

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GERALDINE EWANCHUK and A. ALLEN EWANCHUK

Applicants

- and -

DANIEL EWANCHUK and TRACY EWANCHUK

Respondents

Trial of an application for specified access to grandchildren.

Heard at Yellowknife, NT from July 8 to 10, 2002

Reasons filed: October 4, 2002

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

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MEMORANDUM OF JUDGMENT

[1] Geraldine and Allen Ewanchuk brought this application for specified access to their only grandchildren, Asia Lee, now six years old, and Alecsa Lynn, now 5 years old. Their application is supported by the Respondent Daniel Ewanchuk, who is their son and the father of the children. He was unrepresented and did not take part in the trial of this matter except as a witness called on behalf of his parents.

[2] The children's mother, the Respondent Tracy Ewanchuk, who is divorced from Daniel Ewanchuk, does not agree with some aspects of the access sought. From the evidence and my observations of the parties as they testified in court, it is clear that there are some very strong differences of opinion and acrimonious feelings between the grandparents and Tracy Ewanchuk and between Tracy and Daniel Ewanchuk. This is also evident from the fact that this access dispute has been the subject of court proceedings here and in Alberta since late 1998. Despite that, and to the credit of all concerned, the parties were able, during the course of the trial, to agree on some major aspects of access, as well as the access that was to take place this past summer.

[3] Counsel indicated at the end of the trial that they would provide me with a draft of the access terms agreed upon, but they have not done so. As discussed with them by teleconference on October 4, 2002, I have decided not to delay any further the release of my reasons for judgment on the matters that were not resolved. I will set out what I understand was agreed upon at the trial and if counsel wish to fine tune these particular terms for purposes of the final order they may do so.

[4] Accordingly, the terms I understand to have been agreed on are as follows:

- a) the grandparents will share in Daniel Ewanchuk's one calendar month summer access;
- b) for purposes of the summer access, the children will be picked up on the first day of access at 7:00 p.m. at the parking lot of the Royal Canadian Mounted Police detachment in Fort Smith and dropped off one calendar month later at the same place and time;
- c) in the event of a vehicle breakdown or an incident delaying the return of the children at the end of an access visit, the party returning them will go to the nearest detachment of the Royal Canadian Mounted Police and communicate that fact and explanation to the police and provide them with a copy of the access order;
- d) while the children are on access visits, the grandparents will advise Tracy Ewanchuk as soon as practicable of any illness, injury or accident requiring treatment;
- e) the grandparents will not use physical discipline on the children during access visits;
- f) the grandparents will not take the children to see a doctor or dentist without prior notification of Tracy Ewanchuk;
- g) the grandparents will not make or permit any physical alteration of the children, including dying or cutting their hair, piercing or tattooing;

h) the grandparents will have telephone access on alternate Sundays at 10:00 a.m. Mountain time and these telephone calls will be taken by the children in private and will not be interfered in by Tracy Ewanchuk or monitored by her by being present in the room or listening on a second telephone.

[5] Because of the agreement that was arrived at while Allen Ewanchuk, the first witness to testify, was still on the witness stand, some of the background that was covered during his testimony was not addressed in the testimony of the other witnesses, and so I will not draw conclusions about events that, in particular, Tracy Ewanchuk was not questioned about.

[6] Tracy and Daniel Ewanchuk were married in 1990. Their first child died shortly after his birth in 1995. After Asia's birth in 1996, the grandparents were quite involved with her. They were less involved with Alecsa, born in 1997, because not long after her birth, Tracy and Daniel Ewanchuk moved from Peachland, British Columbia, to northern Vancouver Island. In April of 1998, they separated and Tracy Ewanchuk moved to Calgary with the children.

[7] The grandparents, who then, as now, lived in Princeton, B.C., had access to the children after the separation. For a period of approximately six weeks, Asia accompanied them on an extended business trip, the intent of which according to Allen Ewanchuk was to visit her father on Vancouver Island. From the point of view of Allen Ewanchuk, relations with Tracy Ewanchuk were cordial up until a few days after Alecsa had surgery for a heart defect in September 1998. I will not go into details as Tracy Ewanchuk was not asked about the incident, but according to Allen Ewanchuk's testimony there was a dispute or misunderstanding about whether Alecsa was to have visitors at the hospital. After this, the grandparents understood that they were not welcome to see the children any more.

