Suchlandt v. *Diveky*, 2009 NWTSC 02

Date: 2009 01 09
Docket: F1-FM-2008000043

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRITA SUCHLANDT

Applicant

- and -

ANDREW DIVEKY

Respondent

Application regarding custody and relocation of child.

Heard at Yellowknife, NT on October 7, 8 and 9, 2008.

Reasons filed: January 9, 2009

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Applicant: Trisha Soonias
Counsel for the Respondent: Donald Large, Q.C.

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REASONS FOR JUDGMENT

This case is about the custody of G., who is four years old. His mother, Brita Suchlandt, wants sole custody of G. She also wants to relocate to Ontario with him. G.'s father, Andrew Diveky, seeks sole custody, or shared custody. He does not want G. to move to Ontario.

I) BACKGROUND AND CONTEXT

[1] The trial proceeded over a period of three days. Ms. Suchlandt testified and called as witnesses her common law partner, Neil Stewart, and her mother, Patricia Suchlandt. Mr. Diveky testified and called his parents, George and Janet Diveky.

[2] Much of the evidence about the circumstances of the relationship between Ms. Suchlandt and Mr. Diveky is not in dispute. When Mr. Diveky met Ms. Suchlandt, she was living in a common law relationship with a man who was a drug dealer. Mr. Diveky was an acquaintance of his and visited his house from time to time. Ms. Suchlandt was addicted to prescription pain killers, and consumed them daily. Mr. Diveky had suffered a serious back injury in a snowmobile accident and had become addicted to pain killers as well. Both of them testified that they also occasionally consumed other illicit drugs during that time period. It seems clear that neither of them lived a particularly healthy lifestyle.

[3] Mr. Diveky went to Ontario to follow a treatment program in an effort to wean himself off the pain killers he had been taking. While he was there he contacted Ms. Suchlandt and expressed interest in her, as well as concerns over her well-being, having regard to the lifestyle that she was continuing to live with her common law spouse. This conversation appears to have been somewhat of a turning point in Ms. Suchlandt's life, and in her relationship with Mr. Diveky.

[4] Ms. Suchlandt ended the relationship with her common law in April of 2003. She went back to live with her parents. She began a relationship with Mr. Diveky in September 2003. She found out she was pregnant in October. Ms. Suchlandt decided she wanted to deal with her drug addiction. She described how Mr. Diveky helped her through this process. She went through severe withdrawal symptoms and he supported her through that time. She credits him for having saved her life.

[5] G. was born on in June 2004. For the first 14 months Ms. Suchlandt stayed at home with him. Mr. Diveky was also at home, caring for G. He is on permanent disability because of his back injury. He was not working back then, nor is he working now.

[6] The relationship ended in August 2005. It was not a particularly acrimonious separation, and the parties continued to see each other frequently. Their arrangement for G.'s care was informal and flexible. Ms. Suchlandt returned to work outside the home around the same time. Mr. Diveky took care of G. during the day. Mr. Diveky also had overnight visits with G. regularly, but there is a conflict in the evidence as to how frequently that occurred.

[7] Ms. Suchlandt began a relationship with Neil Stewart in October 2006. They started living together in August 2007. Mr. Stewart is an aircraft maintenance engineer. He came to Yellowknife in 2005 and worked as an instructor at the Buffalo Airways School of Aviation. The school eventually shut down because of funding problems. Mr. Stewart was offered another position with the parent company, Buffalo Airways, but this employment was not as professionally satisfying from his perspective. He is now on leave from that position as he has accepted a job in North Bay. Mr. Stewart is originally from North Bay. His parents and several family members still live there. Although Mr. Stewart has work options in Yellowknife, his employment in North Bay is more advantageous, professionally and financially.

[8] Ms. Suchlandt is employed with Arctic Sunwest, an aviation company, as a quality assurance assistant and master librarian. She wants to further her education in the field of counseling. She is interested in a mental health and addictions worker program offered at the Canadore College in North Bay. She has been accepted into that program. She has also been approved for student financial assistance offered by the Government of the Northwest Territories.

[9] Ms. Suchlandt was asked about a counseling program offered in the Northwest Territories through Aurora College. That program is offered in Inuvik. It is modelled after another program offered at Canadore College for indigenous wellness and addictions prevention. That program, unlike the one she wants to take, does not have an accreditation to a university, and has a different scope, as it is focused on natural and traditional healing. The program offered in Inuvik is not one that interests Ms. Suchlandt. She also has no particular interest in relocating to Inuvik.

[10] Ms.Suchlandt testified that in addition to wanting to move to North Bay to pursue her education, she would like G. to grow up in a community other than Yellowknife. This is because of the troubled past that both she and Mr. Diveky have in Yellowknife, in conjunction with their drug addiction, questionable associations, and unhealthy lifestyles. She is concerned that as G. gets older, his parents' past may catch up with him. She thinks it would be better for him to grow up elsewhere. She thinks moving now would be far less disruptive to G. than it would be when he is older.

[11] G.'s paternal and maternal grandparents live in Yellowknife. He has had regular contact with them his whole life. He also has a number of cousins, on both the Suchlandt and Diveky sides, who live in Yellowknife. He spends time with them regularly and they have been a part of his life since he was a baby.

II) ANALYSIS

[12] Decisions in custody cases, especially when one of the parents wants to move, are highly dependent on the facts. In this case, important aspects of the facts were the subject of conflicting evidence, so I must assess the evidence and make findings of facts before I embark upon the analysis of the legal principles and factors that must be considered.

[13] I must deal at the outset with the admissibility of two documents that were produced during the trial by Mr. Diveky. The admissibility of those documents is contested by Ms. Suchlandt.

A) Admissibility of correspondence regarding Travis Luke

[14] The documents produced by Mr. Diveky, marked as Exhibits A and B, are copies of letters addressed to one Travis Luke. The first letter advises Mr. Luke that he is suspended with pay pending an investigation into his conduct. The second letter advises him of his dismissal from his employment as a correctional officer. The documents are stamped "received" on December 7, 2006, by the Department of Human Resources of the Government of the Northwest Territories.

