Date: 2015 08 14
Docket: S-1-FM-2013-000047

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TASHA SOUND

Applicant

- and -

ALBERT BERNHARDT

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION

[1] The parties to these proceedings separated in 2012. They have two children who are now 6 and 9.

[2] On July 7, 2015, a Special Chambers hearing was held to deal with applications brought by each of the parties to vary the existing custody order. The father lives in Yellowknife and the children are in his day to day care. He wants to relocate with them to Nova Scotia. The mother lives in Hay River. She has filed an application seeking to have the day to day care of the children returned to her, or alternatively, an order prohibiting the father from relocating with the children.

[3] The July 7 hearing had been scheduled to deal with these two applications, but in the end it also served as an opportunity for the parties to make submissions about summer access. The parties were in agreement that the children should spend some time in Hay River this summer, but had been unable to agree to specific terms for that access. I filed a decision dealing with that issue on July 14,

2015. *Sound* v. *Bernhardt*, 2015 NWTSC 35 cor.1. This Memorandum deals with the father's application for leave to relocate and the mother's application to have the children returned to her care.

[4] Before turning to the evidence adduced on these applications, it is useful to summarize how the custody of the children has been dealt with since the separation.

B) CUSTODY ORDERS MADE SINCE SEPARATION

[5] The parties separated in 2012. After the separation the children remained with their mother, initially in Inuvik. Shortly thereafter, she relocated to Hay River with them, and went to live with her father, J.W., and his long-time spouse, C.M. In April 2013 she initiated custody proceedings and on July 25, 2013, a Consent Order issued, placing the children in her sole custody.

[6] Around the same time, J.W. and C.M. began caring for the children on a full-time basis. It appears undisputed that the mother was not leading a healthy lifestyle at that point. She was abusing alcohol on a regular basis. J.W. and C.M. determined that it was best for the children to stay with them, and to have contact with their mother only in their house and only when she was not under the influence of alcohol.

[7] In the meantime, the father had moved to Yellowknife and was living with his new partner. In the fall of 2013 he approached J.W. and C.M. with a view of resuming having contact with the children. C.M. was aware that during their relationship, the mother and father had struggled with alcohol abuse and domestic violence. She agreed to facilitate contact between the father and the children but proceeded cautiously. The contact between the children and the father was re-established progressively, starting with telephone contact, and eventually moving to in-person visits with the father, his new wife and their infant child. The children responded well to this.

[8] By March 2014, the children were still living with J.W. and C.M. and the father filed an application seeking to have the 2013 Consent Order varied to have the children placed in his day-to-day care. This was opposed by the mother but supported by C.M.

[9] In responding to the father's application, the mother acknowledged that she had struggled with alcohol and other issues but outlined the steps that she was taking to address those issues. She explained that her intention was to continue with her treatment and counselling and to take the children back into her care once this was completed.

[10] The mother's position was that the change in circumstances that the father was relying on in seeking a variation to the 2013 Consent Order – the fact the children were actually living with their grandparents – was a temporary situation only. She argued that the proposed change would be too disruptive for the children, and not in their best interests.

[11] The father's application proceeded on May 8, 2014. In a decision filed July 25, 2014, this Court granted the father's application and issued an Interim Order placing the children in his day to day care (the July 2014 Order). The Court acknowledged the efforts that the mother had been making to deal with her issues but noted that her situation had not been stable since August 2013, and that there was no time frame provided for when she anticipated to have the children returned to her care. The Court acknowledged that a move to Yellowknife would be disruptive, but on balance, concluded that it was in the best interests of the children to be placed in the care of their father. *Sound* v. *Bernhardt*, 2014 NWTSC 51.

[12] The children moved to Yellowknife shortly after the Interim Order issued, and have lived there since. It is undisputed that they have done very well while living with their father and his wife.

C) ANALYSIS OF THE PRESENT APPLICATIONS

1. Overview

[13] On January 9, 2015, the father filed the Notice of Motion seeking leave to relocate to Nova Scotia with the children. When the mother appeared in Chambers to speak to that motion, she indicated she would be filing a motion seeking to have the children returned to her day to day care. That motion was filed on June 11, 2015.

[14] Both parties have filed affidavits. The father has filed four affidavits: three of his own, sworn January 9, 2014, April 29, 2015, and June 19, 2015, and one

sworn by C.M. on June 12, 2015. The mother has filed two affidavits, sworn by her March 31, 2015 and May 19, 2015. Both parties represented themselves at the hearing.

