Beggair v. Nixon, 2006 NWTSC 22 Date: 2006 05 08
Docket: S-0001-CV2001000328

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ELSIE BEGGAIR

APPLICANT

-and-

BRENT DARRELL NIXON

RESPONDENT

Proceeding under the *Children's Law Act.*

Heard at Hay River on February 20-21, 2006.

Reasons filed: May 08, 2006

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Applicant: **Michelle Staszuk**
Counsel for the Respondent: **Karina Winton**

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REASONS FOR JUDGMENT

[1] This is a proceeding under the *Children's Law Act*. The partieslived togetherin a common-law relationship in Hay River from 1990 to 2000. These proceedings were commenced in September 2001, with each party seeking relief with respect to custody of the three children of the relationship, and child support. The parties, with the assistance of their then counsel, reached agreement on these issues in 2002, and at the request of the parties the Court issued a Consent Order in July 2002. That order provided that the parties would have joint and shared custody of the children, with the children "spending approximately 50% of their time with each of the parties on a flexible basis". In August 2003 the mother sought a variation of the July 2002 Order, seeking sole custody of the children. That application never came before the Court for adjudication. In August 2004 the mother again filed a Notice of Motion seeking a variation of the July 2002 Order, in particular, a) seeking sole custody of the children, and b) seeking an Order requiring the father to pay child support in the full amount prescribed in the *Child Support Guidelines.* In October 2004 the Court ordered the father to pay $1300/month child support on an interim basis, and directedthe partiesto set down for trial the issue of ongoing custody care and control of the children. That trial did not take place until February 2006. The Court heard *viva voce* testimonyfrom each of the parties. Decision was reserved, and these are the reasons for the Court's adjudication of the issues between the parties.

[2] Two children were born to these parties - Steffon Albert Beggair (now 14 years of age) and Angel Victoria Beggair (now 7 years of age). In addition the mother's biological son Lorne David Beggair (now 18 years of age) resided with the parties throughout the relationship and the father stood *in loco parentis* with respect to Lorne. The respondent is the only father that Lorne has known.

[3] The father has worked as a locomotive engineer since 1977, and has been based in Hay River since 1982. His work schedule consists of a combination of "road" shifts and "yard" shifts. On a road shift he is required to be out of town for a 30-hour return trip to High Level, Alberta. On yard shifts he works during day-time in Hay River. In recent years he has requested his employer to reduce the frequency of road shifts for him so that he is away from the children less often. As I understand his evidence, his current schedule is such that for nine months of the year, he does only yard shifts, i.e., he works 4 days in town each week. For the other 3 months of the year, in addition to yard shifts, he is required to take 1 road-trip per week to High Level, from 10 am one day to 6 pm the next day. His income in 2004 was $91,500. (At the time of the July 2002 Order the parties agreed that his income was $78,000 for purposes of the *Child Support Guidelines*). The respondent was the sole source of financial support for the family throughout the relationship.

[4] The mother had a grade 6 education at the commencement of the relationship, and has since upgraded her education to a grade 10 equivalency. During the course of the relationship she cared for the children and did not seek or obtain employment outside the home. Other than providing babysitter services for other parents, and working a few days as a chambermaid, she has little work experience. Her income, apart from child support payments received from the respondent,consists of Child Tax Credits of $800/month ($9600 per annum) and approximately $700 per annum in GST rebates. She lives in subsidized public housing for which she pays rent of $32.00 per month.

[5] From my observations at trial and on other material before the Court, I am satisfied that each of the parties is a good parent. There is no suggestion in the evidence that either is a bad parent.

[6] The "shared parenting" agreement they reached in July 2002 was incorporated into the Consent Order using these words:

> "The applicant and the respondent shall have joint and shared custody of the children of the relationship, with the children spending approximately 50% of their time with each of the parties on a flexible basis."

In addition, the Consent Order provided that the respondent would pay to the applicant child support in the amount of $700/month, and the child support was to continueuntil "the children respectively become nineteen years of age". Also, the respondent was to be responsible for providing clothing for the children.

[7] There has been a material change in circumstances since the July 2002 Order with respect to the oldest child Lorne. He and the respondent have become estranged. Lorne ceased attending school in 2002 when he was 14 years old. He has made limited attempts to return to school, to no avail. He has obtained some part-time casual employment. The respondent has expressed his disagreementwith Lorne's decisionto quit school and with Lorne's lifestyle. Since 2003 Lorne has ceased spending time with the respondent and now lives full-time with his mother.

