Date: 2008 08 11
Docket: S-0001-DV-2006103734

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

VERNA STEWART

Petitioner

- and -

ABRAHAM STEWART

Respondent

MEMORANDUM OF JUDGMENT

[1] This is a divorce action. The trial proceeded on July 10, 2008, in Yellowknife. The Respondent, Abraham Stewart, did not appear, nor did anyone appear on his behalf. The Petitioner, Verna Stewart, testified at the trial and also called her current spouse, Richard Adams.

[2] The reliefs that Ms. Stewart seeks are a divorce, sole custody of the three children of the marriage, child support, and retroactive child support. Although the Petition filed by Ms. Stewart claimed an order for the division of matrimonial property pursuant to the *Family Law Act*, that claim was not pursued at trial.

A) BACKGROUND OF MARRIAGE AND HISTORY OF PROCEEDINGS

[3] Because Mr. Stewart did not appear at this trial, the only evidenceI heard about the history of the marriage is the evidence of Ms. Stewart. Ms. Stewart testified about her relationship with Mr. Stewart, some events that unfolded during that relationship, as well as things that transpired since their separationin December2004. Her evidence was not tested by cross-examination, nor was it contradicted by any other evidence. This does not mean that her evidence should automatically be accepted,of course. But

having observed Ms. Stewart while she gave her testimony, and having regard to the things she testified about, I do not think that there is any reason not to accept her evidence. I also accept Mr. Adams' evidence, who I found testified in a very straightforward manner. He did not strike me as someone who was trying to speak ill of anyone. His testimony was precise and factual. He was cautiousto speak only about events he had himself witnessed or been a part of.

[4] The parties were married in Inuvik on May 2, 1997. They had lived togetherfor two years before that. They have three children, R.S, born September 9, 1998, A.S., born July 9, 2000, and J.S., born December 5, 2003.

[5] Ms. Stewart testified that when she first met Mr. Stewart, he had not consumed alcohol for a period of six or seven years. A year and a half or so after their relationship started, he started drinking. He lost both his jobs because of this. He became verbally abusive towards her. Mr. Stewart would go on drinking binges for periods of time as long as a month, then would be sober for a short period of time, and go on another drinking binge. There were times where Ms. Stewart actually left the house with the children until Mr. Stewart sobered up.

[6] Ms. Stewart described how the verbal abuse eventually escalated to physical violence. In one incident Mr. Stewart threw a double bladed axe in her direction. She ran out the door and reported the incident to the police. R.S. and A.S. were in the house when this happened. A.S. was two years old and was sleeping; R.S. was three years old and was watching television. When the police attended the house and arrested Mr. Stewart, R.S. was crying and Mr. Stewart was swearing at him. Mr. Stewart was charged in conjunction with this incident and was eventually sentencedto a jail term of six months.

[7] The couple separated in December 2004.

[8] After the separation custody proceedings were commenced in the Territorial Court. Those proceedings progressed to the point of being set for trial. The trial never proceeded because by operation of Subsection 8(2) of the *Children's Law Act*, S.N.W.T. 1997, c. 14, the proceedings in Territorial Court were stayed when Ms. Stewart filed her Divorce Petition. After Ms. Stewart filed that Petition, Mr. Stewart filed and Answer and Counter-Petition. At that point both parties were seeking sole custody of the children.

[9] The parties later reached an agreement whereby they would have joint and shared custody, with day to day care of the children to alternate between them every six months. An Order was issued by this Court on October 10, 2006, confirming this arrangement. By virtue of this Order Mr. Stewart had the day to day care of the children from January 1st to June 20th every year, and Ms. Stewart had the day to day care of the children from July 1 to December 31. The Order also provided that there would be no child support payable by either party, given the shared custody arrangement.

[10] Ms. Stewart testified that during the period of time where the children were in the day to day care of Mr. Stewart in 2007, there were a number of occasions where she and Mr. Adams were contacted by social services because Mr. Stewart was drinking and there were concerns about the children's well-being and safety.

[11] In December 2007, Mr. Stewart contactedMs. Stewart and said that he intended to move to Whitehorse and take the children with him. This apparently occurred at a time where he was on a drinking binge. Ms. Stewart made an *ex-parte* application to this Court and on December 6 2007, obtained a suspension of the October 2006 Interim Order. The December 2007 Order provided that the children would remain in Ms. Stewart's care and custody pending further Order of the Court. The Order also provided that Mr. Stewart could, on ten days' notice to Ms. Stewart, apply to have it varied or set aside. Mr. Stewart did not file any application with the Court to have the December 2007 Order varied.

[12] Ms. Stewart made another application to this Court to have the matter set down for trial. An Order to this effect issued on May 8, 2008.