[15] The mother and father both indicated, in the initial appearances in Chambers, that they wished to call oral evidence on this matter. They were granted leave to do so; that was why two days were set aside for the hearing. When the matter proceeded, however, both parties decided not to call oral evidence. They did not cross-examine each other on their affidavits. The mother did not ask to cross-examine C.M. on her affidavit either.

[16] When a matter proceeds on the basis of affidavits only and there are significant factual disputes, conflicts in the evidence are difficult to resolve. In this case, having reviewed the affidavits carefully, I find that there are not any significant factual disputes on the matters most relevant to the present applications. There are some areas of conflict, in particular with respect to the level of involvement the father had with the children during the relationship and after its breakdown. But on the whole, what has transpired since he renewed contact with the children in the fall of 2013, and, more importantly for my purposes, what has transpired since the July 2014 Order, does not appear to be disputed.

[17] On a variation application, the correctness of the initial order must be presumed. Ordinarily, the party seeking the variation must meet a high threshold of showing a material change in the circumstances affecting the children. *Williams* v. *Williams*, [1996] N.W.T.R. 363; *Sound* v. *Bernhardt*, *supra*, paragraph 4.

[18] Here, the situation presents somewhat differently because the July 2014 Order is an Interim Order only. The Memorandum of Judgment shows that the Court approached the issue of custody with caution, given the background of this matter, including the 2013 Consent Order, and the potential for things to evolve in the future:

> Varying a custody order is not something that the Court undertakes lightly and after having given this careful consideration, I am of the view that the circumstances are such that it is in the best interests of the children that they be in the care of the [father] at this time. The [mother]'s involvement with the children in the past years and potential to resume her parental role should also not be ignored. Rather than granting [the father] sole custody, the parties will have joint custody with the [father] having day to day care

> and control of the children. Given the history and what has transpired, this will be an interim order.

Sound v. *Bernhardt*, *supra*, Paragraph 31.

[19] The fact that the existing Order is an Interim Order means the threshold to vary it is not as high as it might otherwise be. In particular, in light of the comments quoted above, I do not think that the threshold that the mother has to meet on her application is as high as it was when the father was asking to change the custody regime that had been agreed to and was set out in the 2013 Consent Order. As referred to above, the Court specifically acknowledged the mother's past involvement with the children and the potential for her to resume her parental role.

[20] Still, anyone seeking a change in a custody regime has the burden of establishing that the proposed change is justified. In dealing with the present applications, the role of the Court is not to revisit events and matters that have been the subject of earlier decisions. Of course, the overall context and history of the matter are relevant and should not be overlooked. At the same time, what is most critical is the evidence of what has transpired between the time the last Order was made, and now. And, as is always the case, the overarching consideration is what is in the best interests of the children.

[21] The *Children's Law Act*, S.N.W.T. 1997, c.14, provides guidance as to what should be considered when applying this test:

> 17. (…)
>
> (2) In determining the best interests of a child for the purposes of an application (…) in respect of custody of or access to a child, the court shall consider all the needs and circumstances of the child including
>
> (a) the love, affection and emotional ties between the child and
>
> i) each person entitled to or seeking custody and access,
>
> ii) other members of the child's family,
>
> iii) persons involved in the care and upbringing of the child;
>
> (b) the child's views and preferences if they can be reasonably ascertained;
>
> (c) the child's cultural, linguistic and spiritual or religious upbringing and ties;
>
> (d) the ability and willingness of each person seeking custody to, directly or indirectly, provide the child with guidance, education

> and necessities of life and provide for any special needs of the child;
> (e) the ability of each person seeking custody or access to act as a parent;
> (f) who, from among those persons entitled to custody or access, has been primarily responsible for the care of the child, including care of the child's daily physical and social needs, arrangements for alternative care for the child when it is required, arrangements for the child's health care and interaction with the child through, among other things, teaching, playing, conversation, reading and discipline;
> (g) the effect a change of residence will have on the child;
> (h) the permanence and stability of the family unit within which it is proposed that the child live;
> (i) any plans proposed for the care and upbringing of the child;
> (j) the relationship, by blood or through adoption, between the child and each person seeking custody or access;
> (k) the willingness of each person seeking custody to facilitate access between the child and a parent of the child who is seeking custody or access.

