day to day care and control. The mother shall continue to have sole custody and day to day care and control of Adam. Each parent shall have reasonable access to the child not in his/her day to day care and control, and shall be responsible for all of the child's travel

costs associated with exercising such access at any place other than the city or town of ordinary residence of the child.

[15] The incomes of the father and mother for purposes of the child support guidelines are determined to be $77,700 and $64,800 respectively. The father's child support obligations for Adam is $623, the mother's child support obligations for Kali is $566. The father shall pay the difference of $57.00/month to the mother as child support, until further order of the Court, without deduction.

[16] Costs: The background circumstances leading to this Court application are that both parents have breached previous Court Orders. Neither parent stands on high moral ground; however, the mother has been substantially successful on this application. Although my inclination is to award costs against the father, I note that the mother did not seek costs in the Notice of Motion commencing this application, and in oral argument, the mother's position was that each party ought to be responsible for his/her own costs. In consideration of all of the circumstances, I order that each party is responsible for his/her own costs of this application.

[17] Summary: An order will issue as follows:

1. The provisions of the Court Orders of August 08, 2002 and January 23, 2004 with respect to custody, access and child support are hereby varied in accordance with this Order.

2. The Applicant or the Respondent are at liberty to register the Orders of August 08, 2002, January 23, 2004, and this Order with the Maintenance Enforcement office, or its equivalent, in the NWT, Ontario, or any other jurisdiction, as advised.

3. The outstanding arrears for child support payments owing from the Respondent to the Applicant under the existing Order of January 23, 2004, as at December 31, 2005 are hereby set at 'X' dollars (counsel shall insert the precise amount, calculated as follows:

    a) child support in the amount of $1367/month payable from August 2004 to June 2005 inclusive;

b) child support in the amount of $1315/month payable from June 2005 to December 2005 inclusive;

c) less child support payments actually made for any of those months;

d) less access costs actually paid by the Respondent in the period August 2004 to December 31, 2005, presumably $1135 + $1081.84 + $3214.78 + $2565.36 + Adam's travel to Ontario in December 2005, but not

i) $235.40 for Kali returning to Fort Smith early in Summer 2005;
ii) $31.75 for overweight charges;
iii) cost of Kali's move to Ontario in September 2005.)

4. Paragraph 9 of the August 08, 2002 Order is specifically rescinded.

5. Declaring that the child Kira ceased to be a child of the marriage effective December 31, 2005.

6. Directing that both parents shall have joint custody of the child Kali, with the father to have day to day care and control, effective January 01, 2006.

7. Directing that the mother shall continue to have sole custody, care and control of the child Adam.

8. Directing that each parent shall have reasonable access to the child not in his/her day to day care and control, and shall be responsible for all of the child's travel costs associated with exercising such access at any place other than the city or town of ordinary residence of the child, effective January 01, 2006.

9. Based upon guideline incomes of $77,700 and $64,800 for the father and mother respectively, the father shall pay $623/month child support for the child Adam,, the mother shall pay $566/month child support for the child Kali, i.e., the father will pay the net difference of $57/month to the mother, on the 1st day of each month, effective January 1, 2006.

10. Directing that each party shall be responsible for his/her own costs of this application.

[18] If counsel are unable to agree on the dollar amount of arrears to insert in paragraph 3 of the formal Order, each counsel shall forthwith send to the writer a memorandum of calculations on behalf of that party.

J.E. Richard,
J.S.C.

Heard at Yellowknife. NT
the 10th day of January, 2006.

Counsel for the Applicant: Michelle Staszuk
Counsel for the Respondent: Katherine R. Peterson, Q.C.