

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TROY DONALD GRESTDY

Applicant

- and -

KRISTINA MARY THERESA WRIGHT

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION

[1] Troy Gresty and Kristina Wright have a daughter who is 9 months old. At the time of her birth, they lived in Edmonton. They moved to Yellowknife in September 2010.

[2] They experienced difficulties in their relationship. As a result of incidents which occurred at the end of November, the details of which are very much in issue, Ms. Wright went to a shelter in Yellowknife, and obtained an Emergency Protection Order which prohibited Mr. Gresty from having any contact with her or the child. A few days later, Ms. Wright left Yellowknife with the child and went to stay with her parents in Ontario. In this Application, Mr. Gresty seeks the immediate return of the child to Yellowknife.

## B) OVERVIEW AND BACKGROUND

[3] Both parties have filed applications seeking custody of the child. It appears likely that there will have to be a trial to deal with issues of custody, access, and the incidental issue of Ms. Wright's desire to relocate outside of Yellowknife.

[4] There is considerable conflict between the parties' accounts of what has taken place in their relationship, particularly since the child's birth. There is also significant conflict between their accounts of the events that preceded Ms. Wright's departure from Yellowknife with the child.

[5] Issues regarding the role that the parties each took in parenting the child, their abilities and suitability as parents, will be explored at the trial on custody. For the purposes of this application, I must focus primarily on the evidence that has a direct bearing on the issue of whether the child should be ordered returned at this time, although some consideration of the rest of the evidence is also required.

[6] The child was born on May 30, 2010, in Edmonton. Mr. Gresty was with the armed forces and had just returned from a 6 month tour of duty in Afghanistan. He returned early from this tour of duty so he could be there for the birth of his child. Ms. Wright was on maternity leave from full time employment with the Department of National Defence. That maternity leave ends in April 2011.

[7] Mr. Gresty became aware of an employment opportunity, a 3 year contract, with the Canadian Ranger Patrol Group in Yellowknife. Mr. Gresty's parents live in Yellowknife. Mr. Gresty got that job and the family moved to Yellowknife in September 2010. They purchased a house which was next door to Mr. Gresty's parents' house.

[8] The parties agree that they experienced problems in their relationship before and after the move to Yellowknife, but describe the extent and intensity of those problems in different ways. Ms. Wright says that when he returned from Afghanistan, Mr. Gresty was not the same person as he was before. She describes escalating verbal abuse, erratic behaviour, and frequent flare ups of anger on his part.

[9] Mr. Gresty acknowledges that he had some difficulties adjusting after his return to Canada. He admits he sometimes gets angry and “loses his cool”. He admits calling Ms. Wright a “cunt” and a “bitch” on occasion, but denies that this occurred as frequently as she claims it did. He also said that becoming a father was a big change and that he was at times overwhelmed, but that he was very happy to have a child.

[10] Some time in November, Ms. Wright told Mr. Gresty that she wanted to separate. He did not want to separate, and wanted them to work on their relationship. On Friday November 26, Ms. Wright asked him to read a separation agreement that she had drafted with the help of her parents during a visit to Ontario earlier that month. Mr. Gresty was upset by this. They had an argument about the issue of custody, with each of them saying they wanted custody of the child. The parties’ accounts of what transpired differ, but it seems clear that they were both very upset. The fact that Mr. Gresty punched a hole in a door in the house during this argument is not in issue.

[11] The parties have different views of what went on over the next few days. Mr. Gresty says that they were talking, and he thought they were working on things. Ms. Wright says that over those days, Mr. Gresty kept pressuring her to stay in the relationship.