[8] In October 1998 the grandparents spent approximately one hour with each child during a time when Daniel Ewanchuk was exercising access. In light of what they understood to be Tracy Ewanchuk's opposition to their involvement, they did not contact the children, who would have been very young at that time, by telephone. Some efforts were made through family members to negotiate access but apparently they were not successful and in late 1998 the grandparents obtained an order for specified access from the Family Division of the Provincial Court in Alberta. Court proceedings have been ongoing since then, although it appears that there have been

periods of time, particularly in early 1999, when Tracy Ewanchuk did permit some access without the necessity of a court order.

[9] The court order that was obtained granted the grandparents two days' specified physical access at the beginning of the father's access period. It is my understanding from what was said at the trial that this was done to facilitate the grandparents picking up the children in Fort Smith, where they now live with their mother, and taking them to the father's home in British Columbia. It is also my understanding that the grandparents have had no problem exercising access to the children when the children are visiting their father, although there have been problems about access as between Daniel and Tracy Ewanchuk, such that neither he nor the grandparents had seen the children since July 2001 at the time of this trial.

[10] The matters on which the parties could not agree and on which I must make rulings are as follows:

- (i) telephone access by Tracy Ewanchuk during the grandparents' and father's access;
- (ii) limits on exposure of the children to the Jehovah's Witness religion;
- (iii) whether a second period of access should be for spring break only or should include Christmas;
- (iv) the grandparents' application to have Tracy Ewanchuk found in contempt.

(i) Telephone access by Tracy Ewanchuk during the grandparents' and father's access

[11] Although the issue of access as between Tracy and Daniel Ewanchuk is not before me (there is a separate corollary relief proceeding between them), counsel dealt with this matter on the basis that the grandparents' and the father's access are linked and it should be left to them to decide how many days out of any access period the children spend with their father and how many they spend with their grandparents. For that reason, some of the rulings I make, such as this one on telephone access, will necessarily affect both the grandparents and the father.

[12] The grandfather, Allen Ewanchuk, testified that Tracy Ewanchuk telephones the children persistently when they are on access visits. It is clear from his evidence that he considers the telephone calls an intrusion on the time the grandparents and the father have with the children, and an annoyance. He also expressed the concern that the children are uncomfortable talking to their mother when they are on access visits, that they change from being happy before a call to withdrawn after a call because their mother questions them closely on what they are doing on the visits. He testified that Tracy Ewanchuk uses foul language and makes disparaging comments about the grandparents when she calls.

[13] The grandmother, Geraldine Ewanchuk, testified that when Tracy Ewanchuk calls the children during visits, the calls last a couple of minutes; she could not recall any longer than 10 minutes. She also has the impression that the children are negatively affected by the calls and testified that at the end of the calls, they seem to feel that they have done something wrong. She testified that there was an occasion when she was present at Daniel Ewanchuk's when Tracy made five calls to the home.

[14] Daniel Ewanchuk testified that when he had access in July 2001 Tracy made as many as 15 calls in one day to his home, leaving messages that she wanted to speak to the children. Generally, when the children spoke to her, they would speak for 10 or 20 minutes and after the call would say that their mother misses them and would appear to feel bad that they were away having a good time without her. He acknowledged in cross-examination that he did not tell Tracy Ewanchuk when he and the children were going to be away from his home for three or four days at a time and said that was because he was not obligated to do so under the existing access order.

[15] The grandparents and Daniel Ewanchuk all feel that a call between the children and their mother once a week should be sufficient. It was clear to me that at least the grandparents feel that they have been denied access in the past and so should now be entitled to access without what they see as interference by the mother.

[16] Tracy Ewanchuk testified that she is extremely close to her children and that they normally telephone her two or three times a day when she is at work. She feels that the children want to have telephone contact with her three or four times a week during access visits. She testified that during the summer access in 2001, Daniel Ewanchuk had not allowed her to speak to the children when she telephoned and that she had to get her lawyer involved before she was able to speak to them, which was

not until two weeks into the access period. She also testified that when the grandparents had Asia with them on their extended business trip in 1997, she often did not know where they were and received little contact from them. She acknowledges that she is overprotective of her children and attributes that to the fact that her first child died. She denies using foul language when speaking to the grandparents.

