Date: 2010 01 07
Docket: S-0001-FM-2009000083

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

MARTIN CLIFFORD KNUTSON

Plaintiff

- and -

KIMBERLY ANN KNUTSON

Defendant

REASONS FOR JUDGMENT

[1] The Plaintiff, father, has filed a Statement of Claim in which he claims general damages of not less than $1,000,000.00 for breach of contract against his former wife for alienation of the affection of the children of the marriage, "specific performance" of the custody and access provisions of the subject separation agreement to require the Defendant to abide by its terms, punitive damages and solicitor and client costs.

[2] The Defendant has now applied to have the Statement of Claim struck out under Rule 129 of the *Rules of Court* on the basis that it discloses no cause of action.

[3] The parties were married on March 28, 1991 and had two children, a boy now aged 16 and a girl now aged 14. They separated in 2004 and entered into a Separation Agreement in October of 2005 which provided for, among other things, custody and access. Specifically, the parties were to have joint custody of the children and a shared parenting arrangement that would, to the extent possible,

allow the time spent with each parent to be equal. Further, the parties were required to consult with one another on matters affecting the children.

[4] The essential elements of the Separation Agreement were set out in a Corollary Relief Order of this Court on April 5, 2007.

[5] The Plaintiff says the Defendant has failed to honour the spirit and intent of the Agreement and thereby has breached the contract between them, some particulars of which include unilateral actions with no or inadequate notice as follows:

a) changing the regime of alternating residences resulting in the children residing exclusively with the Defendant as of January 2008 for the daughter and May 2008 for the son;

b) arranging for counselling for the children without substantive input from and agreement of the Plaintiff;

c) arranging for the son to have orthodontic braces;

d) making summer plans for the children;

e) placing the daughter in a French immersion school programme;

f) taking both children out of the country on vacation;

g) committing the son to a year's absence from Yellowknife and residence in Brazil.

[6] On an application to strike a statement of claim it is well accepted law that the court is to assume the facts alleged in the claim are true and then cautiously consider whether there is any chance of success and only strike if it is "plain and obvious" that the claim discloses no cause of action. See *Steiner* v. *Canada*, 1996 CanLII 3869 (F.C.); *Anderson* v. *Bell Mobility Inc*., 2008 NWTSC 85; *Fullowka* v. *Whitford*, [1996] NWTJ No. 95 (C.A.). As well, a claim should not be struck out unless it is or would be incurable by amendment. Finally, it serves to quote from the judgment of Madam Justice Wilson in *Frame* v. *Smith*, 1987 CarswellOnt 347 (SCC) at para. 15:

> "While the normal rule in such motions is that any doubt is to be resolved in favour of finding the existence of the cause of action and permitting the action to proceed, given the overriding importance of ensuring that such litigation is in the best interests of the children in a particular case, the court may impose a more stringent standard before it allows the action to be brought."

[7] The Defendant takes the position that the Supreme Court of Canada decision in *Frame* v. *Smith, supra*, is determinative of the issue; that the Plaintiff's cause of

action does not exist at common law and the Statement of Claim should be struck out.

[8] The facts in *Frame* were similar to those here but the conduct of the mother as alleged in that case was considerably more egregious. The main and crucial distinction, argues the Plaintiff, is that here there exists a domestic agreement and breach of contract while in *Frame* the wife was being sued in tort for breach of court orders.

[9] The Plaintiff did not seek to distinguish the case at bar from *Frame* and others cited by the Defendant on the basis that this case does not involve denial of "access" by a custodial parent but rather breach of shared custody arrangements or acquiescence in the decision of older children to alter this regimen. Regardless, in my view, these facts would not serve to distinguish this case. The essence of the action is for alienation of affection and denial of the presence of the children in the father's life and it is not important if this is by virtue of a failure to honour an agreement and Court Order for shared custody or for access.

[10] The majority in *Frame* dismissed the Plaintiff's appeal in finding that he had no right of action against his former spouse (and her present husband) for interfering with access to his children. Madame Justice Wilson agreed that no cause of action arose in tort but dissented in finding that the Plaintiff was entitled to advance a claim for breach of fiduciary obligation.

[11] The Court noted that the tort of alienation of affection did not exist in Canada. [See also Fridman, *The Law of Torts in Canada*, 2nd ed., 2002]. As well, old actions at common law of enticement, harbouring, seduction, or loss of services that gave some protection to a father's interest in his children had been abolished in Ontario by the *Family Law Reform Act*, R.S.O. 1980, c.152, s.69(4). It has been said that these torts were vaguely based on the law of master and servant and of property. Notionally, the father (not the mother unless the father was deceased) could sue for his loss of services if the affections of a child were "alienated." Many of the "family relationship" torts offended the equality provisions of the *Charter* and, with the dramatic change in society and its values over the past fifty years, most have been viewed as discriminatory, fictitious and simply outdated.

[12] Other provinces, apart from Ontario, enacted substantially similar reform legislation in the 1980s. In Alberta, some legislative reform was undertaken but it was comparatively modest and largely designed to comply with the equality provisions of the *Charter of Rights and Freedoms*. For example, the common law of seduction was replaced with statutory provisions to allow both husband and wife to bring action.

