

ORIGINAL

Lay v. Lay, 2003 NWTSC 7

DV 6101-02934

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

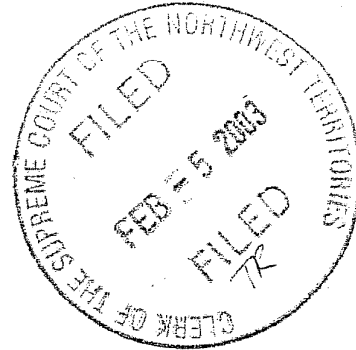
JAMES MALCOLM CAMERON LAY

Petitioner

- and -

MAUREEN JANIS LAY

Respondent



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Transcript of the Oral Reasons for Judgment by The Honourable Justice V.A. Schuler at Yellowknife in the Northwest Territories, on February 4th A.D., 2003.

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APPEARANCES:

Ms. K. Peterson, QC: Counsel for the Petitioner

The Respondent was not present or represented:

1 THE COURT: On the issue of division of  
2 property, I'm going to reserve obviously on that,  
3 and I will ask you to file those cases on the costs  
4 of sale issue within the next two weeks.

5 On the question of custody and access, just so  
6 that it isn't hanging up in the air although I will  
7 refer to it when I do my reasons for judgment on the  
8 property issue, I'm satisfied, in light of the fact  
9 that the children have been with the Petitioner for  
10 approximately five years now, they have been  
11 consistently in his care, there is nothing that I  
12 heard in the evidence that would cause me any  
13 concerns about that or suggest that there is any  
14 need to revisit that issue and obviously the fact  
15 that they are settled in BC with the Petitioner and  
16 that there has to be some good reason to change or  
17 disrupt their lives, all of that leads me to  
18 conclude that the situation should continue as it  
19 is. So I will order that there be joint custody  
20 with day-to-day care to the Petitioner. And also  
21 because of the difficulties between the parties that  
22 have been described and because I think in this  
23 particular type of situation, where they are parted  
24 by such a distance, it makes sense as well to order  
25 that if there is any disagreement between them after  
26 consultation on an issue regarding the health,  
27 education, welfare, or other activities of the

1 children, that the Petitioner will have the final  
2 say on that issue.

3 Now in terms of access, it just occurred to me  
4 as I was looking at page 12 of the brief, you have  
5 specifically mentioned Christmas and summer and I  
6 think then that you referred to "major holidays".  
7 Is there a need to deal specifically with spring  
8 break? In other words, the school spring break?

9 MS. PETERSON: The Petitioner has indicated,  
10 Your Honour, that for the last three years the  
11 Respondent has been in British Columbia during the  
12 spring break period so it has been less of an issue.  
13 Overall, it would be his intention to balance time  
14 at spring break with whether or not the children are  
15 going up in May and to try and achieve some balance  
16 there. So I think in terms of specifying access, it  
17 would be our preference to specify one-half of  
18 Christmas and July 15th to August 15th and leave a  
19 little bit more discretion with respect to other  
20 periods.

21 THE COURT: That's fine, that seems  
22 reasonable in the circumstances. So the access then  
23 that I will order for the Respondent will be  
24 one-half of the Christmas school break in each year  
25 alternating between the first half and the second  
26 half of the break. Summer access from July 15th to  
27 August 15th each year. Reasonable telephone access

1 and access by correspondence and e-mail.

2 I will also order then that the Respondent  
3 acknowledge and agree in writing to the travel  
4 schedule to be presented to her by the Petitioner  
5 for any period of access and that she acknowledge  
6 and agree in writing to that at least 30 days before  
7 travel occurs failing which the Petitioner will then  
8 have the right to decide whether the access will  
9 take place. I don't know if I have worded that very  
10 well. In other words, I want to make it so that if  
11 she isn't prepared to agree to something 30 days  
12 ahead of time -- maybe I should say the access will  
13 take place on the terms presented rather than  
14 whether it will happen at all. That may just cause  
15 problems if it is worded that way.

16 MS. PETERSON: I think, Your Honour, that the  
17 wording that you have suggested, we can work with. I  
18 can spend some time with the Petitioner and we will  
19 work out what the various potential alternatives  
20 are. His concern is that when it is signed off, then  
21 she knows and he knows what the dates are and that  
22 she will be at the airport to pick them up when they  
23 arrive and that she will take them to the airport  
24 when they have to go back. And if that doesn't  
25 happen in the 30 days, he is then, under your  
26 wording, left with the discretion about whether it  
27 is going to take place, or if it is going to take

1 place under what kinds of constraints or  
2 considerations. So if we leave that discretion with  
3 him, it may not always be black and white but it  
4 leaves him with at least the decision of whether it  
5 is going to occur and if there is some reduced  
6 regime that is still going to allow access to  
7 happen.

