Citation: *Clarke v. Clarke,* 2002 YKSC 53

Date: 20021018
Docket: S.C. No. 00-D3300
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

GEORGE WILLIAM CLARKE

PETITIONER

AND:

YVONNE DEJON CLARKE

RESPONDENT

REASONS FOR JUDGMENT OF
MR. JUSTICE VEALE

INTRODUCTION

[1] On February 27, 2002, I reversed a previous custody order in favour of the father and granted custody to the mother. The father applies to set aside my February 27, 2002 order and have custody returned to him based in part on the fact that he did not have notice of the variation application brought by the mother in February 2002.

[2] The children involved are Rachel, who is fourteen years old, Sabrina, who is eight years old, and Sean who is four. During the course of the hearing, the father was satisfied that Rachel's wishes should be respected and he consented to joint custody of Rachel with her primary residence with the mother. The mother still seeks custody of Rachel as opposed to joint custody.

[3] The parents were married on October 25, 1993 at Dumaguete City, in the Philippines. The father, a Canadian, is now 72 years old and the mother, a Filipino, is 32 years old.

[4] The parents and children resided in the Philippines until 1995 when they moved to Whitehorse, where the father originally resided and has business interests.

[5] The parents separated in September 2000 and they agreed on the terms of a separation agreement dated November 19, 2000 (the separation agreement), which were incorporated into a consent corollary relief order. The other relevant applications and orders made in this case are as follows:

1. A consent corollary relief order dated December 14, 2000. This order gave custody of the children to the father with reasonable access to the mother. The father was ordered to pay $1,200.00 per month to the mother for a period of four years so she could return to college to complete her education. The spousal support was conditional upon her full-time attendance at college and that she not commence cohabitation with a man in a common-law relationship or remarry. The father received the matrimonial home and his business assets; the wife received a home in the Philippines.

2. A variation order dated December 18, 2001. The spousal support and educational terms of the agreement fell apart within a few months. The husband unilaterally terminated the spousal support and the wife was unable to continue her education. The father and mother brought variation

applications. I confirmed the December 14, 2000 order with some variation arising from the terms of the separation agreement. I ordered joint custody of the children with primary residence to the father so long as the mother was a registered student. The spousal support order with conditions was confirmed at $1,200.00 from October 1, 2000 for four years. (See *Clarke v. Clarke*, 2001 YKSC 539.)

3. The father filed an application to vary on December 6, 2001, which was stayed by an order dated January 9, 2002 until spousal support arrears were paid to the mother. This application was essentially the same as the father's previous application to vary and has never proceeded.

4. The mother then brought an application to vary on February 13, 2002, on what amounted to a without notice basis. She essentially alleged abandonment of the children by the father. I made a without notice order dated February 13, 2002 granting interim custody of the children to the mother. This order was delivered to the father's address for service by leaving it at his residence in Whitehorse and the application to vary was adjourned to February 26, 2002. The matter was heard on February 27, 2002.

The father did not appear and it is not disputed that he was in the Philippines and had no knowledge of the variation application or the interim order until March 8, 2002. He returned to the Yukon on March 13, 2002. The order of February 27, 2002 granted the mother custody of the

children and ordered the father to pay child support of $1,111.00 per month plus the spousal support of $1,200.00 per month without conditions. Arrears were fixed at $14,400.00.

5. On April 16, 2002, the father brought an application to vary the order of February 27, 2002. The father had made substantial payments to reduce the arrears of child and spousal support. I ordered that the application could proceed upon final payment of the arrears of child and spousal support. The payments were made, and on July 25, 2002, I ordered that the matter be set down for trial on September 30, October 1 and 2, 2002.

THE ISSUES

[6] The father's application is filed as an application to vary the order of February 27, 2002. However, it has proceeded as a review of an order without notice to allow the father to be heard.

[7] The issues are:

1. Should the without notice order of February 27, 2002 be rescinded?

2. If so, on what terms?

THE FACTS

[8] I will begin with the events following my order of December 18, 2001, which incorporated the terms of the separation agreement.