[15] The documents were shown to Ms. Suchlandt during Cross-Examination. She said Mr. Luke was an affiliate of hers when she was a teenager, and a friend of her former common law spouse. She denied having ever seen the two letters. She also denied the suggestion that she copied them from personnel files when she was working at the Department of Human Resources. She acknowledged that she worked for that department from July 2006 to March 2007.

[16] Mr. Diveky testified that Ms. Suchlandt brought these documents home when they were still living together. He testified that she told him she had taken copies of the documents to have some power or leverage against her former common law spouse.

[17] Ms. Suchlandt's common law spouse is referred to by name in the dismissal letter. It refers to him having been an inmate at the Yellowknife Correctional Centre, and to Mr. Luke's association with him. The letter also refers to the police having seized illicit drugs in a car registered in Mr. Luke's name, while the car was being driven by Ms. Suchlandt's former spouse.

[18] These documents were not listed in the Statement as to Documents filed on behalf of Mr. Diveky. Mr. Diveky's evidence summary did not include any reference to them either.

[19] Mr. Diveky acknowledged that he only told his counsel about these documents a few days before the trial. He said that he thought the documents had been lost, that his mother found them and gave them to him shortly before the trial, and that was when he brought them to his counsel's attention. Janet Diveky was not asked any questions about this topic.

[20] Mr. Diveky argues that the documents are relevant because they are indicative of Ms. Suchlandt's character. If Mr. Diveky's evidence about how he came into possession of these documents is accepted, it means not only that she stole the documents from confidential files to use them for her own interests, but that she lied under oath when she answered questions about the documents. Such a finding would taint her evidence significantly.

[21] Ms. Suchlandt is opposed to these documents being admitted because they were not disclosed in a timely fashion in accordance with the usual rules of civil procedure. She argues that the rationale for the requirement for disclosure before trial is to avoid trials by ambush, and that this is what Mr. Diveky is attempting to do. She also points out that the documents do not establish how they came into Mr. Diveky's possession, so they are not in fact helpful on the issue of credibility.

[22] In a Statement as to Documents, a party is required to disclose documents that are in that party's possession, but also documents that the party is aware of, even though they are no longer in that party's possession. So even if Mr. Diveky believed these documents were lost, they should have been listed in his Statement as to Documents. His counsel argued that the relevance of these documents to these proceedings may not have been immediately apparent to Mr. Diveky, and that in that sense he should be "forgiven" for not having disclosed their existence sooner. The problem with that submission is that it is not aligned with Mr. Diveky's evidence. Mr. Diveky did not say that he did not disclose the existence of these documents because he did not realize their relevance to the case. He said that he did not disclose their existence because he thought the documents were lost. As I have already stated, if the documents were lost, they should still have been listed in the Statement as to Documents.

[23] Another area of concern is that no evidence was adduced from Janet Diveky about this issue. When I raised this with Mr. Diveky's counsel during submissions, he argued that he was not at liberty to adduce evidence on this topic from Ms. Diveky because it had not been included in her evidence summary. The problem with that submission is obvious: this subject-matter was not included in Mr. Diveky's evidence summary either, and that did not stop counsel from eliciting the evidence from him. There is no reason why the same could not have been done with Ms. Diveky, subject to my ruling on the admissibility of the evidence.

[24] In my view, the explanation for having failed to include these documents in the Statement as to Documents is not convincing. This is not a subject matter that flows from other things about Mr. Diveky's case that were known to Ms. Suchlandt. She was taken by surprise. It is to avoid this type of ambushing that the rules exist. I do not attribute the "ambushing" to Mr. Diveky's counsel, as I accept that he did not know about these documents until a few days before trial, and that once he became aware of them, he sent a copy to Ms. Suchlandt's counsel. But I do not think a party should be permitted to get away with taking the other party by surprise in this manner absent a compelling excuse or explanation. I do not find there is any such explanation in this case. I therefore find that Exhibits A and B are inadmissible.

[25] If I am mistaken on the admissibility issue, I would, in any event, attribute no weight to these documents. They are date stamped to a date that fits within a time frame when Ms. Suchlandt worked with the Human Resources Department and had access to personnel files. But Mr. Diveky testified that she brought the documents home when they still lived together. The evidence is that they stopped living together in August 2005, over a year before the documents were received by Human Resources, according to the date stamp.

[26] I also find that the reason Ms. Suchlandt is said to have taken these documents, as recounted by Mr. Diveky, does not make a lot of sense. Ms. Suchlandt had left her previous spouse some three years earlier. She had made a complaint against him for harassment. He had been charged, convicted, and sentenced to jail for this back in March 2004. All Exhibit B does is, over two years later, refer to him as someone who was at one point an inmate at the correctional centre, and someone who was found driving a vehicle where drugs were seized. If this man spent time in a correctional facility, his illegal activities were already a matter of public record, as criminal proceedings are generally open to the public. Mr. Luke himself would have been aware of the contents of the letters, since they were addressed to him. Hence, I have difficulty understanding how these documents would have given Ms. Suchlandt any leverage or power over her former spouse.

[27] A party who asserts a fact has the burden of proving it on a balance of probabilities. Even if the documents were admitted at this trial, their weight would depend on whether the manner in which they came into Mr. Diveky's possession was established to the requisite standard. In my view, given the confusion about

the timeline, the questionable alleged purpose for their theft, the late disclosure, the lack of evidence from Janet Diveky, and Ms. Suchlandt's denial, Mr. Diveky has failed to establish, on a balance of probabilities, how he came into possession of these documents.

[28] As a result, I conclude that even if Exhibits A and B are admissible, they are of no assistance in resolving the issues in this case.