[12] On Sunday November 28, they went out to buy groceries. While in the parking of the grocery store, Mr. Gresty called Ms. Wright’s attention to a song from a CD that was playing in the vehicle. The parties have conflicting accounts of what was said, but Mr. Gresty acknowledges he drew her attention to a particular verse of the song. The lyrics of that verse are reproduced in one of Ms. Wright’s affidavits and Mr. Gresty acknowledges that this is what it says:

So after a year and six months, it’s no longer me you want  
But I love you so much it hurts, never mistreated you once  
I poured my heart out to you, let down my guard, swear to God  
I’ll blow my brains in your lap, lay here and die in your arms  
Drop to my knees and I’m pleadin’, I’m tryin’ to stop you from leavin’  
You won’t even listen, so fuck it I’m trying to stop you from breathin’  
I put both hands on your throat, I sit on top of you, squeezin’  
Til I snap your neck like a popsicle stick, ain’t a possible reason

I can think of to let you walk up out of this house and let you live  
Tears stream down both of my cheeks, then I let you go and just give  
And before I put that gun to my temple, I told you this

[13] Ms. Wright claims that Mr. Gresty told her he had been listening to the song over and over again, and that it described how he felt about their relationship. She also claims that he uttered a threat to kill her and the child if she left him. This made her fear for her life and the life of their daughter. From that point on, she says her actions were designed to avoid upsetting Mr. Gresty. In the following days she phoned her father, told him what was happening, and got advice and assistance from him. He helped her get information about the women's shelter in Yellowknife and during the afternoon of November 30, she went to the shelter with the child. There, she obtained an Emergency Protection Order. Her parents purchased her a plane ticket and she left for Ontario the next day.

[14] Mr. Gresty's account is very different. He claims that he simply told Ms. Wright that she should listen to the song, that it was pretty good. She listened to it, said she did not like it, and that was the end of the conversation about the song. He denies uttering any threat to her. He says they did their shopping, went home, and watched the Grey Cup together that evening. In the following days, everything was normal. He returned from work on Tuesday November 30 and no one was home. At first he thought nothing of it but as time passed, he became concerned. He went to the hospital with his mother to make sure nothing had happened to Ms. Wright or the child. A short time after he returned, he was served with the Emergency Protection Order. On December 7, he received a letter from Ms. Wright's lawyer in Ontario advising of where she and the child were, and asking him to get a lawyer or get in touch with Ms. Wright's lawyer to address issues arising out of their separation.

[15] Mr. Gresty retained a lawyer and filed an Originating Notice on December 8, seeking the child's immediate return to the Northwest Territories, custody, and other relief. He also sought a hearing to have the Emergency Protection Order set aside. Those matters were before this Court on December 16. After hearing submissions from counsel, the Court set aside the Emergency Protection Order, adjourned the balance of the matters to January 6, 2011 and issued an interim order providing that in the meantime the child would remain in the care and control of Ms. Wright and

that Mr. Gresty would have supervised access to her in Ontario over the holidays. The Court also ordered that the parties not have any direct contact with each other.

[16] The next day, on December 17, Mr. Gresty was charged with uttering threats arising out of the incident that occurred in the parking of the grocery store. One of the conditions of his process was that he remain in Yellowknife. This effectively prevented him from exercising the access that had been granted to him by this Court the previous day.

[17] The matter was withdrawn from the Family Chambers list on January 6. It was eventually spoken to on February 10, 2011. On that date, in the face of conflicting evidence in the affidavits filed, the Court decided that in all circumstances the application to have the child returned should be the subject of a hearing with *viva voce* evidence. That hearing proceeded on March 4.

### C) ANALYSIS

[18] In their submissions, counsel have referred to the case of *Gordon v. Goertz* [1996] 2 S.C.R. 27 and other cases dealing with the issue of relocation. Mr. Gresty argues that the issue of whether the child should be returned should be approached by examining whether Ms. Wright would have been successful had she applied to the Court for permission to relocate with the child when she decided to move out of the matrimonial home on November 30.

[19] This Court will eventually have to make a decision on the issue of relocation, as Ms. Wright does not want to return to Yellowknife, while Mr. Gresty, even if he has had second thoughts about living in Yellowknife, intends on fulfilling his 3 year employment contract. That difficult issue will be an integral part of the custody hearing.

[20] But the issue that arises on this Application is not whether, ultimately, Ms. Wright will be permitted to remain outside the Northwest Territories with the child. The issue is whether, pending a determination of the issues of custody and access, she should be compelled to return.

[21] Generally speaking, courts do not tolerate that one parent, in the context of a separation, take unilateral action that affects the other parent's contact with the children of the relationship. In particular, a parent who wishes to move away with a child is expected to seek agreement of the other parent, or, failing that, to obtain the court's approval before acting. Courts usually will have little hesitation in ordering the return of children who have been removed from one of their parents by the unilateral action of the other.

