

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DEREK WISEMAN

Petitioner
(Respondent by
Counter Petition)

- and -

SHERRY WISEMAN

Respondent
(Petitioner by
Counter Petition)

MEMORANDUM OF JUDGMENT

1

As indicated at the conclusion of the trial of this matter, a divorce judgment will issue on the ground that the parties have been separated for in excess of one year. The parties are also agreed that they will have joint custody of the two children of the marriage, Geoffrey, born May 17, 1983, and Scott, born March 15, 1990.

2

The only issues I am called upon to resolve are: who is to have the day to day care of the children and, if necessary in consequence of that decision, what access the other parent will have; child support, if any, and by whom it should be payable; arrears of child support; and costs.



3 By agreement between counsel prior to trial, the matrimonial property
claim is adjourned *sine die*.

4 An agreed statement of facts was filed at trial. The parties, Geoffrey and
three other witnesses testified at the trial and there were a number of exhibits. I have
considered all of these.

5 I emphasize that custody of children is neither a reward to the
"successful" parent nor a punishment to the "unsuccessful" parent. My 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 I am specifically bound by section 16(10) of the *Divorce Act* to give
effect to the principle that a child of the marriage should have as much contact with
each spouse as is consistent with the best interests of the child.

Background

7 The parties were married on June 7, 1980. They separated in October,
1992. The children remained with Mr. Wiseman in the family home in Yellowknife.
Ms. Wiseman began cohabiting with Gerald Drover in November of 1992. From
September of 1993 to July of 1994, she lived with him in Edmonton and then they
returned to Yellowknife.

8 While living in Edmonton, Ms. Wiseman had frequent telephone access to the children. She saw them in Yellowknife at Christmas of 1993 and they visited her in Edmonton in July of 1994, returning to Yellowknife with her. Since then, she has had access on two evenings a week, every second weekend and during the summer as well as other holidays.

9 Gerald Drover is separated from his wife, Janet Drover. Janet Drover has provided childcare to the Wiseman children for many years, beginning when Geoffrey was an infant. She has continued to provide care since the Wiseman separation. Ms. Drover and Mr. Wiseman have been romantically involved for the past couple of years but do not live together.

10 Ms. Drover provides overnight care for the children when Mr. Wiseman is on nightshift at Giant Mine, where he is employed. He has not worked on the nightshift since May of 1996 and it is not certain whether he will go back on nightshift. Ms. Wiseman has asked to take the children overnight when he has worked the nightshift but he has not agreed to that. His evidence was that he did not agree because the arrangements to have the children stay overnight at Ms. Drover's had been in place for some time and he felt that it was best for the children that their routine remain in place.

Geoffrey's wishes

11 Geoffrey testified under oath after the usual inquiry as to his ability to do so. He is 13 years old. He has lived with his father since the separation, but his mother has had generous access to him, although not as generous as she would have liked.

12 Geoffrey said in his evidence that he wants to live with his mother and that he has expressed this wish to his father but his father has said no to it. The only reason he gave for not wanting to remain at his father's was that he does not want to be around Janet Drover because she gets mad at him, for example if he and others are playing and she is sick or if the kids are hurting each other. However, he also said that when he stays at her house when his father is on night shift, he enjoys it most of the time.

13 Geoffrey felt that the rules in both his father's and his mother's households were fair and could not identify any differences between the two sets of rules. He was unable to point to any difference he expected in life at his mother's as contrasted to life at his father's. He said that he wants to try living with his mother because they have not tried it yet.

14 There was evidence from Mr. Wiseman and from Janet Drover that Geoffrey and Ms. Drover sometime have disagreements over his behaviour but these did not appear to be anything more than what could be expected with any teenager.

15 Of more concern relating to Geoffrey is the fact that there has been an instance of shoplifting and one of stealing money at home. I do not, however, draw anything significant from that in terms of his family situation in that the evidence did not really shed any light on why he did this or whether more or less strict discipline is needed for him.

16 Counsel cited a number of cases on the extent to which the court should take into account the child's wishes in a custody dispute. It has been pointed out that the child's preference is not necessarily what is in his best interests: *Jesperson v. Jespersen* (1985), 48 R.F.L. (2d) 193 (B.C.C.A.); *Farden v. Farden* (1970), 3 R.F.L. 315 (Sask. Q.B.). But the child's expressed wishes must at least be considered: *Jesperson*; and, with a child who is older or more mature, those wishes should be respected: *Metz v. Metz* (1991), 34 R.F.L. 255 (Sask. Q.B.).