B) Credibility of Witnesses

[29] I now turn to my assessment of the witnesses' testimony in a general way. In a number of areas, that evidence was conflicting or contradictory. Not all of those areas are directly relevant, or relevant at all, to the issues that I must decide. But many are relevant to the parties' character and credibility as witnesses, which does have a bearing on my findings.

[30] The assessment of witnesses' credibility is not an exact science, and it is often not a straightforward exercise. I find this to be very true in this case. My estimation is that all of the witnesses told the truth, to the best of their abilities and from their own perspective, about some of the subject matters they testified about. But it is not possible to reconcile all aspects of the evidence, nor is it possible to explain away all the inconsistencies by failing memories or perspectives skewed by emotions. I am forced to conclude that one or more of the witnesses who testified in this trial was not entirely truthful with the Court.

i) Evidence of Patricia Suchlandt, George Diveky and Janet Diveky

[31] My general assessment of the testimony of Patricia Suchlandt, George Diveky and Janet Diveky is that they answered the questions that they were asked to the best of their abilities. They were not shaken on Cross-Examination. They cannot be characterized as independent witnesses because they have strong bonds with their children, and to a certain extent, are aligned with them. But none of these witnesses went out of their way to paint the opposing party in a particularly negative light. They listened to the questions carefully and appeared to try to answer them fully, to the best of their abilities. They may have been mistaken about certain details, and cannot be expected to be entirely objective about this case, but generally speaking, I am inclined to accept most of their evidence, and I find that to be a useful starting point in assessing the evidence of others.

ii) Evidence of Andrew Diveky

[32] I have some concerns about Mr. Diveky's testimony. There are a number of aspects of that testimony that I do not find particularly credible.

[33] Mr. Diveky testified that he consistently attempted to exercise the access granted to him by the Interim Order made on June 19, 2008. That Order gives him access every week day between noon and 4:00 p.m., but places an onus on him to exercise that access no later than 1:00 p.m., otherwise access can be denied.

[34] In his Examination in Chief, Mr. Diveky said that Patricia Suchlandt denied him access between 15 and 20 occasions, telling him he was late, when he was in fact attempting to exercise his access before 1:00 p.m. He said that for the first two months or month and a half after the Order was made, he was not aware of the details of its terms, so he believed Patricia Suchlandt when she told him she could deny his access if he was not there right at 12:00. He said for that period he had not seen a written copy of the Order. On Cross-Examination, his evidence was slightly different, in that he said that he was denied access in this manner on 10 occasions. He was pressed about his claim to not have known the terms of the Order or seen it for some time after it was issued. He was asked why he did not have a copy of that Order and answered that he thought the Order had not been drawn up.

[35] The Interim Order was made on June 19, following an application for specified access brought on behalf of Mr. Diveky. Mr. Diveky was represented by counsel. His counsel filed the Order on June 26, one week after it was made. I find it very difficult to believe that Mr. Diveky would not have been aware of its terms.

[36] In addition, Patricia Suchlandt categorically denied that she refused access to Mr. Diveky, except on those occasions where he did not exercise the access before 1:00 p.m. As I have already alluded to, I found her to be a credible witness, notwithstanding that she is close to her daughter. On this point, I prefer her evidence to that of Mr. Diveky's. I find that Mr. Diveky was not denied access in contravention of the Interim Order.

[37] I also have some difficulty with Mr. Diveky's testimony about the frequency of his overnight visits with G. after he and Ms. Suchlandt separated. Ms. Suchlandt said that Mr. Diveky generally had G. overnight once a week. Mr. Diveky first testified in his Examination in Chief that G. spent between 1 and 3 nights a week with him. Later on, still being asked questions by his own counsel, he said that he used to have G. 3 or 4 nights a week.

[38] Mr. Diveky's testimony in this regard is contradicted by his mother's. Janet Diveky testified that the parties' informal arrangement, as far as she was aware, was that Mr. Diveky had G. during week days and on Saturday nights, although she did say the arrangement was flexible and Mr. Diveky may on occasion have had G. on a week night from time to time. Ms. Diveky's evidence is consistent with Ms. Suchlandt's testimony. I find that Mr. Diveky exaggerated the frequency of G.'s overnight visits after separation.

[39] Another point I have concerns about is Mr. Diveky's evidence about his continued intimate involvement with Ms. Suchlandt for some time after she began dating Mr. Stewart. He maintained that this went on even after Mr. Stewart had moved in. Ms. Suchlandt acknowledged that she was intimate with Mr. Diveky on one occasion after the start of her relationship with Mr. Stewart. She said that this occurred only once, and before Mr. Stewart moved in with her.

[40] Mr. Diveky's evidence on this point is somewhat confused and contradictory. He said in his Examination in Chief that for a period of time after separation, he and Ms. Suchlandt continued to see each other, even though they were not living together. He said Ms. Suchlandt spent a few nights a week at his place. He also said that this continued on even after Mr. Stewart moved in with Ms. Suchlandt. However, he also testified that he did not know when Mr. Stewart had moved in. If that is the case, how could Mr. Diveky know that his involvement with Ms. Suchlandt continued after Mr. Stewart had moved in with her?

[41] Mr. Diveky also said that the last time he and Ms. Suchlandt were intimate was 18 months or 2 years before the trial, which would place that event roughly between October 2006 and April 2007. Both Ms. Suchlandt and Mr. Stewart said that they started living together in October 2007, and I accept that as a fact. So Mr. Diveky's timeline for events does not withstand scrutiny.

[42] I also found Mr. Diveky's evidence somewhat self-serving on this topic. At one point during Cross-Examination, he appeared to suggest that he was not aware, as his intimate relationship was continuing with Ms. Suchlandt, that she and Mr. Stewart were anything but friends. I have some difficulty with this, considering other parts of Mr. Diveky's testimony that this was going on after Ms. Suchlandt and Mr. Stewart had actually moved in together. Again, these different aspects of his testimony do not fit together and are hard to reconcile.

