CV 05413

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KEVIN O'BRIEN

Applicant

- and -

MICHELLE O'BRIEN

Respondent

REASONS FOR JUDGMENT

INTRODUCTION:

1 The parties are married but living separate and apart for the past five months. They are the parents of Cynthia Kelsey, who is almost 5 years old. Since the separation Kelsey has resided with her mother. She sees her father frequently.

2 The father commenced these proceedings seeking an order of joint custody with equal access for each parent. The mother countered with an application seeking sole custody of Kelsey, with specified access for the father, and child support. The parties have filed affidavits and now come to court seeking an interim order.

3 The parties reside in Arviat, a community of approximately 1,400 people. The father is in a management position with a public agency. The mother is a teacher. They are obviously intelligent and capable people. They each earn a significant income. They each have suitable accommodations. The child is attending school and day-care while the parents work.

4 The parties have gone through some difficult exchanges as between each other since the separation. This may be expected. It appears from the affidavit material that both parents wish to minimize stress for Kelsey but they are sometimes inconsiderate or insensitive to each other in working out arrangements regarding Kelsey. Everything submitted on this interim application, however, shows that, while the parents may not have yet developed the perspective necessary so as to deal with other on a mature unemotional basis, each of them is a loving and fit parent for Kelsey.

CUSTODY AND ACCESS:

5 The dominant principle in all questions of child custody is the best interests of the child. On an interim application, however, the focus is narrower than at trial. An interim order is merely a temporary solution. Usually, as in this case, the decision has to be based on affidavit evidence containing broad generalizations and subjective

opinions. A trial judge may come to a different opinion once detailed evidence is presented and tested. For that reason, the best interests test on an interim application is usually condensed to a consideration of the child's best interests pending the trial.

6 The father's application for joint custody is premised on the belief that a child's contact with both parents should be maximized. I do not disagree save to add the caveat, as used for example in s. 16(10) of the *Divorce Act (Canada)*, so much contact as is consistent with the best interests of the child.

7 The father's counsel argues that since this is only an interim application there can be greater flexibility in arranging custody. Any stress or hostility is between the parents and they should be given the opportunity to overcome them so as to focus their attentions on the child. It is submitted that this court should at least sanction an attempt at joint custody in the interest of trying to preserve the role of both parents in the child's life.

8 The mother's counsel argues that at this point in time the court's concern should be over disrupting the child's life as little as possible. The child is now settled into a routine in the mother's new home and, she says, it would be potentially

detrimental for Kelsey's well being to be shuffled back and forth. It is submitted that there is no evidence that the parties can be co-operative to the extent necessary to support a joint custody award and therefore this court should hesitate to impose a regime that may be unworkable.

9 The current approach of the courts to joint custody was, in my opinion, well summarized by Bielby J. in Colwell v. Colwell (1992), 38 R.F.L.(3d) 345 (Alta. Q.B.), at page 348:

> Once, courts were hesitant to award joint custody except where both parents have agreed to it. That hesitancy, no doubt, arose from a concern that joint custody, meaning joint decision-making, was only effective if both parties were willing to participate in the process.
>
> That position has been modified. Courts now are prepared to impose joint custody unilaterally where one parent protests but where the evidence shows the parties have, in the past, been able to put aside their personal differences to make co-operative decisions about their children. Almost every case where joint custody has been ordered arises from a situation where the parties once agreed to joint custody and parented on that basis for some time before one of them applied to set aside or vary this arrangement.
>
> Therefore, where there is no history of effective joint decision-making, post-separation, the court must examine the evidence to decide if it reveals a couple with the maturity, self-control, ability, will, and communication skills to make proper joint decisions about their children.

> If it does not, it would not be in the best interests of the children to order joint custody.

10 In my opinion, the more prudent course at this time is to grant sole custody to the mother, since she has been the primary care-giver since at least the separation, and then see if the parents can work together. The evidence, while revealing that both parents are mature professionals, does not reveal a history as yet of effective co-operation in decision-making. Until that has been exhibited at least to some degree the court should hesitate before awarding joint custody. At her young age, I think Kelsey can benefit more from the security of being a resident of one home rather than feeling like a visitor in two homes by being shunted back and forth.

11 I do not place much emphasis on the mother's opposition to joint custody. It would be too easy to sabotage a joint custody proposal by self-serving protestations or simple non-cooperation. If, over time, it appears that one parent is deliberately not co-operating then custodial arrangements can be changed. On-going non-cooperation could result in a radically different order being imposed on a permanent basis. The parties should keep in mind that the obligation to evidence good will, maturity, flexibility, and co-operation, rests on both parents.

