

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KJ

Petitioner/Applicant

-and-

DJ

Respondent

Corrected judgment: A corrigendum was issued on September 1, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

MEMORANDUM OF JUDGMENT

[1] This is a variation application brought under s. 17 of the *Divorce Act*, RSC 1985, c 3 (2nd Supp) to permit the children to move to Edmonton with the applicant mother, K. K also asks the Court to find D in contempt of an order directing the transfer of pension funds to her.

PROCEDURAL HISTORY

[2] The parties live in Hay River. Following a trial, this Court issued a Corollary Relief Order (“CRO”) on March 29, 2018 providing for custody, access and child support with respect to the parties’ three children, A, B and C. The parties were granted joint custody, with the children living weekdays with K and weekends with

D. D was ordered to pay child support of \$1,134.00 per month. The CRO also provided that D would have specified time with the children over school breaks and holidays.

[3] Property division was set out in a separate order, also dated March 29, 2018. It provided, among other things, that K was to take over the mortgage payments on the family home. With respect to dividing D's pension, the order states:

8. The amount of \$7,652.88, which represents 50% of the value of [D's] pension, as at the date of separation, shall be transferred to [K] in accordance with the *Pension Benefits Standards Act*. . .

LEGAL FRAMEWORK

[4] The relevant legal framework is set out in *Gordon v Goertz*, [1996] 2 SCR 27, (1996) CanLII 191.

[5] The threshold question is whether there has been a "material change in circumstances". That term is defined as follows:

12 What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 1991 CanLII 839 (BC SC), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

Gordon v Goertz, paras 12-13

[6] The burden of demonstrating that there has been a material change in circumstances falls to the applicant.

[7] If the Court finds that there has been a material change in circumstances, it “must embark upon a fresh inquiry what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them”. There is no presumption in favour of the custodial/primary care parent, although their views are entitled to “great respect”: *Gordon v Goertz*, paras 48 and 49.

[8] Each case turns on its own circumstances; however, there are a number of relevant considerations:

- a. the existing custody arrangement and relationship between the child and the custodial parent;
- b. the existing access arrangement and the relationship between the child and the access parent;
- c. the desirability of maximizing contact between the child and both parents;
- d. the views of the child;
- e. the custodial parent’s reason for moving, only in the exceptional case where it is relevant to that parent’s ability to meet the needs of the child;
- f. disruption to the child of a change in custody;
- g. disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

Gordon v Goertz, para 49

ANALYSIS

Has there been a Material Change in Circumstances?

[9] K submits there have been a number of material changes since the CRO was made in 2018. These can be summarized as follows:

- a. D’s extended absences from Hay River for work/education, resulting in an inability to exercise regular access to the children;
- b. A high degree of conflict between D and K, and a conflict between the eldest child, A, and D;
- c. Foreclosure of the family home, resulting in K moving to subsidized housing;
- d. K’s inability to achieve economic stability in Hay River, due to limited employment opportunities, inconsistent child support payments from D,

- D's failure to pay half his pension proceeds to K and his inconsistency in exercising weekend access;
- e. The absence of appropriate medical and dental services in the Northwest Territories to address K's medical issues and the medical and dental issues of the child, B; and
 - f. A's wish to attend an art-focused school in Edmonton.

[10] For the reasons that follow, I find that these changes are not material changes, whether taken individually or combined.

a. D's extended absences

[11] K argues that D has lived and worked outside of Hay River and, sometimes, the Northwest Territories, for a cumulative period of a year out of the two and half years that have elapsed since the CRO issued. She characterizes this as an instability which interferes with D's ability to exercise access and which leaves her to parent full-time on her own.

[12] This point is now moot, as D had secured a full-time position in Hay River by the time this application was heard. Even if he had not changed jobs, however, the demands and circumstances of his employment positions since the corollary relief order was entered would not constitute a material change in circumstances.

[13] Since the corollary relief order issued, D has had a number of different employment positions and he has pursued the educational component of an apprenticeship. These have taken him away from Hay River, but only on a temporary basis. D acknowledged that the absences and other work demands interfered with his ability to spend time with the children. He also testified that he felt he had to sacrifice time with the children for work so that he could continue to support them financially.