[43] I also found Mr. Diveky's testimony problematic and unconvincing when he answered questions about his reasons for not working. The following exchange took place during his Cross-Examination:

> Q. Your pain level interferes with your ability to work full-time?
>
> A. Somewhat.
>
> Q. What do you mean "somewhat"?
>
> A. I choose to stay home, be a father, stay-home dad.
>
> Q. And you choose not to work?
>
> A. I am on disability so, it's not that I choose not to.
>
> Q. Then why don't you work?
>
> A. Well for one thing, my pain level. And two, I want to stay home and take care of my son.
>
> Q. What about part-time?
>
> A. I haven't found anything part-time.
>
> Q. Have you applied anywhere?
>
> A. No, I have looked but I haven't applied, no.
>
> Q. Where have you looked?
>
> A. Newspaper.
>
> Q. Anywhere else?
>
> A. No.

[44] I accept that Mr. Diveky's injury interferes to an extent with his ability to work. I also accept that as a parent he may choose to not work outside the home to be able to look after his son. What troubles me is Mr. Diveky's going back and forth between the two explanations.

[45] Mr. Diveky became visibly emotional during his testimony when he was asked questions about the prospect of G. moving to Ontario. I have no doubt he is very attached to his son and the prospect of him moving far away from Yellowknife is completely devastating to him. Perhaps his not being entirely truthful with the Court was borne out of desperation at the prospect of Ms. Suchlandt's application being successful. But on the whole, the concerns I have about his testimony are such that I do not accept his evidence where it is contradicted by other evidence that I find credible.

iii) Evidence of Neil Stewart

[46] For the most part, I found Mr. Stewart's testimony credible. Many aspects of his evidence are not particularly contentious. As I have already stated, I accept that for him, a move to North Bay presents professional and financial advantages. It also presents personal advantages because his extended family is there.

[47] Mr. Stewart testified that Mr. Diveky used abusive and threatening language towards him on a number of occasions, as well as condescending and demeaning language towards Ms. Suchlandt. He testified that most of the times this occurred in G.'s presence. Mr. Diveky acknowledged that there were occasions where there were heated discussions and arguments, but denied making threats or even raising his voice. He also said that G. was not in close proximity when these incidents occurred, although he acknowledged he may have heard things through windows.

[48] It is noteworthy that Ms. Suchlandt did not testify to the same effect as Mr. Stewart on this point. She made reference to some arguments that she and Mr. Diveky had, but she did not talk about Mr. Diveky repeatedly using very abusive or insulting language towards her in G.'s presence, nor about having witnessed incidents between Mr. Diveky and Mr. Stewart.

[49] Everyone agrees that the stress levels have been elevated since the legal proceedings were commenced. I am satisfied that there were instances where heated arguments, raised voices, and foul language was used, sometimes within

earshot of G. I find that while Mr. Stewart's evidence was perhaps overstated on this issue, Mr. Diveky's minimized how much arguing took place. In any event, this is not an issue that I find to be determinative. Outbursts and inappropriate conduct, especially in the presence of children, regrettable as they are, are not an infrequent occurrence in these kinds of circumstances. This type of conduct is relevant because it can be indicative parties' willingness and ability to control their behaviour to place the interests of the children first, but it is a factor that must be weighed along with many others when deciding issues of custody and access.

iv) Evidence of Brita Suchlandt

[50] Ms. Suchlandt testified in great details about a number of matters. She was cross-examined at length by Mr. Diveky's counsel and in my estimation, was not shaken on any material point during this Cross-Examination. She answered all the questions that were put to her, and did not at any point appeared confused or evasive. On the contrary, her answers were specific and involved a lot of details. In certain areas she had a tendency to stray beyond the scope of the questions, but not in a way that avoided the questions asked. She just provided a lot of information in her answers. I did not note any areas of internal inconsistency in that testimony, notwithstanding the considerable level of details that she provided.

[51] There are aspects to Ms. Suchlandt's testimony that, in my view, bolster her credibility. She acknowledged her past involvement with drugs, and her past associations with the drug world. She gave Mr. Diveky enormous credit for assisting her in overcoming her drug addiction. She answered many questions in a manner that would not necessarily be helpful to her case. For example, she acknowledged Mr. Diveky's involvement in caring for G. during the relationship and for some time after separation; she was very forthcoming about what G. has said to her about not wanting to move away from Yellowknife; she acknowledged that for the most part G. likes spending time with Mr. Diveky; she acknowledged that the involvement of the Diveky grandparents in G.'s life is positive.

[52] Although I am inclined, in general terms, to accept Ms. Suchlandt's testimony, I do have some reservations about certain aspects of it. I find that she too may have overstated certain things. An example of this is relates to the difficulties that she experienced in getting into contact with Divekys during their trip to Mexico in December 2007. Her reaction to the situation seemed to have been somewhat out of proportion with the events. I do not doubt that it was

upsetting for her not to hear from Mr. Diveky for the first several days of this trip, but there seemed to be no objective basis for her to be as worried as she seemed to have become over this. It was clear at various points in he testimony that Ms. Suchlandt is a very emotional person. This may have clouded her perception of certain events.

[53] Ms. Suchlandt testified that from the time the Interim Order was issued in June 2008 to the time of trial in October, Mr. Diveky's exercise of access was so sporadic that she and her mother no longer counted on him showing up. Ms. Suchlandt went on to say that Mr. Diveky had missed 33 days of access during week days. Patricia Suchlandt also testified that the exercise of access was so sporadic that she no longer counted on Mr. Diveky showing up.

[54] I find that this is a somewhat exaggerated portrait of the situation. By my rough count, between June 19, 2008, when the Interim Order was made, and the start of the trial on October 7, there would have been approximately 75 potential access days during the week, and 15 Saturdays of week-end access. There is no suggestion that Mr. Diveky missed any of his week-end access. So even if he missed 33 of his days of access during the week, that means he still exercised his access on a large number of occasions. One most also consider that some of the missed access was due to Mr. Diveky arriving late, as opposed to not showing up at all. Thus, even on Ms. Suchlandt's evidence, I do not think that Mr. Diveky's exercise of access can be characterized as grossly sporadic as she says it was. So when it comes to Ms. Suchlandt's characterization of Mr. Diveky's exercise of access, I do have some reservations about her testimony.