B) CUSTODY AND ACCESS

[13] The overarching principle that governs the question of custodyof childrenis the best interests of the children. Any decision about custody and access must first and foremost be based on that principle.

[14] It is often said that where possible, it is in the best interests of children to have a meaningful relationship with both their parents. Joint and shared custody arrangements are the best way to achieve this goal. The Record and the evidenceshow

that the parties attempted to achieve this and were able to agree on the arrangement of shared custody that was sanctioned in the Interim Order of October 2006.

[15] Unfortunately, that arrangement failed. The evidence about what transpired when the children were in the day to day care of Mr. Stewart is of great concern. Both Ms. Stewart and Mr. Adams described that on more than one occasion, and because of Mr. Stewart's drinking, they were contactedby officialsfrom the Departmentof Social Services, and were asked to take charge of the children because they were not being looked after adequately by Mr. Stewart. This evidence is uncontradicted. It suggests that when Mr. Stewart is drinking alcohol, he is unable to care properlyfor his children and being in his custody places them at risk. This is consistent with some of the behaviour Mr. Stewart displayed in the presence of the children when he and Ms. Stewart were still together.

[16] Ms. Stewart and Mr. Adams have obviously given a lot of thought about how they want to raise the children. They have jointly prepared a parenting plan that was filed as an exhibit. They are both committed to raising the children in an alcohol free, safe, and loving environment. The children are doing well in school, as is clear from some of the school records that have also been filed as exhibits.

[17] It is unfortunate that Mr. Stewart's issues with alcohol have been an obstacle to his ability to have a consistent positive presence in his children's lives. Even his access to the children has been sporadic at best since they have been in Ms. Stewart's day to day care, a period of well over a year now. It appears he is still having difficulties related to his consumption of alcohol, as he told Ms. Stewart days before the trial that he had lost his driver's licence. Although he made a claim for the sole custody of the children in the Answer and Counter-Petition he filed in these proceedings, there is no evidence that he has taken any steps, since being served with the December 2007 and May 2008 Orders, to re-establish a shared custody arrangement such as the one that had been in place previously.

[18] Under the circumstances, I conclude that it is in the best interests of the children to be in the sole custody of Ms. Stewart. Mr. Stewart should have as much access to the children as possible, but he must understandthat this accesscannot take place when he is intoxicated. That type of access is not in the best interests of the children. I will therefore make the access conditional to Mr. Stewart having been alcohol free for at least 24 hours before any access takes place. I will also make the access conditional to

him giving Ms. Stewart some notice that he intends on exercising it. This is for logistical reasons, but also in the best interests of the children. Children need some structure and a routine. If Mr. Stewart is unable to have a consistent presence in their lives, then they need to at least have some advance notice of when they will see him and spend time with him.

C) CHILD SUPPORT

1. Ongoing support

[19] Child support is generally determined through the *Child Support Guidelines*, S.O.R./97-175, and is based on income and on the number of childrenbeing supported.

[20] There is no evidence before the Court as to Mr. Stewart's annual income. In those circumstances the *Guidelines* give the Court power to impute income to the payor parent. Evidence has been adduced as to the average salary for male persons in the Northwest Territories, based on information generated by Statistics Canada. In situations where there is no evidence available about a parent's income, it is not unusual for this Court to rely on this type of evidence to impute income and set the child support obligations.

[21] All parents have an obligation to support their children. They cannot simply ignore those obligations. There comes a time where Courts have to make orders on the evidence that is available, even if it is imperfect and approximate. I will therefore set Mr. Stewart's ongoing child support obligations on the basis of an imputed annual income of $41,828.00. For the support of three children this corresponds to monthly support in the amount of $839.00.

2. Special Expenses

[22] Section 7 of the *Guidelines* provides that in making a child support order, the Court can also order provide for an amount to cover certain additional expenses such as child care expenses, certain health related expenses, and extraordinary expenses for extra-curricular activities. In my view, these expenses should be shared by both parents in proportion of their respective incomes. Ms. Stewart argues that Mr. Stewart's share of these expenses should be 60%. Based on the income I have

imputed to him, and on Ms. Stewart's testimony that her annual income in 2007 was $26,660.00, I think that this percentage is reasonable.

3. Retroactive support

[23] In *D.B.S.* v. *S.R.C.*; *L.J.W.* v. *T.A.R.*; *Henry* v. *Henry*; *Hiemstra* v. *Hiemstra* 2006 SCC 37, the Supreme Court of Canada set out the guiding principles to be followed when dealing with the issue of retroactive child support. The Court recognized in no uncertain terms that parents' obligations to support their children exists, whether the other parent requests the support or not. The Court also recognized that retroactive child support can be ordered to make up for a parent's failure to provide adequate support for his or her children.

