

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

MARIE-SOLEIL LACOURSIERE

Applicant

- and -

MARCO PENK

Respondent

MEMORANDUM OF JUDGMENT

[1] This is a matter involving child custody, access, and related issues. The mother lives in Yellowknife and is represented by counsel. The father is self-represented and lives in Germany. On July 18, 2013, the Office of the Children's Lawyer was appointed to represent the interests of the two children.

[2] There have been a number of Court appearances on this matter, and voluminous materials filed. I do not propose to review any of that material in detail in this Memorandum of Judgment. Several Orders have already been made by the Court to deal with interlocutory matters. It would appear that a full hearing with *viva voce* evidence will likely be required to dispose of most the issues between these parties. It goes without saying that the fact that the parents reside on different continents adds significant challenges, for all involved, in particular with respect to access.

[3] The matter was before me in Family Chambers on August 29, 2013, having been adjourned from August 22, 2013. On August 22, the Court directed that the following matters would be addressed on August 29th:

- a) the next period of in-person access and the conditions of that access;
- b) ongoing Skype access;
- c) whether the matter should be referred to case management;
- d) whether there should be restrictions on the contact between the mother and the father.

[4] At the start of the proceedings on August 29th, I was advised that counsel for the children had submitted a list of proposals to the mother and to the father ahead of the Court appearance. These proposals were made with a view of moving the parties closer to a resolution of some of the issues. While agreement was not reached on every item, it was on some. With the consent of the mother and father, a copy of the email setting out the proposal, and the father's response and comments, were filed with the Court. I then heard submissions from all parties about the matters raised in the email exchange.

1. Case Management

[5] Everyone agrees that this case should be referred to case management. There is little doubt that it would be beneficial for one judge to take charge of this matter, deal with all interlocutory issues that might arise, and assist the parties in moving the case forward towards a hearing on the merits if matters that cannot otherwise be resolved. Once a case management judge is appointed by the Senior Judge of this Court, all applications will be channelled through the case management process and dealt with by that judge. This will avoid multiple motions being filed to be heard in regular Family Chambers and heard by a different judge each time. It will be for the assigned case management judge, in consultation with the parties, to set the specific parameters for how the case management will proceed.

2. Contact between the parties

[6] Counsel for the children has proposed that a term of the Order direct the parties to refrain from communicating with one another other than for certain specific matters related to the children. The evidence filed makes it clear that direct contact between the mother and father often leads to difficulties and conflict.

It is obviously not in the best interests of the children to be exposed to such conflict. In the Notice of Motion that she filed on August 14, 2013, the mother had requested that something more restrictive be in place, but she is prepared to compromise and agree with the terms proposed by counsel for the children. The father has expressed in his submissions that while he does not see the need for as much structure as what is being proposed, he is also prepared to compromise and comply with the proposed condition.

[7] Given the parties' ability to agree on this point, which the Court commends them for, the term proposed by the children's counsel will be included in the Order.

3. Skype access

[8] The Order issued June 6, 2013 provided that the Skype access be for a minimum of one hour per week at a time mutually agreed on by the parties. This is the type of flexible condition that tends to work well when there is not a lot of tension between parties. Here, based on the materials filed, I am satisfied that such a general term is not what is best. The children will benefit from predictability in the Skype access they will have with their father. The mother and father will benefit from having a fixed schedule and not having to constantly be in contact to arrange it. Limiting contact between the parents is likely to reduce the potential for conflict to erupt between them. And as I have already noted, that is in the best interests of the children.

[9] Counsel for the children suggested that Skype access take place twice a week, for half an hour, and that it take place on Mondays and Fridays. The father wants the Skype access to take place on week-ends. His position is that week-ends are a better time for him to exercise this access. He is not employed at this time but expects to secure employment. If he does, he is concerned that Skype access during week days may not be workable for him.

[10] The mother's position is that Skype access during the week-end interferes significantly with the children's activities, in particular with respect to hockey. Her position is that what would be the least disruptive to their activities and routine would be for the Skype access to take place during the week. She suggests the first access can take place Monday mornings at 6:30AM (which is 2:30PM Germany time). According to my notes she suggested the second Skype access take place on Fridays be at 5:00PM, which she said would be 13:00 PM Germany time. If that is what counsel said, it was in error. 5:00PM Yellowknife time would be 1:00AM Germany time, which is not an appropriate access time. If the suggestion was that

access take place at 5:00AM Yellowknife time, in my respectful view, that is too early for the children.

[11] It is obviously challenging to find a schedule that can accommodate everyone's needs, particularly given the 8 hour time difference between the Northwest Territories and Germany. The terms of access have to be workable for the access parent. If the father were employed and worked during the day from Monday to Friday, it may not be possible for him to exercise access during the week, given the time difference. Much would depend on his work schedule and how much flexibility he would have within that schedule.

[12] But as things currently stand, the father is not employed. His situation is in flux. I do not think it would be in the best interests of his children to be prevented from taking part in some of their sport or other activities by imposing a week-end Skype access schedule when, at this time, the father is not actually employed. Even when the father does become employed, it may be possible for him to make arrangements to accommodate his access schedule.