C) Findings of facts

[55] Based on my assessment of the witnesses' credibility, I make the following findings of facts.

(i) nature of arrangement for G.'s care

[56] For G.'s birth in June 2004 until the parties separated in August 2005, Ms. Suchlandt and Mr. Diveky shared equally in caring for him.

[57] From the time of separation through to early 2008, Mr. Diveky looked after G. during week days when Ms. Suchlandt was at work, and usually had G.

overnight one night every week-end. I accept that there were occasions where Mr. Diveky was not there when he said he would be, or did not answer the door when Ms. Suchlandt was trying to drop G. off, which forced Ms. Suchlandt to make other arrangements and caused her certain problems at work. However, I find that Mr. Diveky usually cared for G. on week days. Despite some of the problems that occurred from time to time, as of the end of 2007, there were no significant concerns about Mr. Diveky's ability to properly care for G. One indicator of this is that the parties agreed that Mr. Diveky could take G. on a trip to Mexico with his family for several days over the Christmas holidays in December 2007.

[58] Some time in early January 2008, Ms. Suchlandt's concerns about Mr. Diveky's parenting abilities increased. Ms. Suchlandt testified that she received an upset call from Mr. Diveky, telling her that G. had hit him with a dumbell, and that G. was now with his mother. Ms. Suchlandt went to Janet Diveky's home to pick up G. and found them making cookies. She was surprised because she would have expected G. to be punished for having hit his father with a dumbell. Ms. Suchlandt testified that G. later told her Mr. Diveky was sleeping and he could not wake him up and that was why he had hit him with the dumbell.

[59] Mr. Diveky testified about this incident in his Examination in Chief. He recalled the incident but said it was an accident. He said that he was lying down resting his back, that G. was trying to show him that he was strong enough to hold the dumbell, and accidentally dropped it on him. Mr. Diveky was not cross-examined at all about this incident. He was not asked about his phone call to Ms. Suchlandt, or about why he was as upset as she said he was if this was an accident. Janet Diveky was not asked any questions about this incident either, even though she apparently was the one who looked after G. immediately after this happened.

[60] It is difficult to make a finding either way about what actually transpired that day. But I accept that Ms. Suchlandt was sufficiently concerned about this incident to take steps to change the arrangements for G.'s care during the day. She talked about Mr. Diveky's day time sleepiness being caused by post-concussion syndrome, and the fact there were to be consultations with his doctor about this, but the evidence on this point was scant. In any event, Ms. Suchlandt made alternative arrangements for G.'s day time care, which was apparently to be split between Janet Diveky and Patricia Suchlandt. Janet Diveky was not asked any questions about this so Ms. Suchlandt's account of this remains uncontradicted. Ms. Suchlandt

testified that her understanding was that Janet Diveky would remain involved in G.'s care until Mr. Diveky had been seen by his doctor to address whatever health issues might be causing him to sleep during the day. Ms. Suchlandt later became aware that G. was still being left alone with Mr. Diveky. My understanding of the evidence is that it was at that point that Ms. Suchlandt arranged for her mother to provide day care for G, with Mr. Diveky taking him for shorter periods of time during the day.

[61] I do not accept that Ms. Suchlandt took steps to reduce Mr. Diveky's access for the ulterior motive of bolstering her case for custody and eventual relocation to Ontario. I find that Ms. Suchlandt was, and still is, genuinely concerned about Mr. Diveky's ability to take care of G. She may have overreacted, misinterpreted some of the things G. was telling her, or some of the surrounding events, but I find her concerns were sincerely held. Her views about the matter, of course, are not determinative of the issue I must decide. Many of the things she was concerned about have not been established conclusively by the evidence. But I reject the allegation that she acted in bad faith.

[62] I conclude from all of this that, the evidence does not establish that the parties had, after the separation, a shared parenting regime in the sense that it is usually understood. G. has spent most nights with Ms. Suchlandt, and she has been a more consistent and stable presence in his life than Mr. Diveky. Apart from the trip to Mexico in December 2007, there is no evidence of G. having spent consecutive nights in Mr. Diveky's care on a regular basis, or at all, since separation. I do find, however, that Mr. Diveky has had significant involvement in caring for G. since his birth.

(ii) Mr. Diveky's exercise of access since June 2008

[63] I find that after the Interim Order made in June 2008, there were a number of occasions where Mr. Diveky did not exercise his afternoon access, either because he arrived at Patricia Suchlandt's house after 1:00 p.m., or because he did not attend at all. I reject the allegation that Mr. Diveky was denied access in contravention of the Order, and I accept Patricia Suchlandt's evidence that she only denied access to Mr. Diveky when he attempted to exercise it after 1:00PM.

[64] I accept that there may have been times when Mr. Diveky had good reasons, including medical ones, for not exercising access. However, he communicated

very poorly about this with Ms. Suchlandt. That said, for the reasons I have already given, I do not find that his exercise of access was as sporadic as was alleged.

(iii) Mr. Diveky's parenting abilities

[65] I accept that Mr. Diveky is very attached to G., likes spending time with him, and engages him in age appropriate activities. However, I find that the environment that Mr. Diveky offers G. lacks the structure, organization and routine that exists in the Suchlandt-Stewart home. The fact that G. has his own room at Mr. Diveky's home, but sleeps in Mr. Diveky's room because that is what G. prefers, is an example of this.

[66] That said, and despite some of the concerns flowing from Mr. Diveky's health and medication that he takes, and from the occasions where he has been unreliable or not communicated well with Ms. Suchlandt about access, there is no evidence that Mr. Diveky does not look after G. properly when G. is in his care. It is worthy of note that as a result of a complaint from an unknown source, the Department of social services made a number of unscheduled visits to Mr. Diveky's home while he had G. in his care and there is no evidence that they found any cause for concern.

