CV 06482

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LORRAINE IPKARNERK

Applicant

- and -

MARGOT SAMMURTOK and TROY SAMMURTOK

Respondents

CV 06506

AND BETWEEN:

MARGOT ELISE SAMMURTOK

Applicant

- and -

LORRAINE IPKARNERK and TROY TAKAUGAK SAMMURTOK

Respondents

Applications (1) to set aside ex parte order and (2) for interim custody pursuant to the *Domestic Relations Act.*

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

Heard at Yellowknife, Northwest Territories
on June 28, 1996

Reasons filed: July 5, 1996

Counsel for Lorraine Ipkarnerk: Jill A. Murray

Counsel for Margot Sammurtok: Heather L. Potter

No one appearing for Troy Sammurtok

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REASONS FOR JUDGMENT

1 On June 7, 1995, a child, Megan, was born to Lorraine Ipkarnerk. The father is Troy Sammurtok. His mother is Margot Sammurtok. In these applications, Margot Sammurtok, whom I shall refer to as the child's grandmother, seeks (a) an order setting aside an earlier ex parte order granted to the mother (in action CV 06482), and (b) an order granting her interim custody of Megan (in action CV 06506).

2 These applications raise three questions:

1. The appropriate jurisdiction in which to litigate the issue of Megan's custody.
2. The legal status of the grandmother to bring an application for custody.
3. The best interests of the child with respect to interim custody.

Jurisdiction:

3 The parents, Lorraine Ipkarnerk and Troy Sammurtok, reside in Chesterfield Inlet, Northwest Territories. They were living together in a common-law union for a brief time prior to Megan's birth. Megan was born in Halifax, Nova Scotia. The parents went there because of the help that could be provided by the grandmother who lives in Halifax. They stayed there for two months after Megan's birth and then mother, father and child returned to Chesterfield Inlet.

4 Difficulties developed in the parents' relationship. In late February, 1996, the grandmother went to Chesterfield Inlet to assist in the care of Megan. In April the grandmother returned to Nova Scotia taking Megan with her. There is no doubt that the mother agreed to the child going to Nova Scotia only as a temporary measure with full expectation that Megan would be returning to Chesterfield Inlet by early June.

5 The principal reason for Megan going with her grandmother was to give time to the parents to try and resolve their difficulties. The relationship deteriorated, however, with the parents separating shortly thereafter. In late May, the mother purchased a ticket for the grandmother to travel back to Chesterfield Inlet with Megan. The grandmother did not return even though she gave assurances she would.

6 In May, the grandmother commenced proceedings in the Family Court of Nova Scotia for custody of Megan. In mid-June, the mother commenced proceedings here (action CV 06482) for an order for the return of Megan to her. On June 19th, an ex parte order was issued by a judge of this court directing the grandmother to return Megan to

her mother and declaring that this court has jurisdiction over the child. The Nova Scotia proceedings have been adjourned in the meantime. The child, however, is still in Nova Scotia with her grandmother.

7 At the hearing before me, the grandmother's counsel conceded the point that this court has jurisdiction to decide the custody issue. I think it was an appropriate concession.

8 The common law rule with respect to jurisdiction in child custody disputes is that the child must be physically within the jurisdiction of the court or be ordinarily resident or domiciled therein. The place where the child is ordinarily resident is usually the most convenient forum for the litigation. This is usually the place with which the child has the most substantial connection. The rule was explained by Christine Davis in "Interprovincial Custody" (1978), 56 Can. Bar Rev. 17, at pages 20 - 21, as quoted in *Gratto v Wittner* (1994), 3 R.F.L. (4th) 189 (Alta. C.A.), at page 194:

> As we have seen, the courts of both provinces have jurisdiction to make a custody order. What factors will weigh with the court in determining whether to exercise that jurisdiction? It has been said that in matters of this sort two considerations must be kept in mind. The first is the welfare of the child. The second is that there must be a fair and proper administration of justice. The welfare of the child is generally best served if the custody dispute is heard in the province wherein the child is ordinarily resident rather than that where he is physically present. The consideration of the fair and proper administration of justice is particularly relevant when a child is brought into a province other than that of his ordinary residence in order to evade process about to issue or contrary to the terms of a custody order.

9 It has also been held that, in the absence of cogent evidence that returning the child would be detrimental to the child, the jurisdiction of original domicile is the proper forum: *Re T.*, [1968] 3 All E.R. 411 (C.A.); *Re Loughran*, [1973] 1 O.R. 109 (C.A.).

10 In this case, the child has a real and substantial connection to this jurisdiction. Her parents are wholly or part Inuit; the community of Chesterfield Inlet is predominantly Inuit; both parents reside there as well as the mother's extended family. Furthermore, while I recognize that the grandmother may have acted with good intentions, the fact remains that the child is currently in Nova Scotia only because of the grandmother's refusal to comply with her previously stated intention to return the child. Such a unilateral act cannot create a domicile for jurisdictional purposes.