[14] When the CRO was issued and for a time thereafter, D was working for a company in Hay River. The job required him to work out of town frequently, sometimes for extended periods. He was often required to work on weekends and to spend time in Fort Smith. He sometimes took the children with him to Fort Smith on weekends he was required to be there. Ultimately, he left that position and in his testimony he cited the effect his work demands had on his parenting time as the primary reason.

[15] In 2020 D decided to take a job based in High Level, Alberta, which would allow him to continue his apprenticeship by working under a journeyman. He said the job had a regular schedule and he was confident that this would allow him to have time with the children pursuant to the terms of the CRO and he was hopeful that he could obtain extended health and dental benefits for the children. He was required to work three weeks in High Level, with a week off. He was “on call” on one of the weekends during his three week rotation, but he had advance notice of this and the other weekends he had free. He would be able to return to Hay River on the other weekends, as it is only a three hour drive from High Level to Hay River.

[16] Not surprisingly, the travel restrictions and self-isolation requirements related to the pandemic made exercising access difficult. D was not able to spend time in person with the children for a number of months, which he attributes to K’s refusal to allow the children to stay with him because of the risk of contracting Covid-19. D had been planning to self-isolate with the children. He thus visited the children through an electronic platform.

[17] As noted, this point is now moot. Shortly after being served with notice of this application, D left the job in High Level. He now has a full-time position in Hay River as a fuel truck driver. He testified that the job has flexible hours.

[18] In the context of all of the evidence, D’s employment and the effect it had on his parenting time neither was, nor is, a material change in circumstances. Changes in employment are not unforeseen, nor is it unforeseen or unexpected that from time to time, a person may be required to accept employment that may interfere with family time so that they can support themselves and their family members. An employer’s need for staff or the manner in which they deploy staff, may change, which will have an effect on an employee. This is all part of life.

[19] D was, in my view, doing what he felt he had to do in order to make a living and support the children to the best of his ability. He was not motivated purely by a desire to advance his own career at the expense of his time with his family. Moreover, while the previous jobs impeded somewhat his ability to spend time with the children and, concurrently, on K’s ability to rely on him taking children at certain times, D was still able to have parenting time with a fair degree of regularity. It did not alter in a fundamental way either parent’s ability to meet the children’s needs, nor did it lead to a situation in which the terms of CRO lost their fundamental meaning.

b. High conflict between the parties

[20] The Court's own record shows that the parties' relationship while they were married and following separation was characterized by a high degree of conflict. K argues that this continues and she points to a number of examples. These include: D's failure to discuss his plans to go to High Level with her before he accepted the position; D's suggestion that K is exaggerating the extent of her health issues and limitations; D's refusal to care for the children while K required medical treatment; and D's inability to trust K's judgment that the child, A, was sick and did not want to go with him on a particular occasion. K argues that these examples are *indicia* of a level of conflict that is so high as to constitute a material change in circumstances.

[21] K points to two cases in support of her position, namely *Zinck v Fraser*, 2006 NSCA 14 and *Foster v Foster*, 2009 CarswellOnt 2099. They stand for the proposition that ongoing conflict and actions which run directly contrary to the spirit and intent of a custody/parenting order may constitute a material change in circumstances.

[22] Both *Zinck* and *Foster* involved deliberate actions by one parent to undermine the spirit, intent and finality of the parenting/custody orders. In both cases, there had been extensive litigation and a number of applications brought by one parent in an attempt to vary the orders, within a relatively short period of time. There was also a pattern of conduct displayed by one parent towards the other, which created significant conflict or interfered in the other parent's relationship with the child. In each case, the degree of conflict escalated in the period following what was to be the final order settling parenting issues. In *Foster*, the court found that the father micro-managed the mother's parenting and engaged in conduct designed to intimidate her. In *Zinck*, the court found that the mother deliberately obstructed the father's ability to exercise parenting time with the child. In each case the court found that the continued court applications and intimidating/obstructive behaviours could not have been foreseen at the time the original orders were made.

[23] The facts in *Zinck* and *Foster* are readily distinguished from the case here. First, the level of conflict between K and D appears to have diminished when compared to the period before the CRO issued. In his evidence, D stated that he had recently invited K to the home he shares with his new partner. While K characterized this in submissions as disingenuous, coming shortly before the variation proceedings were heard, the overture was nevertheless made. In my view, that is indicative of a decreased level of animosity and a desire to move forward.