[17] It was also clear to me from Tracy Ewanchuk's testimony that she feels that the children's father does not make enough effort to be part of their life, that the grandparents try to interfere in the way she raises her children, and that the life she has built with the children is enough for them.

[18] The sad thing about all this is that all the parties obviously love these children very much, yet are engaging in behaviour which exacerbates the ill feeling between the adults and makes things difficult and unhappy for the children. However strongly the grandparents may feel that their lifestyle and way of thinking is preferable to that of the mother, the fact is that it is the mother, as the parent with the day to day care of the children, who is responsible for the children's upbringing and they should respect her wishes.

[19] On the other hand, Tracy Ewanchuk exhibited little appreciation that the children's relationship with their grandparents is one that should be fostered, instead of discouraged and that making the children feel bad about the relationship will only cause grief to them. Having heard the evidence, and having observed Tracy Ewanchuk as a witness, I have no doubt that she has a temper and is combative when challenged. I do not accept her evidence that she does not use foul language with the grandparents. At the same time, I have no doubt that the grandparents' insistence on having unhindered access has resulted in phone calls from the mother not being returned as promptly as they might have been and has thus made the situation worse. I also have no doubt that the tensions between Tracy and Daniel Ewanchuk are such that any contact between them when the calls occur is acrimonious on both sides.

[20] In my view, the best thing that can happen in this case is for the parties to try to put behind them the problems of the past and start anew. Telephone calls from Tracy Ewanchuk during access visits should not be a problem if the calls are polite and are not conducted in such a way that the children end up feeling bad about being apart from her. A visit to the grandparents and their father should be a happy occasion, not one that causes stress to them. Telephone calls between mother and

children should not be viewed by the grandparents as an intrusion on their time with the children, but instead a natural consequence of the bond between the mother and children. Since the children are now at an age where they can conduct the calls themselves, it would be best if contact between Tracy Ewanchuk and the other adults is kept to a minimum.

[21] A telephone call every three days amounts to twice a week, which is not unreasonable for five and six year old children. The order I make is as follows:

- a) during access visits, the grandparents or the father will have the children telephone the mother every third day at 7:00 p.m. Mountain time. In the event that the mother is not present to receive the call, the children will leave a message on her answering machine at a number to be provided by her;
- b) in the event that the children are in a location where there is no reasonable opportunity for them to make the telephone call every three days, the mother is to be advised in advance of the date of their departure and return and where they will be. Upon their return from that location, the children will call her within 24 hours and, in any event, within six days of the previous call;
- c) in no event are the children to miss more than one regularly scheduled call;
- d) during these telephone calls, none of the parties to this action will make disparaging comments about or criticize any of the others and none of the parties will use foul language.

(ii) Limits on exposure of the children to the Jehovah's Witness religion

[22] The grandparents adhere to the Jehovah's Witness faith. They are actively involved in their faith and believe that not to practise it while the children visit them would amount to not portraying themselves as they really are. Both grandparents say they will not have the children accompany them while they are evangelizing. However, they have friends of the same faith who visit them and converse about their faith and the Bible and the grandparents want to be free to have these friends to their home while the children are present. They would also like to take the children, as they have in the past, to their place of worship, the Kingdom Hall.

[23] The father, Daniel Ewanchuk, was raised in the Jehovah's Witness faith and considers himself a Christian, however he does not now practise any faith.

[24] Tracy Ewanchuk was raised in an agnostic household and does not attend church. She testified that she disagrees with many of the practices of the Jehovah's Witness faith and is strongly opposed to the children being involved in it. She testified that the exposure thus far has caused Asia to question some of the things she has told the girls.

[25] This application falls under the *Children's Law Act*, S.N.W.T. 1997, c. 14. Section 17(1) of that *Act* says that the merits of an application in respect of access to a child shall be determined in accordance with the best interests of the child. In determining the best interests of a child, the court shall consider all the needs and circumstances of the child, including the child's cultural, linguistic and spiritual or religious upbringing and ties [s. 17(2)(c)].