[22] This is for good reason. First, it is generally recognized that it is in the best interests of a child to have contact with both parents. Second, the *Children's Law Act* provides that both parents have an equal right to custody. This right cannot be taken away by one parent from another. Third, a parent who unilaterally assumes control of a child creates a situation that can be used as an unfair advantage in the litigation over custody. Finally, these types of unilateral actions are sometimes designed to circumvent the Court that has jurisdiction where the family lived at the time of separation, and to force the other parent to fight the custody battle in another jurisdiction, thereby creating additional obstacles for that parent.

[23] In this case, the concerns about circumventing this Court's jurisdiction do not arise. Ms. Wright has filed her own application for custody in this Court, and has clearly attorned to its jurisdiction. During submissions her counsel mentioned that since the child has now spent as much of her life in Ontario as she has in Yellowknife, this Court might, pursuant to section 27 of the *Children's Law Act*, decline to exercise its jurisdiction. The argument was not pressed, but I want to address it since it was raised.

[24] In my view, it is inconsistent for Ms. Wright to file a motion for custody in this Court, and later suggest that the Court should decline exercising its jurisdiction. In addition, and perhaps more importantly, the only reason the child has been in Ontario for this period of time is because of Ms. Wright's unilateral action. The Northwest Territories was the child's habitual residence when the separation occurred and Mr. Gresty acted promptly to seek relief from this Court after the child was removed. These are not circumstances where section 27 of the *Act* should be invoked. This Court is the proper forum for the determination of issues of custody and access with respect to this child.

[25] In deciding whether the child should be ordered returned, in my view, the Court must examine the circumstances that led to Ms. Wright's move, the parties' conduct after she left, and their situation at present. The ultimate issue of course is what living arrangements would be in the child's best interests pending a determination by this Court of issues of custody and access.

**a. Events that preceded Ms. Wright's departure**

[26] As I have already alluded to, there is conflicting evidence about the events that led to the child's removal from the Northwest Territories.

[27] Mr. Gresty claims that Ms. Wright is exaggerating many aspects of his behavior to paint him in a poor light and justify her choice to leave Yellowknife. His position is that she left not because she was afraid, but because her preference was to go live elsewhere. He argues she made the decision to leave based on this preference, without regard for the impact that this would have on the child, or the child's relationship with her father and paternal grand parents.

[28] It may be that not all of Ms. Wright's accounts of events are accurate. It may also be that she has embellished to a certain extent, or presented matters in the light least favorable to Mr. Gresty. But on the whole, the evidence satisfies me that her primary reason for leaving was fear, and not simply a matter of personal preference. I find support for this proposition not only in the evidence she adduced, but in elements of Mr. Gresty's own testimony.

[29] First, Ms Wright left the matrimonial home with very little. This is not consistent with a well planned action, but suggests, rather, that she left in a hurry, and without advance preparation. The fact that her plane ticket was purchased the day before she left is a further indication that this was not something that was planned in advance.

[30] Ms. Wright's state of mind is also corroborated by what her father deposes to in his affidavit. He deposes that he had concerns for his daughter during her relationship with Mr. Gresty. He further deposes that those concerns became acute after their telephone conversation following the November 28-30 weekend. He was sufficiently concerned to get information about the women's shelter and arrange for

her to go there. This does not establish that Ms. Wright was in fact at risk of harm, but it shows that her demeanour and words over the phone were such that her father believed she was genuinely afraid.

[31] Another aspect of the evidence I find significant is the evidence about what happened on November 28 at the grocery store. Mr. Gresty acknowledges drawing Ms. Wright's attention to a verse of a song while they were in the vehicle. He acknowledges what the lyrics of that verse are. Taking into account the context of what was happening between these parties at the time (her having told him she wanted to separate, his resistance to that, and the serious argument they had about the child's custody just a few days before), it is not surprising that having her attention brought to a verse that talks about a murder suicide in the context of a separation would be frightening to her.