[24] Second, the conflict between K and D is not nearly as significant as it was in either *Zinck* or *Foster*. This is so even if I accept as accurate the examples that K cited in her evidence. What she describes can be readily characterized as typical of the misunderstandings, smaller-scale disagreements and residual mistrust that former spouses must grapple with as they transition to a new family structure.

[25] Third, the conflicts between K and D lack the frequency and consistency which characterized those described in the *Zinck* and *Foster* cases. Moreover, unlike the situation in those cases, the disagreements K describes cannot be attributed either entirely or mostly to one party. For example, the situation that arose when D questioned K's representation that the eldest child was sick and did not want to spend time with her father happened once and there is no evidence of any ongoing reluctance on the children's part to spend time with their father.

[26] Finally, given the high degree of conflict that characterized K's and D's relationship before Justice Mahar issued the CRO, it is reasonable to conclude that some level of continued conflict was anticipated. This is borne out in the very detailed directions respecting D's parenting time.

c. Foreclosure on family home and move to subsidized housing

[27] As noted, the order respecting the parties' property division directed that K would assume the mortgage payments on the former family home. There was some discussion about this between counsel and Justice Mahar at the hearing indicating that K's ability to obtain new financing and/or take over the mortgage payments was uncertain. Justice Mahar recognized that the parties were in an unhealthy financial state at the time. Unfortunately, K was unable to make the mortgage payments and consequently, foreclosure proceedings ensued.

[28] The possibility of foreclosure was contemplated when Justice Mahar made the order, as evidenced by his direction that if K was unable to make the payments, she was to advise D "forthwith" and that if this continued for two months, the house was to be listed for sale. Further, even though K and the children were forced to move from the family home, they are not without housing now. They moved to subsidized housing, which K described in her evidence as "a nice place". As such, K is still able to provide a home in Hay River and to have the children in her care on the weekdays, as contemplated by the CRO.

[29] The foreclosure is unfortunate and I have no doubt that it has had a negative effect on K's sense of security. It was also disruptive in so far as it forced K and the children to move to alternative accommodations in Hay River. This is not, however, a material change in circumstances. It was obviously foreseen when the CRO was made. Further, it has not fundamentally altered K's ability to have the children in her care as contemplated by the CRO.

d. K's inability to achieve economic stability in Hay River

[30] K is currently receiving income support. She attributes her inability to achieve economic stability on the following: a lack of suitable employment opportunities in Hay River; D's failure to exercise access and pay child support consistently; and D's failure to pay K half the value of his pension.

[31] With respect, K's inability to achieve financial independence is not a material change in circumstances, nor can it be attributed to D.

[32] First, in his oral reasons for decision on the CRO, Justice Mahar noted that K had quit her job in Hay River, coinciding with her unilateral attempt to relocate the children from Hay River to Edmonton in November of 2016. She remained unemployed at the time of the trial before Justice Mahar.

[33] Since the CRO was granted, K has been required to undergo surgery. According to her evidence, she was not able to return to work until September of 2019 and she feels she cannot resume working in her previous field as a personal care professional because she cannot meet the physical demands. She has had a contract position on a traditional knowledge panel with one of the mines and she said she has applied for office positions "here and there".

[34] K testified that she had taken a part-time job on weekends in a youth program, when the children would be with D. It entailed working four to eight hours each weekend. K said she missed four weekends of work because D could not always take the children as scheduled. Ultimately, the program was shut down and her employment there ended because of the pandemic.

[35] With respect to her skills, K said she has worked in government in the human services sector since she was eighteen, including working with children and youth who have experienced violence and abuse. She also has experience working in schools. K feels she has limited opportunities in Hay River but that she would be

able to secure a position in Edmonton in the construction, oil and gas or public sectors.

[36] I have no doubt that K truly believes she would stand a better chance of getting a job in Edmonton than in Hay River; however, this is her opinion and it is not based on evidence or facts. Her evidence about applying for jobs in Hay River was vague and I am unable to conclude that she has made sustained and genuine efforts to secure employment there. Further, there was no evidence presented with respect to whether K has made any inquiries about or applications for positions in Edmonton or the type of work that might be available to her. I would also note, and take judicial notice of, the fact that Alberta has been experiencing a significant economic downturn, particularly in the energy sector. This pre-dates the pandemic, which doubtless has only worsened the economic situation there. Respectfully, I cannot conclude that K's potential employment opportunities would be any better in Edmonton than in Hay River.