[8] Part of the application which the mother has brought before the Court is variation of the July 2002 Order such that she have sole custody, care and control of Lorne. In the circumstances I find there is merit in this variation. Indeed, the father does not oppose this aspect of the application.

[9] However, the father submits that he ought not be required to continue to pay child support for Lorne. On the evidence before the Court, I find that a parental relationship existed between the respondent and Lorne during the currency of the parties' co-habitation, i.e., during the time that the family functioned as a unit. Post-separation the respondent's obligations, *qua* parent, continue.See *Chartierv. Chartier* [1999] 1 S.C.R. 242, and *Swindler v. Belanger* 2005 SKCA 131. Lorne has not yet attained the age of majority. On the evidence, I conclude that he "has not withdrawn from the charge of his parents" (see s.57 of he *Children's Law Act*). In these circumstances the respondent is required to pay child support with respect to Lorne in accordance with the *Child Support Guidelines.*

[10] Turning to the two youngest children, I observe that at the time of the shared custody agreement in 2002, there was no particular "structure" to that agreement, e.g. alternate two week periods. As noted, it was expressed in the Consent Order to be "on a flexible basis".

[11] Both parents gave evidence regarding the actual time that the 2 youngest children have spent with each parent since the July 2002 Order. In very general terms, the children have been in the care of their father, except when he is working. Generally the children stay overnight at the father's home, unless he is on a road trip to High Level. Other than those road trips to High Level, the children spend overnight at the mother's home approximately once or twice per month. On a regular day, the children have their evening meal at the father's home.

[12] From all of the evidence I conclude that the roughly 50% - 50% arrangement contemplated at the time of the July 2002 Order has evolved into a situation where the father has the actual care of the 2 youngest children 60 - 75% of the time, and for the following reasons:

a) the children express a desire to stay at the father's house more often,
b) each of the mother, and the father, want to "give in" to the children's wishes in this regard, and
c) to a lesser extent, the mother declines the father's requests that she take the children more often (the father says he has ceased making such requests).

[13] It is my respectful view that the present unstructured characteristicof the shared custody arrangement is not in the best interests of the two youngestchildren becauseof the daily uncertainty of which parent is responsible for picking up the children from school, etc. These two parents do not communicate well with each other. Both the mother and the father are of the view that the mother has a veto over who the father can use as a babysitter (which she does not).

[14] The mother presents as a caring, protective parent who has a deep and genuine concern for her children, to the point, perhaps, of being over-protective. It seems she is unable to "let go" of her perception that her sole responsibility is "being there" for the children, and that as a result she is reluctant to get into the work force and/or go back to school. I acknowledge that this is indeed difficult for her to do, given her limited education and limited work experience.

[15] On the mother's own evidence the shared custody regime in the existing Court Order is working in the sense that the children (the 2 youngest children) have

maximum contact with both their parents. On her evidence there is no "material change in circumstances" - which is a prerequisite to any variation of the existing custody order (i.e., re the 2 youngest children). My impression is that at the time of filing each of the Notices of Motion in August 2003 and August 2004 she was not really seeking a variation in the shared custody regime (with respect to the 2 youngest children) so much as an upward adjustment of the quantumof child support requiredto be paid to her by the July 2002 Order.

[16] The father, too, presents as a genuine caring and sincere parent, and a credible witness. While on the one hand he is not as strict with the children as the mother, in the sense of being protective and setting down rules for their daily activities, on the other hand he puts more emphasis than does the mother on the issue of the children's education, attendance at school, homework, etc. I found him to be a credible witness with respect to the amount of time the children have been spending with him, and with respect to his interaction with, and lack of communication with, their mother. He recognizes that the children want to be with him a good deal of the time, and he is prepared to have them with him most of the time (this does not, however, detract from the children's entitlement, and the mother's entitlement, to be together 50% of the time).

[17] As stated earlier in these reasons, the application which is before the Court with respect to the 2 youngest children is the mother's applicationunder the *Children'sLaw Act* for a variation of the existing Consent Order of July 2002 such that the mother have sole custody of the 2 youngest children. Section 22 of the *Act* states that a prerequisite for a variation of the existing Order is a material change in circumstances that affects or is likely to affect the best interests of these children. Having considered the evidence and the submissions of counsel, I am not satisfied that there has been any such material change to justify granting sole custody to the mother as she requests in this application.

