6101-02512

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHRISTINE MARY TANNER

Petitioner

- and -

LARRY ALAN SIMPSON

Respondent

Trial of divorce action and corollary relief and property issues.

Heard at Yellowknife on March 17, 18 and 19, 1997

Reasons for Judgment filed: May 9, 1997

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Petitioner:	James Brydon
Counsel for the Respondent:	Sheila MacPherson and Sarah Kay

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REASONS FOR JUDGMENT

1 During the trial of this matter, the Court granted a judgment of divorce on the ground that the parties have lived separate and apart for over one year.

2 The remaining issues are as follows:

a) custody of the two children of the marriage, day to day care and access; b) child support;

c) matrimonial property.

Custody

3 The parties agree on joint custody of the children. The dispute is as to their day to day care. The Petitioner submits that they should remain in her day to day care. The Respondent submits that they should spend alternate years with each parent.

4 There are two children of the marriage: Mark, born July 16, 1991 and Michael, born June 21, 1990.

5 I emphasize that custody and care of children are neither a reward to the "successful" parent nor a punishment to the "unsuccessful" parent. 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 Court is also bound by s. 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 parent as is consistent with the best interests of the child.

a) Background

7 The parties were married in 1989 and separated by mutual agreement in July of 1993. The children have lived with the Petitioner since the separation. Initially, the Petitioner remained in Iqaluit, which is where the parties lived during the marriage. In mid-August, 1994, the Petitioner moved with the children to Yellowknife, where they still reside. The Respondent continues to reside in Iqaluit. Jean Simpson, his sixteen-year-old daughter from a previous relationship, lives with him and has done so since she was an infant.

8 Since the separation, the Respondent has exercised access to Mark and Michael. Initially, while they still lived in Iqaluit, his access consisted of occasionally having supper with them, taking them for a drive and two or three overnight visits. The Respondent admitted that he did not have as much contact with the children as

he could have and attributed this to problems he and the Petitioner were having in the aftermath of the separation.

9 Six months after the separation, the Respondent went to Newfoundland for an education program from February until December, 1994. During that time he returned twice to Iqaluit to visit the children, for periods of approximately five days each time.

10 By the time the Respondent returned to Iqaluit in December, 1994, the Petitioner had moved to Yellowknife with the children. Since then, the children have spent one month each summer (1995 and 1996) and Christmas of 1994, 1995 and 1996 with the Respondent. He has also had regular telephone access to them, although this has been somewhat difficult due to the age of the children and the Respondent's hearing problem. On occasion, the Respondent has exercised overnight access to the children when he has been in Yellowknife on business.

b) Abilities of the Parents

11 The Respondent raised no concerns about the Petitioner's care of the children. He acknowledged that she is a good mother. His proposal that the children spend alternate years with him in Iqaluit is based on his wish to be more involved with

them and to make a more significant contribution to their upbringing.

12 The Petitioner raised some concerns about the Respondent's care of the children. These concerns, and my findings, are as follows.

13 The children returned to Yellowknife after a visit with the Respondent and talked to the Petitioner about an eight year old girl they knew in Iqaluit who exhibited inappropriate behaviour such as wanting to watch them urinate. The Petitioner raised these concerns with the Respondent, to whom the children had said nothing, and the Respondent undertook to ensure that the children were not left unsupervised with the girl. I am satisfied that his response to the problem was appropriate.

14 The Petitioner also raised concerns about the children having difficulty settling back into their usual routine after visits with the Respondent. This involved mainly a relaxation of rules of behaviour that they abide by in her home. To a certain degree, no matter how much time the children spend in the household of a parent, there is going to be an adjustment when they go to the other parent's household. I do not find the evidence in this case to reveal any serious problems in this regard.

15 There was also a concern arising from foul language used by the children and talk by them about the size of their genitalia upon their return from visiting the Respondent. The Respondent denied talking about the latter in the presence of the children and there was no evidence to contradict him. The Respondent did admit to using swear words occasionally in the presence of the children but said that he made an effort not to do so.