[9] The mother had the children with her from November 16 to December 10, 2001. This was by arrangement with the father so that the mother could go to the Philippines for Christmas. She also met her boyfriend and made house repairs. After Christmas she traveled on standby to Germany to meet her boyfriend. These transportation arrangements were made possible courtesy of her sister. The mother kept her apartment in Whitehorse and the father paid $1,200.00 to Yukon College by cheque in January 2002 to permit the mother to return to her education. The cheque should have been paid directly to the mother. There was no evidence indicating the mother was aware of the cheque paid to Yukon College, although it was anticipated that she would return to Whitehorse to continue her education. As events turned out, the wife did not return to Yukon College full-time until September 2002.

[10] Meanwhile, the father was making arrangements to go to Vancouver for business reasons and then on to the Philippines to make arrangements to bring a nanny and a wife back to the Yukon. He did not reveal these plans to the mother, as he was concerned that she would interfere.

[11] The father arranged for Olga Majola to look after the children while he was away. I find Olga Majola, a family friend and former nun, to be a very appropriate caregiver. However, she did not disclose to the father that she might have a meeting to attend in Saskatoon in February to promote her childrens' book. Nevertheless, the father left very explicit written instructions on other friends that could be contacted if Olga was unable to look after the children for any reason. Olga was in the process of making the alternative arrangements when she had a conversation with the mother, who phoned almost daily to speak to the children. Olga told the mother about her plans to go to

Saskatoon and the mother decided to return to Whitehorse as soon as possible to look after the children.

[12] The father did not hear of the plans between Olga Majola and the mother until he had a telephone conversation with Olga on January 30, 2002. She advised the father that she wanted to go to Saskatoon and the mother was returning from Germany via Hong Kong to look after the children. The father was relieved to hear this as he was planning to return to Whitehorse on February 16, 2002. He had no difficulty with the mother looking after the children.

[13] The father, however, had encountered immigration problems with the nanny and his nineteen-year old wife, whom he married on February 4, 2002. He originally planned to bring a nanny as he was embarking on a new pizza business. This plan has not come to pass and he has no present plans to bring a nanny. His new wife is still in the Philippines and he is attempting to get her to Canada.

[14] The mother's February 2002 application can only be explained by the fact that the mother and father do not communicate. The father was content that the mother had returned to care for the children on February 1, 2002. However, he made no attempt to contact her to see how things were going or explain his plans. His contact was via e-mail with his daughter Rachel.

[15] The mother, on the other hand, had the father's phone number in the Philippines and had even dialed it to allow the children to speak with their father. However, she gave no indication to the father that anything was amiss or that she was contemplating court action.

[16] The mother's affidavit in support of her custody application was filed February 13, 2002. She made the following assertions:

1. She stated that she "had difficulty communicating with the children as I was unable to reach them by telephone on a regular basis." This statement was misleading as it referred to the period of time before Olga Majola looked after the children. In fact, while Olga Majola was the caregiver, the mother had almost daily telephone contact with the children.

2. She stated that Olga informed her that she was "upset" with the father because he had not returned to care for the children and she had to leave for Saskatoon on February 1, 2002. The mother added that Olga was "extremely upset as she did not know what to do." This may have been the mother's perception, but I find that Olga was managing quite well and following the instructions of the father. In fact, Olga was in the process of making arrangements for the children. However, she was relieved that the mother was coming to look after the children as Olga's departure had not been contemplated and having the children cared for by a parent was preferable. I accept Olga Majola's evidence that she never told the mother that she was upset with the father not returning so she could go to Saskatoon. Olga Majola did not tell the mother that she did not know what to do.

3. The mother stated in her affidavit that, "If I had not arrived when I did, the children would have been left with nobody to care for them." That

statement is flatly contradicted by Olga Majola, whose evidence I accept. She said that she was making arrangements with the O'Dea and McLeod families to care for the children when she left for Saskatoon. Ms. Majola advised O'Dea and McLeod that their assistance wouldn't be required when she learned the mother was returning from Germany to look after the children.