[13] Obviously, if the father's situation changes and there is evidence before the Court that it is impossible for him to exercise access at reasonable hours during the week, then the access schedule may have to be revisited, and may well have to take place during the week-end. That can be dealt with as part of case management. But to set the Skype access to the week-end in the present situation would interfere with activities that the children are involved with and are enjoying. This would be to their detriment. There may come a point where it is an unavoidable compromise but such is not the case at this time. Putting their interests first, I do not see the point in interfering with activities that are positive for them when there is not yet a need to do so.

4. In-person access

a) During the fall

[14] Counsel for the children has proposed that there be a 2 week period of in-person access this fall in either October or November, provided that the father gives 14 days notice to the mother of the intended dates. Both parents are in agreement with this. The mother asks that the Order be as specific as possible as to what "2 weeks" means because apparently this has given rise to differences in interpretation on the part of the parties.

b) Holiday season

[15] This is a contentious and very difficult issue. Understandably, the father wants to have access to the children during the Christmas holidays. The mother wants to spend the holidays with her family in Québec, as she has done consistently over the past years. She is also to pick up her other child in Québec during that period of time. Last year, the father did have access to the children during the holiday season, in Québec. The evidence shows that several problems emerged. I am satisfied that it is not in the best interests of the children to repeat that experience.

[16] The mother asks that the father be given access, immediately before the holiday season, so that she can go to Québec and spend the holiday season with her family. The father's position is that it is important for him to have access to his children at Christmas. He argues that if he obtains employment he will not have accumulated a sufficient number of vacation days to be in a position to be away for 2 weeks in December, whereas access during the holiday season itself would coincide with statutory holidays in Germany.

[17] I understand the father's position and concerns. But again, he is asking the Court to make a decision now based in part on the possibility that he will have employment and on the assumption that he will not be able to get vacation time to visit his children. These are unknowns at this point.

[18] The mother's preference would have been to travel to Québec earlier in December to avoid the travel rush, and higher costs, of travel during the holiday season. She is prepared, however, to follow the suggestion made by the children's counsel, and remain in Yellowknife longer to permit access that would take place closer to Christmas itself.

[19] The Court does understand that for many parents, being able to be with their children over Christmas and other religious or significant holidays is important. This issue arises frequently in family law litigation. The wishes of the parents have to be taken into account, but the best interests of the children are paramount. I have concluded that access immediately before the holiday season is the best compromise under the circumstances.

[20] I hasten to add that the mother must understand that she cannot expect that her preferences and plans for the holiday season will prevail year after year,

irrespective of the father's preferences. Having not had access at Christmas itself this year, it is to be expected that the father will seek to have it next year. While it is not for me to decide this issue today, depending of where things are at by then, he may have a strong argument that next year, his ability to have access at Christmas should take precedence over any preferences the mother may have.

c) Terms of in-person access

[21] In his response to the email sent by the children's counsel, the father stated that he agreed with the proposed term that access take place at the home of Irene Golchert. Counsel for the children has spoken with Ms. Golchert and she has agreed not only to have her home be used to exercise access but also to facilitate the pick up and drop off of the children.

[22] In his submissions, the father asked for the removal of the condition that access take place in Yellowknife. He would like to have the flexibility to take the children outside of Yellowknife, and possibly even outside of the Northwest Territories, during his access visit. He has also asked that the mother be required to contribute to the costs of his access.

[23] For the purposes of this Order, I am not prepared to change the term that the access has to take place in Yellowknife. While this may well be something that can be contemplated in the future, the Court would require much more detailed plans, and various issues would have to be addressed. For example, one of the conditions of in-person access to date has been that the father deposit his passport with the R.C.M.P. in Yellowknife. It may not be possible for him to travel outside of the Northwest Territories without having his passport with him, which would mean, in turn, that the requirement that he deposit his passport would have to be lifted. This would constitute a marked change from how the in-person access has been dealt with to date, and I am not prepared to deal with an issue like that without the benefit of more detailed evidence and submissions focused on that issue.

[24] The issues related to the costs of access are also issues that should not be dealt with as a one-off basis. That is a larger issue, part of the broader context of custody and access generally. They are matters that can be addressed as part of the case management process.

5. Restrictions regarding Tony Collins

[25] Mr. Collins is the mother's current spouse. Some of the Orders issued to date have included terms related to his presence during the access. There is an issue as to whether any such terms should continue to be included in the Court's orders.

[26] The Order issued December 6, 2012, which provided for in-person Christmas access in Québec, included a term that the access was to take place in the presence of the mother and another adult of her choice but not her father, Luc Lacoursière, and not Mr. Collins. The Order issued on June 6th 2013, which provided for in-person access in July 2013, provided that the mother was entitled to be present during the access and could be accompanied by a third person of her choice so long as it was not Mr. Collins.

