Date: 1997 12 05
Docket: CV 6101-02462

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHRISTOPHER BRIAN WILSON

Petitioner

- and -

KIM SUZANNE WILSON

Respondent

Reasons for judgment following the trial of a divorce petition in which the main issue was custody and access respecting the two children of the marriage.

Heard at Iqaluit, NT: November 10, 1997

Reasons filed: December 5, 1997

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Petitioner: Susan Cooper

Counsel for the Respondent: Olivia Rebeiro

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REASONS FOR JUDGMENT

[1] The parties= seven year marriage broke down in 1994 and they seek a divorce. The main issue in this divorce proceeding is a determination of what custodial arrangement is in the best interests of the two children of the marriage.

[2] When the parties married in November 1987, the respondent wife already had a three-year-old daughter Suzanne from a previous relationship. A son, Patrick, was born to these parties in July 1988. In August 1989, the family of four relocated from British Columbia to Iqaluit, NT. The reason for the move was a better paying job that the petitioner husband had obtained in Iqaluit as a retail manager for a commercial enterprise.

[3] In the first few years of the family=s residence in Iqaluit, the husband worked long hours and the wife was the primary caregiver for the children. Eventually the wife obtained employment outside the home as well, as the family needed a second income to pay household expenses. Daycare services were obtained for the two young children.

[4] In due course, problems developed in the marriage, some of which related to the disciplining and general upbringing of the children. The parents had different

approaches to the rearing of the children, the wife being slightly Astricter@ than the husband. However, on the whole of the evidence, I do not see that this was a major concern. It is mentioned here as merely one example of discord in the marriage. There were also frequent arguments about the respective roles of the two parties in the matrimonial household. Communication was poor.

[5] By 1992 and 1993, the husband and wife had begun to drift apart. The respondent wife started to socialize with a different circle of friends. She wanted to socialize outside the matrimonial home; the husband=s preference was to stay at home. The wife began to socialize with her friends, but without her husband, on a regular basis, especially on Friday and Saturday evenings.

[6] The matrimonial bond completely unravelled in May 1994. During a discussion between husband and wife about the wife=s wish to continue socializing outside the matrimonial home on weekends, the wife admitted that she had been unfaithful. The parties separated. The husband remained in the matrimonial home and the children continued to live there. The wife, in the initial weeks following separation, lived with a girlfriend. She visited with the children every day at lunchtime at the matrimonial home and had regular contact by telephone.

[7] Later, the respondent wife (who now uses her maiden name McAstocker) moved into the apartment of a man with whom she had commenced a relationship and by whom she was pregnant. A child, Aaron, was born of this relationship in March 1995.

[8] In June 1994, the petitioner commenced these divorce proceedings. In the summer of 1994, he made application to obtain custody of the children. Both parties had counsel. In August 1994, a Consent Order issued granting day-to-day care and control of the children to the petitioner and generous access to the respondent.

[9] The custodial arrangements contemplated by the Consent Order of August 1994 continued for a mere four or five months. In late 1994 or early 1995, the parties reached agreement on a more equal sharing of custody, or daily care and control, of the two children. This shared custody arrangement was still in place as at the date of trial. The two children, Suzanne and Patrick, live in one parent=s residence for a two-month or three-month period, and then in the other parent=s residence for two months or three months. In addition, the children spend every other weekend with each parent. Over a period of two years, the children are with each parent an equal amount of time.

[10] The petitioner father has been in a common law relationship since January 1996. He and his common law spouse live in a three-bedroom home in Iqaluit. The petitioner has steady employment with the Government of the Northwest Territories.

[11] The respondent mother lived with Aaron=s father for 1-2 years; however, they were not living together at the date of trial and their relationship is Aon hold@. Aaron=s father moved to southern Canada and then recently relocated to Yellowknife.

[12] The respondent=s position with her employer, the Government of the Northwest Territories, has been declared Asurplus@. The prospects of her continued employment with the government at Iqaluit are uncertain at best. For some time the respondent has had a desire to leave Iqaluit and to move to Yellowknife or to southern Canada. She does not wish to live in Iqaluit any longer. She minds the Aisolation@ of Iqaluit both for herself and her children. She is of the view that Iqaluit is too far away from family in British Columbia.