[18] In my view the basic order of July 2002 with respect to the 2 youngest children (50% - 50% shared parenting) should not be varied. However, in my view that shared parenting regime ought to be <u>structured</u> (as opposed to "on a flexible basis") as the parties seem unable to do so on their own, and also in the best interests of the children.

[19] I will direct, then, that the parties continue to share parenting of the 2 youngest children on a 50% - 50% basis, such that these children shall live in one parent'shome,

and be in the care and control of that parent for a continuous period of 'X' days (between 4 days and 14 days, as discussed later in these reasons), and then in the other parent's home for a continuous period of 'X' days. The incidents of care and control while the children are in one parent's care and control, include the decision-making with respect to daily routines, use of babysitters, etc.

[20] I turn now to the issue of child support.

[21] The provisions of the *Children's Law Act* permit a variation in a previous child support order when there has been a change in circumstances. See s.61 of the *Act,* and s.14 of the *Child Support Guidelines.* There is a change in circumstances in the present case in that:

a) the Court is ordering a different custodial arrangement with respect to the child Lorne,
b) the father's present income is greater than at the time of the July 2002 child support order,
c) the youngest child is now in school and the mother is able to enter the work force.

[22] For reasons stated earlier, I find that the law requires the respondent to continue to pay child support for the child Lorne. Following the reasoning of this Court in *McBride v. McBride* 2001 NWTSC 59 I calculate child support for Lorne as follows:

Respondent's guideline income:	$91,500
Guideline amount for 3 children:	$1,749
Divided by 3:	$583

[23] Thus, the respondent shall pay child support for the child Lorne in the amount of $583/month until Lorne's 19th birthday.

[24] Child support for the two youngest children, for whom the shared custody arrangement continues, must be calculated pursuant to s.11 of the *Child Support Guidelines.*

> 11. Where a parent exercises an entitlement to access to, or has physical custody of, a child for not less than 40% of the time over the course of a year, the amount of support for the child must be determined by taking into account

> (a) the amounts set out in the applicable tables for each of the parents who exercises such access or custody;
>
> (b) the increased costs of shared custody arrangements; and
>
> ©) the condition, means, needs and other circumstances of each parent and of the child for whom support is sought

[25] The father's income for purposes of the *Child Support Guidelines* is $91,500 (that is the most recent annual information provided to the court on the hearing of this application).

[26] The mother's income, as stated earlier, consists of Child Tax Credits of $9600/annum, and approximately $700/annum in GST rebates. (I include these two forms of payments received by the mother as "income" only for purposes of the s.11 analysis, similar to what was done by the Saskatchewan Court of Appeal on an "undue hardship" application in *Pelletier v. Kakakaway* 2002 SKCA 94). In addition, the father's counsel asks that the Court impute incometo the mother pursuantto s.19 of the *Child Support Guidelines* on account of the fact that the mother is intentionally under-employed or unemployed. On the evidence before me on this application, I find that there is merit in this submission. Now that the youngest child of the relationship is attending school full-time, and the 2 youngest children are parented by their father at least 50% of the time, there is no valid reason why the mother should not seek and obtain employment. She has no particular job skills nor work experience;however the evidence indicates she is capable of obtaining at least unskilled employment albeit at minimum wage, and/or entering a job training program. The law requires each parent to provide financial support for her children where she is capableof doing so. Fairness requires that income be imputed to the mother in these circumstances.

[27] There is evidence before the Court that the mother has been employedin the past as a chambermaid at $10/hour. This is equivalent to approximately $20,000 annually. There is also evidence before the Court that, according to Statistics Canada, the average income for employed adult females in Hay River in the year 2000 was $42,886. In the personal circumstances of the applicant mother, I would set her imputed income at well below the average, say, $25,000.