17 In *Alexander v. Alexander* (1988), 15 R.F.L. (3d) 363 (B.C.C.A.), in dealing with the strongly expressed wishes of a 14 year old boy, the Court said:

This court is now faced with the decision as to what is best for this boy who has been in the middle of a protracted custody battle between two parents who are both equally well qualified to parent and who would each offer him a good home. What the child wishes is not necessarily best for the child, but there does come a point when at near adult years a child capable of responsible thought must now be deemed to be able to settle his own future in this important matter. Concomitant with that he must take the responsibility for his own actions. I think that that point has now been reached. For three years or more he has been unswerving in his wishes and no change is to be expected. It is not fair to push this boy to the point of rebellion and, consequently, I think that the change should be made sooner rather than later.

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And in dealing with an 18 year old, Vertes J. of this Court considered that he was old enough to choose with whom he wants to live and where and how he will communicate with either of his parents and therefore declined to make a custody order: *Viswalingam v. Viswalingam* (April 23, 1996), S.C.N.W.T. no. 6101-02038 (unreported).

19

In this case, we have a 13 year old who expressed a preference at least to try living with his mother. He did not give reasons for the preference, but I think that to ignore his wishes completely at his age would not be appropriate or wise. He will very soon be at an age where he will live where he wishes in any event. Yellowknife is a small enough community that he can go back and forth between his parents' homes without too much difficulty. I do, therefore, take Geoffrey's wishes into account and place some emphasis on them.

Separation of Siblings

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If I take into account Geoffrey's wishes and make an order which provides that he spend more time with his mother, where does that leave his 6 year old brother Scott?

21

The cases cited by counsel indicate that siblings should rarely be separated: *White v. White* (1994), 7 R.F.L. (4th) 414 (N.B.Q.B.); *Stark v. Stark* (1988), 16 R.F.L. (3d) 257 (B.C.S.C.); *Lynch v. Lynch* (1995), 12 R.F.L. (4th) 367 (Ont. Gen. Div.). It is generally recognized that there is a benefit for the child in growing up with his siblings. That benefit must, of course, be weighed against benefits that might accrue from any

situation that entails separation of the siblings.

22 In this case, Scott is some 7 years younger than Geoffrey so that the amount of time they are likely to spend together may be less than if they were closer in age. To some extent their interests and recreational activities are going to differ. Ms. Drover, for example, gave evidence about activities she pursues with the children when they are with her, but she also noted that Geoffrey "mostly does his own thing". Nevertheless, on balance, I think that the children should remain together except to the extent that Geoffrey may make decisions which affect only him. The children have already been through their parents' separation and I hesitate to impose any further separation than what might develop naturally as a result of their age difference.

Status Quo

23 The status quo is simply one factor to take into account on a level equal with all other applicable factors: *R. v. R., supra*. In this case, the status quo is with Mr. Wiseman, although Ms. Wiseman has been very involved with the children. In addition, the children have known Ms. Wiseman's partner, Mr. Drover, since they were infants. A change of circumstances by giving the children more time with Ms. Wiseman would not put the children in an uncertain or unknown situation, just a different one.

Comparison

24 Both parents obviously care very much for the children. Both Janet Drover

and Gerald Drover have known them a long time and care for them. The two households are similar: hunting and fishing are favoured recreational pursuits, the children have access to a computer, the parents are involved in and help with the children's school projects and homework. Both Mr. and Ms. Wiseman work outside the home, so some daycare is likely to be required in both situations, if only for Scott.

25 The children in this case are fortunate. Neither household and neither of the parents is in any way unsuitable or inferior to the other in terms of what they offer the children.

26 There are some differences in parenting style. Both Mr. and Ms. Wiseman testified that of the two of them, Mr. Wiseman was the stricter or harsher when it comes to disciplining the children. Mr. Wiseman testified that his discipline style seems to work in improving unacceptable behaviour on the part of the children.

27 I think it is also fair to say that of the two, Mr. Wiseman appeared to be the more inflexible in terms of seeking adherence to schedules and rules and sticking to what he has done in the past. His refusal to have Ms. Wiseman instead of Janet Drover take the children when he is on nightshift is one example of that. I accept that his adherence to schedule and routine is because that is what has worked for him in terms of coping with being a working single parent. There are, however, two factors that I think realistically require that he be more flexible. One of those factors is Geoffrey's wish to spend more time with his mother. The other is that there simply is no reason why the children should not spend more time with their mother. Their mother may be less strict

but there is discipline and structure in her home.