[13] The respondent states that Iqaluit has no long-term appeal for her. She wishes to relocate. The petitioner, for his part, likes living in Iqaluit and plans to live here indefinitely. In my view, neither of these positions is unreasonable in the circumstances.

[14] The respondent has plans to travel to Yellowknife during the Christmas break and investigate her job prospects there. She has already sent over 20 resumés to public and private sector employers in Yellowknife. She says she has friends there with a large home who will provide accommodation for her and her children until she can get herself established.

[15] For almost three years the children have enjoyed continuous and plentiful contact with both parents, although those parents have been separated from each other. Suzanne is now almost 13 years of age and in grade 8. Patrick is 9 years old and in grade 4. Each is doing well in school. From all accounts, each child, generally, has a happy life, in the circumstances. It is my assessment, from the evidence adduced at trial, that the split custody arrangement that the parties themselves fashioned, has worked satisfactorily in the interests of the children, pending the trial of the custody issue.

[16] That the split custody arrangement has worked may be considered a pleasant surprise, given the acrimony which continues between the petitioner and respondent, despite the passage of 3 2 years since the marriage breakdown. Each acknowledges that they are unable to communicate amicably with each other. Indeed, it is my view that there is insufficient communication between them on matters, ordinary or otherwise, that concern the welfare and happiness of their two children. Perfect harmony between the parents is not a realistic goal in this case; however, a greater effort to improve communication is required of each of the petitioner and respondent, in the interests of these two children.

[17] At the trial, each party acknowledged that the other is a good parent. There is no issue here that one or the other is an unfit parent.

[18] There is also no issue about the fact that the petitioner, although not Suzanne=s biological father, has stood *in loco parentis* with respect to her, and has status to seek custodial rights to Suzanne as well as to Patrick. Both are Achildren of the marriage@ for purposes of the ***Divorce Act*** and this proceeding.

[19] The two children are close to each other, as any pair of siblings would be at those young ages. They have also, naturally, developed a bond with their step-sibling Aaron.

[20] Upon a divorce judgment issuing, the petitioner father seeks a custody order continuing the *status quo*, i.e., a split custody arrangement here in Iqaluit. He also submits that it is in the children=s best interests that they remain living in Iqaluit where they have lived most of their young lives, where they have received all of their schooling, where they have friends, etc.

[21] The respondent, for her part, seeks a Court order which would give her the predominant custodial rights and, in particular, which would allow her to relocate with all three of her children to a new home away from Iqaluit where her job prospects and her proximity to family are more advantageous to her.

[22] These respective applications of the parents for a custody order are made pursuant to s.16 of the ***Divorce Act*** and are incidental to the within divorce proceeding. The test that the Court must apply in determining what custody order to grant is

statutorily prescribed, i.e., that which is in the best interests of the children. Pertinent excerpts from s.16:

> 16(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
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> . . .
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> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
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> . . .
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> (10) In making an order under this section, the court shall 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 and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[23] The test is clear; the result of applying that test in the present case is not immediately obvious. From the perspective of the children of the marriage, there are advantages and disadvantages in both scenarios presented by the parents at trial.

[24] If sole custody is granted to the mother, and she follows through with her intention to relocate away from the eastern Arctic, the two children will lose regular and continuous contact with the father, and will also be deprived of the ongoing contact with their friends, schoolmates and familiar surroundings in Iqaluit. On the other hand, they will be enjoying the benefit of maximum and continuous contact with their biological mother and with their step-sibling Aaron, in one home environment without the disruption of a move from one parent=s residence to the other every two or three months. Also, they will be afforded generous access, in person and by telephone, mail, et cetera, to the father, as agreed by the parents or as ordered by the Court.