16 The Petitioner is raising the children as Roman Catholics. They are enroled in the separate school system in Yellowknife and attend church regularly. The Respondent is not Catholic, but testified that he would endeavour to have a Catholic friend take the children to church.

17 I do not attach any weight to the issue of religion. The Petitioner testified that it is an important aspect of the children's lives, but not the most important. There was no evidence that would lead me to conclude that a disruption in their religious training would have an impact on their welfare in this particular case.

18 I have no doubt that there would be benefits to the children in spending more time with the Respondent and fostering their relationship with him. Nothing I heard in the evidence persuades me that the Respondent is unsuitable or lacking as

a parent. Perhaps the best evidence of his ability to parent is his daughter Jean, who testified on his behalf at the trial. She came across as a pleasant, intelligent and mature teenager.

19 I also heard evidence from Andrew Johnson, a resident of Iqaluit who has known the Respondent for 15 years. He has observed the Respondent interact both with Jean and the boys. He has also observed the boys on access visits with their father and expressed the view that they seemed happy and that the Respondent exhibited appropriate concern about their behaviour and manners.

20 There was evidence of unpleasant notes and conduct on the part of the Respondent directed at the Petitioner, particularly relating to threats by him to tell others about certain aspects of her past. I am not persuaded that any of this conduct is relevant to the Respondent's ability to care for the children and I do not take it into account: *s. 16(9) Divorce Act*.

c) Children's Wishes

21 I allowed counsel for the Petitioner to adduce evidence from Sister Angela Fleming as to statements made to her by Michael and Mark. Sister Fleming is an art therapist employed by the Department of Social Services in Yellowknife.

22 Sister Fleming testified that she was asked by a co-worker (after the Petitioner had made the arrangements) to meet with the children to determine which parent they wanted to live with. She did not ask the boys direct questions about that, but rather engaged them in discussion and play involving building and drawing houses, in the course of which they made certain statements.

23 Counsel for the Petitioner did not seek to have Sister Fleming qualified as an expert witness in any capacity. He sought to adduce her evidence as to the preferences expressed by the children on the one occasion she met with them, so that the children, ages 6 and 5, would not have to testify. Counsel for the Respondent objected on the basis that the evidence was hearsay and was not required as the parents would in any event testify about statements made by the children as to where they wish to live.

24 I ruled that the evidence was admissible on the basis that the wishes of the children are relevant and that the evidence in this form was necessary as neither counsel wished to call the children as witnesses due to their age. In my view, particularly as counsel indicated that the parties would testify to statements made to them by the children about their wishes, the evidence could also be relevant to show consistency or otherwise of any wishes expressed by the children. The wishes

of a child are, of course, a factor to be considered but are not necessarily determinative or reflective of the ultimate issue, that being the best interests of the child: *Jesperson v. Jesperson (1985), 48 R.F.L. (2d) 193 (B.C.C.A.)*.

25 Sister Fleming's evidence was that Mark, the younger child, told her that he wanted to live in his mother's house, not his father's house. Michael also expressed a liking for his mother's house and a disinclination to draw his father's house. I take nothing more from the evidence than that on that particular occasion the children made those statements. I am not satisfied on the evidence that the statements reflect any degree of thought or consideration on the part of the children. I note that the meeting with Sister Fleming took place in late February, 1997, after the discussions referred to below and therefore at a time when the children were anxious about what was going to happen and were aware of the court proceedings.

26 Both the Petitioner and the Respondent testified about discussions they have had with the children on the subject of spending more time in Iqaluit. The Respondent testified that at Christmas of 1996, he explored with the children their feelings about staying for a longer period of time in Iqaluit. Their response to him was that their mother would be sad so he did not ask about it again. The Petitioner testified that the children, on returning from Iqaluit, said that the Respondent told

them they were going to live one year in Iqaluit, one year in Yellowknife. She felt that they were scared. She said she responded by explaining the court proceedings and the Respondent's proposal to them. The Respondent testified that in February or March the children stated to him in telephone conversations that they did not want to live in Iqaluit.

