

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JEANNINE DIANE PILON

Petitioner  
(Respondent)

- and -

ROGER ERNEST PILON

Petitioner  
(Applicant)

MEMORANDUM OF JUDGMENT

A) INTRODUCTION AND BACKGROUND

[1] The parties are engaged in litigation over the custody of their son, A., who is just over seven and a half years old. They both seek sole custody, and the matter is very contentious. The trial is likely to proceed in the early part of 2009. In the interim, the parties share the day to day care of A. on alternating weeks. An Order to this effect was issued by consent in 2006.

[2] The mother occasionally travels for work. The issue on this application is whether A. should stay with his father when his mother has to travel on days where A. is in her care. The mother wants to make suitable arrangements for A.'s care during her absences. The father wants A. to stay with him if he is not to be with his mother.

[3] There is significant conflict and contradictions in the affidavit materials filed on this application, as there are in other affidavits filed over the last several months. The areas of conflict are at the heart of the dispute between the parties and will have to be

resolved by the Court at trial. It appears there will be much conflicting evidence that the Court will have to assess to make findings one way or another. Such findings cannot be made at this stage, on the basis of affidavit evidence.

[4] Despite the many conflicts in the evidence, certain matters are not in issue. For some time, now, A. has displayed behaviour that is of great concern to both his parents. This has included extreme anxiety and aggression. He has also had difficulties in certain areas of learning. He has had difficulties functioning adequately at school and in certain day homes settings.

[5] In August 2008 A. was assessed at the School-Aged Neurodevelopmental Assessment Clinic at the Glenrose Rehabilitation Hospital in Edmonton. The report from that assessment has been filed as an exhibit to one of the father's affidavits. It makes several recommendations as to strategies to assist A. with his behaviour and with his learning. The report also recommends medical follow-up, the involvement of a psychologist, and re-testing of his cognitive skills in a few years.

[6] It is clear from the report, and from other evidence about A.'s behaviour, that he has special needs. It is not altogether clear from the materials before the Court what the root causes of A.'s issues are, but it appears that some of those issues have been exacerbated by the stresses associated with the issues between his parents. That is unfortunate, but not surprising.

[7] Against this general backdrop, and recognizing that the many areas of conflict in the evidence cannot be resolved at this stage, I turn to the specific issue raised in this application.

## B) ANALYSIS

[8] The mother's opposition to the application is based on two things. First, she is concerned that A. is not being medicated adequately when he is with his father, so she does not want A. spending any time there in addition to the usual alternating weeks. She is also concerned that A. spending additional time with his father will be destructive to the bond that she is trying to foster with A.

[9] The father argues that there is no good reason for A. not to be with him if he cannot be with his mother. This, he says, is especially so because of A.'s special

needs. The father argues that even the best babysitter or caregiver cannot be expected to know A. as well as his parents do, or to be in a position to respond to emergencies as well as they will.

1. A.'s Medication

[10] This issue has been very contentious between the parties for some time. They disagree about certain aspects of A.'s medical treatment.

[11] The affidavits filed in support of this application, as well as affidavits filed previously, refer to this controversy. What transpired is not entirely clear because the parties' accounts of events differ and there is no independent evidence before the Court on this issue. But it appears that medication was prescribed to A. by a doctor. Some time later the dosage was increased by another doctor. The mother's view is that the medication in question, and the increase in dosage, was beneficial to A. It appears that there was an incident that resulted in A. being taken to Emergency. This was after the dosage had been increased. The father's view, as outlined in one of his affidavits, is that the second doctor overdosed the child on the medication.

[12] At the end of September 2008, the parents met with the doctor who had increased the dosage. That doctor offered a referral to another pediatrician. There were discussions about what should happen in the meantime. The father wanted more tests done before any further medication was given to A. The mother wanted A. to continue with the medication. The conflict was not resolved that day, and does not appear to have been resolved since.

[13] There is no evidence as to where things are at now. In their respective affidavits, both parents assert that they have followed medical advice and the other parent has acted contrary to that advice. There is no evidence before the Court from any of the doctors involved. What the doctors have said is being conveyed to the Court by the parents, is hearsay, and is also filtered through their perceptions of events.