[37] K also cited a lack of child care as an obstacle to finding and sustaining full-time employment in Hay River. On this point I note first, that all three children are now school-aged; second, that K did not provide any evidence about inquiries she has made for child care in Hay River or Edmonton, nor the costs and availability of child care in either place. She stated that in Edmonton she would be near family who would be able to assist, but there was no evidence about the details, such as who in her family would provide care and whether that would be a sustainable arrangement.

[38] I have already dealt with D's reasons for not exercising all of the parenting time he was granted under the CRO in the past. This obviously had some effect on K's ability to work at the part-time job, but I cannot find a tangible connection between the missed access visits and K's inability to find employment and become economically stable.

[39] As part of her evidence, K submitted an Affidavit and a Supplementary Affidavit, and adopted the contents of both during the hearing. In the Affidavit, she stated the following:

21. [D] does not regularly pay child support and is often late. [D] unilaterally changes the child support amount payable to a lower amount than imputed and is inconsistent with his payments.

[40] In her Supplementary Affidavit, she stated:

35. Since 2018, [D] has been difficult about making child support payments and has been in arrears several times. There are several email exchanges where [D] demeans me when I bring up his arrears, calling me “lazy” and that I should figure out on my own about the pension he owes.

[41] The emails reference in paragraph 35 are not included in either the Affidavit or the Supplementary Affidavit.

[42] D addressed child support in his own evidence. In an Affidavit which he adopted during the hearing, he provided a series of printouts from his bank showing transfers to K for child support. Payments are broken up and made two to three times a month, presumably coinciding with D’s paycheques. This is acceptable, and given that the CRO specifies a monthly amount to be paid, but does not specify the day on which the payment is due. There have been months when D has not paid the full amount; however, the difference is not substantial and most of it is paid. There are other months where he has paid more than the required amount, presumably in an attempt to cover any arrears.

[43] D also stated that he had to reduce/delay payments when he was in school, as it took some time for his employment insurance payments to be processed and he was making less money. He provided K with advance notice of this.

[44] D’s failure to pay the full amount at times is in no way condoned by this Court. Recipient parents have to be able to rely on getting the full amount of support order or agreed upon, as the case may be. This is particularly so where the recipient parent is on a tight budget. Where child support is not paid as ordered, it is children who suffer. Nevertheless, in the circumstances here, I am unable to conclude that D has “been difficult” in paying child support, nor that his failure to pay the full amount of support some months has contributed to K’s financial issues in any significant way.

[45] I will deal with D’s alleged failure to pay the pension funds over to K when I address the contempt application. At this point, however, I will say that the evidence does not establish a reasonable connection between K’s inability to achieve economic stability and the fact that it took some time for the pension funds to be transferred to her. The amount to be transferred, while not insignificant, would not be enough to sustain K for more than a few months, particularly if she was not working full time.

e. Absence of appropriate medical and dental services

[46] K testified about difficulties she has faced in having her own health needs addressed in the Northwest Territories, as well as B's. B has hearing problems and significant dental issues. K testified that A has some medical needs as well. She feels that moving to Edmonton would allow her to have faster and better access to medical and dental treatment for the children.

[47] Respectfully, this is not a material change in circumstances. There is no evidence that B's medical issues, or those of the other children, cannot be effectively addressed within the Northwest Territories' healthcare system, nor is there reliable evidence that the services would be better or faster in Edmonton. K provided anecdotal evidence about her own navigation of healthcare in Edmonton and suggested that her health issues would not have been resolved so quickly here. She also provided evidence about delays in procedures scheduled for B, which coincided with the public health emergency. That is not evidence upon which I can rely to establish a material change in circumstances.

[48] Illness and medical conditions are, unfortunately, part of life and it follows that, for the most part, they are foreseeable. Had one of the children developed a condition that could not be accommodated in the Northwest Territories, the situation might be different. Having to wait for specialist clinics to go to Hay River or having to attend medical appointments in Edmonton or Yellowknife may not be ideal, but there is nothing to indicate it is substantially less effective or less responsive to medical needs than what one might find in another jurisdiction.

f. A's desire to attend an art-focused school in Edmonton

[49] K provided evidence about an art-focused public school in Edmonton and the eldest child's wish to attend it. There was evidence that A likes to draw and that she has participated in a hand-bell choir in the past.

