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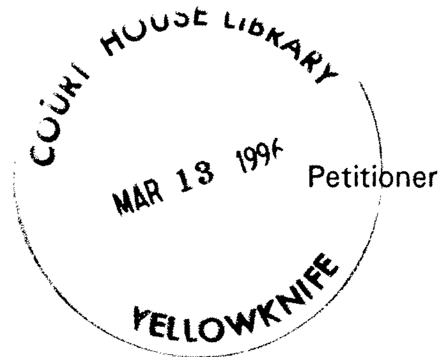
6101-02516

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LISA ANNE TAYLOR



Petitioner

- and -

SCOTT BYRON TAYLOR

Respondent

Applications respecting interim child custody and access.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on December 5, 1995

Reasons filed: December 11, 1995

Counsel for the Petitioner: Graham M. Watt

Counsel for the Respondent: Elaine Keenan Bengts

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REASONS FOR JUDGMENT

1 The parties were married in 1989. They are the parents of two girls ages 8 and 5. They separated in 1994 and divorce proceedings have been commenced. Before me now are applications brought by both parents respecting the following issues:

(a) interim custody of the children;

(b) the desire of the current de facto custodial parent to relocate with the children out of the jurisdiction; and,

(c) specific terms of access to the children over the coming Christmas season.

Facts:

2 The family unit, prior to the separation of the parties, lived in Yellowknife. After the separation the mother relocated to Cambridge Bay. Her parents are long-term residents of that community who own several successful business ventures. I think it is fair to say that both parties recognized the advantage to the children of having the involvement of their maternal grandparents in their lives.

3 The mother worked in one of the family businesses. The father continues to live and work in Yellowknife. By the terms of a previous order, the father is paying interim child support. There has, however, been no previous hearing with respect to interim custody. The father has had only sporadic access, the last time being several months ago.

4 The mother has now made plans to move to British Columbia with the children. Her family has sold the business in which she was working in Cambridge Bay so she has decided to continue further education. In addition, she has entered into a new relationship and her "spouse" has employment in British Columbia. There will be some other members of the mother's family in the area. As well, there is some suggestion that one of the children may have some special learning needs that cannot be adequately addressed in Cambridge Bay.

5 The mother plans to take the children with her on a two-week vacation to Hawaii from December 18 to January 2, 1996. Upon their return they would relocate immediately to British Columbia. These plans were made by the mother without consulting the father.

6 The mother has now brought an application for interim custody. The father has also applied but for an order of interim joint custody. He also seeks an order restraining the mother from removing the children from the Northwest Territories pending a final resolution of the custody issue and an order directing specified access over the Christmas season.

Interim Custody:

There is no serious argument being advanced on behalf of the father that the children should not be in the day-to-day care of the mother. They have been in her care since the separation. The mother's counsel therefore points to the well-recognized principle that where there is no good reason to disturb an existing situation, then that situation should prevail until trial: Prost v Prost (1990), 30 R.F.L. (3d) 80 (B.C.C.A.).

In terms of joint custody, I will simply reiterate what I said in O'Brien v. O'Brien, [1995] N.W.T.R. 73. Joint custody is not easily ordered unless there is evidence of a history of responsible joint decision-making on the part of the parents. There is no such evidence here as yet. It may be that over time such co-operative decision-making as would justify a joint custody order will be shown by the parents. But in the absence of any history of joint decision-making, I am satisfied that the best interests of the children warrant an interim custody order in favour of the mother. I am reinforced in this decision by the fact that the parties have lived a great distance apart since the separation and will continue to do so.

The father should not feel that he is being further cut off from the children's lives by this interim order. I will repeat some of my exact words from O'Brien (at page 77) which I think are equally appropriate to the situation here:

> 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 cooperation 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.

Relocation of the Children:

10 The father's counsel has submitted that to permit relocation of the children to British Columbia would be to effect a significant change to their lifestyle. It was urged on me that the decision to relocate is strictly a unilateral one made without consultation or regard to the long-term effect on the children.

11 Reference was made to a number of cases where the custodial parent was prohibited from removing the children. In all of those cases, a custodial and access arrangement was in place, either by order or agreement, and the custodial parent sought to effect a change by relocating. But, in my opinion, the cases referred to are distinguishable.

12 In Clegg v Clegg, [1988] N.W.T.R. 76 (S.C.), the parties had gone through a contested interim custody hearing which resulted in an order in favour of the mother with generous access to the father. The mother wanted to relocate. The trial, however, was only two or three months away at the time so relocation was restrained at least until trial. Here, there has been no previous custodial disposition and the trial date is nowhere in sight.

