6101-02376

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LEON RONALD CHARLES NESSEL

Petitioner

- and -

COLINDA DAWN KAREN NESSEL

Respondent

MEMORANDUM OF JUDGMENT

1 This is an application for interim custody of three children, ages 10, 9 and 7.

2 The Respondent mother also applied for enforcement of an interim custody order dated March 6, 1996 and made in the Family Division of the Provincial Court of Alberta. That order awarded her custody of the three children. As I indicated to counsel in Chambers, however, the last two paragraphs of the order indicate to me that it was an interim order to continue to June 19, 1996 only, at which time there was to be a further court appearance. My view is confirmed by the fact that the same wording is found in the December 20, 1995 order, a copy of which was submitted to the court and which adjourned the matter to March 6, 1996 and granted interim custody to the latter date to the mother.

3 Counsel for the mother advised that she had been unable to obtain any information about what happened on June 19, 1996 but that it seemed likely that no appearance was in fact made by counsel for the mother (who was not counsel on this application) on that date.

4 In my view, therefore, the Alberta order expired on June 19, 1996 and for that reason is not capable of being enforced.

5 Both parties claim interim custody. This matter was dealt with by way of a Chambers application on affidavit material only and so of course I have had no opportunity to assess the credibility of the parties. I point out that generally with respect to child custody the court's duty is to do what is in the best interests of the children, not what is fair to the parents: see *R. v. R.* (1983), 34 R.F.L. (2d) 277 (Alta. C.A.).

6 The parties were married in 1986 and separated in the summer of 1990. Up until the separation the family lived in Hay River, Northwest Territories. The facts are in dispute but it appears that the children initially moved to Edmonton with the mother and were there for over a year. The mother alleges that on a visit to Hay River the father kept one of the children at Christmas of 1991 and then took the other two children from her in Alberta in February of 1992. Both of these incidents she says occurred without her consent. The father in his affidavit says simply that the children spent the school year after separation in Edmonton and then returned with him to Hay

River. It is common ground that the father had the children in 1993 and that he moved to Edmonton during that year until the summer of 1994, when he returned to Hay River with them. In the summer of 1995, the father began attending college in British Columbia and left the children with the mother for the school year.

7 The parties differ as to who was to have the children for the 1996-97 school year. The father picked them up in Alberta in early July, 1996 and took them back to Hay River. On August 9, 1996, the mother attended in Hay River, apparently without indicating to the father that she would be doing so, with the intention of taking the children because, she says, the agreement was that she would have them for the 1996-97 school year. The father says he was to have them. In what was apparently and understandably an upsetting incident for the children, the mother took one of the children, Blake, with her. The father was not present at the time.

8 The mother returned to Grande Prairie, Alberta, where she resides, with Blake, who is nine years old. The other two children, Brandi, age 10 and Zane, age 7, have remained in Hay River with their father.

9 The children have spent roughly equal portions of time in Hay River and in Alberta since the separation. As I understand it, they have spent less time with their mother than their father since the separation. They have spent the majority of the last four years with their father, but the last (1995-96) school year with their mother. Each parent has exercised access when the children have been in the other's care.

10 A great deal of argument was directed at the issue of whether the children have a real and substantial connection to Alberta or to the Northwest Territories. Because there is no longer any issue as to enforcement of the Alberta order and no issue as to this court's jurisdiction to make an interim custody order, I am not convinced that where the children have a real and substantial connection is determinative. I have reviewed the cases submitted by both counsel, but they seem to me to go mainly to the issue of jurisdiction of the court. The issue for me to decide is whether it is in the best interests of these children to be with their mother or their father on an interim basis, recognizing that because this is an interim application and I am dealing only with untested affidavit material, I am not in a position to come to a final conclusion as to where the best interests of the children lie except on a temporary basis in order to resolve the immediate situation; see: *Williams v. Williams*, [1991] N.W.T.R. 387 (S.C.).

11 In this case, both parties make allegations about the fitness of the other to look after the children. Both, however, are content to have the children spend time with the other parent. Each accuses the other of "kidnapping" the children at some point during the years since separation. Each alleges that the other has at one time or another been uncooperative about access or custody arrangements.

12 The court usually seeks to preserve the status quo in coming to a decision about interim custody, the rationale for that being that children should not be subjected to any more disruption or trauma than necessary in these situations. In

this case, the status quo is not so easy to determine. The children have, as I have said, spent most of the last four years with their father, although the immediate last year was spent with their mother.

13 The only independent information I have about the children (by which I mean information not coming directly from the parties or the spouse of either of them) is in the letters from teachers at the Avondale School in Grande Prairie, Alberta, where the children attended in the 1995-96 school year. There is one letter about Blake and one about Zane. Both letters indicate that the children had problems when they began school but progressed well throughout the year, although Zane became a problem near the end of the year. I am not going to draw conclusions about why the children behaved as they did or whether their "poor" behaviour can be connected to their time with their father and their "improved" behaviour can be connected to their time with their mother.

14 I will and I do draw the conclusion, however, that the children were doing well in school during the year, and that their mother (this is set out in the letters) was supportive and interested in their school work. I view these as significant factors in determining what is in the best interests of the children.

15 The allegations made by the mother against the father about his behaviour are disturbing. They are untested and disputed, but there is no affidavit material responding to them. I note that despite the allegations of violence and criminal activity, the mother is and has been prepared to have the children see their

father and spend time with him. I also note that the letters written by the father to the children and to the mother prior to this custody application and appended to her affidavit sworn August 29, 1996, appear to paint a different picture of the father, one who cares about the children and felt that both parents should spend as much time as possible with them.

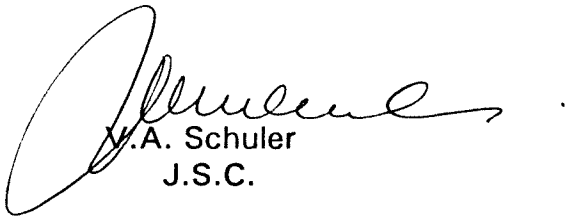
16 Considering all of the factors, on balance I think it best that the children return to Grande Prairie, where it appears that they had been enroled in school for the coming year. Although Brandi and Zane may have already begun school in Hay River, the disruption should be minimal at this early stage of the school year. I have considered the disruption to the children that will result from this move, but then any order I make will result in a move for at least one of the children. There was no suggestion made that the children should be separated and in light of their ages and the circumstances, I do not feel that that would be appropriate in any event.

17 Accordingly, I grant interim custody to the mother, Colinda Cardinal (Nessel). I grant reasonable access to the father, Leon Cardinal. If the parties cannot agree on the terms of access, they may apply to the court to settle same.

18 This interim order is not in any way to be viewed as condoning the mother's actions in removing Blake and attempting to remove the other children from Hay River. I am unable to determine at this point what the parties' intentions were for the 1996-97 school year or whether they had come to any agreement at all.

19 No submissions were made on the issue of child support and so that matter will be left to be dealt with should either of the parties make application.

20 I thank counsel for their submissions in this difficult matter and urge them to set this matter for trial as soon as possible.



V.A. Schuler
J.S.C.

Yellowknife, Northwest Territories
August 30, 1996

Counsel for the Petitioner: Michael E. Hansen

Counsel for the Respondent: Lucy K. Austin

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HONOURABLE JUSTICE V.A. SCHULER