[25] If the father=s request for a custody order prevails, this means that the children=s residence will continue to be in Iqaluit. If the mother loses her employment in Iqaluit, the children will be deprived of the financial support that their mother has been able to provide to date, during her period of unemployment. If the mother moves away from Iqaluit, to seek employment or for other reasons, the children will, of course, lose the close, continuous contact with their biological mother. They will also lose regular, intimate contact with their step-sibling Aaron. This is countered, though, by the advantage to the children of continuing to live in the community of Iqaluit, where they have spent most of their formative years to date, with familiar friends, acquaintances and surroundings.

[26] Either scenario carries the risk of being unsettling to the children, of being disruptive to their young lives. But such is the reality of life for separated families in these modern times. Separation of families is commonplace today. The mobility of society=s members has increased dramatically. Families adapt. Children adjust, as evident with these two, apparently happy, well-adjusted children in the past 3 2 years.

[27] On the evidence presented, I am satisfied that each of the petitioner and respondent, as parent, will endeavour to minimize the disruption to the children=s lives resulting from any change which accompanies whichever of the two scenarios is adopted. Each will fulfill his or her responsibility as parent in either set of circumstances.

[28] Although the Court is required to make its determination from the perspective of the children=s best interests, I am compelled to address the issue of the mother=s desire or stated intention to relocate from Iqaluit. Any decision she makes in that regard will necessarily affect the children. If they relocate with her, they will be Auprooted@ from familiar surroundings. If she relocates without them, they will be stripped of a regular close and intimate relationship with their biological mother.

[29] Taking into consideration all of the circumstances, I do not view any decision made or which might be made by the mother to relocate from Iqaluit as unreasonable. For her to relocate from Iqaluit for reasons of employment or for the other reasons she expressed in her evidence is no less reasonable than the petitioner=s decision or the couple=s decision in 1989 to relocate the family from British Columbia to Baffin Island. The children=s mother should not be Aforced@ to stay in Iqaluit in order to give

effect to maximizing contact between parent and child. She, nor the children, should not be held hostage to the 1989 decision to move to Iqaluit.

[30] For the foregoing reasons, and those which follow, I find that in all of the circumstances the scales are tipped in favour of granting sole custody to the mother. The best interests of these two children, as determined by reference to their condition, means, needs and other circumstances lie with their mother as custodian, with provision for generous and liberal contact with the petitioner father.

[31] I refer firstly to the particular situation and circumstances of the 13-year-old child Suzanne. She is the biological daughter of the respondent mother, and stepdaughter to the petitioner. If the respondent is moving away from Iqaluit for *bona fide* reasons (and I find that that is so), it is not unreasonable that her biological daughter should go with her, as opposed to remaining in Iqaluit with her stepfather, all else being equal.

[32] However, Suzanne is not the only child of the marriage. There are two children of the marriage; they are siblings. The evidence is clear that Suzanne and her nine-year-old brother Patrick have a close relationship as sister and brother. The Court should not, by a custody order, split siblings apart. Instead, a Court=s order should endeavour to make certain that a child who is subject of the Court=s order enjoys the continuing companionship of his or her brothers and sisters. A Court order should not separate siblings. See *Hurdle v Hurdle* (1991) 31 R.F.L.(3d) 349 (Ont.Crt.,Gen.Div.); *White v White* (1994) 7 R.F.L.(4th) 414 (N.B.Q.B.). In their respective testimony, each of the petitioner and respondent stated that the two children should not be separated, by Court order or otherwise.

[33] By the same reasoning, in my view, the Court should not make any order which would have the effect of separating in a major way these two children from their young stepbrother Aaron, with whom they have developed a sibling bond. Aaron, of course, will be with his mother, wherever she ultimately resides.

[34] These factors militate in favour of placing the two children of the marriage in the continuing care and custody of the respondent mother.

[35] There is no evidence to show that the mother (or the father for that matter) is not able to, or will not be able to, establish or maintain a satisfactory or stable home

environment for the children, whether in Iqaluit, Yellowknife or elsewhere. This trial has not been about the ability or inability of either parent to provide for the material needs of the two children. The respondent may have some initial difficulties in establishing herself and her children in a new community; however, I am satisfied that she will, in due course and in a reasonable time do so, with appropriate financial assistance from the petitioner for the children=s maintenance.

[36] There will, therefore, be a Court order granting custody of the two children to the respondent mother, with provision for general access by the petitioner as described below.

