

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

JEANNINE DIANE PILON

- and -

ROGER ERNEST PILON

Petitioners

Transcript of Ruling on Summary Judgment Application
delivered by the Honourable Justice V.A. Schuler,
sitting at Yellowknife, in the Northwest Territories,
on March 16th, A.D. 2011.

APPEARANCES:

Mr. D. Large, Q.C.: Counsel for Jeannine Diane Pilon

Mr. A. Duchene: Counsel for Roger Ernest Pilon

1 THE COURT: This proceeding is an
2 application by Ms. Pilon for an order varying the
3 2006 Corollary Relief Order that provides that
4 she and Mr. Pilon have shared custody of their
5 son, Alexi. Alexi currently spends alternating
6 weeks with each parent. Ms. Pilon seeks sole
7 custody of Alexi and that he live with her and
8 Mr. Pilon have specified access on weekends and
9 during holiday periods. My understanding is that
10 Mr. Pilon is content with the current regime,
11 but, if it is not to continue, his position is
12 that he should have custody of Alexi.

13 At this stage in the trial I have heard from
14 Ms. Pilon and her witnesses. Dr. Seitz, who was
15 appointed to do an assessment under section 29 of
16 the Children's Law Act, is scheduled to testify
17 in April. She will testify as a court witness
18 and counsel for both parties will be able to
19 cross-examine her.

20 However, now, before Dr. Seitz is heard and
21 before he calls his own evidence, Mr. Pilon
22 applies for summary judgment. He argues that
23 there is no triable issue with regard to a
24 threshold matter, that being whether there has
25 been a change of circumstances as required by
26 section 17(5) of the Divorce Act. That section
27 provides that before the Court makes a variation

1 order in respect of a custody order, the Court
2 shall satisfy itself that there has been a change
3 in the condition, means, needs or other
4 circumstances of the child of the marriage
5 occurring since the making of the custody order.

6 The burden on an Applicant for variation of
7 a custody order, including an order that was made
8 on consent, as this Corollary Relief Order was,
9 is to show that a material change has occurred.
10 Section 17(5) speaks of a change occurring since
11 the making of the custody order. I do not read
12 the section as requiring that the change be a
13 continuous one or one that exists precisely at
14 the time of trial, although those will certainly
15 be factors in assessing the effect of any change.

16 Rule 16 of the Divorce Rules provides that
17 in a contested proceeding the parties may take
18 any steps that are available in other causes,
19 including applying for summary judgment on any or
20 all issues in the proceeding.

21 Cases from this jurisdiction, such as the
22 Anderson Mills case and the Wallace v. Wallace
23 case, establish that the test on an application
24 for summary judgment is whether there is a
25 genuine, a bona fide issue for trial. The
26 question at this stage for purposes of the
27 summary judgment application is not whether Ms.

1 Pilon has established that there has been a
2 change of circumstances since the Corollary
3 Relief Order, but it is, instead, whether Mr.
4 Pilon has shown that there is no genuine issue of
5 change of circumstances.

6 Essentially, Mr. Pilon says that the
7 evidence heard thus far in the trial all
8 indicates that the parties are currently
9 communicating well, that they have been able to
10 do so for the last year and a half or so, that
11 Alexi is doing well under the current custody
12 regime, despite his special needs.

13 As to the evidence of Dr. Seitz, Mr. Pilon's
14 position is that even if Dr. Seitz is of the
15 opinion that Mr. Pilon was alienating the child
16 from Ms. Pilon or that Mr. Pilon engaged in
17 negative parenting behaviours, that evidence is
18 current only as at May of 2009 when Dr. Seitz
19 prepared her report. He says that even if the
20 problems identified by Dr. Seitz did exist, which
21 he does not admit, the evidence heard thus far in
22 Ms. Pilon's case indicates that those problems
23 are no longer operating and no longer affecting
24 Alexi and are, therefore, not relevant.

25 Ms. Pilon, on the other hand, opposes the
26 application for summary judgment. She says that
27 alienation is a live issue, one that has arisen

1 since the Corollary Relief Order. She testified,
2 for example, about a number of incidents that she
3 says occurred in 2008 where Mr. Pilon encouraged
4 or at least did not discourage the child in
5 behaving badly toward Ms. Pilon or did other
6 things that interfered in the mother and child
7 relationship.

8 To briefly summarize some of the incidents
9 she referred to, there was the incident where Mr.
10 Pilon, she says, called Social Services and came
11 to her home, which led her, in turn, to call the
12 RCMP, all because Alexi was crying while she was
13 bathing him and she would not let Mr. Pilon speak
14 to him on the telephone.

15 There is also what I will describe as the
16 Tim Hortons incident where she says Mr. Pilon
17 would not assist her in controlling the child
18 when he was screaming that he hated her and that
19 Mr. Pilon told her that the child hates her.

20 There is the incident where Ms. Pilon says
21 that Mr. Pilon told the child that she, Ms.
22 Pilon, would give him medication that made him
23 sick and then told the child that he was a good
24 boy when the child told Ms. Pilon that he did not
25 have to listen to her.

