*Sound* v. *Bernhardt*, 2014 NWTSC 51

Date: 2014 07 25
Docket: S-1-FM-2013-000047

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TASHA SOUND

Applicant

- and -

ALBERT BERNHARDT

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application by the Respondent Albert Bernhardt for an Order varying the Consent Order of July 25, 2013 to change custody of the children of the relationship from the Applicant to the Respondent on the basis that there has been a material change of circumstances.

[2] The parties entered into a Consent Order on July 25, 2013 where they agreed that the Applicant would have sole custody of the children, the Respondent would have access to the children, the Respondent would pay child support of $320.00 per month, and the Respondent would provide a copy of his income tax return and Notice of Assessment annually to the Applicant. Both parties were represented by counsel when agreeing to the Consent Order.

[3] Section 22 of the *Children's Law Act*, S.N.W.T. 1997, c. 14 (the "*Act*"), states that a court shall not vary a custody or access order unless there has been a material change in circumstances that affects or is likely to affect the best interests of the children. In *Gordon* v. *Goertz*, [1996] S.C.J. No 52, the Supreme Court of Canada, considering a similar provision in the *Divorce Act*, R.S.C. 1985, c. 3 (2nd

Supp.), held that the party seeking a variation must meet the threshold requirement of showing a material change in the circumstances affecting the children.

[4] When seeking variation of an Order, the threshold is a high one:

> [A] variation application is not to be used as an indirect method of appealing the initial order. The correctness of the initial order is assumed. And where, as in this case, the initial order was issued on consent and as the result of a negotiated agreement, the burden of proof on the applicant seeking a variation is a high one. That is because, as between the parties, the agreement operates as strong evidence that at the time each regarded those terms as providing adequate and acceptable conditions. Where those terms are then embodied in an order they will not be departed from lightly.
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> *Williams* v. *Williams*, [1996] N.W.T.R. 363 at para. 4

[5] The Respondent claims that there has been a material change in circumstances because the children have not been in the Applicant's care since July 2013; they have been cared for by their maternal grandmother, Cyndi McNichol.

[6] The Applicant, in her Affidavit filed May 6, 2014, disputes the date when the children started living with her parents but agrees that they have had continuous physical custody of the children since the end of August 2013. The Applicant acknowledges that the threshold of a material change of circumstances has been met but claims that the material change is of a temporary nature and that it is not in the best interests of the children to vary the custody order.

[7] This application proceeded before me in regular Chambers on the basis of Affidavit evidence. Both parties have filed several Affidavits in relation to this application. There are many facts which do not appear to be in dispute as they are acknowledged or not denied but there are also conflicts in the evidence, such as the date the children began living with the Applicant's mother. The Court is not able to resolve these conflicts on the basis of Affidavit evidence. In any event, on this Application, I am able to make a decision on the basis of the facts that are not in dispute.

[8] The Consent Order of July 25, 2013 grants the Applicant sole custody of the children. Whether the children started living with the Applicant's mother in July 2013 or August 2013, it is clear that the children have not been living with the

Applicant for many months and that circumstances changed shortly after the parties entered into the Consent Order. The Respondent's evidence was that he thought the children were living with the Applicant up until November 2013 when he learned otherwise. It is apparent that, when entering into the Consent Order in July 2013, the Respondent believed that the children would continue to be in the physical custody of the Applicant. In my view, there has been a material change in circumstances.

[9] If the threshold requirement of a material change in circumstances is met, then the Court must go on to consider the best interests of the children. In considering the best interests of the children, section 17(2) of the *Act* states that:

> (2) In determining the best interests of a child for the purposes of an application under this Division in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including
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> (a) the love, affection and emotional ties between the child and
>  i) each person entitled to or seeking custody and access,
>  (ii) other members of the child's family,
>  (iii) persons involved in the care and upbringing of the child;
> (b) the child's views and preferences if they can be reasonably ascertained;
> (c) the child's cultural, linguistic and spiritual or religious upbringing and ties;
> (d) the ability and willingness of each person seeking custody to, directly or indirectly, provide the child with guidance, education and necessities of life and provide for any special needs of the child;
> (e) the ability of each person seeking custody or access to act as a parent;
> (f) who, from among those persons entitled to custody or access, has been primarily responsible for the care of the child, including care of the child's daily physical and social needs, arrangements for alternative care for the child where it is required, arrangements for the child's health care and interaction with the child through, among other things, teaching, playing, conversation, reading and discipline;
> (g) the effect a change of residence will have on the child;
> (h) the permanence and stability of the family unit within which it is proposed that the child live;
> (i) any plans proposed for the care and upbringing of the child;

