

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TASHA SOUND

Applicant

- and -

ALBERT BERNHARDT

Respondent

MEMORANDUM OF JUDGMENT
(SUMMER ACCESS)

A) INTRODUCTION

[1] The parties have two children, now aged 6 and 9. On July 7, 2015, a Special Chambers hearing was held to deal with the father's application for permission to relocate from Yellowknife to Nova Scotia with the children. The mother opposes this, and filed a motion seeking to have the children returned to her day to day care in Hay River.

[2] The mother had indicated in earlier Court appearances that she would be filing a motion seeking summer access. I had given directions about when that motion should be spoken to. By July 7, the mother had still not filed it. However, the affidavits filed by both parties addressed summer access and both parties wanted that issue dealt with as part of the July 7 hearing. Given this, I agreed to hear submissions about summer access on that date even if no motion had been filed.

[3] As this is already the middle of July, the terms of the summer access need to be set as quickly as possible. This Memorandum of Judgment deals with that issue only. I will file a separate Memorandum of Judgment to deal with the relocation and day to day care issues.

B) BACKGROUND

[4] The history of this matter, in terms of how custody has been dealt with so far, is somewhat unusual. That history is set out in an earlier decision of this Court. *Sound v Bernhardt*, 2014 NWTSC 51. I will refer briefly to some of these circumstances to put the issues that now arise about summer access in their proper context.

[5] The children were born in 2006 and 2009. The parties separated in 2012. Before the separation, the family lived in Inuvik. After the separation, the children remained in the care of their mother. She was struggling with various personal issues and was having difficulties coping. In December 2012 she relocated to Hay River with the children and went to live with her father, J.W. and his long time spouse, C.M.

[6] The mother initiated proceedings in this Court in April 2013 seeking sole custody of the children. On July 25, 2013, a Consent Order issued, placing the children in her sole custody. At that point both parties were represented by counsel.

[7] Around the same time, C.M. and J.W. began caring for the children on a full-time basis. According to C.M.'s affidavit, this happened because the mother was continuing to struggle with her alcohol addiction and other issues, and was unable to care for the children adequately.

[8] C.M. deposes that the mother visited the children on occasion, but was not allowed in the home if she was intoxicated. C.M. and J.W. also did not allow the mother to see the children outside their home. C.W. deposes that it was difficult for them to restrict access to the children in this way but she and J.W. felt that doing so was necessary for the children's wellbeing.

[9] In the fall of 2013, the father approached C.M. and J.W. with a view of resuming contact with the children. He too had struggled with alcohol addiction, substance abuse, and anger management issues. C.M. was aware of this, and of the

many problems that had existed during his relationship with the children's mother. She agreed to help the father renew contact with the children, but proceeded cautiously. The contact was reestablished progressively, starting with telephone contact, and eventually moving to in-person visits with the father, his wife, and their young child. By all accounts, the children responded well to this.

[10] In March 2014, the father filed an application seeking to have the 2013 Consent Order varied and have the children placed in his day-to-day care. This was opposed by the mother, but supported by C.M. and J.W. At the time of that application, the mother was still represented by counsel. The father represented himself.

[11] In response to the father's application, the mother filed evidence where she acknowledged her struggles with alcohol and addictions, but described various steps she was taking to address those issues. Her position was that although the children were still being cared for by their grandparents on a day-to-day basis, this was a temporary measure. She argued that she would soon be in a position to take the children back in her care.

[12] On July 25, 2014, in the decision referred to above at Paragraph 4, this Court granted the father's application, and, on an interim basis, placed the children in his day to day care, granting the mother reasonable and generous access. The Court concluded that there was much uncertainty about the mother's situation, and about whether she had actually regained control of her life to the point that she would in fact be in a position to have the children returned to her care in the short term. The Court concluded that it was in the best interests of the children to vary the custody order and place them in the day to day care of their father in Yellowknife.

[13] The children moved to Yellowknife shortly after this Interim Order was made. By all accounts, they have been doing very well.

[14] The mother has not exercised regular access to the children over the past year. In his affidavit sworn January 9, 2015, the father provides details of several communications he had with her on the issue of access, as well as evidence about communication, and lack thereof, between the mother and the children. This evidence, for the most part, is not contradicted.

[15] The mother's affidavits confirm that that she had very little contact with the children during this period. She deposes that from August 2014 to January 2015, she stayed with her current spouse, B.O., at a cabin situated one hour outside of Hay River. She deposes that she was there to help B.O. getting his trapping camp up and running for the season. She acknowledges that she was not leading a sober or healthy lifestyle during this period of time.

