CV 04860

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF THE Domestic Relations Act, R.S.N.W.T. 1988, c. D-8;**

**AND IN THE MATTER OF access to Chantelle Florence Beck.**

**BETWEEN:**

**RAYMOND WADE BECK**

**Applicant**

**- and -**

**KAREN MAXINE ELIZABETH BALSILLIE**

**Respondent**

**REASONS FOR JUDGMENT**

**SUMMARY**:

1 The applicant seeks an order specifying terms of access to his daughter. He also seeks an order of costs against the respondent's solicitors. For the following reasons, I have decided to grant, on terms, the relief sought.

2 The parties lived in a common-law relationship which ended in 1986. They are the

parents of the child, Chantelle Florence Beck, who was born on May 30, 1985. The child has been in the respondent's care since their separation.

3 On June 2, 1987, an order was issued out of the Territorial Court granting the respondent sole custody of Chantelle with the applicant having reasonable access. No terms of access were specified in the order.

4 Both parties have now formed new relationships. The applicant was married in September of 1991; there are no other children in that relationship. The respondent was married in August of 1987; there are 3 other children in that family unit. The two families live close-by in the same community.

5 The applicant's access has been sporadic. He blames the respondent and says that she continuously frustrated his attempts at access out of spite. The respondent, on the other hand, says that the applicant is unstable; that he has a long-standing alcohol abuse problem; and, that he tends to become violent when drinking. She points to the fact that the applicant has been convicted of at least 6 criminal convictions, 5 of which are for crimes of assault, and all of which were related to alcohol abuse. As pointed out by the applicant's counsel, however, there is no suggestion of impropriety in his relationship and interaction with Chantelle.

6 The applicant now seeks specific terms of access providing for overnight visitation.

The respondent is willing to allow access but only on conditions such as supervision and restrictions on the applicant's use of alcohol. She says that it is risky to allow unsupervised and overnight visits. By "supervision", the respondent says that she would be satisfied with a condition that the applicant's wife --- who is considered to be a good influence on the applicant --- be present during the access visits.

7 Unfortunately I have not been provided with any experts' reports or other objective evidence regarding this situation. Therefore my decision is based solely on the untested affidavit evidence filed on behalf of each party.

**ACCESS:**

8 The Domestic Relations Act, R.S.N.W.T. 1988, c.D-8, provides, in sections 27 and 28, a scheme whereby, if the parents of a child are unable to agree on custody and access, the court may "make the order that it considers fit". In doing so, the court shall have regard to (a) the welfare of the child; (b) the conduct of the parents; and (c) the wishes of each parent.

9 Even in the presence of legislative criteria, the predominant test in all matters of custody and access is the "best interests" of the child. The welfare of the child is the paramount consideration to which all others must yield: K.K. v. G.L. and B.J.L. (1985), 44 R.F.L. (2d) 113 (S.C.C.). Only to a relatively minor extent do the other criteria outlined

in the statute affect the outcome and even then they are assessed in the context of the "best interests" test. For example, the conduct of the parents is not considered in the abstract but only as it may affect the welfare of the child: MacDonald v. MacDonald, [1976] 2 S.C.R. 259.

10 I also adopt the premise that the best interests of the child are more aptly served where, if possible, a meaningful relationship is preserved with both parents. This principle has now been legislatively mandated in divorce actions: see s.16(10) of the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.). Where, as here, the parties are unable to cooperate for one reason or another then it becomes necessary for the court to set out with particularity the scope of the access to be exercised.

11 In this case I think the best approach would be a gradual establishment of a permanent visitation schedule. Due to the haphazard access situation to date, a regularization of the visitation would benefit the child. A gradual approach, i.e., starting with daily visits and then moving on to overnight stays, would allow the child to adapt to this new situation and also allow the parents to assess the situation as it progresses.

12 On the question of supervision, the applicant's counsel refers me to the comments of Dickson J. of the Saskatchewan Unified Family Court in Mitchell v. Mitchell (1988), 16 R.F.L. (3d) 462, at page 463:

**If access is to be granted at all, it should be genuine access. Both**

> **parent and child must be given the opportunity to continue or to develop anew their relationship. Supervised access restricts that opportunity. The watchful eye of a third person creates an artificial environment that inhibits the natural and spontaneous behaviour that healthy relationships are built upon. If unsupervised access proves harmful to the child contact with the parents should be terminated as opposed to the imposition of an artificial regime that can only result in frustration and disappointment for both parent and child.**

13 While I agree with these comments in general, I do not think they apply to the particular facts of this case.

14 The respondent suggests that the access be supervised by the applicant's wife. She can hardly be considered a "stranger" to the relationship. Furthermore, the applicant's wife has expressed her fondness for the child and has already engaged in various activities with her.

15 There is sufficient evidence to satisfy me that some safeguards should be taken with respect to the applicant's pattern of alcohol abuse. Requiring the presence of the applicant's wife during the visitation will be one of those safeguards. Besides, I do not envisage the presence of the applicant's wife with the applicant and the child at all times. It is enough, as has been requested by the respondent, that the applicant's wife be at home in the community whenever access is exercised. In other words, access is not to be exercised if the applicant's wife is out of town at the particular time.