[26] The children were two and one years old when their parents separated. Tracy Ewanchuk has been their primary caregiver since then. She has decided that their needs do not include exposure to the Jehovah's Witness or any other religion. It was obvious from her testimony that she feels strongly about this. On the other hand, I conclude from his testimony that Daniel Ewanchuk does not have strong feelings about religious upbringing for the children. Although he did say that he has respect for any faith that teaches good morals, he did not say that he wants the children to be raised in the Jehovah's Witness faith. Since he does not practise that faith, this is not a matter of the children getting to know that aspect of his life. On the evidence, it appears that he has acquiesced in the mother's wish that religion not be part of the children's upbringing.

[27] Therefore, the children's "religious upbringing and ties" as per s. 17(2)(c) of the *Children's Law Act* must be described as non-religious.

[28] I found Allen Ewanchuk to be the more insistent of the two grandparents on the issue of exposure of the children to his religion. His testimony indicates there are three reasons why he feels strongly about this. One is that he views any restriction on the children's exposure to his religion while they are in his home as an infringement on his rights. A second is that he views their exposure to his religious practices as something

that is healthy for them. Third, he stated that in his view, the mother has the right to choose her children's instruction when they are with her and the father has the right to choose when they are with him. He implied that he views it as the father's wish that the children be exposed to the Jehovah's Witness religion. However, as I have already noted, Daniel Ewanchuk did not say that in his testimony and did not appear to me to feel strongly about the issue of religion. The most that can be said based on the evidence is that Daniel Ewanchuk does not object to the children's exposure to his parents' religion.

[29] I start from the proposition that the grandparents are neither responsible for, nor do they have the right to decide, the religious upbringing of their grandchildren. In any event, the issue is not one of rights; it is the best interests of the children. If exposure to a religion or a religious practice is not in the best interests of a child, then a court is justified in restricting the child's exposure, even though that may affect how or whether a party has access to the child. This is consistent with the requirement that the terms and conditions of access be assessed from the perspective of the child's interests and not the rights of the party exercising access.

[30] The Supreme Court of Canada dealt with this issue, albeit in the context of parent, not grandparent, access in *Young v. Young*, [1993] 4 S.C.R. 3. In her reasons dissenting in the result, L'Heureux-Dubé J. said the following about access:

As the ultimate goal of access is the continuation of a relationship which is of significance and support to the child, access must be crafted to preserve and promote that which is healthy and helpful in that relationship so that it may survive to achieve its purpose. Accordingly, it is in the interests of the child, and arguably also in the interests of the access parent, to remove or mitigate the sources of ongoing conflict which threaten to damage or prevent the continuation of a meaningful relationship.

[31] I see nothing in the reasons of the other members of the Supreme Court indicating disagreement with that statement and in my view it must apply equally in the case of grandparent access.

[32] Justice L'Heureux-Dubé also pointed out that the court's task is not to cast judgment on the religious beliefs of the parties:

In instances where there is conflict over religion, it is important to emphasize that the court is not engaged in adjudicating a "war of religion" nor are the religious beliefs of the parties

themselves on trial. Rather, as courts have often recognized, it is the manner in which such beliefs are practised together with the impact and effect they have on the child which must be considered In all cases where the effects of religious practices are at issue, the best interests of the child must prevail

[33] Finally, as L'Heureux-Dubé J. also pointed out, "While a child's exposure to different parental faiths or beliefs may be of value, when such exposure is a source of conflict and is not in the best interests of the child, such exposure may be curtailed."

[34] In *Young*, L'Heureux-Dubé J. emphasized the right of the custodial parent to determine and put limits on the child's exposure to religion. McLachlin J. (as she then was) emphasized instead the benefits to the child of unrestricted contact with the access parent, relying in part on s. 16(10) of the *Divorce Act*, which provides that in making a custody or access order, 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. Here, too the emphasis is on the child's best interests rather than parental rights.

[35] There is no statutory provision relating to grandparents or other non-spouses which corresponds to s. 16(10) of the *Divorce Act*. So the issue falls to be decided according to the best interests of the children, but without any statutory presumption in favour of contact with the grandparents. For that reason, in my view, although the relationship with the grandparents is one that the court should encourage because the evidence indicates that it is important to the children and because relationship with extended family is generally of benefit to a child, the grandparents are on a different footing than a non-custodial parent would be. This, I think, must mean that more weight is to be given to the wishes of the primary caregiver in relation to religious upbringing and exposure.

