Slade v. Slade, 2002 YKSC 40

Date: 20020711
Docket: S.C. No. 98-D3137
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

BRENDA LYNNE SLADE

Petitioner

AND:

ROY ALAN SLADE

Respondent

CHRISTINA SUTHERLAND — Appearing for Petitioner

JOHN LALUK — Appearing for Respondent

MEMORANDUM OF JUDGMENT

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[1] VEALE J. (Oral): This is a case where Ms. Slade applies for a variation of a consent corollary relief order. She seeks a variation of custody and access for Rhea, who is now ten years old. Ms. Slade has made arrangements to move to Prince George, where she has obtained a better employment situation in her occupation as a horticulturalist. Mr. Slade opposes the application to take Rhea to Prince George.

[2] The background is important. The parents were married on July 7, 1990 and

separated in November 1997. Prior to separation, Ms. Slade stayed at home with Rhea, while Mr. Slade worked out of the home. A corollary relief order was entered into with the consent of the parents on September 7, 1999, which granted joint custody of Rhea to the parents. It states that since November 12, 1997 the parents have maintained a joint and shared custody arrangement in which Rhea would spend 50 per cent of her time with each parent. The corollary relief order did not specify a primary caregiver. The order also included a temporary relocation of Ms. Slade to Alberta for two school years to study for her horticulture diploma, which she obtained in June 2001. Rhea moved to Alberta with her mother, but returned to Whitehorse during the summers, as did her mother for summer work. Rhea also had extended visits with her father and actually returned to Whitehorse in March 2001, while her mother prepared and wrote her exams. The consent corollary relief order was explicit that Rhea should return to the Yukon no later than June 2001, and that custody would then be shared on an equal time basis. This is what occurred and has taken place with Rhea.

[3] The corollary relief order also included spousal support of $350 per month while Ms. Slade was at school and $400 per month to be paid by Mr. Slade to Ms. Slade for support of Rhea, on an indefinite basis. Ms. Slade anticipated that she would obtain full-time employment in Whitehorse in her occupation. This has not come to pass and she has had financial difficulties, although she has managed to earn approximately $2,500 a month in the past year. This is presently based on employment insurance income, which will run out. The employment she has accepted in Prince George pays $58,000 a year plus benefits and is a clear improvement in her financial situation. She has purchased a house in Prince George on the assumption that she would be moving with Rhea.

[4] In her variation application, Ms. Slade seeks the following:

(i) sole custody of Rhea;

(ii) the Court's permission to move with Rhea to Prince George, British Columbia;

(iii) reasonable and generous access to the Respondent;

(iv) a review of the amount of child support payable by the Respondent to the Petitioner; and

(v) if the Petitioner is not permitted to move with Rhea to Prince George, British Columbia, an order that the Respondent pay spousal support to the Petitioner indefinitely;

(vi) if the Petitioner is not permitted to move with Rhea to Prince George, British Columbia, Rhea's primary residence to be with the Petitioner; and

(vii) full financial disclosure from the Respondent pursuant to the federal *Child Support Guidelines*.

[5] Mr. Slade is a partner with a local engineering firm and wishes to maintain the shared parenting arrangement with Rhea remaining with him and Ms. Slade having access, similar to when she temporarily relocated to Alberta.

[6] Counsel for Ms. Slade concedes that the onus is on Ms. Slade to establish a material change in circumstances. This is a reasonable position because this is not a case where there is a custody arrangement without a corollary relief order, as in *Roth v. Carruthers* (2000), 10 R.F.L. (5th) 419 (Ont.Ct.Jus.). Counsel for Ms. Slade also relies on *Roth, supra,* for the proposition that once the onus is met it is appropriate to

determine which parent is the primary caregiver, which in this case she says is Ms. Slade.

[7] Counsel for Mr. Slade submits the onus has not been met and that in any event Ms. Slade is not the primary caregiver.

[8] I will be guided by the summary of principles set out in *Gordon v. Goertz,* [1996] 2 S.C.R. 27, in paragraph 49 of that decision. The material change in circumstances presented is Ms. Slade's deteriorating financial situation. While it may be questionable whether the financial situation affected Rhea, it certainly affected Ms. Slade and that would impact on the child. I therefore find that the onus has been met, as it is a threshold only to ensure that it is not being used as an indirect route of an appeal or a re-trial of the original order.

[9] At this point, I must consider what is in the best interests of Rhea, not the interests or rights of the parents. Neither parent has any legal presumption in their favour, particularly in this case where there is a joint custody order and a sharing of custody on an equal basis. The corollary relief order of September 7, 1999, contained these two paragraphs:

> B. The parties separated on or about November 12, 1997 and since that date the parties have maintained a joint and shared custody arrangement in which Rhea would spend 50% of her time with each party.
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> C. It is the intention of the parties that the joint and shared custody arrangement outlined in paragraph B continue except for the temporary relocation as

outlined in the term of the within Order.

[10] Counsel for Ms. Slade suggests that a determination must be made as to which parent is the primary caregiver. The corollary relief order is silent in that respect and states that there has been a joint and shared custody since November 1997. I do not find it helpful to go behind that order and review the evidence before the date of separation. What is clear to me is that there is a true shared custody arrangement where it would be difficult to say one parent or the other is the primary caregiver. Rhea has a good relationship with both her parents and the present arrangement achieves the desired goal of maximizing contact between Rhea and both her parents. It is my view that the move of Ms. Slade is not relevant to meeting the needs of Rhea, who will clearly be better of with both parents remaining in Whitehorse where she has friends, her school and is involved in a developmental gymnastics program for the past two years. The move to Prince George would be a disruption of her life at this time.

[11] To conclude, I am denying the variation application as it applies to custody and access. The corollary relief order of September 7, 1999 will remain in place, subject to a further hearing with respect to paragraphs 5 and 7 of the application regarding spousal support should Ms. Slade remain in Whitehorse. There will be no award of costs. Either party may apply for further directions in this matter.

[12] To both parents, I think you have done an excellent job in terms of settling how to care for your child in the best way. The decision I have made is going to have very serious financial consequences for both of you and there will undoubtedly be a further application regarding spousal support. I will be seized of that application. Because of the financial consequences of this decision, which I must say was most difficult for

me to make, are quite severe for Ms. Slade, they will have to be addressed. Both parents should know, and I am sure you do know through your counsel, that you can continue to have discussions. I have made a ruling, but the parents should continue discussions because it may be that there is some daylight in which this matter can be resolved to the satisfaction, or not necessarily to the satisfaction but resolved to some extent so that the financial consequences of the decision may not have to be addressed. But I will leave that to you and your counsel to work out.

[13] Unfortunately, I am leaving town this afternoon. I am not back until next Thursday, but I can be reached by telephone at any time and certainly next Thursday onwards I will be available for any discussions you wish to have.

[14] Is there anything arising, counsel, that I have not dealt with? Thank you very much for your submissions.

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VEALE J.