27 It is clear that the children have shown some anxiety about the prospect of splitting their time between Yellowknife and Iqaluit. There was a discrepancy between what the Respondent said he told the children and what the Petitioner said the children passed along to her. Nothing turns on that discrepancy. I have no doubt that discussion about this subject is stressful for the children.

28 I take into account that the children have exhibited this anxiety about the prospect of moving between Yellowknife and Iqaluit and indeed have said to the Respondent that they do not want to live in Iqaluit. The evidence does not satisfy me that they able, at their age, to or do understand the Respondent's proposal. I prefer, therefore, to consider this evidence as indicating a level of anxiety on their part about the prospect of longer periods of time in Iqaluit and a radical change in their routine rather than a clear and considered expression of their wishes regarding which parent will have their day to day care.

d) Status Quo

29 The status quo is also a factor to be taken into account with all other applicable factors: *R. v. R., supra*. In this case, the status quo is with the Petitioner.

30 Generally speaking, any change in the status quo is likely to cause some disruption in the lives of children. In the context of a change in day to day care, this may be less marked where the parents live in the same community or where the children have lived for a substantial part of their lives in the care of both parents prior to the separation or where there has been substantial involvement with the children by the non-custodial parent since the separation.

31 In this case, the children were very young at the time of separation. Mark was two years old and his brother Michael was three.

32 Since the separation, as outlined above, the Respondent has exercised access but due to the geographical situation, that access, and therefore his involvement with the children, has been less than one would expect if he lived in the same community they do.

33 A regime whereby the children would spend alternate years in the care

of the Respondent in Iqaluit would be a disruption in their lives not only in a physical sense but also in their relationship with their mother, the Petitioner, who has been their primary caregiver for the past four years.

34 In my view, the real issue in these circumstances is whether the Respondent has shown that the benefits to the children from his proposal outweigh the disruption that such a change would cause in their lives.

35 I have said that there would be benefits to the children from spending more time with the Respondent; there would also be benefits to the children from spending more time in Iqaluit. They would see Jean more often, they have an uncle there, their father's brother, with whom they engage in boating and other activities and they may benefit from exposure to the Iqaluit way of life and culture of the Eastern Arctic.

36 I bear in mind that the children have lived with the Petitioner in Yellowknife for almost four years. They are still young, 6 and 7. There is support in the evidence for the conclusion that at that age they would find it difficult to adapt to a major change in their lives. For example, Deborah Coggles, who has provided their daycare for the past year and a half testified that Mark, the younger child, went

through a difficult period of adjustment involving misbehaviour when he started school.

37 Mark's kindergarten teacher testified that Mark had some difficulty adjusting at the beginning of the year but by the time of trial (March, 1997) was progressing very well. Michael's grade one teacher testified that Michael was lacking in self-confidence at the beginning of the school year but that he has progressed. She also testified that he is easily distracted when not in a structured situation.

38 Michael has in the past taken speech therapy. He was not taking it at the time of trial but is to be reassessed later in the school year. The evidence indicated that speech therapy is not as readily accessible in Iqaluit as in Yellowknife but I do not place much weight on that as the extent of Michael's future need for speech therapy is not clear at this time.

39 The evidence of the two teachers and that of Ms. Coggles confirms, in my view, that the children are at a stage where structure and certainty are important and any disruption in their lives is likely to be difficult for them to handle.

40 The Respondent in his evidence acknowledged that his proposal may be

a challenge for the children. But in my view the essential feature is the disruption. I am not persuaded that the children are old enough that the disruption which would necessarily follow would be a challenge that they are likely to rise to successfully rather than a negative factor that may affect them detrimentally. The change back and forth of schools and community each year, with the resulting need to become acquainted with new teachers, classmates and friends or re-acquainted with those they already know but have not seen for a year is in my view something that is likely to be difficult for the children. The evidence does not convince me that it would not be so.