[27] The mother takes the position that these terms have been misinterpreted by the father as preventing Mr. Collins from being in any location at all when the children are with the father. This has resulted in the police being contacted, investigations taking place, and statements being taken. Some of this has occurred in the children's presence. The mother takes the position that there is no basis for continuing to have any terms in the Court's orders dealing with Mr. Collins. The proposal submitted to the parties by the children's counsel contemplated a removal of conditions restricting Mr. Collins' presence during Skype access, in-person access, or pick-up or drop-off. The father does not agree with the proposal. He asks that there continue to be restrictions.

[28] While there is a lot of conflict in the evidence filed in this litigation, one thing that seems to be beyond dispute is that any form of contact between the father and Mr. Collins is undesirable. There is no reason why Mr. Collins should be involved with the Skype access, or anything to do with the in-person access, pick-up or drop-off of the children. If contact between those individuals necessarily results in conflict, which it appears to, it is not in the best interests of the children to have such contact occur. I therefore agree with the father that some restrictions should continue to be in place.

[29] Given what has transpired to date, however, I recognize that it is important that any such term be crystal clear and that there be no possibility of it being misinterpreted. As counsel put it, it is intended to be a shield, not something that is used as a weapon. It is not in the best interests of the children to witness conflict

between their mother's spouse and their father. But it also certainly is not in their best interests to find themselves in situations where the police come to their house to investigate alleged wrongdoings if the Court's orders are not, in fact, being breached. That being so, clarity and predictability is important at every level in the contact.

[30] The conditions I propose to put in place are simple and should be clear to all involved. Mr. Collins is not to be in the room when the father is exercising his Skype access. Mr. Collins should not be involved, present, or even in the vicinity where the pick-up and drop-off of the children is taking place for the in-person access periods. That condition should be easy to implement if the pick-up and drop-off is done through Ms. Golchert.

[31] The situation that seems to have given rise to the most problems is when the father finds himself with the children in a sports facility or other public place with the children, and Mr. Collins is also present at that location. This is an issue that parents who have separated have to deal with all the time. If children are involved in sports, it is to be expected that both parents (and sometimes their partners) will go and watch them play. It is not this Court's intent to prevent Mr. Collins, or the mother, from being present at activities that the children are taking part in simply because the father is also attending. The fact that an activity is taking place during the time that the father has in-person access should not prevent the mother and Mr. Collins from also attending that activity if it is taking place in a public area or facility. It is not to the children's benefit, for example, to prohibit their mother and Mr. Collins from watching a soccer game or other activity that they are involved in during their time with their father. In fact, the reverse is true: it is beneficial for them to know that the people who are in their lives love them and are interested in their activities irrespective of which parent they are staying with at any given time.

[32] In my view, what is reasonable is to require the father and Mr. Collins to refrain from direct contact with one another, and to keep their distances to avoid any problems. I am prepared to accede to the father's request to put those types of conditions in place. If interpretation or enforcement problems occur, this issue can be revisited by the Case Management Judge.

[33] Finally, I also think that the suggestion made by counsel for the children that the parties be directed to refrain from filming, photographing and recording their interactions is a sound one. Whatever the reasons have been for doing so and the

perceived benefits, they are far outweighed by the negative impact this type of conduct between separated parents is likely to have on the children.

[34] For these reasons, an Order will issue as follows:

1. The matter is referred to Case Management;
2. The father will have Skype access, for up to half an hour, on Mondays and Fridays between 6:30AM and 7:00AM (Yellowknife time), 2:30PM and 3:00PM (Germany time). Tony Collins shall not be present in the room while the Skype access takes place;
3. The father will have in-person access in Yellowknife for a total of 14 consecutive full days (14 consecutive periods of 24 hours) in October 2013 or November 2013, provided that he provide the mother with 14 days notice of the intended dates;
4. The father will have in-person access in Yellowknife for a total of 14 consecutive full days (14 consecutive periods of 24 hours) in December 2013, which access period shall conclude no later than 4:00PM on December 20, 2013;
5. With respect to the in-person access set out at Paragraphs 3 and 4 of this Order,
 - a) the pick up and drop off of the children will be facilitated by Irene Golchert;
 - b) the father and children will live at the home of Irene Golchert;
 - c) the mother will have telephone access with the children on Mondays and Wednesdays between 7:00PM and 7:30PM;
 - d) prior to having in-person access to the children set out in this Order, the father shall deposit his passport with the R.C.M.P. in Yellowknife. The passport is to remain deposited until the children have been returned to the mother at the end of each access period.
6. The mother and father shall refrain from communicating with one another, other than for matters pertaining to current significant health

and welfare issues of the children, or to fine tune the logistics of access provided for in this Order;

7. The father and Tony Collins shall have no direct contact with one another. If the father and Tony Collins are in the same public place at the same time, they shall not communicate in any way nor be within 10 meters of one another;
8. The mother and father will refrain from photographing, audiorecording or videorecording their interactions, or cause or permit any other person to do so.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT
this 3th day of September 2013.

Counsel for the Applicant: Margo Nightingale
Respondent represented himself and appeared by telephone
Counsel for the Children: Karen Wilford

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