[36] Tracy Ewanchuk is not opposed to the grandparents saying a prayer with the children before a meal or at bedtime. She does not want the grandparents to take the children to the Kingdom Hall or to teach them their religion or conduct Bible study with them. The grandparents have agreed not to evangelize and proselytize in the presence of the children and they say they do not engage in formal Bible study. So the real issues are whether they should be allowed to take the children to the Kingdom Hall or expose them to discussions between adults which might touch on the Bible and religion.

[37] There was very little in the grandparents' testimony at the trial about what the children would do at the Kingdom Hall. Religious services take place there, although it was not clear from the evidence whether the grandparents have taken the children to such services. There was some reference in Allen Ewanchuk's testimony to social activities involving other children but the nature of the activities was not described, although Mr. Ewanchuk did say it is not Sunday school. Counsel for the grandparents suggested in his submissions that there may be occasions such as weddings that the children would like to attend.

[38] The line between taking the children to religious services on a regular basis and indoctrinating them in that religion is probably so fine as to be virtually non-existent. I do not see that any benefit will accrue to the children from such activity when their mother is so adamantly against it. This has nothing to do with whether the Jehovah's Witness faith itself has merit or might be of benefit to the children. The point is that it is a source of conflict as between the parties. The conflict between their grandparents' strongly held beliefs and the mother's opposition to them and strong insistence on her own way of thinking may cause confusion to the children but, more significantly, can only be stressful to them. It seems to me that the best thing to do, in the interest of preserving the children's relationship with their grandparents in a way that does not threaten the mother's way of raising her children, is to remove the source of the conflict.

[39] Counsel for the grandparents submitted that some regard must be had to the right of the children to be involved in the Jehovah's Witness religion should they wish to be involved. There was evidence from the grandparents that the children have expressed a wish to go to the Kingdom Hall with them. However, these children are still very young and this evidence suggests only that the attraction for them is simply being able to accompany their grandparents where they go, rather than any conscious desire to be involved in their religion.

[40] In light of the conflict that has arisen from the children's attendance at the Kingdom Hall, I am persuaded that it is not in their best interests that they attend religious services there. As to other events they might attend at that location, as I have indicated above, the evidence was not detailed about that and I am unable to find that there is any benefit to the children in going to the Kingdom Hall, considered against the background of their mother's opposition to it. There must be activities elsewhere

which would bring these children into contact with other children. Allen Ewanchuk indicated in his evidence that there are playgrounds and a school and children of all ages living near his home.

[41] As a practical matter, the time these children spend with their grandparents is not lengthy. Allen Ewanchuk acknowledged in his testimony that the father has the children with him for the major part of any access period. For what may be a few days or a week at a time, I am sure that the grandparents can work around the fact that the children will not be able to accompany them to the Kingdom Hall and I am sure that, as reasonable people, they will find a way of explaining this to the children that will not create more conflict with Tracy Ewanchuk. If there is a special event, such as a wedding at the Kingdom Hall, the grandparents will have to seek the permission of Tracy Ewanchuk to take the children to it. Again, I would hope this would be done in such a way as not to create expectations in the children before their mother's permission is obtained.

[42] For the same reasons, I will order that the children not be exposed to formal Bible study or to group discussions, the main purpose of which is the discussion of religion or the Bible. I appreciate that this is something that will be difficult to monitor and enforce, especially when the natural curiosity of children comes into play. It is not my intention to prohibit casual conversation or to prohibit the grandparents from answering questions which may be asked by the children. It would not be possible to prevent children in today's society from ever coming into contact with religion, for example, when they are visiting their friends. However, if the grandparents choose, during the time they have access to the children, to invite individuals to their home for the purpose of discussing religion or the Bible, they will have to ensure that the children are not part of that. I would expect that this will actually get easier as the children get older and have their own interests to pursue in preference to adult business.

[43] It is unfortunate that the end result of this must be restrictions that the grandparents will no doubt view as adversely affecting their ability to profess and practise their strongly and sincerely held beliefs. However, the conflict between them and the mother, and the negative impact of all this on the children, convinces me that this is the only option if access is to be a good experience for these children.