41 In a situation like this one, where one parent proposes a major change in the life of young children, the plan offered would, in my view, have to be clearly superior to what now exists. That has not been shown to be the case. How and whether the Respondent's proposal would work is uncertain. It may be that when the children are older his proposal can be tested but in my view this is not the time in the children's lives for that to happen.

e) Ruling

42 Accordingly, I order that the parties have joint custody of Mark and Michael. The Petitioner will have the day to day care of the children. The

Respondent shall have liberal access. The parties have been able to work this out in the past and I expect that they will continue to do so. I therefore order that the Respondent have reasonable access to include, but not be limited to, the following:

- four weeks access during the summer of 1997 and during each summer in each odd-numbered year thereafter
- six weeks access during the summer of 1998 and during each summer in each even-numbered year thereafter
- alternating Christmases
- alternating spring school breaks

Child Support

43 The *Federal Child Support Guidelines* have come into effect since the trial took place. The Petitioner's position at trial was that child support should be payable by the Respondent in the *Guideline* amount with a tax gross-up if tax were payable on the monies received by her and without a tax gross-up if no tax were payable. As the amendments to the *Income Tax Act* are now in effect, no tax will be payable by her.

44 On behalf of the Respondent it was argued that an amount less than what is set out in the *Guidelines* should be ordered to take into account his obligation to support his daughter Jean and the high cost of living in Iqaluit.

45 The Respondent's income from his employment with the Government of the Northwest Territories and rental of part of his home totals $72,750.00. The *Guideline* amount at that income level is calculated at $1008.00 for two children.

46 I have considered the evidence presented with respect to the Respondent's financial situation. The law is clear that child support takes precedence over non-necessities and debt payments: *Levesque v. Levesque, [1994] 8 W.W.R. 589 (Alta. C.A.)*. I note that despite his financial difficulties, the Respondent has been able to take vacations in Cuba and California in the last two years. His difficulties may therefore be in the management of his money or priority of expenditures rather than a true inability to meet expenses.

47 I have considered that the Respondent does have high access costs because of his distance from the children and that he has responsibility for the support of his daughter Jean.

48 On balance, I see no reason to depart to any significant degree from the *Guideline* amount. Child support will, therefore, be payable in the amount of $1008.00 per month total, except that it will not be payable for any month in which the Respondent has access for four consecutive weeks. Payments will commence

May 1, 1997 and continue on the first day of each month.

49 With regard to the order to be drafted resulting from these Reasons for Judgment, I direct the attention of counsel to section 13 of the *Guidelines* which requires that certain information be contained in a child support order.

Matrimonial Property

50 The items to be dealt with under this heading are as follows:

1. the Petitioner's liability for interest on a line of credit;

2. whether the Respondent is entitled to a share of the sale proceeds of the Petitioner's business, Tanmar Ltd.;

3. whether the Petitioner is entitled to a share in the Respondent's pension credits.

51 The *Matrimonial Property Act, R.S.N.W.T. 1988, c. M-6* provides that a Judge may make an order that she considers fair and equitable, notwithstanding that the legal or equitable interest of the spouses in the property is otherwise defined. Section 27(4) of the *Act* requires that I take into account the respective contributions of the spouses whether in the form of money, services, prudent management, caring for the home and family, or in any other form.

52 At approximately the time the parties married, the Petitioner started her own consulting business, Tanmar Ltd. She testified that the Respondent did not hold shares in the company and had no involvement in it because, as an employee of the Territorial Government, he was concerned about conflicts of interest. He testified that he had no involvement in it because it was not the type of business he was interested in.

