CUSTODY
DIVORCE
SC CIV 78 013

File No: 6101-00492

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

JEAN MARIE SHEWFELT,

Petitioner;

-and-

JOHN GORDON SHEWFELT,

Respondent.

---Tried before THE HONOURABLE MR. JUSTICE TALLIS at Fort Smith in the Northwest Territories, June 19th and 20th, 1978.

APPEARANCES:

B. WILLIS — Counsel for the Petitioner.

S. GREEN — Counsel for the Respondent.

HIS LORDHIP'S ORAL REASONS FOR JUDGMENT

Mr. Willis and Miss Green, I have decided that it is probably in the best interests of all concerned that I deliver judgment orally today. In many instances both of you are familiar with the fact that I do reserve judgment in contested cases, but having regard to the arguments that both of you have made and having heard the evidence that was adduced before me, I think I am in as good a position today to deliver judgment as if I delayed it further and gave written reasons. I can tell you that I did take extensive notes and I have reviewed those notes of evidence quite carefully during the course of the proceedings. I have had an opportunity to weigh and consider the matter to the best of my ability.

Insofar as the parties to this action are concerned, I can tell you that it is always a difficult thing for a trial judge to deal with matters as important as custody of children. In spite of the fact that this has been a contested case, I would hope that both of you as responsible people will not look upon this as a contest where one is the victor and one is the vanquished. Unfortunately, litigation even in family law is often concluded with one side relishing the result to the detriment of the other side.

In this particular case both the petitioner and the respondent will, in my view, be involved in the welfare and happiness of the two children of the marriage for a number

of years to come. I do not look upon sixteen or eighteen years as any arbitrary cut-off time for parental participation in a moral sense. Legally there may come an end to the responsibilities of parents at varying ages having regard to the course or route that a child takes. I think in this particular case the father and mother are going to have to work together for many years, and I have no doubt that both of you are sincere in your respective desires to do what is right by the children. This, of course, is what makes the determination of the case very difficult for a trial judge, and in saying that I am not in any way trying to escape my responsibility. I do, however, want to impress upon you that the court appreciates the efforts that you have made to as nearly as possible come to agreement on some of the issues, and I think that both of your counsel should be commended for assisting you in that connection. It is unfortunate that matters of this kind must be litigated but I make no criticism of either of you for putting your respective views before the court. On the contrary, the court is charged with that responsibility where you have not been able to reach agreement. By the same token, I do not want to restrict your manoeuvrability by providing rigid orders where I cannot take into account your own special circumstances.

Both counsel have indicated to me that at this point I need make no specific reference either to maintenance or the right of access. If these two problems cannot be

amicably settled after I have delivered my judgment on the divorce and custody, then, of course, it follows that the matters may be settled by me, and, in fact, will be settled by me upon the application of counsel.

In this particular case I turn my attention, as I must, to the question of the petition for divorce under the provisions of the Divorce Act. In the Petition for Divorce brought under Section 3(d), the petitioner Jean Marie Shewfelt sues her husband John Gordon Shewfelt for divorce. In this particular case there is also a counterpetition for divorce by John Gordon Shewfelt against his wife claiming relief under Sections 3(d) and 3(a) of the Divorce Act. I should also mention that the petitioner claimed relief under Sub-section (a) but during the hearing of this case both counsel withdrew or abandoned the allegations of adultery on which the petition and counterpetition were based. In this particular case, the counterpetition based on Section 3(d) was not really pursued and under the circumstances for the record I have to make a disposition of it. The counterpetition for divorce is accordingly dismissed without costs.

With respect to the petition for divorce brought by the petitioner, counsel for the respondent indicated to me during the course of argument that the prayer for relief in the form of dissolution of marriage was not being contested. In making this observation, Miss Green and Mr. Willis made it abundantly clear that they were not trying to usurp my

function and appreciated fully that the case had to be established by a preponderance of evidence.

In this particular case a great deal of evidence was adduced by the petitioner in giving her evidence. This dealt with the history of the married life between the parties and, in my opinion, this is one of those unfortunate situations where the cumulative effect of a course of conduct on the part of the husband was such as to lead to the petitioner leaving him. Even before that her love and affection or him had disappeared. Under the circumstances I am satisfied on the evidence that relief can be granted under Section 3(d) of the Divorce Act. Unfortunately, the marriage in this case cannot be redeemed, and looking at the matter in realistic terms as counsel have, I think that a decree should be granted. I have reached the conclusion that the case has been made out as provided by the Divorce Act. I see no need having regard to the position of counsel to review the evidence in this connection because it would be quite unnecessary. Both parties, I am sure, have found these proceedings to be stressful and I have no desire by a repetition of the evidence to revive the memory of some of the incidents which were discussed here yesterday and today.