[13] In the Northwest Territories, initial statutory reform which took place in this area of the law occurred in 1985 with the passing of the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, S.N.W.T., c.10(3rd) 1985 which, *inter alia*, repealed the *Seduction Act*. Substantive family law reform arrived with the passage of the *Children's Law Act*, S.N.W.T. 1997, c.14 and the *Family Law Act*, S.N.W.T., 1997, c.18. Among other things, the *Children's Law Act* sets out a comprehensive legislative regime for dealing with issues of custody, access and the enforcement thereof.

[14] The issues to be decided in this case are:

1. Given that the tort of alienation of affection of children does not exist at common law, is it open to the Court in the Northwest Territories to devise a new tort to meet the situation?

2. Is *Frame* v. *Smith* binding authority on this Court or can it be distinguished on the facts in this case and particularly having reference to the Plaintiff's argument that his claim is not in tort but rather for breach of contract?

[15] In *Frame* the Supreme Court made it clear that torts like alienation of affection or intentional interference with access to children did not exist at common law but went on to consider whether courts should devise a new tort to meet the situation.

[16] In addressing this issue LaForest J. stated (para. 77):

> But there are formidable arguments against the creation of such a remedy. I have already mentioned the undesirability of provoking suits within the family circle. The spectacle of parents not only suing their former spouses... for interfering with rights of access is one that invites one to pause. The disruption of the familial and social environment so important to a child's welfare may well have been considered reason enough for the law's inaction, though there were others.

[17] His Lordship went on to detail practical considerations which militate against judicial activism in this area. He thought it impossible to define what interference would be actionable and that a damage award could well deprive a child of much needed financial support. Some might argue this was obiter or judicial musings but the ratio of the case can be found in the following passages (para. 79):

> But what really determines the matter, in my view, is that any possible judicial initiative has been overtaken by legislative action. In all the provinces (and at the Federal level for that matter), legislation has been enacted to deal with the modern phenomenon of frequent family breakdowns and, in particular, to provide for custody of, and access to children. (emphasis mine)
>
> …
>
> In particular, the courts are given the role of ensuring that issues involving custody of and access to children are determined on the basis of the best interests of the children.

[18] He proceeded to set out in detail the various remedies available in the Ontario legislation for enforcement of custody and access orders. Many of these provisions are identical to those contained in the *Children's Law Act*. He went on to state (para. 80):

> It seems obvious to me that the Legislature intended to devise a comprehensive scheme for dealing with these issues. If it had contemplated additional support by civil action, it would have made provision for this, especially given the rudimentary state of the common law.

[19] The Plaintiff suggests that none of this is applicable in the case at bar since his claim is grounded in contract as opposed to tort. With respect, it is my view that *Frame* v. *Smith* is binding on this court and that it is clear that parents having issues regarding custody of and access to children are to resort to statutory remedies available under family law legislation regardless of whether the action could be grounded in tort, breach of fiduciary duty or breach of contract. On the issue of whether an action could be brought for breach of fiduciary obligation or breach of contract, the Court said at paragraphs 85 and 87:

> All the reasons for not permitting a tort action apply equally to an action for the breach of such an obligation.
>
> ...
>
> Why the legislature should be thought to have intended enforcement by an action for breach of a fiduciary obligation when there is a failure to comply with an access order, when an intention to permit a tortuous action will not be implied, I fail to understand.
>
> ...
>
> In other contexts, not only have they [courts] refused to allow a tort action but they have gone further and not permitted what had traditionally been permissible contractual actions...

[20] The Plaintiff argues that sections 2, 12 and 13 of the *Family Law Act* demonstrate that a domestic contract, as is present here, is valid and enforceable; that the Defendant voluntarily entered into this bargain and has been guilty of

multiple breaches of it; that if these agreements are not to be given any status or weight and be enforceable at common law, there will be little point in entering into them with a resultant blow to the process of non-adversarial dispute resolution.

[21] In support of his argument the Plaintiff cites *Critchley* v. *Critchley*, (1988) 30 B.C.L.R. (2d) 316, as standing for the principle that courts will examine closely the provisions in a separation agreement and where it finds that one party has repudiated the agreement, it may relieve the other of its obligations thereunder. However, it is to be noted that the action was being prosecuted under the *Divorce Act* and was not an action for damages at common law and is therefore distinguishable.

[22] Nevertheless, while some aspects of this argument are not unattractive, it fails to acknowledge certain other important factors.

[23] The common law and now modern statutes have clearly represented that the governing and overriding principle to be followed in dealing with children's issues is to do that which is in the best interests of the children. [*Children's Law Act*, *supra*, s.17] Another legal principle particularly relevant in the case of children is that the court's jurisdiction is never ousted by agreement of the parents (or the state unless by statute) and it will always exercise oversight with its *parens patriae* power; see *Laraque*, v. *Allooloo*, (1992) 44 R.F.L. (3d) 10; *Ipkarnek* v. *Sammurtok*, 1996 CanLII 3658 (N.W.T.S.C); *G.D.* v. *G.M.*, (1999) 47 R.F.L. (4th) 16; *Pynn* v. *Pynn*, 2009 NWTSC 15. In other words, courts can always review and overturn provisions of a separation agreement dealing with custody of and access to children. Indeed, courts routinely review and vacate previously issued orders if it is in the best interests of the children to do so.