53 There were occasions when the Respondent went through Tanmar to investigate business opportunities that he was interested in for himself. Expenses incurred by Tanmar in making these investigations would be reimbursed to the company. The Petitioner conceded that the parties did not keep a good paper trail of the expenses they put through Tanmar but there was no evidence of any specific expense being incurred for the Respondent's benefit which was not reimbursed.

54 After the first year of its operation, Tanmar made money. The Petitioner drew money out as needed in the form of bonuses. Much of the money simply went back into the company, which was sold by the Petitioner in 1994.

55 Approximately one year into the marriage, the parties took out a $120,000.00 line of credit, mortgaged against the house owned by the Respondent

and in which they lived as a family. The line of credit was used by both parties for various business and personal matters. Each would pay the principal they incurred on the line of credit and they would apportion the interest accordingly.

56 In November of 1996, the Petitioner paid $37,000.00, representing obligations incurred by her, on the line of credit. She did not, at that time, pay the interest outstanding and attributable to the principal but concedes that she should be responsible for it. She concedes that judgment should issue against her in the figure of approximately $8100.00; counsel indicated that they could settle on an exact figure.

57 It appears from the evidence that prior to the birth of the boys, the Respondent would pay for many, but not all, of the fixed household expenses and the Petitioner would pay for vacations and things that improved their standard of living. After the birth of the boys, the Respondent would pay household costs, while the Petitioner would pay costs directly related to the children, such as daycare, diapers and formula. I am satisfied on the evidence that both parties contributed to the family expenses in relatively equal proportions.

58 I am also satisfied on the evidence that there was a relatively equal

sharing of such duties as food preparation and housecleaning. After the two boys were born, the Petitioner tended to take somewhat more responsibility for their feeding and such things as bathing, with the Respondent concentrating more on Jean. Both spouses travelled as part of their employment and each would be responsible for childcare, with the help of a babysitter, while the other was away.

59 The Petitioner testified that every couple of months, the parties would reconcile their expenses on a 50-50 split, resulting in much argument between them and what she described as a "warped" financial relationship for a marriage. The Respondent in his evidence agreed that the parties kept separate financial lives, which he said was partly by preference and partly because of the Respondent's business. Having considered the evidence as a whole I find that the parties approached their household and family expenses in such a way that everything was accounted for and set off so that both spouses bore an equal share of what were considered household and family expenses but each was responsible for what was considered personal or was his or her own business expense.

60 The picture presented in the evidence is of two people who were careful to keep their financial lives separate and, where they were jointly responsible for expenditures, accounted to each other to ensure an equal split of the financial

burden.

61 I find that the spouses played equal roles in terms of their financial and other contributions to their family life. Both worked hard, both were able to accumulate assets. This was a marriage of four years' duration; it was not a long term marriage where the role played by one spouse has allowed the other to accumulate assets and there is an expectation that both spouses will benefit from the assets so accumulated.

62 To the extent that the Petitioner contributed in a non-monetary way to the Respondent's ability to accumulate RRSP's or his pension, I find that it is offset by the Respondent's non-monetary contributions to her ability to carry on and finance her business.

63 Accordingly, I find that the Respondent is not entitled to any share of the proceeds from the sale of Tanmar and the Petitioner is not entitled to any pension credits in the plan the Respondent has from his employment with the Territorial Government.

64 I order that judgment issue against the Petitioner in an amount

representing her share of interest on the line of credit. If counsel are unable to agree on the figure, they may arrange to meet with me in Chambers.

Costs

65 Counsel did not address the issue of costs. As success has been somewhat divided, this may be an appropriate case for each party to bear their own costs. Should counsel wish to make submissions in that regard, however, they may do so in writing within 30 days of the date these Reasons for Judgment are filed.

V.A. Schuler,
J.S.C.

Yellowknife, NT
Dated this 9th day of May 1997

Counsel for the Petitioner: James Brydon

Counsel for the Respondent: Sheila MacPherson and Sarah Kay