[67] In addition, George and Janet Diveky have had ample opportunity to observe their son parenting G. and they are not concerned about his abilities. Notwithstanding their support for their son, they are very attached to G. and I am satisfied that even if they may have a somewhat embellished perception of Mr. Diveky, they would not turn a blind eye if they had seen any indication of G. being at risk or not properly cared for when he is in Mr. Diveky's care.

[68] There was a suggestion that Mr. Diveky allows G. to watch horror movies, and that this has resulted in G. having nightmares. Mr. Diveky testified that he does not let G. watch inappropriate movies, and I believe his evidence. He acknowledged that there may have been times where G. saw things he was not meant to see that Mr. Diveky was watching a movie after putting G. to bed. This speaks more to the need for Mr. Diveky to be more careful, and perhaps more firm about certain things, than a fundamental flaw in his parenting skills. With respect to other concerns, about G.'s use of foul language and other inappropriate

behaviour, I do not find that the evidence establishes conclusively that these things can be linked to to Mr. Diveky's behaviour or his parenting abilities.

[69] As I have already alluded to, a party who relies on a fact to advance a legal position has the burden to call evidence to prove that fact on a balance of probabilities. Accepting, as I do, that Ms. Suchlandt is sincerely concerned about Mr. Diveky's conduct, choices, and parenting abilities, is not the same as finding that the basis for those concerns has been established on a balance of probabilities.

[70] The evidence shows that for most of G.'s life, Mr. Diveky has had considerable responsibility in caring for him. My finding that he has at times been inconsistent in abiding by fixed schedules and somewhat inconsistent in his exercise of access does not negate his involvement in caring for his son, or establish that he is incapable of parenting him.

(iv) Ms. Suchlandt's parenting abilities

[71] There is nothing in the evidence to suggest that Ms. Suchlandt is anything but a good parent. She provides G. with consistency, discipline, and structure. I am satisfied that she provides a more consistent, steady, and stable environment to G. than what Mr. Diveky offers, notwithstanding my finding that Mr. Diveky is also a good parent. Ms. Suchlandt has had to take responsibility for making alternative child care arrangements when Mr. Diveky could not or would not look after G. during the day.

[72] Ms. Suchlandt was asked about her continued intimate involvement with Mr. Diveky after she began her relationship with Mr. Stewart. There is conflicting evidence as to the extent and duration of this involvement. I need not make any finding on this issue, as I find it is irrelevant to Ms, Suchlandt's parenting abilities.

[73] Similarly, I find that several matters raised during the evidence, such as Ms. Suchlandt having had, for a time, a home business selling sex toys, are irrelevant to her ability to parent G.

[74] There is nothing in the evidence that raises concerns about Mr. Stewart's relationship with G. There is evidence that Mr. Stewart has developed a meaningful bond with G. There is no evidence that Ms. Suchlandt's involvement with Mr. Stewart has a negative effect on her ability to parent G.

[75] As I have already alluded to, I found that Ms. Suchlandt was largely unshaken during Cross-Examination. There is no evidence of her having ever been anything but completely devoted to G. and consistent in caring for him. She has provided stability and consistency in his life and has made it clear to Mr. Stewart that G. remains her first priority.

(v) Ms. Suchlandt's reasons for wanting to move

[76] Ms. Suchlandt has changed employment often over the last several years, but I do not think that this should be held against her. She has worked hard to better her life. She has identified a career path that she would like to pursue, and her aspirations to further her education to follow that path are legitimate.

[77] Furthermore, while the relationship between Ms. Suchlandt and Mr.Stewart is no doubt complicated by the fact that Mr. Stewart now commutes back and forth between Yellowknife and North Bay, I am satisfied that it is a serious relationship. I accept that a move to North Bay would be positive for Ms. Suchlandt, and for her relationship with Mr. Stewart.

(vi) G.'s connections to Yellowknife

[78] I find that G. has a close bond to both his parents, to his grandparents, and to several members of his extended family who live in Yellowknife. He has a general awareness of the potential move to North Bay and this is the source of a stress for him. While it has been alleged by Ms. Suchlandt that Mr. Diveky has deliberately fed into G.'s anxiety about the potential move, and perpetuated negative messages about it, I do not find that this has been established on a balance of probabilities. By all accounts, G. is a smart little boy who is very aware of his surroundings. It is clear that these proceedings have been very stressful to those he is closest to, and it is more than likely that he has picked up on this, and overheard conversations he was not intended to hear.

[79] Having made these findings of fact, I now turn to the legal principles that are engaged in this case.

D) Legal Principles

[80] The *Children's Law Act*, S.N.W.T. 1997, c. 14, sets out the criteria that must be considered in deciding issues of custody and access. The overarching consideration is what is in the best interests of the child. Subsection 17(2) of the *Act* goes on to identify specific factors to be considered in deciding what those bests interests are.

[81] Given the level of involvement that both parents have had with G., this is not a case where G. should be placed in the sole custody of either of them. Rather, this is an appropriate case for a joint custody order. That is not to say that G.'s day to day care should necessarily be split equally between the two parents. G.'s need for routine, consistency and structure may militate against this. But for the relocation issue, day to day care and access would have to be determined taking into account what has transpired to date, with a view of setting up a regular schedule that fosters stability and routine, while maintaining maximum contact possible with each parent.

[82] Obviously, in the circumstances of this case, it is not possible to decide the issues of custody, access, and day to day care, without addressing the question of G.'s possible relocation to Ontario. The determination of that issue has the potential to seriously impact what day to day care arrangements are feasible.

[83] The relocation issue must also be determined in accordance with what is in G.'s best interests. This is an issue that is often very difficult for the courts to resolve, but I find it particularly difficult in the circumstances of this case.