13 In Smok v Smok (1994), 8 R.F.L. (4th) 59, and Hayward v Hayward (1994), 8 R.F.L. (4th) 66, both decisions of Veit J. of the Alberta Court of Queen's Bench, one parent wanted to relocate even though there was a joint custody arrangement in place by virtue of an agreement reached by the parties. Prohibiting relocation merely confirmed

the pre-existing agreement pending a full trial on the merits. Here, there is no agreement or joint custody arrangement between the parties.

14 Several recent appellate court decisions have considered this question of relocation of children by the custodial parent. Generally speaking, these decisions have adopted a principle of deference to the decisions of the parent who has custody whether by order or by agreement. These decisions, however, have dealt with situations where there has been a determination as to permanent custody: Levesque v Lapointe (1993), 44 R.F.L. (3d) 316 (B.C.C.A.); MacGyver v Richards (1995), 22 O.R. (3d) 481 (C.A.); Lapointe v Lapointe, [1995] M.J. No. 403 (Man. C.A.).

15 There is guidance from these cases to situations of interim custody where the issue of relocation arises. First, the relocation should objectively be in the best interests of the children. Second, the relocation should not be a deliberate attempt to subvert the non-custodial parent's exercise of access. In my opinion, both factors are satisfied in this case.

16 The circumstances surrounding the relocation are ones meant to improve the family's circumstances. The business ties to Cambridge Bay are being disengaged by the mother's family so relocation is almost inevitable. It seems apparent to me that there is no reason for the mother to be in Cambridge Bay should her family cease to have ties to that community. The children are still at a young enough age that any pains of adjustment to a new lifestyle would be minimized. I should also point out that this is not

a case of some racial or cultural connection to Cambridge Bay. There is nothing to suggest that the children would have an exceptionally difficult experience in relocating.

17 The question of the father's ability to exercise access seems to me to be evenly balanced. There is nothing to suggest that, so long as the father resides in Yellowknife, he would have more difficulty in exercising his access whether the children are in Cambridge Bay or British Columbia. Both places are a long distance from Yellowknife. I am satisfied, however, that the mother's motivations in wanting to relocate are bona fide and in no way are they an attempt to undermine the exercise of access.

18 For these reasons I dismiss the father's application for a restraining order preventing relocation of the children.

Christmas Access:

19 No concerns have been expressed to suggest that the father should not enjoy reasonable access. The mother has certainly not gone out of her way to facilitate access to date but there is no reason to think that she would not comply with reasonable directions.

20 Access over this coming Christmas season has proven to be problematic. The mother made her plans without consulting the father. The children were with the mother last Christmas. They were last with the father several months ago. Neither parent is particularly concerned about having the children on Christmas Day because of its religious significance. It is simply because, for the mother, it is a time for a family vacation while,

for the father, it is a time when he would have more time away from work to spend with the children. Hawaii is also not of any special significance since the children have been there before.

21 After the hearing of this matter, I gave the parties some further time to see if they could work out some mutually agreeable solution. They could not. Therefore I am left to impose some access arrangement that will undoubtedly inconvenience both parties to some extent. I am convinced, however, that in all fairness the father should be able to see the children during this time frame. It is quite likely that he may not see them for some time afterward having regard to the disruption caused by the relocation of the children.

Conclusions:

22 I hereby order as follows:

1. The mother (petitioner) shall have interim custody of the children of the marriage.

2. The father (respondent) shall have reasonable access to the children on such terms and at such times as the parties may agree upon, failing agreement as may be directed by the court.

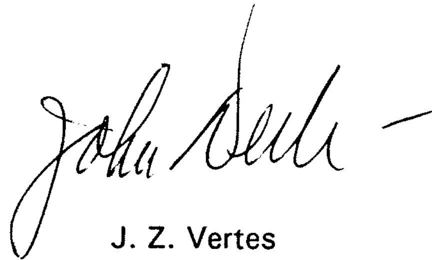
3. The father (respondent) shall have access to the children for the period of December 18 to and including December 25, 1995, upon the following terms:

(a) the access is to be exercised in Yellowknife;

(b) the mother (petitioner) shall be responsible for arranging transportation, with suitable adult escort, to and from Yellowknife;

(c) the additional travel costs caused by the stopover in Yellowknife (over and above the cost of transporting the children from Cambridge Bay to Hawaii) will be paid by the father to the mother.

23 There will be no order as to costs with respect to these applications.



J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 11th day of December, 1995

Counsel for the Petitioner: Graham M. Watt

Counsel for the Respondent: Elaine Keenan Bengts

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