28 Mr. Wiseman testified that he does not agree with the idea of shared custody (by which I understood him to mean shared day to day care) because the children use the parents against each other and because different households with different rules will be confusing for them. There was, however, no evidence of specific instances of the children using the parents against each other. Even if that is the case, it seems to me that it could happen just as easily in a custody-access situation as in a shared care situation. The same applies to the issue of different rules. No matter how much time the children spend with each parent, there are bound to be some differences in the rules and some adjustment each time the child is with the other parent.

29 Both parents are mature, intelligent, caring people. They have agreed on joint custody. They are clearly able to confer and come to agreement on decisions relating to the welfare of the children.

30 It used to be that courts would not impose joint custody where one parent was opposed to it. The position now is that even where one parent protests, joint custody may be imposed where the parties have been able to put aside their personal differences to make co-operative decisions about the children: *Colwell v. Colwell* (1992), 38 R.F.L. (3d) 345 (Alta. C.A.).

31 In this case, the parties, by agreeing to joint custody, acknowledge that they can put aside their differences and co-operate when it comes to the children. I rely on that fact, as well as the evidence I heard in court and what I observed of the parties

themselves, in coming to the conclusion that they are also able to co-operate to make shared day to day care workable. In other words, although Mr. Wiseman is opposed to it, and although they have had some difficulties, I am satisfied that they can make it work.

32 With regard to section 16(10) of the *Divorce Act*, generally speaking, I think it can be said that a child should have as much contact as possible with each parent. In this case, there is no evidence that Geoffrey's best interests require less contact with his mother than what he himself wants. Put another way, in my view it is in Geoffrey's best interests that he have as much contact with his mother as he wants.

Day to day care

33 After balancing all of the above factors, I take the view that this is a case where the children should have as much time as possible with both parents. I am, therefore, going to order that the parties have shared day to day care of both children. This should not be seen as taking anything away from Mr. Wiseman or giving anything to Ms. Wiseman; it is simply what, on the evidence, appears to me to be in the best interests of the children.

34 The day to day care will be alternately two weeks with their father and two with their mother, subject to the parties agreeing on some other period of alternating time, such as a month. I would expect that there will be some flexibility in this. For example, if Mr. Wiseman does go back on nightshift, it would make sense that the

children spend their weeks with Ms. Wiseman during that period of time.

35 I decline to make any order specifying holiday access. The parties have been able to work that out for the last few years and although they have had some difficulties, I am satisfied that they can continue to work it out.

36 The alternating two weeks will also be subject to Geoffrey's wishes in that, as I have said, he is almost at the age where the Court is not going to order where he lives if it is against his wishes. The reason I am ordering shared day to day care is that Geoffrey said that he wants to try living with his mother. I would hope that the parents would sit down with Geoffrey and work out a schedule that will be agreeable to all of them and suitable to Scott as well. There may be times when Geoffrey chooses to stay at his mother's when Scott is not scheduled to be there; there is no reason why the children have to have absolutely identical schedules.

Child Support

37 In light of the shared day to day care order, no child support will be payable by either party.

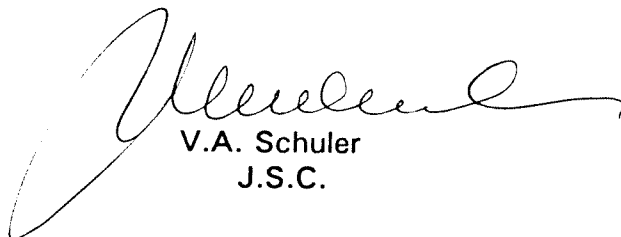
Arrears of child support

38 There was no evidence of inability on the part of Ms. Wiseman to pay the arrears of child support which have accumulated under the interim order dated February 1, 1993. Indeed, the evidence was that she has made substantial payments reducing the

arrears to \$4084.48 as of July 11, 1996. Her application that these arrears be cancelled is therefore denied.

Costs

39 Success has been somewhat divided. Having considered the matter and in all the circumstances, I order that the parties bear their own costs of these proceedings.



V.A. Schuler
J.S.C.

Yellowknife, Northwest Territories
August 14, 1996

Counsel for the Petitioner
(Respondent by Counter Petition): Karan M. Shaner

Counsel for the Respondent
(Petitioner by Counter Petition): James D. Brydon



6101-02267

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HONOURABLE JUSTICE V.A. SCHULER

