SC CIV 77 018

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

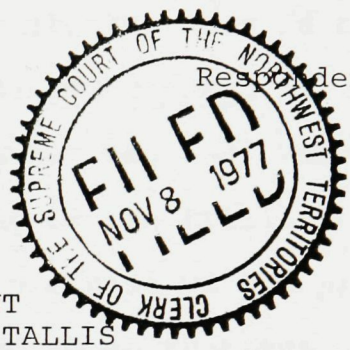
BEVERLY KRENN

Petitione

- and -

LAMBERT JOHN KRENN

Respondent



Counsel: G. Boyd, for the Petitioner
D. Geldreich, for the Respondent

ORAL REASONS FOR JUDGEMENT
OF THE HONORABLE JUSTICE C. F. TALLIS

Gentlemen, in this particular case, I have decided that it is probably in the interests of all concerned that the judgement be delivered orally if possibly. In many instances, I reserve judgement of this kind, but having heard your arguments and heard the evidence which was put in with some care, I think that I am in as good a position as I would be even if I delayed the matter to deliver judgement.

I indicated to you both during the course of argument that this is indeed a difficult case for any trial judge to deal with, but by the same token, I look upon both parties in this case as being responsible people who will not look upon this particular case as having been a contest where the result is to be relished by one side or the other. On the contrary, the result of this particular case will involve the parties in the welfare and happi-

ness of the children in question and undoubtedly having regard to the age of the children, the father and the mother are going to have to work together in a meaningful way for many years if they are sincere in their desire to do what is right by the children. I have no doubt that both of them have that particular sincerity.

Turning, therefore, to the case itself, this is a petition for divorce under Section 3(d) of the Divorce Act in which Beverly Mae Krenn is the petitioner and her husband, Lambert John Krenn, is the respondent. At the opening of the trial, the counter-petition was withdrawn, and during the course of the proceedings, counsel for the respondent indicated to me that the divorce action was not being contested. In making that observation, he of course made it abundantly clear he was in no way trying to usurp my function and appreciated fully that the case had to be established by a preponderance of evidence.

The relevant section which is Section 3(d) of the Divorce Act provides as follows:

> "Subject to Section 5, a petition for divorce may be presented to a court by a husband or wife on the ground that that the respondent, since the celebration of marriage, has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses."

In this particular case, a great deal of evidence was adduced by the petitioner in giving her own evidence as to the history of the entire married life between the husband and the wife.

This is one of those unfortunate situations where the cumulative effect of a course of conduct was such as to lead the petitioner leaving the husband, and even before that, losing her love and affection for him. I think it is fair to say, and the evidence established this, in my mind, that the husband sincerely regrets many of things that happened. He is candid and honest in his observation that he regrets many of the things that happened.

Unfortunately, the marriage cannot be redeemed, and I am satisified on the evidence that the course of conduct, which I am not going to detail, because it is clearly before me in the evidence and not disputed, was such as to constitute cruelty within the meaning of the Divorce Act. I came to the conclusion on this issue that the petitioner was a credible witness, and as I mentioned before, this is not one of the cases where the respondent is in any way maligning her. There is no substantial difference in their evidence, except perhaps for a few details.

It is understandable that certain items might be more vivid in the recollection of the petitioner than in the respondent and vice versa. It depends on the occasion and the circumstances under which the events took place. In any event, the conclusion that I have reached is that the treatment by the respondent of the petitioner was cruelty such as to constitute a a grounds for divorce under Section 3(d) of the Divorce Act.

Even though the respondent did not realize it, I have no doubt that the course of conduct did amount to mental cruelty, and to some extent, may have lead to a deterioration of

the physical as well as mental health of the petitioner. In coming to this conclustion, I have in mind the subjective test that was referred to by counsel and which is fully explained and dealt with in the following cases: Austin v. Austin, 1970, 2 Reports on Family Law, 136; Zalesky v. Zalesky, 67 W.W.R., 104.

In other words, in my opinion, the conduct of the respondent in this case was cruel within the meaning of the Act, and this cruelty was sufficiently grave and weighty that it made her continued cohabitation with him intolerable for her. Furthermore, it did have an effect on her health, and it is one of those unfortunate situations where I honestly believe that the husband did not realize it until it was perhaps too late.

I also have considered the observations of the Court in Gollins v. Gollins, 1964 Appeal Cases, at page 644.

In this particular case, the question of custody of the two children is really the basic issue. The two children are Shannon, who is 8 years of age, and Christopher, who is 4 and-a-half years of age.

It is common ground between the parties and their respective counsel, and certainly the evidence bears it out, that there is a close attachment between the two children, and accordingly, there is no suggestion that the children should in any way be split up with one child going to one parent and one going to the other at this particular time.

This I think demonstrates that both parents have in all sincerity tried to consider the interests of the two children in giving those instructions to counsel. Counsel have already

referred to a written judgement that I delivered in the Kupeuna v. Kupeuna, a case which dealt with custody of a child. In that particular case, I endeavored to set forth principles applicable in custody cases in the Northwest Territories and some of the general propositions perhaps bear repeating in this particular case.