In this particular case we have two children of the marriage. The two children are Heather and John Reilly Shewfelt. Heather was born on June 1st, 1963, and John Reilly Shewfelt was born on June 22nd, 1966. In this particular case there is evidence that the two children are fond

of one another but I do not think there is what is commonly called a particularly close attachment between the two. I do not say this in any way critical of the children but I think it is just one of the facts of life at this stage because Heather undoubtedly has her friends and John also has his friends and the disparity in their activities is probably much greater than their ages. In this particular case I think that both parents have in all sincerity tried to consider the interests of the two children in giving instructions to counsel, and I have on previous cases reviewed what I considered to be the leading authorities in this area. Miss Green and Mr. Willis have both appeared on a number of cases, and as Miss Green pointed out, she appeared as counsel on the Kupeuna vs. Kupeuna case where I endeavoured to set forth principles applicable in custody cases in the Northwest Territories. I am not going to repeat the authorities in the form of elaborate quotations, but I do think there are one or two authorites that merit at least a passing observation by me since both Mr. and Mrs. Shewfelt are in court here today. The recent case of Talsky v. Talsky has been referred to, and this is reported at 21 R.F.L. 27. In this particular case the Supreme Court was dealing with a case where the trial judge had made an order with respect to custody, and the Ontario Court of Appeal had varied it and granted custody to the father. The court allowed the appeal and in allowing the appeal and directing that the children be returned to the mother, the court re-emphasized the

proposition that the welfare of the children is the paramount consideration that must be taken by the trial judge. It is not the sole consideration but, as has so often been stated in many cases, it is the paramount consideration that the court must focus on. This, of course, is, in my view, merely a restatement of the law that has been enunciated in many earlier cases including Francis v. Francis, 8 R.F.L. 209, and also the case of Farden v. Farden, 8 R.F.L. 183, and the trial judgment at 3 R.F.L. 315. Miss Green has already referred to the judgment in Leboeuf v. Leboeuf, (1928) 1 W.W.R. at page 423, and, of course, the relevant considerations that must be applied by the court are very well set out in the quotation that was read from the Alberta Court of Appeal judgment at page 423.

Perhaps one of the earliest statement made on this matter insofar as this court is concerned appears in the case of McKee v. McKee, (1951) 1 All E.R. 942, at 948, where the Privy Council stated that the welfare and happiness of the infant is a paramount consideration in questions of custody, and further stated that to this paramount consideration all others must yield.

In taking into account the various considerations that apply I should point out that the court in appropriate cases can give substantial weight to the expressed wishes of the children. However, "the welfare and happiness of the children" as used in the McKee v. McKee case and the other cases does not mean that the court is bound to give

effect to an oral declaration by any child. They must weigh that declaration with the other evidence and decide what is best for the child, not what he thinks or what she thinks is best for him or her. In this particular case I must resolve the issue by centering my thoughts around these principles. I have had the opportunity here to listen to viva voce evidence as well as certain reports that were filed in evidence by agreement between the parties. I have endeavoured to weigh the attitude of each of the parents towards their children, and in this particular case I think it is common ground that both parents have deep love and affection for their children. I have taken into account all of the factors that have been mentioned, and I have given this case my very anxious consideration. I should also add that I had the opportunity of hearing the evidence of the boy John Reilly Shewfelt in the absence of his parents, Both of them of their own volition withdrew from the court room so that he could give his evidence in front of me without having to face either parent. While there is some indication that both parents had discussed the matter with him, and this is perhaps unfortunate, I can well understand the pressures that caused each of them to do this. After examining the boy, as I am required to do, to determine whether or not his evidence might be given under oath, I came to the conclusion that it could not be given under oath, but I also concluded that he was of sufficient maturity

and intelligence to give unsworn evidence. In this particular case there is no doubt that he is attached to Fort Smith and likes it here but after considering the matter, I am of the opinion that at this particular time in his life he is a somewhat quiet, unassuming lad who is not older than his years, if I may use that term. On the contrary, he came across to me as someone who perhaps is a little younger than his years, and at this particular time I have, after carefully weighing the matter, concluded that it would be better at this stage of his career for him to be living with his mother and also his sister. I think that at this particular time he needs the stability of home life in that environment, and that time will tell whether or not this is the best place for him. I am, however, satisfied, that the father will be able to make a very major contribution to the welfare and upbringing of this boy, and I would be very disappointed if there is any change in the attitude of the petitioner as far as her stated wishes that the father is to have very liberal and generous access. The father has mentioned in the witness box, and I think quite properly, that the boy needs both his mother and his father and, in my opinion, he will on many occasions lean not only on his mother but also will need the guiding hand of his father. I think that it is important in this particular case that arrangements be made so that he can spend a substantial amount of time with his father. Without going into a detailed and