[32] When he was cross-examined about this event, Mr. Gresty said that he had no idea that Ms. Wright was planning on leaving when he brought this song to her attention. This is a surprising statement, considering they had been discussing her desire to separate and had argued about who would have custody of the child just a few days before.

[33] I conclude that under the circumstances, his drawing her attention to that verse of the song made her genuinely fearful. Mr. Gresty may have been oblivious to her fear, but that is immaterial. It is not unusual for people who are afraid of someone they live with to hide their feelings and attempt to act as though everything is all right. In fact Ms. Wright did say she tried, in the days that followed, to act normally and avoid any arguments or confrontation with Mr. Gresty. That does not mean she was not afraid.

[34] Mr. Gresty's counsel appeared to suggest that the events that gave rise to the issuance of the Emergency Protection Order should be given limited weight because that Order was set aside on December 16. It is true that the Order was set aside, but the transcript of those proceedings shows that this was not done because the Court found that the Order had been obtained in bad faith or that there was no basis for Ms. Wright to be afraid when she applied for it. The Emergency Protection Order was set aside, on consent, because Ms. Wright was no longer in the Northwest Territories. It is important to note as well that a no-contact order was included in



the interim order issued by the Court that day, and the access that was granted was supervised access. As such, some elements of the Emergency Protection Order were retained even though the Order itself was set aside.

[35] On the basis of the evidence adduced at this hearing, I conclude that Ms. Wright's primary motivation for leaving Yellowknife with the child was that she was afraid. Because she had no support network in the community, she turned first to the women's shelter, and felt the safest place for her to go from there was to her parents' home in Ontario. In so finding I am not making a determination that she was in fact at risk; I am merely making a finding about the reason why she left.

**b. The parties' conduct after the child was removed**

[36] As I have already stated, it is generally expected that parents will initiate proceedings before taking the type of action Ms. Wright did and not after. Clearly, Ms. Wright did not do so. But she did not completely ignore the legal consequences of her actions either. She attended the Legal Aid office in Yellowknife before she left, even though in the end, she did not speak to a lawyer that day. Once she got to Ontario she quickly took steps to retain counsel and through that counsel, made contact with Mr. Gresty to advise of where she was and attempt to engage in negotiations to address the issues arising from their separation.

[37] The events that occurred after the December Court appearance - Mr. Gresty being charged with uttering threats and being placed on conditions that nullified his ability to exercise the access granted to him by this Court the previous day - raise obvious concerns. Ms. Wright says the criminal charges were not pursued at her initiative, but that she was asked to attend the R.C.M.P. detachment in Milton to provide a statement. She says that she realized Mr. Gresty would be charged, but not that he would be placed on conditions that would negate his ability to exercise access. She also says that as soon as she became aware that he was forbidden from leaving Yellowknife, her lawyer communicated to Mr. Gresty's lawyer that they would cooperate in having the terms of his bail amended so that he could exercise access over the holiday season.

[38] This issue may be explored in more detail at the custody hearing. If it were established that Ms. Wright deliberately orchestrated things such that the access order she had agreed to in this Court would be nullified by the initiating of the criminal process, that would undermine her position because it would show bad faith and a manipulation of the Court's process. But the evidence adduced at this hearing does not support such a conclusion.

[39] It is very unfortunate that the authorities, in deciding what release conditions would be placed on Mr. Gresty, short circuited this Court's decision to grant him access to his child in Ontario. No application was made to this Court for a review of those bail condition, and I can only assume that this was because of the time frame within which these events occurred. However, I do not find there is a sufficient basis to conclude that Ms. Wright orchestrated this. For that reason, I do not consider that this event has a bearing on the outcome of this application.

[40] The condition restricting Mr. Gresty's ability to travel to Ontario was lifted on February 8. He has not exercised any access since then. He was asked about this and indicated that because of his job, it is difficult to exercise access. I accept that it may not have been possible for him to get additional leave to exercise his access in February but I note that there is also no evidence that he asked for leave or took any other steps to attempt to do so.