[37] As at the date of trial, the respondent resides in Iqaluit. Uncertain though her future employment with the Government of the Northwest Territories is, at the moment it continues. She has no definite plans for replacement employment or place of residence, in Yellowknife or elsewhere. For these reasons, the Court=s order should provide for an access regime both while she has her ordinary residence in Iqaluit, and after relocation away from Iqaluit.

[38] While the respondent and the children have their ordinary residence in Iqaluit, the petitioner father shall be entitled to reasonable and generous access to the children. Minimum access shall include every other weekend. I prefer, with some hesitation, to leave the balance of the terms of minimum access to be agreed between the parties. I do not want to force upon them a schedule which is unworkable for both of them and/or the children. I have in mind periods of access which total, in a given time frame, a mid-ground between Ano access@ and the generally equal time spent with each parent under the present voluntary divided custody arrangement. I stress, however, that what is being ordered is access, not divided custody or split custody.

[39] The Court=s order shall include a provision, pursuant to s.16(7) of the ***Divorce Act***, requiring the respondent to give to the petitioner a minimum of 45 days= notice, in writing, of any intended change of residence from the community of Iqaluit (or from any subsequent community of residence), the date of the change, and the new place of residence of the children. In the immediate future, it may be that the mother will decide it is in the best interests of the children to leave the children=s residence in Iqaluit until the end of the school year.

[40] In the event the respondent and the children move away from Iqaluit, and the petitioner maintains his residence there, obviously a different access regime will be required. In that event, the petitioner=s minimum access shall include:

(a) five consecutive weeks during the children=s summer school break,
(b) every other Christmas school break, commencing with Christmas 1998,
(c) every other spring school break, commencing with Spring 1999.

Costs of exercising such access shall be the responsibility of the petitioner.

[41] Either access regime will of necessity require a concerted effort by each parent to cooperate with, and communicate with, the other parent, in the interests of the children=s happiness and well-being. It is my observation that the respondent mother does not communicate well, or cordially, to (or about) the father. Two examples from the trial evidence: a) her failure to notify him about the concerns noted in report cards, and b) her failure to notify him about the planned Christmas trip to Yellowknife. She needs to concentrate on improving her communication skills, relating to the petitioner and these two children.

[42] In addition to the issuance of a divorce judgment, therefore, there will be an order which will incorporate the following items:

a) granting custody of the two children to the respondent mother,
b) granting reasonable and generous access to the petitioner father, on reasonable notice to the respondent, as follows:

(i) while both parties are resident in Iqaluit,
A. every other weekend,
B. such other times as agreed between the parties, and, failing agreement, as ordered by the Court on application of either party,

(ii) while the parties are ordinarily resident in geographically-separate communities,
A. five consecutive weeks during the children=s summer school break,

B. every other Christmas school break, commencing with Christmas 1998,

C. every other Spring school break, commencing with Spring 1999,

D. such other times as agreed between the parties, and, failing agreement, as ordered by the Court on application by either party.

(c) any costs of access under (b)(ii) above shall be the responsibility of the petitioner,

(d) requiring the respondent to give to the petitioner a minimum of 45 days= notice, in writing, of any intended change of residence from the community of Iqaluit (or from any subsequent community of residence), the date of the change, and the new place of residence of the children.

[43] There will be a separate Court order rescinding any child support arrears under the interim custody order of August 1, 1994. This is by agreement of the parties.

[44] The respondent has withdrawn her request in the Counter Petition for a division of matrimonial property.

[45] In her Counter Petition the respondent also seeks an Order changing her surname to her maiden name. No such Order is required. See s.3 of the ***Change of Name Act***, R.S.N.W.T. 1988, ch.C-3.

[46] The issue of child support to be paid by the petitioner is reserved pending further submissions from counsel in the context of the Court=s decision regarding custody and access. Counsel can advise the Clerk whether they wish to make written submissions only, and/or their preferred dates for making of submissions on this issue, and on the issue of costs.

J.E. Richard,
J.S.C.

Dated this 5th day of December 1997
at Yellowknife, NT

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