[84] In *Gordon* v. *Goertz* [1996] 2 S.C.R. 27, the Supreme Court of Canada laid down the criteria to be considered in a mobility case that arises in a context where there is an existing custody order that is sought to be varied to permit one of the parties to relocate. Subsequent cases have however applied many of these criteria in cases such as this one, where there is no existing custody order. The factors were summarized as follows:

> 1. The judge must embark on a fresh inquiry into what is in the best interest of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
>
> 2. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect and the most serious consideration.

> 3. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
>
> 4. The focus is on the best interests of the child, not the interest and rights of the parents.
>
> 5. More particularly, the judge should consider, inter alia:
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
> (b) the existing access arrangement and the relationship between the child and the access parent;
> (c) the desirability of maximizing contact between the child and both parents;
> (d) the views of the child
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
> (f) the disruption to the child of a change in custody
> (g) the disruption to the child consequent on removal from family, schools and the community he has come to know.
>
> *Bjornson* v. *Creighton* (2002), R.F.L. (5th) 242 (Ont. C.A.), at para.18; *Hardy* v. *Bogan* [2006] SKQB 365, at para 59; *Gilles* v. *Gilles* 2008 SKCA 97 at para.10.

[85] No legal presumptions are available to the Court in adjudicating on these difficult issues. Even when it is established that one parent is the custodial parent or the primary caregiver, there is no presumption in favor of that parent's wish regarding residence. There is also no presumption that a move will be contrary to the best interests of the child. As the Saskatchewan Court Appeal so aptly put it in *Gilles* v. *Gilles, supra,* at para. 16, "These matters must be explored through a full and sensitive inquiry into all the evidence adduced at trial."

[86] I turn now to the specific factors that were listed in the excerpt of the *Gordon* v. *Goertz* case that I quoted previously.

> i) the existing custody and access arrangement, and the relationship between the child and the custodial parent and the child and the access parent

[87] I examine these factors together because the facts I have found in this case do not clearly establish that one parent is the "custodial parent" and the other the "access parent". For the purposes of the decision I must make, irrespective of whether the labels "custodial parent" and "access parent" are used, both parents's involvement with G. since his birth must be taken into account. That consideration should not be limited to the situation that has existed since the June Interim Order. It must also take into account the arrangements for G.'s care that existed before the proceedings were commenced.

[88] Even though I have concluded that the arrangement for G.'s care since separation was not truly a shared parenting regime, in the sense of alternating weeks or alternative blocks of days, I have also concluded that Mr. Diveky has had regular and extensive contact with G. since his birth, and has spent a lot of time looking after him. I also conclude that G. has a strong bond with both parents.

> (ii) the desirability of maximizing contact between the child and both parents

[89] Given their involvement in his life to date, and his bond to both his parents, it is difficult to see how G.'s best interests would be served by reducing significantly his contact with either of them. Notwithstanding some of Mr. Diveky's shortcomings in his exercise of access, for most of G.'s life, he has been involved in caring for him. He has testified that he wants to continue caring for him, and on that point, was not shaken on Cross-Examination. Based on my observations of him during his testimony and throughout the trial, I accept that he sincerely wants to have a significant role to play in raising his son. To this extent possible, and as long as it remains in G.'s best interests, this should be facilitated.

[90] There is also no doubt that it is in G.'s best interests to continue to have regular contact with his mother. Ms. Suchlandt has been a stable presence in his life and it would be a very significant disruption to G. if he lost that. Although the question was not directly put to Ms. Suchlandt, my understanding from her testimony, and from Mr. Stewart's testimony, is that she has no intention on moving if she cannot take G. with her. That is always a very difficult issue to address for a parent who wishes to move. Some cases strongly suggests that it is not an appropriate question to ask in this type of case. *Spencer* v. *Spencer*, 2005 ABCA 262. I make mention of it simply to note that the option of Ms. Suchlandt moving to North Bay without G. does not appear to be among the possible

outcomes that emerge from the evidence, nor something that any of the parties are contemplating.

(iii) the views of the child

[91] G. is very young. The evidence from all sources is that he is stressed about the possibility of moving to North Bay. That is hardly surprising. Any child who has had regular, almost daily contact with both his parents all his life would almost inevitably be very worried about moving far away from either of them. But given his young age, his views are not a determinative factor.

(iv) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child

[92] Mr. Stewart's employment in North Bay is more advantageous financially than the job he is on leave from in Yellowknife. Ms. Suchlandt wants to pursue her relationship with him and live in the same community as he does. That is understandable, from her perspective. Ms. Suchlandt has a job in Yellowknife, but she wants to pursue another career path, which is also legitimate. I accept that furthering her education would likely lead to better employment prospects, which is relevant to her ability to meet G.'s needs.

[93] As for the argument that it would be best for G. not to grow up in Yellowknife because of his parents' past associations and the unhealthy lifestyle that they led in their youth, I do not find it compelling. I recognize that Yellowknife is a relatively small city but there is no evidence of Ms. Suchlandt or Mr. Diveky having been involved in matters so horrendous or notorious that their past will become a burden to G. if he continues to live here.

(v) the disruption to the child of a change in custody

[94] Consideration of this factor of possible disruption to the child of a change in custody must also include, in my view, consideration the potential for disruption in access, when that access has been extensive. As I have already alluded to, no matter what legal label is used to describe the arrangement that the parties have had with respect to G.'s care over the years, the bottom line is that both parents have had extensive involvement with him since his birth. A move to North Bay would mean that Mr. Diveky's access to his child would go from daily access, including

regular overnight access, to sporadic periods of access separated by months without personal access.

[95] When she was asked if she was concerned about the disruption to G. arising from this, Ms. Suchlandt's answer was that G. could maintain contact with his father through tools such as email, web cameras, and other technologies. While those means could provide some contact if they are available, they are hardly a substitute for day to day personal contact, particularly considering G.'s age. I recognize there could also be longer periods of access during the summer and other school holidays, but in my view, those could not be expected to be equivalent, or have the same effect on G., than the daily contact he has all his life with Mr. Diveky.