[50] This is not a material change in circumstances. There is no evidence that A, who is currently eleven years old, has displayed artistic talents so significant or profound as to require her to move away and attend a specialized school to hone them.

Would moving to Edmonton be in the children's best interests?

[51] Given the foregoing, it is not necessary to move to the second step on the analytical framework set out in *Gordon v Goertz*. Had I found that any of the changes K put forth were material or that they combined to create a materials change in circumstances, however, I would not have granted K's application to vary the CRO for a number of reasons.

[52] Moving the children to Edmonton would have a profound effect on D's ability to see them and to maintain his relationship with each of them. I accept D's evidence that it takes some nine hours to drive to Edmonton from Hay River. Given what is known at present about the financial means of the parties, it is reasonable to conclude that flying the children to Hay River would not be a viable financial option. The fact is that they would see him less.

[53] We are in the midst of a pandemic and there is no way to predict when the travel restrictions and self-isolation requirements will be lifted. If they children went to Hay River from Edmonton, they would be required to self-isolate. If D traveled from Hay River to Edmonton, he would be required to self-isolate upon his return. This would be impractical and would, doubtless, limit the amount of time D could spend with the children.

[54] The children have lived in Hay River all of their lives. They go to school there, they have friends there, and they have extended family in Hay River with whom they have a close relationship. Requiring them to move would mean having to establish new friendships and new relationships with teachers, peers and other care providers.

[55] Finally, K's plans for after she moves to Edmonton are vague. She does not have a job there, nor did her evidence suggest she had applied for anything. Her plans for housing were also unclear. Her only evidence was that family friends could likely provide housing for her and the children.

Contempt application for failure to pay pension proceeds

[56] The evidence does not establish that D was in contempt of the order directing a transfer of pension proceeds to K.

[57] Three elements are required to establish civil contempt: there must be an order; there must be knowledge of the order; and there must be a breach of the order.

These must be established beyond a reasonable doubt. In this case, the first two elements are established, but the third is not.

[58] As noted by Justice Charbonneau (as she was then) in *McLeod v Bruno's Pizza Ltd.*, 2007 NWTSC 47, at para 9:

[. . .] It is not necessary that a deliberate intention to disobey the court order be established. The breach of the order must be more than accidental or casual, but the intention that must be established is simply the intention to do or not do the act that constitutes the breach of the order.

[59] The order dealing with property division did not direct D to pay this. It directed that half the value of the pension be transferred to K pursuant to the *Pension Benefits Standards Act*, RSC 1985 c 32. Of course, D had an obligation to do what was required of him to facilitate the transaction, but there is no evidence that he refused or neglected to do so. When D was asked about why this was not transferred to K, he stated that there was an issue with the account numbers between institutions, of which he was unaware. In the circumstances, I am not convinced on any standard that D intended to act, or that he intentionally failed to act, in any way that would frustrate the transaction. In any event, he testified at the hearing that he had taken the steps required on his part to facilitate the transfer and to his knowledge, it had been effected.

CONCLUSION

[60] For the foregoing reasons, K's applications to vary the CRO and to have the Court find D in contempt of the property division order are dismissed.

[61] Being the successful party, D is entitled to costs. If counsel wish to make further submissions on the scale of costs, they may seek a date from the Clerk to do so within ten days of these reasons being filed. Otherwise, D may submit a Bill of Costs on a party-and-party basis.

"K.M. Shaner"

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
21st day of October 2020

Counsel for the PetitionerApplicant:

Sukhmanpreet Dhindsa

Counsel for the Respondent:

Gabriel Byatt

Corrigendum of the Memorandum of Judgment
of
The Honourable Justice K.M. Shaner

1. An error occurred in Paragraph [21]

Paragraph [21] reads:

[21] K points to two cases in support of her position, namely *Zinck v Fraser*, **2005** NSCA 14 (...)

Paragraph [21] has been amended to read:

[21] K points to two cases in support of her position, namely *Zinck v Fraser*, **2006** NSCA 14 (...)

2. The citation has been amended to read:

J(K) v J(D), 2020 NWTSC 44.cor 1

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Corrected judgment: A corrigendum was issued on September 1, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

**MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE K. M. SHANER**