[16] The mother deposes that since returning to live in Hay River in January 2015 she has worked on her issues. She has been sober since February 2015, attends A.A. regularly, and has taken counseling to get help to deal with her addictions and anger management issues. She intends on continuing with these steps. She and B.O. are expecting a child, who is due in October.

[17] The mother advised the Court during the hearing that she is working full-time, Monday to Friday. She has babysitters lined up to look after the children while they are with her and she is working. She explained in her submissions that she has upcoming medical appointments that will determine, among other things, whether she will go on maternity leave early. If this happens, she says, it will free her up to look after the children, without needing babysitters, while they are in Hay River.

[18] As far as her living situation, she has a one-bedroom apartment. She said that she has spoken to her landlord and would be able to move to a two-bedroom apartment on very short notice if need be.

[19] The evidence about B.O. is limited. There is reference in the evidence that he was incarcerated at some point in the spring, and has now been released. There is no evidence before me of what he was incarcerated for or what his sentence was. In her affidavit sworn May 19, 2015, the mother deposes that he has obtained a commercial fishing license and plans to fish during the summer months and hunt and trap during the winter months. I understand B.O. and the mother are living together, but the mother said in her submissions that she will not be going back to live at the trapping cabin. I take it from this that if B.O. stays there to hunt and trap next winter, the mother will remain in Hay River with her new baby.

C) PARTIES'S POSITIONS ON SUMMER ACCESS

[20] The parties agree that there should be summer access, but have been unable to agree on the terms.

[21] The mother wants the children to be in her care, in her home, continuously, for the rest of the summer. She argues that she has stability in her life now, and is willing and able to look after the children. Especially because she has not seen them a lot over the past several months, she says that it is important that she spend as much time as possible with them. She wants them to stay with her, in her home.

[22] The father is opposed to the children going to Hay River for the whole summer. He argues that this is too long a period of time for them to be away from him and from what is now their family unit. The father proposes that the children rotate between Yellowknife and Hay River in periods of two weeks.

[23] The father would also prefer that when the children go to Hay River, they reside primarily at their grandparents' home. He has concerns about them staying with the mother. This is in part because of something that happened during a recent visit to Hay River. The children had been staying with their grandmother, and went to spend the night at their mother's place. The father deposes that he spoke to one of the children that evening and that she was crying, not wanting to stay there, and wanting to return to her grandmother's.

[24] The father is not opposed to the children staying with their mother if they want to but he wants them to be able to decide where they will stay. He does not want them to be forced to stay at their mother's home if they do not want to.

D) ANALYSIS

[25] In any decision relating to custody and access, the paramount consideration is what is in the best interests of the children.

[26] The first issue I have to decide is whether the children should be in Hay River continuously for the rest of the summer.

[27] I certainly agree that the mother should have access to the children for significant periods of time this summer. This is not disputed by the father. It is in their best interests to maintain a close relationship with both their parents, if possible. It seems clear that over the past few years, the relationship between the children and their mother has suffered as a result of her struggles with alcohol abuse and the dysfunction in her life. It is to her credit that she is working on those issues, and it is particularly important that she continue doing so, considering she will have another child in a few months.

[28] I understand why the mother would like to spend the maximum amount of time possible with the children this summer. Even apart from the issue of their possible relocation, it is clear that the opportunities for extended visits will necessarily be more limited once the children are back in school.

[29] At the same time, it has been some time since the mother has been the primary caregiver of these children. The reality is that they have spent very little time with her over the course of the last 2 years. 2 years, considering the children's ages, is a long time.

[30] Given this, taking the children out of what is now their normal environment, and placing them in the mother's sole care for 7 consecutive weeks, seems to me to be too drastic a step. In my view, it is preferable to create an access schedule that will have the children spend time in Hay River for two significant periods of time this summer, with some time in Yellowknife in between.

[31] The second issue I have to decide is whether the children should stay with their mother while they are in Hay River, or whether they should stay primarily at their grandparents' house, which is a home where they have lived before and are familiar with.

[32] The issue of where the children should stay while in Hay River is not a straightforward one. For the mother to be able to re-establish a stronger bond with the children, she has to have an opportunity to parent them and to look after them on a day-to-day basis. I also understand the father's concerns. He does not want the children to be forced to stay at their mother's home if they are not comfortable there. This is why he suggests it be left up to the children to decide where they will stay. The father expresses concerns about the mother's current living arrangements, and whether it is suitable for the children, given that it is a one-

bedroom apartment and that the mother has a spouse who will also be staying there at least some of the time.