[28] Accordingly, I determine that the mother's income, for purposes of s.11 of the *Child Support Guidelines*, is $35,300, calculated as follows:

Child Tax Credits:	$9600
GST rebates:	$700
Imputed employment income:	$25,000
Total:	$35,300

[29] There are three factors to be considered when the Court exercises its discretion in determining the amount of child support payable under shared custody arrangements under s.11 of the *Child Support Guidelines.* The first factor is the set-off amount, i.e., a determination of the Table amount for each parent as if each was seeking child support from the other, and then determining the difference between those two amounts. In the present case, I calculate the set-off amount as follows:

Father's guideline income:	$91,500
Child support for 2 children @ $91,500:	$1,342
Mother's guideline income:	$35,300
Child support for 2 children @ $35,300:	$544
Difference: ($1342-$544):	$798

[30] At stated by the Supreme Court of Canada in *Contino v. Leonelli-Contino* 2005 SCC 63, the set-off amount is not determinative but is merely the starting point of the s.11 analysis.

[31] The second factor is the "increased costs" of the shared custody arrangements. In the present case there is no evidence of what "increased costs" exist, if any. Although each party has filed a Financial Statement, those statements offer no assistance on this factor of "increased costs". I acknowledge that it is understandably difficult to quantify the increase in costs which flow from the mere fact that the children now have two "custodial" homes rather than one nominal custodial home with one custodial parent.

[32] The third factor in the s.11 analysis is "the condition, means, needs and other circumstances" of each parent and of the two children. This requires, *inter alia,* an examination of the standard of living of the children while in each household and the

ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances. See *Contino, supra.*

[33] Applying this examination and analysis to the present case, I note that there is a disparity in household income, even after imputing employmentincome to the mother. The financial statements of the parties are fairly general and have not been subjected to any close scrutiny or cross-examination. I acknowledge, at this stage,that the father has child support obligations as payor parent for the child Lorne, as previously discussed. I note that the mother is in receipt of subsidized public housing at a considerably reduced rental rate, i.e., $32/month. I note that the father has substantial debts. I conclude that both parents are struggling financially. I conclude that the standard of living in the two households is, in very general terms, comparable.

[34] In all of the circumstances, I would assign the simple set-off amount of $798 as the appropriate amount of child support payable for the 2 youngest childrenunder s.11 of the *Child Support Guidelines.*

[35] Before concluding these reasonsand directingthe preparationof a formal Order, I return to the issue of the 'structure' of the shared custody regime which is to be continued in the future for the 2 youngest children. It is the Court's Order that the shared custody be on a 50% - 50% basis. It is the Court's Order that the 2 children reside with one parent for a continuous period of x days, and then with the other parent for a continuous period of x days. My sense, from the trial evidence, is that the duration of that equal but alternating custodial time has not been fully considered by either parent. Alternating one-week periods, and alternating two week periods, are common shared custody arrangements, in the experience of the Court. These parents may consider that equal but alternating custodial time of a different duration is more appropriate for these two children. I invite further written submissions from counsel on this one narrow issue. Counsel are to file such written submissions within 30 days of the date of filing of these reasons. The Court will take such further submissionsinto consideration, together with all previous submissions and the trial evidence, and issue its decision.

[36] For the foregoing reasons, a formal Order will issue as follows:

> (1) the mother's application to vary the July 2002 Order, i.e., for sole custody of the child Lorne, is granted,

(2) the mother's application to vary the July 2002 Order, i.e., for sole custody of the children Steffon and Angel, is denied,

(3) the parties shall continue to have joint and shared custody of the children Steffon and Angel on a 50%-50% basis, with the children spending alternating periods of x days duration in the care custody and control of each parent,

(4) the incidents of care and control while the children Steffon and Angel are in one parent's care and control shall include the decision-making with respect to daily routines, use of babysitters, etc.,

(5) the father's income for purposes of the *Child Support Guidelines* is set at $91,500,

(6) the mother's income for purposes of s.11 of the *Child Support Guidelines* is set at $35,300,

(7) the father shall pay to the mother child support for the child Lorne in the amount of $583/month on the 1st day of each month, until Lorne's 19th birthday, effective June 1, 2006,

(8) the father shall pay to the mother child support for the children Steffon and Angel in the amount of $798/month on the 1st day of each month, effective June 1, 2006,

(9) each party shall be responsible for his/her own costs of these proceedings.

[37] Issuance of the formal Order will await counsel's submissions as directed by paragraph 35 above, and the Court's decision with respect to the duration of the alternating custodial periods in paragraph (3) of the Order.

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

Dated at Yellowknife, NT
this 8th day of May, 2006.

Counsel for the Applicant: Michelle Staszuk
Counsel for the Respondent: Karina Winton