**c. The parties' current situation**

[41] Ms. Wright has adduced evidence that she is required to return to her job in Edmonton at the end of her maternity leave next month. Failing that, she will owe her employer a considerable sum of money. She claims that when she and Mr. Gresty made the decision to move to Yellowknife, they agreed that she would go back to Edmonton with the child and return to her job if she did not find employment here. Mr. Gresty denies that this was ever discussed as a possibility. He said that he was confident that she would be able to find work in Yellowknife.

[42] I find it difficult to accept that the parties would not have had at least some discussion about what would happen if Ms. Wright was unable to secure employment in Yellowknife. I accept that the primary plan was that she would try to find work in Yellowknife. I also accept that Mr. Gresty was confident that she

would be able to find work. But overall I find it improbable that they would not have discussed what would happen if Ms. Wright did not find work. In fact this eventuality appears to have come up when they negotiated their mortgage, as an email Ms. Wright sent to their mortgage broker makes reference to it. I conclude that it is more probable that Ms. Wright's recollection of these discussions is more accurate, and that the possibility of her returning to Edmonton with the child if she did not find work in Yellowknife was something that was discussed at the time of the move to Yellowknife.

[43] As far as Ms. Wright's prospects for employment in Yellowknife, there is limited evidence on that subject. Mr. Gresty believes she could find work here. Ms. Wright testified that she has been looking and only saw only one job posting for positions at her level in Yellowknife. There is no evidence of what her employment prospects are, in fact, at this time.

[44] The parties agree that Ms. Wright does not have any support systems in Yellowknife. If she were ordered to return now, she would have to resign her position in Edmonton and would owe the government in excess of \$18,000.00.

[45] As for Mr. Gresty, he works full time and has to travel regularly as part of his job. His parents are in Yellowknife and his mother, in particular, had been very present in the child's life. Mr. Gresty testified he would continue counting on them to help him out in caring for the child. However, both parents work full time, so there would be limits to their ability to assist with her care.

**d. What living arrangements are in the child's best interests in the short term, pending a determination of the issue of custody?**

[46] It is apparent from all of this that the only reason to compel Ms. Wright to return to Yellowknife immediately would be to restore Mr. Gresty's ability to have ongoing access to his child. That is a compelling reason, especially given the young age of the child and how long she has been cut off from contact with him.

[47] What Mr. Gresty says he would like to see happen is to have the child returned to Yellowknife and to resume the routine that existed, according to him, before the separation. To him, this means daily access every evening until her

bedtime, and having the child in his care on a continuous basis each weekend from Friday to Sunday. In my view, placing the child in his sole care over the weekend would not be a realistic proposition, considering he has never been the child's primary care giver for days at a time. Of course, this Court could order the return of the child and devise a different access regime than what Mr. Gresty seeks.

[48] But as I already mentioned, compelling Ms. Wright to return to Yellowknife would force her to give up stable employment and cause her to owe a significant amount of money to her employer. There is considerable uncertainty as to where she would live. While Mr. Gresty is prepared to give her exclusive possession of the matrimonial home, he would be living next door with his parents. Having accepted that Ms. Wright fears him, and given the no-contact order, that option is problematic. Ms. Wright's other options for accommodations, particularly if she remained unemployed for a period of time, are unclear.

[49] By contrast, if Ms. Wright goes back to her employment in Edmonton next month, as she has indicated through counsel she plans to do, she will have employment. Importantly, it will be more feasible for Mr. Gresty to exercise access in Edmonton than it is in Ontario. There are several direct flights every day between Yellowknife and Edmonton, and they are less expensive than flights between Yellowknife and Ontario. That makes it realistic for someone who lives in Yellowknife to spend a weekend in Edmonton, whereas it is far less realistic to contemplate going from Yellowknife to Ontario for a weekend. With a little more time, it is also feasible to drive back and forth between Yellowknife and Edmonton. Regular access to the child between now and the trial on custody would be feasible if she is in Edmonton.

[50] Mr. Gresty says that what he is asking is a return to the *status quo* that existed before Ms. Wright left Yellowknife. He relies on the well established principle that in matters of custody and access, courts are reluctant to disrupt the *status quo* on an interim basis. But the cases that he relies on, such as *Cater v. Cater* 2000 NWTSC 34, *Ivens v. Ivens* 2008 NWTSC 18, and *Praetzel v. Porter* 2008 NWTSC 86, were cases where a parent was asking to change arrangements that had been in place for some time after the separation. That was the *status quo* that the courts were reluctant to disrupt. This is not the situation here. Here, the "status quo" that Mr. Gresty seeks to return to, really, is the situation that existed prior to the separation.