4. The mother also stated in her application that: "It is my belief that it would be in the children's best interest to reside with me until the Petitioner's life and health stablizes" (*sic).* That is not the position of the mother now as she has given evidence finding fault with the father's care since the date of separation. Much of this evidence related to the time before the order of December 2001 and hence is not relevant to this application. It was not put to the father in cross-examination in any event.

Despite the obvious dislike the mother and father have for each other, they both acknowledge that the other is a capable parent. Ms. O'Dea and Ms. Majola both speak positively of the father's parenting and relationship with the children. Ms. LeBlanc speaks highly of the mother and I have no doubt about her ability to care for the children.

It is fair to say that both the mother and the father have some uncertainties in their future relationships. The mother is engaged to a German man who lives and works in Germany. She acknowledges that he will not move to Whitehorse and she will not move to Germany until her education is

complete, which will be sometime between 2003 and 2005 depending on how far she wishes to pursue her education. She acknowledges that they will eventually live together.

The father, on the other hand, has married a nineteen-year-old Filipino woman, his fifth marriage. She remains in the Philippines because of immigration problems. The father has no plans to live in the Philippines and has discussed his marriage with the children.

THE LAW

[17] Both the original application of the mother filed February 13, 2002 and the application of the father filed April 16, 2002, are in the form of applications to vary corollary relief pursuant to the *Divorce Act*. In normal circumstances, the onus to establish a material change in circumstances is on the applicant.

[18] Counsel for the father submitted that the onus should remain on the mother, as that is the application being reviewed. Counsel for the mother submitted that both parties have an onus, which in effect cancels out the onus issue, and the appropriate test is the best interests of the children. Both counsel agreed that the February application was heard without notice to the father and that I have the power to review my original order of February 27, 2002.

[19] Although it was not a term of my order of February 27, 2002, the usual practice is to allow a person who has not received notice to bring the matter on for review on 48 hours notice without the necessity of establishing a material change in circumstances.

There is also support for the power to reconsider or vary orders in Rule 52 of the *Rules of Court*. Rule 52 applies to applications to be heard in Chambers and includes all originating applications and all interlocutory applications, unless made in the course of a trial. Applications to vary are normally chambers applications in this jurisdiction and it is useful to review the applicable rules:

> **Rule 52**
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> *Failure of party to attend*
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> (4) If a party to an application fails to attend, whether on the return of the application or at the time appointed for the consideration of the matter, the court may proceed if, considering the nature of the case, it thinks it expedient to do so, and may require evidence of service it thinks necessary.
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> *Reconsideration of proceeding*
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> (5) If the court has proceeded under subrule (4), the proceeding shall not be reconsidered unless the court is satisfied that the party failing to attend was not guilty of willful delay or default.
>
> *Orders without notice*
>
> (12.1) If the nature of the application or the circumstances render service of a petition or notice of motion impracticable or unnecessary, or in case of urgency, the court may make an order without notice.
>
> *Service of orders required*
>
> (12.2) If an order is made without notice by reason of urgency, a copy of the order and the documents filed in support must be served by the party obtaining the order on each person who is affected by the order.
>
> *Setting aside orders made without notice*
>
> (12.3) On the application of a person affected by an order made without notice, the court may vary or set aside the order.

[20] It is my view that whether this application is covered by Rule 52 or the general jurisdiction to review orders without notice. The onus should remain on the mother to show a material change in circumstances before proceeding to a consideration of the merits and the best interests of the children. (See *Gordon v. Goertz,* [1996] 2 S.C.R. 27 (QL) (SCC).)

[21] The law is clear that the party bringing an application without notice is obliged to make a proper disclosure of all material facts.

ANALYSIS

[22] In this case, it is the January – February 2002 conduct of the father which must be examined to determine whether there has been a material change. In my view, it is not appropriate to consider all the past conduct back to the consent corollary relief order dated December 14, 2000 on this issue.

[23] Having heard all the evidence, I find that the mother acted somewhat hastily in concluding that the children had been abandoned or that the father was physically or mentally unfit to have the care and control of the children. The evidence of Olga Majola clearly indicates that the father had made appropriate arrangements for the children. This may not have been known by the mother and, given the total lack of communication between the parents, the mother brought her application without having any discussion with the father to verify or confirm her concerns.