protracted discussion of the evidence at this particular point, I do say that if the parties cannot work out these terms then, of course, as I said earlier, you may come back to me and I will do so. I indicated to you earlier that to my way of thinking in this particular case arrangements should be made for the boy to spend a substantial period of time with his father during the summer holidays, and it has occurred to me that the parties if they want to save money, and it always costs more to run two households than one, should perhaps enter into an arrangement whereby this year at least the time is spent with the father during July so there will be only one fare out rather than a return fare. I would also have in mind that the boy would spend part of the Christmas holiday season with his father; part of what I will call the Easter or spring holiday session with his father, and I would like for the parties to make arrangements with respect to some of the long week-ends. It seems to me that a boy who is doing reasonably well in school should be able to take an extra day or two from school to make a long week-end of three days into a five-day week-end, or something like that. Those are only just general guidelines I am raising with counsel at this point, and I am raising them in the presence of your clients so you can see that what I have in mind as access is to mean liberal access in spite of distance, and that if you cannot resolve matters you will be able to anticipate an order of some substance emanating

from this court. It will also be open, if you cannot reach agreement, to speak to arrangements with respect to week-ends. I have already given my views of trying to arrange longer week-ends because of the cost of travel, and it seems to me this is a very material consideration in this particular case. At this particular point the order I make is as follows:

(a) There will be a decree nisi for dissolution of the marriage between the petitioner and the respondent, such to be made absolute at the expiration of three months unless sufficient cause be shown why it should not be made absolute.

(b) It is further ordered and adjudged that until further order of this court the custody of the persons of the infants Heather Shewfelt and John Reilly Shewfelt and each of them be and the same is hereby committed to the petitioner.

(c) It is further ordered and adjudged that with respect to the issue of maintenance or the right of access, these matters can be settled by further application to me if agreement cannot be reached.

Counsel have indicated that they anticipate being able to agree, but quite properly have asked the court to leave it open.

With respect to the question of maintenance for the wife, the only request at the outset was to reserve the

positi... was it not? What I was thinking is that I would put it... a dollar a year if that is satisfactory at this time, b...ause if she gets a job -

MR. WILLIS: Yes, it is.

THE COURT: And

(d) It is further ordered and adjudged that the respondent do pay to the petitioner the sum of one dollar per year by way of maintenance; that the first of such payments be made on the 1st day of January, A.D. 1979.

What do you have to say about the issue of costs, or is that something you want to reserve?

MR. WILLIS: Perhaps that could also be discussed between -

THE COURT: Do you agree with that?

MISS GREEN: Yes.

THE COURT: With respect to the issue of costs counsel have also suggested to me that this should be reserved pending the possibility of an amicable settlement in this area. The matter of costs is hereby reserved with the understanding that this issue, like the issue of access, can be brought back before me on application.

Are there any further issues?

MR. WILLIS: On the question of the decree nisi, is it to wait for the final resolving of these issues, or an initial decree nisi - perhaps there should be a final decree

nisi.

THE COURT: If your clients are anxious to have a decree nisi issued pending your discussions, I do not want to hold them up. They may have reasons that are well known to you that they would like time to start running on the decree nisi right now. Before you issue it, submit it to Miss Green for her approval in form, and incorporate into it the decree nisi, the custody, the reservation of the right to apply with respect to access, and costs, and maintenance, and put the one dollar a year in it, and in that way your three months' period will start to run, so three or four months from now if one of them are in a position where they wish to consider remarriage, they are in the position that they have the appropriate piece of paper for a marriage license.

MISS GREEN: With regard to amending the papers, the petition and the style of cause -

THE COURT: I think that was amended. Mr. Kimmerly raised that when we were here before, but you can make a note of it, Miss MacCaffrey. Would you make a note that it was amended at trial, and your decree nisi then can have the correct spelling when you have followed through with the correct spelling on the documents.

MISS GREEN: Thank you, my lord.

THE COURT: I will close court now, but before I do I will repeat what I said, that I express my appreciation to both counsel for their sincere and able efforts in this case, and

also in continuing in their role in trying to bring these matters to a termination by acting in the best interests of your clients. If you reach the point where you have to apply to me, it is understood you can make it returnable on a chamber date in Yellowknife on affidavit evidence. Frankly, I do not think you will need additional evidence because I will make my decision on what I have here, but if there are some special problems that have emerged you can let me know on the application. All I am saying is that it need not be adjourned to a specific chamber date. I will be posting chamber dates.

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