

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ALAN KAYLO

Petitioner

-and-

KELLY MARIE KAYLO

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application by the father of two children for variation of a corollary relief order filed December 18, 2003 (“the order”) to incorporate a provision of the parties’ separation agreement.

[2] The father, who is the Petitioner in the divorce proceedings, seeks to vary paragraph 6 of the order, which reads as follows:

6. Each the Petitioner and the Respondent will have the right to take the children on holidays and the person so doing shall provide the other with full particulars of his or her itinerary and details of where the children may be contacted during the holiday period, including where and with whom the children will be. Each the Petitioner and the Respondent agree that holidays plans shall be made with the consent of the other party, which consent shall not be unreasonably withheld.

[3] To place the above in context, I note that the order also provides that the parties have joint custody of the two children of the marriage, who are now 15 and 12 years old. Day to day care is rotated between the parties on a weekly basis and holidays and other important dates and events with the children are to be shared in as equal a way as possible under the terms of the order.

[4] The following paragraph was not included in the order but is part of the separation agreement entered into by the parties in February 2003:

36. The Mother shall provide to the Father, in 2003, an airline travel pass (2 coupons Yellowknife to Ottawa return) so that the Father may take the children to visit their extended family in Ontario. The children, as dependents of the Mother, will have unlimited travel privileges in connection with the Mother's work related benefits.

[5] It is the second sentence of the above paragraph that the father seeks to have included in the corollary relief order, although varied somewhat to provide that the children, as dependents of the mother, will have unlimited travel privileges with members of the children's family, for so long as the mother's work related benefits so provide.

[6] The mother is employed by an air carrier and as a result is entitled to various free and rate reduced travel passes for the children pursuant to her employer's policy which provides travel privileges for employees and their dependants. On this application, I am not called upon to interpret the policy and what it does or does not permit; I am called upon to interpret only the separation agreement.

[7] The father takes the position that paragraph 36 of the separation agreement was intended to obligate the mother to provide free travel passes for the children whenever the father might ask for them, including for trips he will accompany them on. He does not suggest that the mother is obligated to provide passes for his own travel with the children.

[8] This application was argued on affidavit evidence and so all references to evidence or to what the parties say is to the affidavits. The father says that the intention and his understanding of paragraph 36 was that the mother would continue to provide the passes for the benefit of the children. He points out that immediately after the separation agreement was executed, she provided passes for the children to travel with him and that she also provided passes for the children to accompany him on a trip in April 2004. He argues that it is in the best interests of the children that they continue to have access to these passes for their personal development and maintenance of extended family relationships.

[9] The mother, in opposing the father's application, argues that paragraph 36 of the separation agreement is ambiguous, that there was no meeting of the minds in regard to the provision and that it does not obligate her to provide passes for the children on an ongoing basis. She maintains that in an initial draft of the separation agreement, the father proposed a clause to the effect that the mother would provide travel passes for both him and the children once annually. The mother says that since he would no longer qualify as her spouse under her employer's policy, they compromised on the provision for passes in 2003, which were for one time only. She says further that when she observed that the clause he had initially wanted had been removed from the agreement, she signed it, never having the intention that she would be obliged to provide him with travel passes for the children whenever he wanted to travel with them. The travel passes provided in February 2003 were, she says, planned long in advance of the separation agreement's execution and the April 2004 passes were the result of one of the children calling her directly, which put her in an awkward position.

[10] The initial question is whether paragraph 36, particularly its second sentence, is ambiguous. In my view, it is not. The first sentence clearly sets out the mother's obligation to provide the father with a travel pass in 2003. The second sentence is not so restricted. It provides that the children will have unlimited travel privileges in connection with the mother's work benefits. The meaning is clear: the mother and father have agreed that so long as the mother has such benefits available to her for the children, the children are to have access to them. The word "unlimited" indicates that the privileges are not restricted to the year 2003 and not restricted to travel with the mother.

[11] Since the language of the paragraph is not ambiguous, there is no basis upon which to go outside it to consider evidence of what the parties intended. The mother is really asking that the sentence at issue be read as providing that the children will have unlimited travel privileges in connection with her work benefits except when they travel with the father. But that is not what the sentence says. Although the mother says in her affidavit that she did not intend to be obliged to provide the father with travel passes for the children whenever he wanted to travel with the children, she does not say what she thought the sentence did mean when she executed the agreement. None of this evidence is sufficient to allow me to disregard the plain meaning of the sentence in question and substitute for it something else.

[12] The mother also expresses concern that use by the children of these travel privileges for travel with their father in addition to travel with her may have a negative effect on the revenues of her employer or be perceived as an abuse of the policy. However, any effect the use of travel privileges may have on the revenue of the employer is irrelevant to the issue before me, which is simply what did the parties agree to in the separation agreement. And any restrictions on use of the privileges are for the employer to specify. If the employer does not want the children of employees to have unlimited travel privileges, then presumably it can and will put restrictions on those privileges, if it has not already done so.

[13] Since paragraph 36 of the separation agreement refers to unlimited travel privileges in connection with the mother's "work related benefits", she is only obligated to provide the children with access to the travel privileges that she has under the benefits that her employer provides or its policies in place from time to time. It is for the employer, not the Court in interpreting the agreement between the parties, to decree how often or with whom or under what conditions employees' children are eligible to travel on free or rate reduced passes.

[14] Considering, however, that the passes are benefits obtained through the mother's work, and are not therefore within her total control, any requests for such passes by the father should be reasonable and made on reasonable notice to the mother. Although that is not specified in paragraph 36, the paragraph should be understood to include those terms.

[15] As indicated above, the father asks that the corollary relief order be varied to include the substance of paragraph 36 of the separation agreement. "Corollary relief" is a term used in the *Divorce Act* to include custody and access, child support and spousal support. For some reason, paragraph 36 of the separation agreement is not included in the sections of the agreement that deal with custody, access and support. It is found in a section entitled "Other Agreements". As such, and in the absence of any evidence as to whether, notwithstanding the format of the agreement, the provision of travel passes was dealt with by the parties as an aspect of custody, access or child support (or as part of the property settlement, which is not corollary relief), I am not satisfied that they would be properly included in the corollary relief order. If, however, counsel are in agreement that the travel benefits be treated as corollary relief, they may submit a joint memorandum to that effect within 30 days of the date this Memorandum of Judgment is filed. Failing that, a declaratory order will issue

that the children, as dependents of the mother, will have unlimited travel privileges for so long as the mother's work related benefits so provide and in accordance with the terms of those benefits. I decline to specify "with members of the children's family" as who they are eligible to travel with on the passes depends on the terms of the benefits provided by the mother's employer.

[16] Any submissions on costs may be made in writing and filed within 30 days of the date this Memorandum of Judgment is filed.

Heard at Yellowknife, NT December 17th, 2004.

V.A. Schuler
J.S.C.

Dated this 10th day of January, 2005.

Counsel for the Applicant: Katherine R. Peterson, QC
Counsel for the Respondent: Sheila MacPherson