[33] I do not agree that it should be left up to the children to decide where they will stay during their time in Hay River. They are too young to have to bear the responsibility of having to make those kinds of choices. I agree with the mother's submission that this would put a lot of undue pressure on them.

[34] The evidence shows that the maternal grandparents have had significant involvement with the children. The children are familiar with that home. No one is suggesting that this is not a proper environment for them.

[35] C.M. has maintained her connection with the children since their move to Yellowknife. She has talked to them regularly and has seen them on a number of occasions. Although she and J.W. are not the children's biological parents and although they have never had legal custody of them, they have been a stable, positive and nurturing presence in these children's lives. And on the evidence before me, they have always tried to act in the children's best interests.

[36] I conclude that what is in the best interests of the children is for the terms of access to be somewhat of a compromise between the two positions advocated at the hearing.

[37] On the one hand, it is important that the mother be given an opportunity to re-establish her bond with the children, which includes them staying with her, so long as she maintains her sobriety and is prepared to put their needs first when they are in her care. Spending time at their mother's home, which is a new environment, may well bring a certain level of discomfort for the children at first. But in the long run, they will benefit from re-establishing a strong bond and comfort level with both their parents, if that can be achieved.

[38] At the same time, in my view, things need to be done in a progressive way. Having both children staying with the mother, and possibly her partner, for a full two weeks may be too much, too soon, considering how long it has been since she has looked after them. I do not doubt that the mother wants to do this and that she sincerely believes that she can do it, but this will require some adjustments for her as well.

[39] Space is another issue. As already mentioned, the mother says that she can move into a two-bedroom apartment on very short notice. I am not entirely clear on whether she would proceed with this move to accommodate access, or whether this is something she would contemplate only if the day-to-day care of the children was transferred back to her. But even assuming that there is a two-bedroom apartment available and that she would be prepared to move to accommodate access, it may be difficult to effect this move on short notice, whether she is working full time or has gone on early maternity leave for medical reasons. It seems to me there is somewhat of a gap between what the mother would like to see happen and what can realistically take place.

[40] In my view, a good compromise is to have the children stay with their mother for part of the access period, and with the grandparents for another part. This will make the transition less abrupt for them, while also ensuring that they are able to spend meaningful time with the mother.

[41] As far as the transportation of the children between Yellowknife and Hay River, to date, it has been arranged by the father, with the assistance of C.W. The mother does not drive and would be dependent on assistance from others if she were responsible for any of the transportation. Under the circumstances, I think it is preferable for the children to travel the same way they have over the last year, and to leave the responsibility for those arrangements with the father.

[42] Nothing in the decision prevents the parties from coming to an agreement to extend or modify these periods of access. The Court's objective is to give the parties basic parameters to work with, since they were not able to agree on those parameters.

[43] Ultimately, what will work best for these children is for everyone to be reasonable, responsible, and put the children's needs and comfort first. Courts are sometimes required to micro-manage access when parties are completely unable to function and communicate with one another. That is never ideal. Hopefully, the parties will be able to cooperate to ensure that the children have an opportunity to spend time with their mother in a meaningful way. These access periods should also be an opportunity for them to spend meaningful time with their grandparents, who have cared for them full time before, and have stepped in at pivotal moments of their young lives.

[44] The terms of the summer access, therefore, will be as follows:

1. The first period of access will commence no later than 2:00PM on Sunday, July 19, and will end no later than 6:00PM on Sunday August 2. For this access period:

(a) the children will stay primarily at the residence of J.W. and C.M. but the mother will have full access to the children. The children will stay with the mother overnight for a total of no less than 4 nights during that period. These nights need not be consecutive nights.

(b) the father will be responsible for arranging the transportation of the children to and from Hay River

2. The second period of access will commence no later than 2:00PM on Sunday August 9 and will end no later than 6:00PM on Sunday August 23. For this access period:

(a) the children will stay at the residence of J.W. and C.M. but the mother will have full access to the children. The children will stay with the mother overnight for no less than 8 nights during that period. These nights need not be consecutive nights.

(b) The father will be responsible for arranging the transportation of the children to and from Hay River.

3. The mother is required to be sober and not under the influence of any intoxicants at all times when caring for the children, or while in their presence.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
14th day of July 2015

The Applicant and the Respondent represented themselves

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