[44] Accordingly, I order that:

- a) the Applicants shall not indoctrinate the children in the Jehovah's Witness faith, or evangelize or proselytize in the presence of the children;
- b) the Applicants will not engage in formal Bible or religious study with the children or expose the children to group discussions, the main purpose of which is the discussion of religion or the Bible;
- c) the Applicants will not take the children to the Kingdom Hall, except with the written consent of Tracy Ewanchuk.

(iii) whether a second period of access should be for spring break only or should include Christmas

[45] It is not unusual for a non-custodial parent to have access at Christmas. It is, however, unusual for grandparents to have Christmas access separate from access exercised by a parent at that time of year. I will approach this issue as a request by Daniel Ewanchuk and the grandparents jointly for access over the Christmas holiday season, on the understanding that they all intend to participate in that access, if granted.

[46] Tracy Ewanchuk testified that Christmas is an important, traditional celebration in her family and in the community of Fort Smith. She is concerned that the children will miss the festivities they are used to if they spend Christmas away from her. She prefers that Daniel Ewanchuk and the grandparents have spring break access.

[47] Daniel Ewanchuk testified that he has never had access to the children at Christmas and that if he is granted such access, he will ensure that the children have a turkey dinner and the traditional exchange of presents.

[48] The senior Ewanchuks do not celebrate Christmas with the traditional trappings of tree and stockings. Geraldine Ewanchuk testified that December 25 is regarded by them as a holiday for everyone, by which I understand her to mean a non-religious holiday.

[49] There is no reason why the children should not spend Christmas with their father from time to time. However, since these proceedings are about access for the

grandparents and there are separate corollary relief proceedings between Tracy and Daniel Ewanchuk, I cannot make an order regarding Daniel's access. All I can do is say what I think is appropriate and that is that Daniel Ewanchuk should be entitled to access for the school Christmas holidays in alternate years. Assuming an order to that effect is made in the other proceedings, I order that the grandparents will be entitled to share in that access with Daniel Ewanchuk. I decline to order separate Christmas access for the grandparents (such as access which they would exercise even if the father were to be unavailable for a particular Christmas school holiday), because the mother should have priority for that particular time of year in the event that the father does not exercise his access.

[50] The only order I can make at this time and do make is, therefore, that the grandparents are entitled to share in any Christmas holiday access granted by order or agreement to Daniel Ewanchuk and actually exercised by him.

(iv) the Applicants' application to have Tracy Ewanchuk found in contempt of court

[51] The Applicants seek a finding of contempt of court against Tracy Ewanchuk. They allege that she is in contempt of earlier court orders granting them telephone access to the children. They submit that an appropriate sanction would be a sentence of 30 days' imprisonment suspended for a period of time on condition that Tracy Ewanchuk comply with the terms of the access order that results from this trial.

[52] Rule 704(a) of the Rules of Court provides that a person is in civil contempt who fails, without adequate excuse, to obey an order of the Court, other than an order for the payment of money. The sanctions which are possible in this case are imprisonment for not more than one year, or a fine of up to \$5000.00 or payment of such costs and expenses as the Court considers proper.

[53] The first relevant order was made on April 28, 2000 in the Family Division of the Provincial Court of Alberta by Judge Helmer (the "Helmer order"). It provided that commencing May 7, 2000, the grandparents would have biweekly telephone access on Sunday at 9:00 a.m. It provided further that Tracy Ewanchuk was not to attend at, participate in or interfere with the telephone access, although she was permitted to tape record the calls.

[54] By order of this court made October 16, 2000, the Helmer order was recognized and declared enforceable in the Northwest Territories. A further order was made on May 2, 2001 by Richard J. (the “Richard order”) whereby the telephone access under the Helmer order was to continue but without any tape recording.

[55] Allen Ewanchuk testified that there were problems with the telephone access right from the beginning. He said that on many occasions there would be no response when he called at the appointed time and during some calls Tracy Ewanchuk would interfere or swear at the grandparents. He testified that from September 2001 to March 20, 2002, they were unsuccessful in their attempts to contact the children by telephone.