8 THE COURT: All right, I will leave it then  
9 the way that I had worded it.

10 Then there will also be, apart from the  
11 specified access, such other access that the parties  
12 may mutually agree upon, taking into account the  
13 school attendance and schoolwork to be undertaken by  
14 the children during any absence from scheduled  
15 school days.

16 I will also order that discussions about access  
17 arrangements will not occur in the presence of the  
18 children.

19 Now, with respect to the Respondent bearing the  
20 costs of her exercise of access, I want to leave  
21 both that and the issue of child support and  
22 consider those.

23 One thing that occurs to me, that if I make her  
24 responsible for the costs of exercising access,  
25 there should probably be some provision whereby she  
26 then makes the proposal as to how the access occurs.  
27 In other words, if she in fact is able to and

1 decides that she will bear the costs of exercising  
2 access one Christmas, then it would seem to me that  
3 it's likely better to at least give her the  
4 opportunity to put together the schedule and the  
5 means by which she is going to exercise that access,  
6 and I just don't want to run into a problem with the  
7 clause that we have just referred to about him  
8 making a proposal to her or putting a proposed  
9 schedule before her. So as a result of that, I may  
10 want to tinker a little with that clause.

11 MS. PETERSON: I would just indicate to the  
12 Court, in terms of access issues generally and the  
13 importance of them, from the perspective of the  
14 Petitioner the certainty about arrangements and the  
15 orderly making of those arrangement is more  
16 important than the financial consideration of the  
17 costs of access.

18 THE COURT: So what are you saying though,  
19 that if she were to propose something that seemed a  
20 little bit up in the air and uncertain but she was  
21 willing to pay for it that he would prefer to pay  
22 and be the one to say this is how it is going to  
23 happen?

24 MS. PETERSON: I mean in theory, because access  
25 is a benefit of the children primarily and that's  
26 the focus that we should have, the parties should be  
27 participating to the extent that's fair to their

1           circumstances in any event. If she had reason to  
2           think that the arrangements that he was making were  
3           unreasonable, in other words you can only see the  
4           children if they fly first class and on a fully paid  
5           ticket and you have to pay, then that is in fact a  
6           means of creating a barrier for access, but there is  
7           no evidence that that has ever occurred. In fact,  
8           quite to the contrary. In some ways, I'm inclined  
9           to suggest to you that her participation in some  
10          costs of access should exist no matter who makes the  
11          arrangements because the evidence is that he has  
12          made the arrangements that are in fact cost effective  
13          and allow the children to go there. I suspect, as I  
14          indicated in submissions, that if she didn't  
15          participate in costs, the children would nonetheless  
16          spend time with her. In other words, my clear  
17          impression from the Petitioner is he is not going to  
18          keep the children from seeing their mother in those  
19          circumstances. But there is a certain message in  
20          terms of what the responsibility of parents is, both  
21          with respect to this and maintenance issues as a  
22          whole. The Petitioner can have an entitlement that  
23          he doesn't enforce or that he doesn't require, and  
24          there might be some merit in that. But if the choice  
25          is the certainty of arrangements and his ability to  
26          put those in place knowing the activities of the  
27          children and getting things organized in a fashion,

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if that has to be compromised in favour of her contributing to the costs of access, then that's kind of a no-brainer for the Petitioner.

THE COURT: All right. Well, I understand what your position is then.

I will reserve then on those matters - costs of access, child support, and matrimonial property and I will issue a written decision on them.

Now, is there anything else that I need to cover?

MS. PETERSON: If we can simply have leave to speak to the issue of costs.

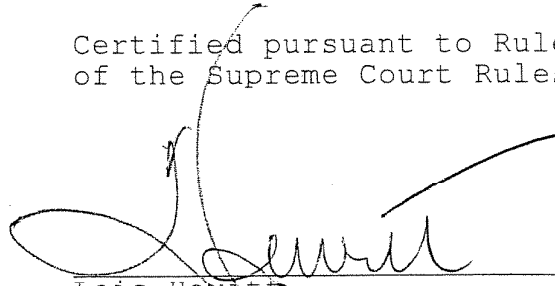
THE COURT: Yes, you can have leave to speak to that issue then once you have the written decision.

MS. PETERSON: Thank you.

THE COURT: If there is nothing further then, we will close court. Thank you.

(AT WHICH TIME THE PROCEEDINGS CONCLUDED)

Certified pursuant to Rule 723 of the Supreme Court Rules.

  
Lois Hewitt,  
Court Reporter