[51] I understand that Mr. Gresty would like to have as much contact with his child as he did before the separation. I also realize that it must have been very difficult for him to have not been able to see his young child since November 30. However, I conclude that for the time being it is in the child's best interests to remain in the care and control of Ms. Wright, and that on balance, it is not desirable to compel Ms. Wright's return to Yellowknife with her pending the custody hearing. Instead, allowing Ms. Wright and the child to return to Edmonton will, in the short term, provide some financial stability for the child's mother and will permit regular access by her father. I realize this is a very unsatisfactory scenario from Mr. Gresty's perspective, but it is a possibility that had been contemplated by the parties before their move to Yellowknife. I conclude that it is, on balance, what is best for the child until issues of custody and access are determined on a more permanent basis.

[52] As for any plans that Ms. Wright may have to seek an employment transfer to Ontario, those plans must be put on hold until this Court has ruled on the issues of custody, access, and relocation. The fact that she is not being ordered to return to the Northwest Territories *at this point* does not mean she can take any further unilateral action without regard for the pending litigation. The outcome of the trial on custody will depend on the Court's assessment of the evidence adduced at trial, which will be more detailed, and broader in scope, than what was adduced at this hearing. All issues incident to custody and access, including Ms. Wright's desire to establish her life with the child in a place other than Yellowknife, remain to be decided by this Court.

[53] In addition, it would be unfair for Mr. Gresty to have to bear, alone, the costs of exercising access to the child. For the time being, those costs should be shared equally between both parents.

[54] Mr. Gresty has testified he has time off during March break, which begins next week. During this time, he has the option of exercising access to the child in Ontario while she is still there. Once Ms. Wright is back in Edmonton, he can exercise access there. If Ms. Wright travels to Yellowknife with the child for any reason, he should obviously be given an opportunity to have access to the child there as well. Wherever it takes place, the access will be supervised access.

[55] Counsel for Mr. Gresty intends on proceeding directly to a trial on custody rather than have an interim custody hearing. Counsel also indicated that Mr. Gresty wishes to await the outcome of the criminal proceedings before proceeding to the trial on custody. Mr. Gresty's criminal trial is scheduled to proceed in May, so counsel indicated they would want to proceed to the trial on custody some time in June.

[56] Based on the number of issues to be decided, this is a hearing that may require a full week of Court time. I encourage counsel to take steps as soon as possible to secure dates for the custody hearing to ensure that the court time can be set aside and the trial can proceed as quickly as possible. It is in the interests of all involved to have these issues decided promptly.

#### D) CONCLUSION

[57] For these reasons, my Order is as follows:

1. The child shall remain in the care and control of the Respondent in Ontario until the Respondent resumes her employment in Edmonton on April 14, 2011, at which point the child will be in the Respondent's care and control in Edmonton;
2. The Applicant shall have access to the child on reasonable terms and conditions that the Applicant and the Respondent shall agree upon;
3. Specifically, the Applicant may choose to exercise access to the child during his upcoming holiday over March break;
4. Any access to the child shall be supervised by a third party mutually agreed upon by the Applicant and the Respondent;
5. The expenses reasonably engaged by the Applicant to exercise access shall be shared equally between the Applicant and the Respondent; the Applicant will provide, through counsel, the receipts for the travel expenses reasonably incurred to exercise the access, and

upon presentation of such receipts, will reimburse him half those expenses;

6. The Applicant and the Respondent shall have no direct contact with each other;

7. All communications and all arrangements for access to the child shall be made through counsel;

8. All matters are adjourned *sine die*, returnable on 4 days notice, pending the setting of a trial date, or a date for an interim custody hearing.

L.A. Charbonneau  
J.S.C.

Dated at Yellowknife, NT, this  
11<sup>th</sup> day of March, 2011

Counsel for the Applicant: Eileen Blackmore  
Counsel for the Respondent: Baljindar Rattan

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