[14] Wherever things are at with respect to this issue, there is no evidence of a deterioration in the child's condition since the end of September 2008, nor any other evidence that could assist the Court in drawing conclusions about who is right and who is wrong about this medication issue. It is not unheard of for doctors to have different views about how a medical problem should be treated. If this is the case with A.'s

treatment, no doubt it makes an already difficult situation even more difficult for all involved. One can only hope that, placing A.'s best interests ahead of their legal dispute, the parents will continue to work cooperatively with the medical professionals to determine what is truly best for him.

[15] In the meantime, and all that being said, the Court is not equipped to resolve the conflict about this medical issue on the basis of the evidence currently before it. Moreover, the Court must deal with this application taking the existing custody framework into account, that is that at present time, each parent is given equal responsibility for the care of this child. In the absence of clear and compelling evidence to the contrary, the Court must presume that they are both able to care for the child properly.

[16] Under the circumstances, and especially because of the existing alternating weeks custody regime, the parents' dispute about medication is not a reason for preventing the child from being cared for by his father when his mother is away. A. is in his father's care every second week as it is. It is difficult to accept the argument that A.'s health will be placed at risk if he spends additional short periods of time with his father during his mother's absences. The argument might be more compelling if A. was in his father's care only sporadically, or for very short periods of time. But under the existing circumstances, it is not persuasive.

## 2. Potential impact on bond between A. and his mother

[17] The mother alleges that the father says and does things that are harmful to the emotional bond that she is trying to maintain with A. She gives various examples in her affidavits. The father denies doing these things. As I have already stated, these are not conflicts that I can resolve on the basis of affidavit evidence.

[18] The observations I made in dealing with the medical issue are relevant to this issue as well. The child spends every second week with his father as it is. It is difficult to see how spending a few more days with him from time to time could have the kind of impact that the mother fears.

[19] Obviously, if either parent is found, at trial, to have done things to undermine the child's relationship with the other parent, that will reflect negatively on that parent. It is conduct that is frowned upon by the Court, is relevant to the question of custody,

and can have a bearing on the ultimate outcome. But this is an issue that will have to be resolved at the trial. At this stage, and considering the conflicting evidence and the existing custody regime, it is not, in my view, a sufficient justification for preventing the father from caring for the child when his mother is unable to.

### 3. Best interests of the child

[20] Decisions about custody and access must, at any stage of the proceedings, be based on what is in the best interests of the child. This is what must guide my decision on this application. A.'s best interests must be at the heart of the analysis, not what either of his parents' preference is.

[21] It is clear that A. has special needs. Among other things, the evidence suggests that he has difficulty coping with disruption. Transitions between the parents has proven, at time, to be difficult. I have given this careful consideration, because allowing the father's application would disrupt the usual week to week routine, and increase the number of transitions between the two households.

[22] However, I also take into account that some disruption is inevitable, and that for A. to be left with care givers other than his mother would also be disruptive to his usual routine. On balance, I am of the view that the benefits of having this child stay with one of his parents, instead of another care giver, outweighs the disruption caused by the transition between households. This finding should not be taken as reflecting negatively on the mother's ability to arrange for reliable and competent care givers for A., because it has nothing to do with that. It is simply a recognition that in a situation where both parents share the day to day care of a child, especially a child who has special needs, it is preferable that he be with one of his parents as often as possible.

[23] The best scenario, that would entail the least disruption to the child's schedule, would be for the mother's travels to occur on weeks where A. is with his father in any event. I say this recognizing that people do not necessarily have flexibility in organizing their work related travels, so it may not always be possible to have the mother's travels coincide with weeks where she does not have A. in her care. But that is the option that would cause the least disruption for A. and it would also alleviate or mitigate some of her concerns.

### C) CONCLUSION

[24] For the reasons I have given, on those occasions where the mother has to travel on weeks when A. is in her care, I am satisfied that it is in A.'s best interests to stay with his father.

[25] For those reasons, the application is granted and the following Order will issue:

1. If the mother has to be absent from Yellowknife on weeks where A. is scheduled to be with her, A. will be in the day to day care of the father for the days where the mother is absent.
2. The mother will communicate her travel schedule to the father as soon as possible after she becomes aware of it, so that the appropriate transition arrangements can be made.

[26] Given the conflicts in the evidence and the nature of the issues raised in this application, I leave costs to be determined at the discretion of the trial judge.

L.A. Charbonneau  
J.S.C.

Dated at Yellowknife, NT, this  
10<sup>th</sup> day of November 2008

Counsel for Jeannine Diane Pilon:  
Counsel for Roger Ernest Pilon:

Abdul Q. Khan  
James Scott

S-0001-DV-2006-103734

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