[24] There are many interrelated elements that comprise a global separation agreement. Some, like division of matrimonial property and compensatory spousal support, are retrospective. Others are prospective − custody, child support and non-compensatory spousal support. In addressing these latter elements, the parties are attempting to predict the future; something that is seldom done accurately even in ordinary circumstances. Upon the dissolution of a relationship there are often unique factors in play which justify courts treating separation agreements somewhat differently from commercial contracts. Breakdowns often reveal a range of emotions such as fear, panic, sadness, guilt and relief. There is often a power imbalance in the relationship. There are trade-offs in any negotiation and the parties are often ill-equipped to make rational and sound judgments.

[25] It is for these reasons that the Supreme Court of Canada has said that the prospective elements of separation agreements are not to be treated as binding and subject to merely contractual remedies. And that contract principles are better

suited to the commercial context or retrospective elements of separation agreements. See *Miglin* v. *Miglin*, [2003] S.C. J. 21.

[26] Where matters of a monetary or commercial nature dealing with matrimonial property are concerned and there is no evidence of undue influence, duress or a significant imbalance in bargaining positions, where the parties have both had independent legal advice and where the provisions appear to be "fair", courts will generally give effect to those aspects of a settlement. [See *Fraser* v. *Fraser*, 1995 CanLII 1594 (B.C.S.C.)] However, as I have said earlier, the approach differs markedly where children are concerned.

[27] As well, here the provisions of the domestic agreement were contained within a Corollary Relief Order of this Court. The fact that the agreement of the parties was reflected in a prior separation agreement as opposed to a draft consent order having been submitted by counsel for the court's approval in the first instance or an order having been made by the court after hearing argument is, to me, a distinction without a difference.

[28] The Defendant cites two other cases in support of her position that the Plaintiff's claim cannot succeed, namely; *Sturkenboom* v. *Davies* [1996] A.J. 911 and *Curle* v. *Lowe* [2004] O.J. 3789.

[29] In *Sturkenboom*, the Alberta Court of Appeal considered whether the Plaintiff had a cause of action against the wife's father for interference with access to the children. Writing for the Court and referring to *Frame* v. *Smith*, McFadyen J.A. stated (para. 12):

> Counsel for the appellant seeks to distinguish that decision, claiming that the majority decision is based primarily on legislative provisions specific to Ontario, and not found in Alberta. I am unable to distinguish the case on this basis and am satisfied that the reasoning of the Supreme Court of Canada in that decision applies with full force in this province.

[30] The fact that Alberta had not specifically abolished many of the family law torts by statutory amendment was not a deterrent to the Court following the *Frame* decision and the case was not distinguishable on that basis. The Plaintiff's claim was therefore struck out as disclosing no cause of action.

[31] In the *Curle* case, the Ontario Superior Court of Justice squarely followed *Frame* v. *Smith* in dismissing the Plaintiff's claim. I cite with approval the remarks of Pierce J. who stated at para. 18:

> I am unable to distinguish the case at bar from the application of the reasoning in *Frame* v. *Smith*. This is not, as the plaintiff suggests, a novel case that should be allowed to proceed to trial. It is not a case where carefully crafted pleading will avoid the precedent. All of the policy reasons enunciated by the Supreme Court

> of Canada in refusing to permit claims in tort for failure to provide access to children apply here. To allow such a claim to continue would divert the parties from a determination of the best interests of the child in the custody case. It would divide their attention and strain their financial resources. It would open the floodgates to similar litigation by parents or family members who are angry about arrangements made for children. It would draw away from children the financial resources needed for their support.

[32] The Plaintiff has not submitted any authorities or precedents where a parent was permitted to pursue a claim for damages against a spouse, whether in tort, trusts or contract, for alienation of affection of children or interference with access. I am not aware of any.

[33] The Supreme Court of Canada in *Frame* decided that for reasons of social policy and because the Provinces (and Territories) have comprehensive statutory regimes for dealing with custody and access issues, and since no provision was made in family reform legislation for bringing actions in common law based on family relationship torts, a claim at common law for alienation of affection or interference with access to children was not sustainable and disclosed no cause of action. Following the reasoning of the Court of Appeal in *Sturkenboom*, *supra*, I find that although the legislature in this jurisdiction did not specifically abolish "family relationship" torts (with the exception noted) in its family law reform legislation, an action at common law for alienation of the affection of children cannot be sustained, whether in tort, trusts or contract.

[34] Accordingly, the Plaintiff's claim is struck out as it discloses no cause of action.

[35] Costs generally follow the event. If counsel are unable to agree on costs, either party may contact the clerk to obtain a date to argue the issue.

D.M. Cooper
J.S.C.

Dated at Yellowknife this
7th day of January, 2010.

Counsel for the Plaintiff: Katherine R. Peterson, Q.C.

Counsel for the Defendant: Margo Nightingale.

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