I think that the following, among other authorities, do give us useful guidelines with respect to the general principles applicable. In McKee v. McKee, 1951, 1 All England Reports, page 942, particularly at 948; Lord Simonds delivering the judgement of the privy counsel said, and I quote:

> "In the course of the proceedings, a large number of authorities have been discussed. It is necessary only to refer to them shortly, for their Lordships concur in the review of them which is to be found in the judgement of Kellock J. in the Supreme Court of Canada. It is the law of Ontario ['as it is the law of England']"
>
> And I will add and insert,
>
> "['as it is the law of the Northwest Territories'] that the welfare and happiness of the infant is the paramount consideration in questions of custody."
>
> Then, that paragraph concludes with this observation:
>
> "To this paramount consideration, all others yield."

I also refer to the learned author of Power on Divorce, 2nd Edition at page 611, where the following quotation from the judgement of Mr. Justice Beck in Leboeuf v. Leboeuf and Germain, 1928, 1 W.W.R., 423, judgement of the Alberta Court of Appeal. The following were cited as the relevant considerations:

> "The paramount consideration is the welfare of the children; subsidiary to this, and as a means of arriving at the best answer to that question are the conduct of the respective parents, the wishes of the mother as well as of the father, the ages and sexes of the children, the proposals of each parent for the maintenance and education of the children; their station and aptitudes and prospects in life; the pecuniary circumstances of the father and the mother --not for the purpose of giving the custody to the parent in the better financial position to maintain and educate the children, but for the purpose of fixing the amount to be paid by one or both parents for the maintenance of the children. The religion in which the children are to be brought up is always a matter for consideration, even, I think, in a case like the present where both parties are of the same religion, for the probabilities as to the one or the other of the parents fulfilling their obligations in this respect ought to be taken into account."

Then, an order for the custody of some or all of the children having been given to one parent, the question of access by the other must be dealt with.

In addition to that particular case, I have also considered the judgement of the Supreme Court of Canada in Talsky v. Talsky, 21 Reports on Family Law, page 27. I have also had the advantage of reading the lower court judgements in connection with the Talsky and Talsky matter, and that particular case is of importance because one of the grounds of attack on the judgement of the trial judge was that he had taken the position that there was a rule of law that children of tender years should be given to the custody of their mother. The Supreme Court rejected that argument and pointed out that in fact, the trial judge did not adopt such a rule as a rule of law, but looked upon it as a

principle of common sense, which may or may not be applied, depending upon the circumstances of the case.

It will appear, of course, from the course of argument that consideration was given to anumber of other cases cited by counsel and also reference was made to the case of Francis v. Francis which is reported in 8 Reports on Family Law, page 209. Now, in this particular case, I have carefully considered the principles that are set forth in the authorities that I have mentioned, and it is fair to observe that both counsel were familiar with the basic principles, so that there is really no dispute over them.

The issue here centers around the application of those principles. In this particular case, I have had the full opportunity to observe the two parents, and I have endeavored to weigh the nature and attitude of each of them towards their children. I have already observed that there is no suggestion on the part of either parents that the other is not a fit and proper person at this time.

I think that it is common ground that the respondent has deep affection and love for his children. It is equally common ground that the petitioner has deep affection and love for the children. It is common ground that she has always been a good mother and certainly in recent times, the father has given every indication that he is a good father.

The evidence satisfies me that the children have love and affection for their father and their mother. I mention

this by way of repetition, because this makes the judgement of the Court that much more difficult.

In considering this particular matter, I have taken into account all of the factors that I have mentioned above and one of the matters that I gave very anxious consideration to during the course of the evidence and during the course of the argument was the question of the little girl, Shannon.

I am particularly concerned about her, although I have a great deal of concern for both of the children, and that is why I was particularly concerned with the attitude and appearance of the mother in these particular proceedings.

I am satisfied on the evidence that the petitioner has been and will be a good and loving mother to the children, and in my opinion, it is highly desirable for the children of this tender age, and particularly the girl, to be under the wing of their mother at this particular time in life.

I am satisfied from the evidence that I have heard that she will be able to care for and bring up the children in a proper way, and I am also satisfied that the father will be able to make a very major contribution to the welfare and upbringing of the children.

I naturally am concerned very much with the little boy, and I feel that there will be many occasions when he will lean not only on his mother, but also need the guiding hand of a father.

Without going into detailed and protracted discussions of the evidence or any aspect of it, I think that it is

obvious from what I say that I am satisified on the balance of probabilities in this particular case that the welfare of the children will be best-served by the mother having custody of them at this particular time.

In making that order, I want to emphasize in this particular case that I hope Mrs. Krenn will not view this as a victory in any sense of a battle that can be bandied about with relish in discussions with her husband. That would be, in my view, a tragic mistake, and unless counsel want me to make the order with respect to access, I am of the view that it would be in the interests of all the parties if the access were worked out in a mutually satisfactory manner.