12 I also agree that there is an important interest in maintaining as much contact between Kelsey and her father as possible. For that reason I have set out specific terms

of access in the summary of my decision at the conclusion of these reasons.

13 The father has a concern over the degree of his involvement in decision-making regarding Kelsey's welfare if he possesses only access rights. A recent judgment from the Supreme Court of Canada suggests that the access parent, while having such powers as necessary to ensure the child's well-being during the visitation period, has no general right to influence major decisions as to the child's upbringing: Young v. Young, [1993] 4 S.C.R. 3. With respect I am of the opinion that such a rule is much too severe to apply in all circumstances.

14 It seems to me that if we are to encourage a healthy on-going relationship between child and access parent, then that parent should feel that he or she can play a major role in making important decisions concerning the child. Such an attitude should also foster co-operation between the parents. The custodial parent should have primary responsibility for decision-making but common sense tells me that the other parent should at least be consulted and kept informed of developments. I trust the parties in this case will act accordingly without the need for specific direction.

15 I emphasize that this is a temporary resolution to the custody-access question. A permanent resolution will depend to a great extent on how the parties conduct themselves henceforth in pursuit of what is best for their child.

CHILD SUPPORT:

16 The mother seeks $1,200.00 per month as interim child support. This claim is supported by detailed financial information as well as a calculation based on the guidelines put forth by the Alberta Court of Appeal in Levesque v. Levesque; Birmingham v. Birmingham, [1994] 8 W.W.R. 589. A copy of that calculation is attached as Appendix "A" to these reasons.

17 I commend counsel's preparation of such a calculation. I think it is helpful in all child support cases, keeping in mind of course the admonition in Levesque that the guidelines set out therein are general ones that are to be applied within the context of the particular matrix of facts of the case before the court.

18 The father's counsel takes issue with some of the items listed in the mother's financial statements. No doubt there will be some refinement of the figures in the course of this litigation. For now I am satisfied that the financial information on which the calculations are based is generally accurate.

19 The father has also submitted detailed financial information. This shows that he has a tight cash flow due primarily to debt maintenance. As noted in Levesque, the general rule is that child support is payable before debts. The father has offered to pay $750.00 per month on the basis of some equality of time the child is with each parent.

It seems to me that offer recognizes the validity of at least the approach evident in the calculations.

20 Since, under the access schedule I have directed, the child will be spending over one-fourth of each month with her father, I think a reasonable interim support order would be on a roughly proportionate basis using the calculations outlined in Appendix "A". That amount I will set at $1,000.00 per month (inclusive of any gross-up factor for tax purposes).

CONCLUSION:

21 For these reasons I order, on an interim basis and until further order of this court, as follows:

1. The mother, Michelle O'Brien, is to have sole custody of Kelsey.

2. The father, Kevin O'Brien, is to have access as follows:

   (a) alternate week-ends from 5:00 p.m. on Fridays to 5:00 p.m. on Sundays, commencing the first week-end after the issuance of these reasons;

   (b) overnight access in each week from 5:00 p.m. Tuesdays to 5:00 p.m. Wednesdays, commencing in the first full week after the issuance of these reasons;

   (c) daytime access on the Sundays in between the week-end access periods from 1.00 p.m. until 5:00 p.m.; and,

   (d) unlimited telephone contact at all reasonable

hours.

3. If the father is unable to exercise access, he will give 24 hours notice to the mother.

4. The parties are at liberty to make such further or alternative access arrangements as they may agree upon from time to time.

5. Except by agreement of the parties, there will be no adjustment to the access schedule in the event of the father being required to be out of town at any time or unable to exercise access on any particular occasion. There will also be no adjustment if the week-end access falls on a long week-end.

6. The father is to pay to the mother as child support the sum of $1,000.00 per month commencing on the 1st day of December, 1994.

7. The parties are prohibited from removing the child from Arviat without each other's prior agreement or the order of this court (except of course in case of emergency).

8. Notwithstanding paragraph 7 hereof, the mother will be at liberty to take the child to Nova Scotia from December 20, 1994, to January 4, 1995, provided that the father will have access to the child from 10:00 a.m. on December 26, 1994, to 5:00 p.m. on December 30, 1994.

9. The parties will bear their own costs of this application.

22 Needless to say it is in the interests of everyone to move these proceedings forward to a permanent arrangement as expeditiously as possible. I thank both counsel for their submissions.

John Z. Vertes
J.S.C.

Counsel for the Applicant (Father): Adrian C. Wright
Counsel for the Respondent (Mother): Sarah A. E. Kay