[56] Tracy Ewanchuk admitted that she sometimes intervened in the calls, for example by telling Alecsa that she was not to tell her grandparents about Asia’s broken arm, or by telling the grandparents that they were speaking to the children about inappropriate matters, and hanging up the telephone. She also admitted that some of the calls required under the Helmer order did not take place. She denied swearing at the grandparents, although she retracted from that somewhat on cross-examination. However, she denied that she had any intention to prevent telephone calls or breach the court orders. She also testified that she never received a copy of the orders in question, although she admitted knowing that the biweekly telephone access was to commence on or about April 28, 2000 and that she knew she was not to interfere in the calls. Her stated reason for not always allowing or facilitating the calls is that, “I didn’t need the grief”. She said that she did not allow the calls to take place when she felt that it was not in the best interests of the children and said that was because the children tell her that the grandparents are not interested in what they talk about, or they talk about religion or about taking the mother to court.

[57] Although she admitted to not always complying with the requirement for telephone access under the Helmer order, Tracy Ewanchuk also testified that she thought the Richard order, made May 2, 2001, terminated all telephone access. She claimed never to have received a copy of that order and that her knowledge of it came only from speaking to her former counsel (who was not counsel at trial). In fact, the Richard order terminated only specific in-person access which had been granted under the Helmer order. Ms. Ewanchuk acknowledged that she may have misunderstood or misheard her lawyer, who apparently telephoned her from the court house after the application before Richard J. concluded, when the lawyer was describing the order that was made.

[58] Ms. Ewanchuk testified that it was not until March 2002 that she learned from her new lawyer (again, not counsel at trial) that telephone access had not been terminated by the Richard order.

[59] Neither of Ms. Ewanchuk's former lawyers were called as witnesses. It strikes me as incredible, in light of the difficult history of the grandparents' access and the acrimony between the parties, that Ms. Ewanchuk would not have insisted on a copy of the order or her lawyer would not have provided one to her.

[60] Counsel for the grandparents points out that the resumption of telephone access in March 2002 coincided with his clients' application to have Tracy Ewanchuk found in contempt of court. That application was set for a return date of March 8, 2002. The implication is obviously that Ms. Ewanchuk allowed access once she realized there was a possibility that she could be found in contempt.

[61] Counsel for Tracy Ewanchuk submitted that there is some evidence to support her client's claim that she believed that the Richard order terminated telephone access. She relied on an affidavit filed by the grandfather earlier in these proceedings, in which he recorded the following attempts to contact the children:

9 September, 2001 9:01 a.m. Respondent advised, "You can't talk to them. Play by the rules".

9:02 a.m. Denied access by the Respondent.

and

27 January, 2002 9:00 a.m. Twenty rings then answering machine picked up.

1:00 p.m. Tracy answered. She said, "Why do you keep calling. Frankly I won't allow it. Your involvement is completely detrimental. You don't follow orders. Don't call here anymore." She then hung up.

[62] The above excerpts are two out of many calls recorded by the grandfather. He also recorded calls taking place with one or both of the children on May 6, May 20,

June 3, August 12 and September 23, 2001. This contradicts Tracy Ewanchuk's assertion that she thought the Richard order, made May 2, 2001 terminated telephone access. I do not accept, therefore, that her recorded statement, "Play by the rules", indicates that she thought, on September 9, 2001, that access had been terminated. In any event, that was only an inference that her counsel suggested could be drawn as no one asked Ms. Ewanchuk about the notes when she was testifying. I decline to draw the inference. Nor do I draw that inference about the remark, "You don't follow orders", recorded on January 27, 2002. In light of the fact that she had permitted some telephone access and the surrounding comments recorded for that date, I infer that the "orders" Tracy Ewanchuk was referring to were her own.

[63] Having heard the evidence, there is no doubt in my mind that if Tracy Ewanchuk had honestly believed that telephone access had been terminated by Justice Richard's order of May 2, 2001, there would have been no telephone access between that date and March 2002 because she would not have allowed it. Clearly that is not the case. She did not cut off access completely until after September 2001, although the evidence does not reveal why. I can only assume that it was because of her concerns about what the grandparents were discussing with the children, as indicated above, and her general unwillingness to co-operate with telephone access.

[64] The evidence was that since March 2002, there have continued to be problems with telephone access due to non-cooperation by Tracy Ewanchuk.