11 I conclude therefore that this court is the proper forum for resolution of this dispute.

Status:

12 In this jurisdiction, the guardianship and custody of children are subjects governed by the *Domestic Relations Act*, R.S.N.W.T. 1988, c.D-8 (the "Act"). By s.22(1) of the Act, the mother and father of Megan are her joint guardians unless this court orders otherwise. A parent may appoint a person to be a guardian after the death of that parent and the court may appoint a guardian to act jointly with the mother or the father. The parents may enter into an agreement respecting custody and, if they fail to agree, either parent or the child may apply for an order. But there is nothing in the Act permitting someone not a parent to apply for custody. Hence there is a question as to the

grandmother's status to bring her application for interim custody of Megan (action CV 06506).

13 Problems of status, or legal standing, are not new with respect to this legislation. Some of them were canvassed by me in *Isnor v Isnor*, [1994] N.W.T.R. 378. In this case there is no automatic entitlement for the grandmother to apply for custody of this child. Such an entitlement rests solely on the exercise of a judicial discretion.

14 There is no question that this court enjoys a *parens patriae* jurisdiction so as to safeguard the welfare of a child. Section 33 of the Act provides that the rules of equity apply in custody matters where they do not conflict with the provisions of the Act. There is also no question that an order placing the child in the custody of a non-parent may be made by virtue of the inherent *parens patriae* jurisdiction. Such was the decision in *Re M.(T.)*, [1989] N.W.T.R. 169 (S.C.), and the various cases referred to therein. The appropriate procedure, however, is for the non-parent applicant to seek standing to bring the custody application.

15 The statutory scheme in this jurisdiction may be usefully compared with that in some other jurisdictions such as Ontario. The *Children's Law Reform Act*, R.S.O. 1990, c. C-12, provides that "a parent of a child or any other person may apply to a court for an order respecting custody of or access to the child" (s.21). The Act also recognizes "relationship by blood" as a factor to take into consideration on a custody application (s.24). In the absence of such clear legislative standing, an applicant for custody who is not a parent must seek leave of the court to bring the application.

16 In this case I have concluded that the grandmother should have standing to contest, if she chooses, the custody of Megan. She has obviously spent a great portion of Megan's young life as one of her prime caregivers. I note, as well, that the grandmother's concerns are immediate ones having regard to what she perceives as the mother's problems. There has been no indication that she plans to seek permanent custody of Megan. Indeed she says her long-range plan is to return the child to the parents. Finally, I note that the father, while not as yet participating in these proceedings on his own behalf, supports his mother's application for interim custody.

Interim Custody:

17 It goes without saying that the paramount consideration in all questions of custody is the best interests of the child.

18 At the hearing before me the grandmother's counsel informed the court that her client was prepared to return to Chesterfield Inlet with the child. Her aim is to reside with her son there and still maintain custody of Megan for now. Concerns have been expressed over the mother's emotional stability including a perceived potential for abusive behaviour. Many of these concerns, however, are disputed. On the mother's behalf affidavits were filed attesting to her mothering ability. She acknowledges that she had gone through a period of post-partum depression but now she has improved, she has been assessed and there are no clinical danger signs.

19 The difficulty with many of these interim applications is that they are argued on the basis of competing affidavits and usually without even the benefit of cross-

examinations on them. It is therefore near impossible to assess the credibility or reliability of the deponents. There are very few objective reference points. In this respect the few helpful items of evidence are the reports and letters from the doctors who saw the mother as recently as June 19th and the social worker in Chesterfield Inlet. They state that there are no apparent signs that should cause concern either in the mother's psychological health or in her parenting skills. Furthermore, members of the mother's extended family are willing to assist her.

20 In my opinion there is no cogent evidence to deprive the mother from having the care and custody of her child. If there are problems, I am confident that they will quickly become apparent to many people who will no doubt intervene as quickly as possible.

Conclusions:

21 I hereby order as follows:

1. The child will be returned by her grandmother to her mother by no later than midnight of July 31, 1996. I am giving this period of time so that everyone can make any arrangements necessary for travel as well as accommodations in Chesterfield Inlet. I understand that the mother still has the air ticket that she purchased in May so that can be used for this travel.

2. The mother will have the care, control and custody of the child until further order of this court.

3. The father and the grandmother will have generous access to the child. I envisage something even close to alternating weeks as between the custodial parent and the others. I will, however, count on the parties to make their own arrangements with respect to access. If they cannot agree, further directions may be sought from me.

4. The child will not be removed from the Northwest Territories without the prior agreement of the parties or an order of this court.

5. The parties will co-operate in sharing all relevant information with each other respecting the child's health and needs. In particular, the grandmother will provide complete information to the mother as to any medical tests or care of the child while she has been in the grandmother's care.

6. While the Superintendent of Child Welfare is not a party to this proceeding, I direct counsel to forward a copy of these reasons to the Superintendent with my request to monitor this child's situation over the next three (3) months and, at the end of that period, to provide a status report to counsel for all parties for possible use in any further proceedings respecting the custody of this child.

7. The parties will be at liberty to apply for directions as to the trial of the custody issue, should that become necessary, including the consolidation of these two actions.

22 There will be no costs of these applications.

J. Z. Vertes

J.S.C.

Dated at Yellowknife, Northwest Territories
this 5th day of July, 1996

Counsel for Lorraine Ipkarnerk: Jill A. Murray

Counsel for Margot Sammurtok: Heather L. Potter

No one appearing for Troy Sammurtok

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