16 I do not think the Domestic Relations Act allows me to make an order specifying access without it being done in conjunction with a custody order. The issue of custody appears to underlie any application pursuant to sections 27 and 28 of the Act and therefore one cannot grant ancillary relief on its own. This, at least, is my interpretation of the comments made by Lieberman J.A. in the recent case of Rebus v. McLellan (N.W.T. Court of Appeal No. 0388; December 13, 1993). This point was not discussed by counsel but I infer that there would be no problem with my addressing custody formally since no one challenged the continuance of the custody order, made by the lower court, in favour of the respondent.

17 Therefore, I order as follows:

1. The respondent is to have custody and control of the child, Chantelle Florence Beck.

2. The applicant shall have access to the child as follows:

   a) commencing on Saturday, February 5, 1994, and continuing on each Saturday up to and including Saturday, March 26, 1994, non-overnight access between the hours of 9.00 a.m. and 9.00 p.m.;

b) commencing on Friday, April 8, 1994, overnight access from Friday at 5.00 p.m. until the following Sunday at 5.00 p.m., and continuing on every alternate weekend thereafter;

c) during the month of July, 1994, a continuous period of 2 weeks to be set upon the applicant giving written notice to the respondent by no later than June 1, 1994, and in each year thereafter;

d) in the event that the applicant fails or chooses not to exercise the July access in any given year, the alternating weekend access will continue, however, if the July access is exercised, then the alternating weekend access is suspended for July but will resume on the first weekend in August;

e) alternating birthdays and Christmas holidays starting with the child's birthday in 1994.

3. The parties shall be at liberty to make alternative or additional access arrangements upon their mutual agreement.

4. The exercise of the applicant's access shall be subject to the

following conditions:

18 a) the applicant is not to consume alcohol or any other intoxicating substance during the course of access or 24 hours prior to the start of the access in each instance; and,

b) during the next 12 months, the applicant's wife, Jennifer Eve Allen, shall be living and present at the applicant's home during each access visit.

5. The respondent shall have the right to refuse access on any occasion if she has reasonable grounds to believe the applicant is intoxicated.

19 If further directions are required, counsel may take out an appointment to see me in chambers. Obviously either party may apply to vary these terms if there are problems or a material change of circumstance.

**COSTS:**

20 Ordinarily, in the circumstances of this case, I would be inclined to direct that each party bear their own costs of the proceeding. I say that with recognition of the general principle that costs should follow the event (see Rule 541(2) of the Supreme Court Rules)

but there may be factors within the context of a particular case that warrant a deviation from that principle: Gold v. Gold (1993), 49 R.F.L. (3d) 56 (B.C.C.A.).

21 The applicant, however, seeks costs against the respondent's solicitors (not Ms. Shaner but the firm instructing her).

22 These proceedings were commenced on September 30, 1993. Prior to that there had been communications between the Boyd Denroche firm, acting for the applicant, and the firm of MacDonald and Associates, acting for the respondent. There is evidence suggesting that an articling student at the MacDonald firm, who was dealing with the respondent, undertook to accept service of the originating documents. The documents were forwarded to the MacDonald firm on October 1, 1993. The first appearance in chambers was on October 25, 1993, but the matter was struck from the list due to the non-attendance of anyone on behalf of the respondent.

23 The articling student in question was discharged by his principal on October 13, 1993. The file containing the documents in this action were not discovered until someone from the Boyd Denroche firm made inquiries about the status of this matter in early December. It was then discovered that the originating documents had been received by the student but nothing had been done in reference to them. Mr. MacDonald personally took conduct of the matter from then on but, in the meantime, the applicant's solicitors took steps to personally serve the respondent with the originating documents with a new

return date. Service was effected on December 21, 1993. The applicant's solicitors attended in chambers on December 20, 1993, and on January 10, 1994, when the matter was adjourned on both occasions.

24 The applicant's counsel argues that the costs of these adjournments should be borne directly by the respondent's solicitors. Such an order is made in circumstances where a solicitor has been guilty of an abuse of the court's process or where there has been a serious dereliction of duty either by the solicitor or by the solicitor's clerks: Sonntag v. Sonntag et al (1979), 24 O.R. (2d) 473 (S.C.).

25 In this case, Mr. MacDonald, the principal, is to be commended for his swift response in taking personal control of the file once his student's dereliction of duty came to light. Nevertheless, as principal, he is still accountable for his student's conduct. A lawyer assumes complete professional responsibility for all business entrusted to the lawyer and must maintain direct supervision over all staff or clerks to whom tasks are delegated: see Canadian Bar Association, Code of Professional Conduct (1988), chapter 17 (adopted by the Law Society of the Northwest Territories on December 9, 1989).

26 There is no reason why the respondent herself should bear any liability for costs resulting from delays caused by the firm's default. She is innocent of these complications.

27 I have concluded that this is one of those rare cases where the solicitors must assume liability for some of the costs incurred. Those costs would be those resulting from the three adjournments noted previously, as well as the out-of-pocket costs incurred to effect personal service of the documents on the respondent.

28 The costs of the adjournments are to be taxed on a party-and-party basis under column 2 of the tariff of costs. The total bill of costs is to be paid by the firm of MacDonald and Associates failing which the applicant may take out judgment against the firm. Needless to say, no portion of these costs are recoverable by the solicitors from their client.

29 Other than those costs I have specified, each party shall bear their own costs.

John Z. Vertes
J.S.C.

Counsel for the Applicant: James D. Brydon

Counsel for the Respondent: Karan M. Shaner

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