[24] Determining how far back in time the retroactive support order should reach is not always a straightforward question. Depending on the circumstances, different dates of retroactivity are appropriate. The date where one party puts the other on notice that they are claiming child support is often the one that is appropriate to use. That notice does not have to be done through formal court proceedings. It can simply be a question of one parent raising the topic of child support with the other.

[25] The question of child support was clearly raised at the time the Petition for Divorce was filed. However, the parties then came to an arrangement whereby the custody of the children would be shared equally.

[26] When the shared custody arrangement was suspended in December 2007, the Order did not provide for child support. I imagine this was in part because there was some uncertainty at that time about what steps Mr. Stewart might take to attempt to re-instate the shared custody regime. But by the time he was served with the Notice of Trial in June 2008, the fact that Ms. Stewart was seeking sole custody and child support was unquestionably known to him. Under the circumstances, I will make an order for retroactive child support going back to June 2008.

C) COSTS

[27] Ms. Stewart seeks costs in these proceedings, either on a party and party basis or in a lump sum of $5,000.00. She does so on the basis of the general principle that the successful party in litigation is usually entitled to costs.

[28] There has been for some time a debate in the jurisprudence as to whether this general rule should be applied in custody cases. It has even been suggested by some that there should be a general presumption against ordering costs in custody cases. This Court has occasion to make reference to this debate on a few occasions. *Fair* v. *Jones* [1999] N.W.T.J. No 44, at para. 15; *Scott* v. *Sibbeston* [1999] N.W.T.J. No.133, at paras 12 - 17.

[29] In recent years, a number of courts have adopted the view that the issue of costs should be approached the same way in custody cases as in other types of cases. *Metz* v. *Weisbgerber* [2004] A.J. No.510 (C.A.), *MacPhail* v. *Karasek* 2006 ABCA 354; *S.D.W.* v. *C.W.W.* [2006] B.C.J. No.207 (S.C.); *Burry* v. *Healey* [2007] N.J. No.203.

[30] In the Northwest Territories, Rule 33 of the *Divorce Rules* confirmsthe Court's wide discretion in dealing with costs. Subrule 3(2) provides that the general rules of civil procedure apply to divorce proceedings. Those rules set out general principles that govern the issue of costs, and do not treat custody cases differently than others.

[31] Given this, in my view, the question of costs in custody cases should be examined the same way as it is in other kinds of cases. The decision is one that involves considerable discretion and will be driven by the unique circumstances of each case. Family law cases often involve multiple issues which may complicate somewhat that analysis, but the fundamental principles that must be applied are the same.

[32] Mr. Adams has testified about the actual legal costs that he and Ms. Stewart have incurred in relation to this case. I have taken that evidence into account. I have also taken into account that Ms. Stewart was successful in her claim for sole custody. But there are other factors to consider. The Petition included a claim for division of property, which was essentially abandoned at trial. This matter was contested in its earlier stages and did require a trial, but at that trial, Mr. Stewart did not challenge the evidence presented by Ms. Stewart or any of the reliefs that she was seeking.

[33] Under the circumstances, I am satisfied that Ms. Stewart is entitled to some costs. Balancing all the factors I have referred to, I conclude that there should be a costs order for a lump sum of $2,500.00.

D) CONCLUSION

[34] For the above reasons, a Divorce Judgment will issue.

[35] There will also be a Corollary Relief Order in the following terms:

1. The Petitioner will have sole custody of the children of the marriage, R.S, born September 9, 1998, A.S., born July 9, 2000, and J.S., born December 5, 2003.

2. The Respondent will have reasonable access to the childrenas can be arranged between the parties from time to time, provided that:

a) the Respondent has not consumed alcohol or non prescription drugs for at least forty eight (48) hours before exercising the access and does not consume any alcohol or non prescription drugs while he is exercisingthe access;and

b) the Respondent gives the Petitioner seventytwo (72) hours notice that he intends on exercising access.

3. The Respondent shall make monthly child support payments of $839.00 based on an imputedannual incomeof $41,828.00,commencing on September 1, 2008.

4. Pursuant to section 7 of the *Child Support Guidelines,* the Respondent shall pay 60% of special expenses for the children, upon being provided receipts in relation to those expenses.

5. The Respondent shall pay retroactive child support in the amount of $2,517.00, to be paid at the rate of no less than $300.00 per month until the amount has been paid in full.

6. There will a costs order in favour of the Petitioner, in the amount of $2,500.00.

[36] The application for division of matrimonial propertypursuant to the *Family Law Act* is dismissed.

[37] I direct that the Petitioner's counsel prepare and submit for filing the Divorce Judgment, the Corollary Relief Order, and the *Family Law Act* Order. Once filed, these Orders and a copy of these Reasons for Judgment are to be served personally on Mr. Stewart.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
11th day of August 2008

Counsel for the Petitioner: James Scott
The Respondent was not represented

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