(vi) the disruption to the child consequent on removal from family, schools and the community he has come to know.

[96] G. is not yet in school. From that point of view, I agree that moving now would be less disruptive than it might be once he has settled in the school system in Yellowknife an developed more friendships and contacts in the community.

[97] But a move to Ontario would prevent G. from continuing to have the day to day contact he currently has with several of his cousins. The same is true for the regular contact he has with his grandparents. While there was evidence that the Suchlandt grandparents intend to move away from Yellowknife some years from now, this is still at the planning stage, and is not expected to happen for some years.

[98] Being cut off from members of his extended family who he is strongly bonded to would not be a minor disruption, even for a relatively young child.

E) DISPOSITION OF THE ISSUES

[99] What makes this case difficult is what usually makes mobility cases difficult: it requires balancing Ms. Suchlandt's right to move ahead with her life against Mr. Diveky's right to continue his relationship with his son. It requires comparing the benefits of the proposed move with the extent of the disruption in Mr. Diveky's access. Even if the reasons for the move are legitimate, as I find them to be in this case, the decision to allow or deny relocation must be focused on the pros and cons

to G., not by reference to the interests of his parents. I cannot place either Ms. Suchlandt's or Mr. Diveky's interests ahead of G.'s.

[100] I heard evidence about the community of North Bay, the types of sports and activities it has to offer to a child G.'s age, and other reasons why Ms. Suchlandt and Mr. Stewart believe moving there would be to G.'s benefit. Even accepting, as I do, their evidence in this regard, the issue is not simply whether G.'s needs could be met in North Bay. No doubt his needs could be met in that community and many others across the country. The issue is whether, from G.'s perspective, the benefits of the move outweigh the disruption it would cause in his life.

[101] I recognize that a move to North Bay would serve G.'s best interests to the extent that Ms. Suchlandt would be happier and more fulfilled there. I accept that the happier she is, the better for G. But that, of course, must also be weighed against the serious disruption to G.'s life that would flow from such a move.

[102] Weighing all the factors I am bound to consider, and after much anxious consideration, I conclude that it is not in G.'s best interests to relocate to North Bay at this time. I conclude that the disadvantages to him from being cut off from regular contact with his father, and from regular contact with his extended family, outweighs the benefits he would get from the move.

[103] Although I think an order for joint custody is appropriate in this case, I am also satisfied that, having provided more structure and consistency in G.'s life, Ms. Suchlandt should be primarily responsible for G.'s day to day care. I am also satisfied that Mr. Diveky should have significant access. But because I accept the evidence that he has shown inconsistency and unreliability in the past, I find that his access must be structured in such a way that Ms. Suchlandt is not at risk of being left in a lurch, having to reorganize her schedule and find day care arrangements on short notice because of his actions. Mr. Diveky has testified vehemently that he wants to stay at home and take care of his son, to be a stay at home father. If that it the case, it requires him to be prepared to organize his life around the requirements for G.'s care. Time will tell if he will follow through on that with consistency. If not, he stands the risk of seeing his access, and level of involvement in G.'s life, reduced.

[104] For the time being, I conclude that it is appropriate for the access schedule to be similar to the interim access regime that was put in place after these proceedings

were commenced. I will increase the duration of the day time access, but in fairness to Ms. Suchlandt, it must be structured in a way that avoids some of the pitfalls that have occurred in the past and the problems they have caused for her.

[105] I make this Order mindful of the fact that G. is approaching school age. When he does start school, the schedule will have to be revised, because most of Mr. Diveky's access will be day time access during week days. But for the time being, it seems pointless to attempt to devise what the access schedule should be like when G. starts attending school, without having the necessary information and evidence about what everyone's circumstances will be at that time.

[106] The best case scenario would be for the parties to be able to agree on a revised access schedule based on G.'s school schedule and the parties' respective schedules at that point in time. In that event, a draft Consent Order could be submitted to the Court setting out the adjustments to the access.

[107] If the parties are unable to agree, they have leave to bring the issue back before me for adjudication, on fifteen days' notice to the other party. This would be for the limited purpose of making the access schedule workable and fair in consideration of G.'s attendance in school. If either party wishes to bring a variation application for other reasons and based on other circumstances, that party will have to initiate variation proceedings in the usual course.

III) CONCLUSION

[108] My Order is as follows:

> 1. The child, G., born June 18, 2004 shall be in the joint custody of Ms. Suchlandt and Mr. Diveky, and in the day to day care of Ms. Suchlandt, in the City of Yellowknife.
>
> 2. G. will be in the care of Mr. Diveky upon terms agreed to by the parties from time to time, and, at a minimum:
>
> > a) every week day from 10:30 a.m. to 4:00 p.m.; if Mr. Diveky has not exercised his access by 11:00 a.m., he will lose his right of access for that day; and

b) from every Saturday at 5:00 p.m. until Sunday at 5:00 p.m.

3. If the parties are unable to agree on a revised access schedule when G. starts attending kindergarten or school during the week, the matter can be brought back before me, on fifteen days' notice to the other party, to speak to that issue.

4. Neither party will remove the child from the Northwest Territories, for any period of time, without the written consent of the other party, or leave of the Court, except if such removal is urgently required for G.'s medical treatment.

[109] Within ten days of the filing of these Reasons, the parties shall advise the Clerk of the Court in writing as to whether a hearing as to costs will be required, and of their availabilities for such a hearing. They will also advise the Clerk of the Court as to whether they would be prepared to present costs submissions in writing. If both parties are prepared to proceed on the basis of written submissions, I will issue directions accordingly.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
9th day of January 2009

Counsel for the Applicant: Trisha L. Soonias
Counsel for the Respondent: Donald L. Large, Q.C.

F1-FM2008000043

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

BRITA SUCHLANDT

Applicant

- and -

ANDREW DIVEKY

Respondent

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU
