Date: 2009 03 16
Docket: S-0001-DV-2001-103288

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHEILA DIANE PYNN

Applicant

- and -

DARREN EUGENE PYNN

Respondent

MEMORANDUM OF JUDGMENT

[1] The Petitioner, Sheila Diane Pynn, (hereinafter the "Applicant") filed for divorce and corollary relief on January 24, 2001. The parties were married on August 18, 1990 and had two children, namely, R. D. P. born March 7, 1992, and B. E. P., born September 3, 1993. The parties were divorced on March 11, 2002.

Background

[2] Since July of 2000, the children resided equally with both parents in a joint custody and *de facto* shared custody arrangement. Child support paid to the Applicant was ordered payable based on the difference in the incomes of the parties.

[3] In August of 2007, both children began living with the Applicant.

[4] In December of 2008, Ms. Pynn, who had remarried, applied for a variation in the child support arrangements to reflect the fact she would be moving to Alberta with her new husband and the children would be remaining in the care and custody of the Respondent so they could finish their school year in Yellowknife. As well, she applied for retroactive child support from September 2007 to November 2008 presumably since the Respondent had not increased the amount of child support to reflect the

change in custody arrangements. Her affidavit in support of the application failed to disclose if and when she made a request for increased support, what she was receiving and the amount she was claiming.

[5] On the return of the application on December 18, 2008, the parties were directed, among other things, to participate in mediation or to return to court on January 29, 2009 to explain what efforts they had made in this regard. On December 24, 2008, an agreement dealing with most of the issues was reached through mediation, however, the Memorandum of Understanding (the "MOU") reflecting this agreement stipulated that the parties "have been encouraged to seek legal advice about these points [of agreement] and about their rights and responsibilities regarding the issues for future discussion." Neither party has done so.

[6] The points of agreement contained in the MOU are as follows:

> 1. Darren agrees to allow R. [sic] to move to Olds, Alberta with Sheila on December 26, 2008. Sheila will have day to day care of R. from that date forward.
>
> 2. Darren will have day to day care of B. on and after December 4th, 2008.
>
> 3. Sheila will collect R.'s [sic] personal items from Darren's home prior to leaving Yellowknife.
>
> 4. Sheila will send a letter to Maintenance Enforcement immediately to tell them that as of January 1, 2009, she and Darren will each have day to day care of one child and that she has agreed that Maintenance Enforcement should stop collecting child support from Darren.
>
> 5. Sheila will no longer seek retroactive child support.
>
> 6. Sheila will be responsible for all of R.'s [sic] post secondary education costs. If R. [sic] requests additional assistance Darren may contribute if he is financially able to do so.

[7] The Applicant had made plans to leave Yellowknife with her husband on December 26, 2008 and the desire of R. to live with her mother was something that seemingly arose or became apparent after the December 18th court appearance. The mediation session was therefore conducted on extremely short notice and in a situation where there was immense pressure on the parties to settle the issues; perhaps the

pressure was particularly acute for the Applicant who, no doubt, wanted to facilitate her daughter's desire to come with her to Alberta.

[8] On January 29, the Respondent appeared in chambers asking the court to issue a draft consent order he had prepared reflecting the provisions of the MOU. The chambers judge directed that the order be forwarded to the Applicant for the endorsement of her consent and the matter was adjourned to March 12, 2009, when it came before me. The Applicant had not endorsed her consent on the Order. The only new evidence filed was a brief affidavit of the Respondent attaching the MOU.

[9] Since approximately 2002, neither party has been represented by counsel and this has resulted in misconceptions and misapprehensions concerning their rights and obligations to each other and to the children. It has also meant that much relevant information which could assist the court has not been produced as evidence. The Respondent appeared in court on the motion and the Petitioner appeared by telephone from Olds, Alberta.

[10] The parties made submissions and, as happens with self-represented litigants, started to become bogged down on ancillary issues and matters of historical debate not relevant to those before the court. This "bickering" resulted in the Applicant either renouncing or threatening to renounce the MOU. Having heard the submissions of the parties and having reviewed the evidence on file, I determined that further argument would be fruitless and reserved my decision on the issues which are not overly complicated.

[11] The parties need clear direction and certainty. The Applicant wishes to have any money to be paid by the Respondent in future to go directly to the children and not to her. As long as she is the one claiming child support, any such payments will be made to her. She is then at liberty to turn those funds over to the children if that is her wish. Further, she wants the children to be able to decide whom they will live with and asks that any court order make it clear that B. can choose to move to Alberta when his school year is completed if he wishes. In reaction to some of the submissions made by the Respondent, the Applicant is also now wanting retroactive child support and any child support to which she might be legally entitled on a go forward basis.

[12] The Respondent wants the agreement reached in the MOU to be reflected in the court order.

Custody

[13] Since separation, the parties have had joint legal custody of the children and I would not propose to disturb that arrangement.

[14] While courts will seldom be guided by the wishes of young children in custody matters they will generally be inclined to give considerable weight to the expressed preferences of older children to live with a particular parent. On occasion there will be compelling reasons why a court should decline to accommodate the preference of a child but I have no evidence before me to suggest this would be the case here. I note that in the direction of the court on December 18, 2008, the parties were to return on January 29, 2009, to explain why they had not gone to mediation and to bring the children with them. As well, the record shows the children were present in court on December 18th. The children were brought into the mediation session on December 24th for a short period. Clearly, the parties accept that the children's wishes regarding custody are to be taken into account. Finally, the Applicant has been adamant in her submissions that the children should live with the parent of their choice and their expressed preferences should be the paramount consideration for the court. In any event, I am persuaded that R., age 17, and B., at 15, should be accorded a very strong voice on the issue of *de facto* custody but the court cannot and will not abdicate this decision to them entirely until such time as they reach the age of majority.