[65] The position taken by Tracy Ewanchuk about access by the Applicants was contradictory in many ways. On the one hand, by agreeing to access by them, she appears to recognize that the relationship they have with Asia and Alecsa is one that is valuable to the children. On the other hand, she claimed in her testimony that the children have no interest in talking to their grandparents on the telephone. My conclusion is that her failure or refusal to comply with the telephone access order has in large part been the result of frustration on her part with what she perceives as the grandparents' interference in her life and the way she wishes to raise her children.

[66] It is clear that the effective administration of justice requires that people comply with court orders. If there are problems with the order, the way to deal with that is not to breach it, but to apply to vary it. If the variation is refused, then the order stands and must be obeyed.

[67] Even with civil contempt, the burden of proof beyond a reasonable doubt applies. I am satisfied beyond a reasonable doubt that Tracy Ewanchuk has failed to obey the Helmer and Richard orders. Her reasons for not obeying as far as her concerns about what the grandparents discuss with the children do not amount to a lawful excuse. In the case of the Richard order, I do not believe her assertion that she thought access had been terminated.

[68] It has been pointed out that by long tradition, the court exercises restraint in family law cases, that the court's focus is on the interests of the children, not the behaviour of parents, and that children are better off if their parents are not in jail or paying fines: *Salloum v. Salloum*, [1994] A.J. No. 304 (Q.B.) per Veit J. In this case, the sanctions that are available to the Court would all result in deprivation to the children, either by jailing their mother, their primary caregiver, or imposing a financial burden on her. Since the father pays no child support under the terms of their divorce, the mother has the sole responsibility for supporting the children and any sanction by way of a fine or payment of costs would affect her ability to carry out that responsibility.

[69] I also accept the submission of counsel for Ms. Ewanchuk that to bring the prospect of imprisonment into this matter will not help what is already a difficult situation.

[70] Tracy Ewanchuk's breach of the court orders regarding telephone access has been intermittent, not absolute. Although she has not purged her contempt by complying with the access orders, she has gone some way toward doing that by agreeing during this trial that such access will take place. I have considered very carefully how best to deal with this and I come back to a remark I made earlier in these reasons: that the best thing is for the parties to, in effect, start anew. If Tracy Ewanchuk does comply with the order that she has agreed to, then there should be no further difficulty. If she does not comply, then she should not expect any lenience from the Court on any future finding of contempt. In all the circumstances, I have decided not to make a declaration of contempt and accordingly, no sanction will be imposed.

[71] In the result, I make the following orders on the matters that were not resolved between the parties:

1.
 - a) during access visits, the Applicants or the father will have the children telephone the mother every third day at 7:00 p.m. Mountain time. In the event that the mother is not present to receive the call, the children will leave a message on her answering machine at a number to be provided by her;
 - b) in the event that the children are in a location where there is no reasonable opportunity for them to make the telephone call every three days, the mother is to be advised in advance of the date of their departure and return and where they will be. Upon their return from that location, the children will call her within 24 hours and, in any event, within six days of the previous call;
 - c) in no event are the children to miss more than one regularly scheduled call;
 - d) during these telephone calls, none of the parties to this action will make disparaging comments about or criticize any of the others and none of the parties will use foul language.
2.
 - a) the Applicants shall not indoctrinate the children in the Jehovah's Witness faith, or evangelize or proselytize in the presence of the children;
 - b) the Applicants will not engage in formal Bible or religious study with the children or expose the children to group discussions, the main purpose of which is the discussion of religion or the Bible;
 - c) the Applicants will not take the children to the Kingdom Hall, except with the written consent of Tracy Ewanchuk.
3. the Applicants are entitled to share in any Christmas holiday access granted by order or agreement to Daniel Ewanchuk and actually exercised by him.
4. the application for a declaration that Tracy Ewanchuk is in contempt is dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
4th day of October 2002

Counsel for the Applicants:
Counsel for the Respondent Tracy Ewanchuk:

James Brydon
D. Jane Olsen

S-0001-CV2000000060

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

GERALDINE EWANCHUK and A. ALLEN EWANCHUK

Applicants

- and -

DANIEL EWANCHUK and TRACY EWANCHUK

Respondents

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