26 There was also evidence from Ms. Pilon
27 suggesting that -- and the evidence, I do not

1 know that it went this far, but my understanding
2 is that she is asking the Court to draw the
3 inference that Mr. Pilon removed her as the
4 primary contact for the hospital for Alexi and,
5 instead, replaced her with himself and his second
6 wife.

7 Now, I want to make it clear that I am not
8 making any findings at this stage as to whether
9 these incidents occurred at all or as described
10 by Ms. Pilon. I am not determining credibility
11 at this stage. I am not making any findings of
12 fact, because I have not heard evidence from Mr.
13 Pilon or from any of his witnesses at this stage
14 of the case, but I have to determine the summary
15 judgment application on the basis of the evidence
16 as it now stands.

17 Mr. Pilon points out that the incidents that
18 were testified to by Ms. Pilon predate Dr. Seitz'
19 report. That, too, however, may give rise to
20 credibility issues, and, again, I cannot
21 determine those at this stage. The fact that the
22 alleged alienating behaviour stopped once the
23 Court appointed Dr. Seitz and she identified the
24 behaviour in her report shortly before this
25 matter was to go to trial the first time in 2009
26 arguably raises the question whether any change
27 in behaviour is genuine and likely to last.

1 There is some evidence from Ms. Pilon that,
2 arguably, is relevant to the issue of alienation;
3 for example, that Mr. Pilon's wife attends the
4 child's medical appointments and that it is she
5 who speaks at those appointments and not Mr.
6 Pilon. It is also clear from the evidence that
7 Mr. Pilon's wife's involvement is still a source
8 of conflict, at least as far as Ms. Pilon is
9 concerned.

10 There are also issues around medications and
11 Mr. Pilon's alleged lack of cooperation with
12 medications that have been recommended by some of
13 Alexi's doctors and with arrangements for medical
14 travel, such as the evidence given by Ms. Pilon
15 that he refused to permit an MRI and an EEG to
16 proceed because of issues about who would
17 accompany Alexi under the medical travel
18 allowance.

19 Although the evidence that I have heard thus
20 far indicates that the parties have been able to
21 deal with these issues more cooperatively in the
22 recent past, it also indicates that Alexi's
23 situation is not settled, that it may change. No
24 one knows if his medications or the dosage will
25 need to be reviewed again and changed. So,
26 again, it is arguable that the disagreements or
27 Mr. Pilon's refusal to cooperate in arrangements

1 - and, again, I emphasize that I am not making
2 any finding of fact in that regard - are a change
3 since the Corollary Relief Order.

4 It is since the order that a diagnosis was
5 arrived at and a medication regime was imposed.

6 It is also arguable that these issues affect
7 Alexi's best interests, because they concern his
8 medical situation or his medication situation.

9 The fact that there has been some improvement in
10 the parties' ability to deal with each other or
11 some improvement in Alexi's situation does not
12 mean that there will no longer be any conflicts.

13 In my view, it is enough to refer to those
14 issues to dispose of the application, but I do
15 note that other issues certainly arise on the
16 evidence thus far. It is clear that Alexi, who
17 is now almost ten years old, is a child with
18 special needs. He is a difficult and unique
19 child. He is a child with problems of
20 aggression. All of these issues have developed
21 and changed over the years and can reasonably be
22 expected to develop and change as he gets older.
23 The evidence thus far indicates that he has
24 difficulties with change, that he needs to be
25 constantly supervised at school, that he, in
26 fact, leaves school early because of incidents of
27 aggression or conflict with other children.

1 The difficulties that he has with change
2 clearly raise an arguable issue whether a week to
3 week change of households is in his best
4 interests, notwithstanding whether it may have
5 been appropriate at the time of the Corollary
6 Relief Order when he was four or five years old
7 and the situation having changed in that Ms.
8 Pilon is no longer involved in work that requires
9 her to travel.

10 In connection with these issues, of course,
11 there have been some issues raised about whether
12 his disciplinary issues at school are more
13 frequent during the weeks he stays with Mr.
14 Pilon, whether some of the activities that Mr.
15 Pilon lets him engage in are exacerbating his
16 aggression.

17 Again, I want to emphasize that these are
18 arguable issues. I am not making any findings of
19 fact at this stage of the proceedings. It will
20 only be after hearing all the evidence that a
21 decision can be made as to whether, first of all,
22 there has been a change in circumstances that
23 affects Alexi's best interests and whether the
24 current shared custody regime or any aspect of it
25 should be changed. I say any aspect of it,
26 because, of course, as in any case involving
27 child custody, the Court has a variety of options

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when it comes to making an order that addresses
the best interests of the child.

But ultimately I am satisfied that there is
a genuine and triable issue as to whether there
has been a change of circumstances affecting
Alexi's best interests since the Corollary Relief
Order as required by section 17(5) of the Divorce
Act. So, accordingly, the application for
summary judgment is dismissed.

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Certified to be a true and
accurate transcript pursuant
to Rules 723 and 724 of the
Supreme Court Rules.

Jill MacDonald, RMR
Court Reporter