[15] Considering the historical evidence and the provisions contained in the MOU, I am ordering that the Applicant shall have day to day care and custody of R. and the Respondent shall have day to day care and custody of B. At the conclusion of the school year this June, B. may wish to move south to live with his mother and sister. Should that be the case, in light of my remarks above, I would hope the parties would arrange for a smooth transition. Given the history of this matter, I would suggest the parties present a consent order for the court's approval reflecting this and any other changes in their arrangements.

Child Support

[16] Given that each party has custody of one child and having reference to the MOU and the provision whereby the parties agreed that no further child support would be payable by the Respondent, I will give effect to this provision and order that as of January 1, 2009, the Respondent's obligation to pay child support ceased. This, however, would change should B. decide to live with his mother in Alberta at some time in the future. In that event, I would urge the parties to settle on the appropriate table amount of child support and any special or extraordinary expenses (as set out in s.7 of the *Child Support Guidelines* pursuant to the *Divorce Act*) and to file a consent order to reflect this change.

[17] I now turn to the provision in the MOU which I find troubling, namely that:

> 6. Sheila will be responsible for all of R.'s [sic] post secondary education costs. If R. requests additional assistance Darren may contribute if he is financially able to do so. (emphasis mine)

[18] It is the legal, if not moral, responsibility of parents to contribute to the financial support of their children. The *Children's Law Act* provides as follows:

> A parent has an obligation to provide support for his or her child where the parent is capable of doing so.

[19] The term "child of the marriage is defined in section 2(1) of the Divorce Act:

> "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 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."

[20] R. is 17 years of age and will attain the age of majority in Alberta in less than one year. There is no evidence before the court disclosing what grade she is in but if she is about to complete grade 12, she may wish to enter university this fall. Should that be the case, she would require the financial resources to do so and may continue to

require support for some years to come. The MOU was negotiated in great haste and the parties were without the benefit of legal advice. While courts generally give considerable weight to agreements reached between parents, such agreements are not final and binding and must be reasonable in all the circumstances. The court has an oversight power where it can exercise its *parens patriae* jurisdiction to do that which is in the best interests of children and can alter or amend the terms of any such agreement. There is no evidence before the court to suggest that the provision regarding financial responsibility for R.'s post-secondary education is fair or reasonable. It may seem fair to one or both parents but may not be to R. who may be unable to pursue her education due to lack of financial resources. The right to child support is not that of the custodial parent but rather that of the child.

[21] Accordingly, I decline to make any order in this regard and will leave it to the parties to resolve this issue through further discussions should that be necessary and failing resolution, either party shall be at liberty to apply for relief to a court of competent jurisdiction.

Retroactive Support

[22] Until August, 2007 the children had resided equally with the parties, however, from that date until December 26, 2008, they were in the *de facto* custody of the Applicant. There is no evidence on file to suggest she gave notice to the Respondent that she was requesting additional child support until the formal notice that was contained in her motion filed December 8, 2008. There is no evidence of when the motion was served on the Respondent. On December 24th, the Applicant specifically agreed that she would abandon her claim for retroactive support. The most appropriate date to use for awarding retroactive support is that upon which effective notice was given by the custodial parent to the payor parent that child support should be paid or increased. [See *D.B.S.* v. *S.R.G.* et. al. 2006 SCC 37] Effective notice need not be formal notice. It can be in the form of a verbal request or an email, for example. In any event, where, as here, notice does not appear to have been given until some time in December, I am not persuaded that the entitlement to retroactive child support has been established and will decline to make that order. I should add that I do not have the same concerns about the provisions in the MOU regarding child support and retroactive child support that I have relating to point 6 dealing with R.'s post-secondary education.

[23] Shortly after I adjourned the motion to reserve judgment, a court clerk handed me a typewritten note addressed to me from the Applicant. This is, in effect, an out-of-court submission not made in the presence of the Respondent and nor is it evidence submitted in proper form and accordingly, I have not considered or taken into account any of the statements or requests contained in the note which will, nevertheless, be placed on file.

[24] In the event that it is necessary for the parties to again resort to litigation to resolve areas of dispute, I would urge them to obtain the assistance of legal counsel, if only to obtain advice on the evidence they ought put before the court and records they need to produce. By way of illustration, in order to properly determine the quantum of child support, a court would need to know the payor spouse's current income as evidenced by the most recent pay stub and perhaps the latest tax assessments from the Canada Revenue Agency. The question of custody of older children has been dealt with at some length in this judgment and I trust it is abundantly clear that absent compelling reasons not to, courts will give considerable weight to the expressed preference of an older child regarding which parent that child wishes to live with. It should not be necessary for the parties to return to court to resolve this issue should B. wish to move to Alberta to rejoin the Applicant in June or July of this year.

[25] There will be no order as to costs.

D.M. Cooper
J.S.C.

Dated this 16th day of March, 2009.

The Applicant was self-represented.

The Respondent was self-represented.

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