[24] The allegation that the father was physically and mentally unfit was exaggerated. While the father is not a young man, he is certainly active and involved with his children,

both before and after the February 27, 2002 order. He does have diabetes but he is dealing with it appropriately by losing weight. He had no apparent difficulty spending all day on the witness stand for examination in chief and cross-examination.

[25] I am reluctant to find that the father's marriage to a nineteen-year old is a material change on its face. While it may be unusual and some would disapprove in principle, it is not a change that has altered the children's needs or his ability to meet those needs in a fundamental way. (See *Gordon v. Goertz, supra,* at para. 12). The evidence before me does not support the mother's claim that the father abandoned the children. He had made all the necessary arrangements for Olga Majola to care for the children. He erred in assuming that the mother would look after them without communicating his plans to her.

[26] In the event that my analysis is incorrect in not finding a material change in circumstances, I will consider the best interests of the children. This does not relate directly to Rachel who is almost fifteen years old. Both parents agree that she should reside with the mother as she has requested that. This does not imply that Rachel had a poor relationship with her father. It recognizes that her views are to be considered.

[27] With respect to Sabrina and Sean, the evidence indicates that they have a very close relationship despite their four-year age difference. They have had their primary residence with the father since separation in September 2000. This was originally agreed upon for as long as the mother is a registered student.

[28] The mother and father acknowledge that the other is a good and caring parent. I have no question about their ability to parent except when their mutual dislike of each

other affects their better judgment. The father, in particular, must not let his feelings toward the mother and her friends interfere with the right of the children to associate with the mother's friends.

[29] The original primary residence and access has been working and ensuring that the children see a great deal of both parents on a regular basis. Both parents have shown flexibility and this should continue in the future. Both parents reside in the same neighbourhood and can easily participate in their children's educational and recreational activities. Primary residence with the father also ensures that the mother has every opportunity to complete her education and become independent.

[30] If all the evidence had been before me in February 2002, I would not have changed the custody of the children, assuming that the father was prepared to financially support the mother in completing her education. It is my view that it is in the best interests of Sabrina and Sean to set aside my order of February 27, 2002 and reinstate my order of October 17, 2001. That is to say that the mother and father shall have joint custody of the children with Rachel having her primary residence with the mother, while Sabrina and Sean shall have their primary residence with the father for as long as Yvonne is a registered student. In other words, paragraphs 1,2,3,4,5,6,7,8,9 and 10 of the order of October 17, 2001 shall be placed in the new order.

[31] There is the matter of child support for Rachel. The only issue is the amount of the father's income to determine the Child Support Guidelines table amount. The father has a somewhat complicated business arrangement. He has commercial property worth approximately $400,000 - $500,000. He holds the title to the property in his personal

name and then he leases the property to his company, Daytrin Enterprises Ltd. Daytrin then leases the property to third parties who pay rent to Daytrin. Daytrin then pays the father $2,500.00 per month as well as repaying loans that the father has made to Daytrin. For the year ended April 30, 2001, Daytrin shows a profit of $8,264.73. Daytrin also pays for vehicle expenses and a vehicle lease. Depreciation is also expensed.

[32] The father has filed several financial statements. In November 2000, his annual earnings were $63,552.00. In December 2001, his annual earnings were $35,359.28. In June 2002 his annual earnings were $39,020.28. The difficulty in determining an annual income figure is that it is difficult to predict the father's expenses on an annual basis for his commercial property. However, for the year ending April 30, 2001, the corporation earned $8,264.73 and pursuant to section 18(1)(a) of the Child Support Guidelines, I add that to his income, resulting in a total income of $47,285.01. The father shall pay child support to the mother for Rachel in the amount of $404.00 each month commencing November 1, 2002. The father shall also pay Rachel's expenses for educational, sports, and extracurricular activities.

[33] There shall be no award of costs. Counsel can arrange to meet with me if there are any outstanding details to be addressed. One of those details may be the access of the father to Rachel if it cannot be worked out.

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Veale J.

Edward J. Horembala, Q.C.	Counsel for the Petitioner
Malcolm Campbell	Counsel for the Respondent