I am further of the view that it would be better for all concerned if the parties also worked out the maintenance.

MR. BOYD: My Lord, if I might interject at this time. We have at this point in time worked out the amount of maintenance which both parties have agreed to.

THE COURT: I see. Well, then I accordingly am making no reference either to maintenance or the rights of access to be granted to the respondent at this time.

MR. GELDREICH: Sir, I will request that you make some reference to perhaps liberal access being granted to be worked out between the parties.

THE COURT: All right. I have been advised that these two problems can be amicably settled between the parties. I trust, therefore, that they will agree on the terms of maintenance and access, but if they fail to do so, these matters can be

settled by application to me.

In the result, therefore, the order of the Court will be as follows: There will be a decree nisi for dissolution of the marriage between the petitioner and the respondent, such to be absolute at the expiration of 3 months, unless sufficient cause be shown why it should not be made absolute.

It is further ordered and adjudged that until further order of this Court, the custody of the persons of the infants, Shannon Krenn and Christopher Krenn and each of them be and is hereby committed to the petitioner.

It is further ordered and adjudged that with respect to the issue of maintenance or the rights of access, these matters can be settled by application to me failing agreement between the parties.

As I have already said, and this is not included in the formal decree, I am satisfied that these two matters can be amicably settled between the parties regardless of the outcome as it has been adjudged by this Court.

What is the situation on costs, Mr. Boyd?

MR. BOYD: My Lord, I think each to bear their own.

THE COURT: That is very fair of you to take that position.

With respect to the issue of costs, each party will pay his or her own costs.

Now, gentlemen, having given the formal terms of the order, I want to say to you here, as Mr. Geldreich has invited me to say if I chose to do so, my views on the issue of access. I can say this for the benefit of both of you, in my opinion, this

is a case that calls for liberal access. I would have come to this conclusion that I have just come to on the evidence without any reference to the Home Study Report, and indeed, in coming to the conclusion that I did, I did not refer to the Home Study Report because I felt I should decide on the evidence in the Court.

In the Home Study Report you will see a recommendation for liberal access, and on the evidence that I have heard here, I think that this calls for liberal access. I also think it calls for conduct on the part of each parent, which will in no way undermine the status of the other parent in the children's eyes.

I have been involved in cases where Courts have later been called upon to restrict or forbid access when things like this happen. I do not think it will happen in this case, but sometimes it is so easy to say something that can be construed by a youngster as undermining Dad or Mother; and I make in effect, I suppose an appeal to both of the parents in this case to refrain from doing anything like that.

If it is of any assistance to you, gentlemen, in your discussions, you are probably familiar with some decrees I have granted in dealing with access, and where the parties have shown themselves worthy of liberal access. As I have said , this is a proper case for it, and if I had ruled the other way, I would have felt the same way. I think you should look at it first of all on the issue of summer holidays.

I think that it would only be proper to work out an arrangement whereby the youngsters have a month or one-half of

of the summer holidays, a minimum of that, with their father. I think that some arrangements should be worked whereby the Christmas Holiday period should be probably split between the parents, because both of them are working people and in order to maintain this family, they are going to, I am sure, keep on working.

In some cases what I do is direct that the first half of the Christmas holiday be with one parent, which means they have Christmas day and so on with one parent, and in effect, New Year's is spent with the other one of them. The same thing applies to the Spring or Easter break. There should be something out on that. Now, if the parties can deal with this on their own, I am not saying they have to get lawyers involved, and then, of course, there is a question of alternate weekends, for example, and time during the week.

So, this justgives you an idea, because my thinking here is that this is a case where the children can benefit from spending a great deal of time with both parents. I hope that the future does not dissapoint me. I really think that within the limits of human possibility, they may end up almost getting the best of both worlds, and those are just general guidelines, and it may well be that Mr. and Mrs. Krenn will work out an arrangement that is much more flexible than that.

I am not suggesting that in any way is a rigid formula to either of you, but rather is the structure around which you can work, because if I have to make an order, I am telling you that that is a structure around which I would build; but the trouble is then I have to start putting in, Starting at

7 p.m., ending at 8:30 p.m., and that is what I said earlier about treating parents who are mature and reasonable people like school children, and I do not want to have to do that.

Now, I think it is obvious from what I have said that I have a lot of confidence that the people involved here will work this out reasonably and that above all, they will refrain from making any cutting remarks arising out of the outcome of this proceeding or any other things that have happened because that the children do not need, and the people involved do not need it.

Now, is there anything else you would like to address me on, Mr. Boyd or Mr. Geldreich?

MR. GELDREICH: No, My Lord.

THE COURT: Well, I repeat what I said earlier, I would like to compliment the two of you for the manner in which you both conducted this litigation, and it may be of assistance to your clients to know that your intervention, if needed, on the issue of access and other matters can facilitate an orderly transition in accordance with the terms of my order.

I will close Court.

Certified Correct

Elaine Bilodeau

Elaine Bilodeau
Court Reporter