> (j) the relationship, by blood or through adoption, between the child and each person seeking custody or access; and
> (k) the willingness of each person seeking custody to facilitate access between the child and a parent of the child who is seeking custody or access.

[10] The Respondent claims that it is in the best interests of the children to live with him and his new partner. He moved to Yellowknife in November 2013 to be closer to the children. He has had access with them regularly since then and he calls them daily. He says that he and his wife have a permanent and stable home for the children where they can each have their own room. The children would be living with a parent every day rather than as it currently is where the Applicant does not see the children or speak to them on a daily basis.

[11] The Applicant says that it is not in the best interests of the children to change custody; the children are accustomed to living in Hay River and a change will be disruptive and drastically alter their daily lives. The Applicant is a consistent presence in the children's lives whereas the Respondent has only recently begun to exercise access. The Applicant will be able to provide a safe and stable home, is working on improving herself and hopes to be able to have the children back into her care soon.

[12] In considering the best interests of the children, some background is necessary. The parties were in a common law relationship for approximately six years. They had two children, C.A.D.R.B. in June 2006 and C.J.K.S. in July 2009. The parties separated in December 2012 and the children remained in the Applicant's care.

[13] It appears that the parties and the children lived in Inuvik until the Applicant and the children moved to Hay River when the parties separated in December 2012. The Respondent lived in Inuvik until November 2013 when he moved to Yellowknife to be closer to the children.

[14] The Applicant was the primary caregiver to the children until July or August 2013. Since then, the children have lived with their grandmother and see the Applicant regularly, although it does not appear to be daily. The Applicant claimed to be seeing the children on a daily basis since the end of February 2014. However, in a later Affidavit, she claimed to see them every other day as she has to rely on others for transportation.

[15] Prior to December 2013, the Respondent's involvement with the children appears to have been limited. After he moved to Yellowknife from Inuvik, he has had regular contact with the children, exercising access at Christmas and Easter as well as visiting the children twice in Hay River. He also speaks to the children on the telephone almost daily.

[16] It appears that there are love, affection and emotional ties between the children and each parent. The Applicant's relationship with the children has historically been a stronger and closer one. In recent months, this has not been the case. The efforts of the Respondent over the past few months have demonstrated his commitment to his role as a parent to the children.

[17] Since August 2013, the Applicant has had another child and she shares custody with that child's father on a 4 day/3 day weekly basis. She is currently in another relationship and lives with her boyfriend at his mother's house. The house is a five bedroom house and the children can each have their own bedroom.

[18] The situation of the Applicant since August 2013 has not been stable. She states that she suffered from severe post-partum depression following the birth of her third child. She acknowledged that she abused alcohol between September 2013 and February 2014. The Applicant stated that she did not want her children exposed to her drinking so she decided that they should live with her parents until she resolved her issues. During this time, the Applicant was sentenced to an intermittent sentence for a drinking and driving offence and served weekends in jail. In addition, she lived in a homeless shelter for approximately two weeks.

[19] In her Affidavit filed April 25, 2014, the Applicant claimed to have been sober since February 3, 2014. When the Respondent filed an Affidavit in response noting that the Applicant had posted on Facebook that she had been drinking in March 2014, the Applicant then acknowledged that she had consumed alcohol on March 3, 2014. She stated that she had been sober since then and was attending AA meetings diligently. The Respondent filed another Facebook post where the Applicant sent him a message on April 11, 2014 stating that she was going to be sober because she was pregnant.

[20] The ongoing sobriety of the Applicant appears to be questionable. The Respondent says that the Applicant attended an inpatient treatment program in March 2013 and planned to take a treatment program in Alberta but did not attend the program. The Applicant stated that she did not attend the treatment program

because she needed to stay with her newborn child and has instead taken advantage of the programs that Hay River has to offer. There is little evidence as to what those programs are and whether they are suited to addressing the Applicant's apparent alcohol problem.

[21] The Respondent claims that the Applicant told him in December 2013 to take the children as she felt she could not look after them. The Applicant called the Respondent in January 2014 and asked him to take the children from her parents' house and that he could keep the children until March 2014. The Respondent did not go to Hay River and collect the children but had access with the children in March and April 2014.

[22] In the Applicant's April 11, 2014 Facebook message to the Respondent, she claimed that the children were going to be living with her as of April 21, 2014. This did not occur and the explanation provided by the Applicant's counsel is that the Applicant was continuing to work on her problems and expected the children to return to her care soon.

[23] Despite the Applicant's claim that the change in circumstances is a temporary one, as of the date of the hearing, the children continued to reside with the Applicant's mother and there was no realistic indication of when they would return to the Applicant's care. The Applicant stated that she intends to have the children return to her care after receiving more treatment and counselling. However, there is no timeframe provided for when the treatment and counselling will occur or when the Applicant anticipates that the children will again be living with her.

[24] While the Applicant may view this situation as temporary and intends for the children to live with her again, at some point the situation ceases to be temporary and takes on an air of permanence. It is in the children's best interests to be raised in a permanent and stable family home. At this point, I do not believe that the Applicant can provide that for the children and I am not certain when she will be able to do so.

[25] The children appear to be doing well in their grandmother's care but their grandmother does not have legal custody of them and has not sought leave to make a claim for custody. While the children could continue in the *de facto* custody of their grandmother, the children need to have some certainty in this situation.

[26] The Respondent lives in Yellowknife with his new partner and infant child and is prepared to be a daily presence in the children's lives. He spoke of registering them for school, establishing a daily routine and that the children could each have a bedroom in his home. While the Respondent's ability to provide a permanent and stable family unit may be recent, it also appears to be genuine.

[27] The Applicant argues that a move to Yellowknife will be disruptive and deprive the children of regular contact with the Applicant and their extended family in Hay River. The Respondent counters that children move all the time and that the Applicant can have reasonable and generous access to the children.

[28] There is no doubt that a move to Yellowknife will be somewhat disruptive to the children. While they have visited Yellowknife, they have not lived there before. The children have family and friends in Hay River and the oldest child has attended school in Hay River.

[29] On the other hand, the children have only lived in Hay River since December 2012 and have already faced the disruption of a move from Inuvik to Hay River. As well, they will be able to have access to the Applicant and extended family in Hay River more readily than if the Respondent still lived in Inuvik.

[30] Changing schools is also a concern as it can be stressful for children. However, the Respondent claims that the oldest child has been having difficulty in school and has been in a fight. It may be that a change in school will not be as disruptive as might otherwise be expected. The youngest child recently turned 5 and will presumably be starting kindergarten this fall so that a change in schools is not a factor. As well, having the children move during the summer allows the Respondent to register the children in school and have them start the school year along with their classmates.

[31] Varying a custody order is not something the Court undertakes lightly and after having given this careful consideration, I am of the view that the circumstances are such that it is in the best interests of the children that they be in the care of the Respondent at this time. The Applicant's involvement with the children in the past years and potential to resume her parental role should also not be ignored. Rather than granting the Respondent sole custody, the parties will have joint custody with the Respondent having day to day care and control of the children. Given the history and what has transpired, this will be an interim order.

[32] For the reasons stated, the Consent Order of July 25, 2013 is varied and:

1. The Applicant Tasha Sound and Respondent Albert Bernhardt are granted interim joint custody of the children, C.A.D.R.B and C.J.K.S, with the Respondent Albert Bernhardt having day to day care and control of the children;

2. The Applicant Tasha Sound will have reasonable and generous access to the children as can be agreed upon by the parties;

3. The Respondent's obligation to pay child support to the Applicant of $320.00 per month on the 1st of every month is rescinded effective August 1, 2013.

[33] I direct the Clerk of the Court to prepare a Formal Order to this effect.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
25th day of July 2014

Counsel for Applicant: Hayley Smith

Respondent is self-represented.

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE S.H. SMALLWOOD

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