Children's Law Act, *supra*, section 17.

2. Summary of the evidence

[22] The evidence adduced by the father sets out why he wants to move and why he believes this move would be in the best interests of the children. He puts forward, primarily, economic reasons: the move would give his family the use of a house, rent-free. His wife has a large extended family in the area where they would live, which would mean free childcare and extensive family support would also be available. This would give the father an opportunity to upgrade his education and improve his employment prospects. He deposes that his wife's family has completely accepted the children as part of their family and can be counted on for support. He also deposes that the children visited the area during the summer of 2014 and loved it. He further deposes that there would be opportunities for the children to continue with some of the activities that they are currently involved with in Yellowknife.

[23] The father acknowledges that the move will mean that the children will live a significant distance away from their mother. But he points out that in the last year, despite the relatively short distance between Hay River and Yellowknife, the

mother has exercised very little access to the children. He describes several examples of situations that show, in his view, that the mother has not made the children her first priority. He questions whether the recent changes she has made in her life can be relied on as a predictor of her future conduct, particularly given the choices she made in the months that followed the issuance of the July 2014 Order.

[24] As far as access, the father deposes he intends on coming to the Northwest Territories every year to visit his family in the Inuvik area, and that he would bring the children with him. This would be an opportunity for them to also have extensive visits with the mother, and the children's grandparents. He is proposing to pay for the costs of one access visit per year, and is willing to accommodate other access visits if the mother is prepared to cover the costs.

[25] In her affidavit, C.M. confirms that she and her spouse looked after the children full-time from shortly after their move to Hay River, up until the children were placed in the day to day care of their father in July 2014. Since they have been in his care, C.M. has had several opportunities to see him interact with them. She has observed him being actively engaged in the children's lives in a variety of ways, which she describes in detail.

[26] C.M.'s evidence corroborates many of the father's assertions about the mother's alcohol abuse after the July 2014 Order was made, and about a number of instances when the mother had the opportunity to exercise access to the children but made other choices.

[27] C.M. confirms that the mother has made some positive changes lately. She describes her recovery as "recent" and having taken place "in the past few months". C.M. deposes that she will support the mother's efforts to continue to work towards a positive and full relationship with the children.

[28] C.M. deposes that she is supportive of the children remaining in the day to day care of their father, even if this means them moving to Nova Scotia. Based on her observations, she is of the view that he has come further than the mother has in dealing with his issues.

[29] In her affidavits, the mother acknowledges that she has made mistakes and has struggled over the past few years. She attributes some of those struggles to the abuse she suffered during her relationship with the father.

[30] She acknowledges that she had limited access to the children in the past year. She deposes that this was due in part to the fact that she helped her current spouse set up his trapping camp outside the community of Hay River. She deposes that they were there from August 2014 to January 2015.

[31] She deposes that she has been sober since February 2015, is attending AA meetings, and is fully invested in addressing her addiction to alcohol and other issues. She deposes that she and her current partner are "more than ready" to take the responsibility for caring for the children. They are expecting a child of their own, who is due in October.

3. The mother's application to have the children returned to her care

[32] As already noted, the mother's application was filed in response to the father's application for permission to relocate. In it, she seeks to have the children returned to her day to day care and in the alternative, seeks an order prohibiting the father from relocating with the children.

[33] In my view, the evidence filed by the mother fails to establish that returning the children to her care would be in their best interests. I have reached this conclusion for a number of reasons.

[34] The first is that the mother has not established that her situation is significantly different from what it was a year ago.

[35] It is abundantly clear on the evidence, including the mother's own evidence, that any stability that now exists in her life is a relatively recent development. This was also the case when the 2014 application was heard. At that time, the mother had a new child, had recently achieved sobriety, intended on continuing with treatment and counselling, and expected to be in a position to resume full time care of her children in the foreseeable future. The evidence shows that as it turned out, whatever stability she had achieved at that point unraveled even before the July 2014 Order was issued, and in the months that followed.

[36] The mother's situation now bears many similarities to what it was a year ago. Her recovery is recent. She plans on continuing with counselling and treatment to help her continue her fight against her alcohol addiction. She may well succeed this time. The Court acknowledges that dealing with addictions is a long term battle. It certainly appears that she has made positive choices since learning of her pregnancy and that she is heading in the right direction.

[37] But the fact remains that at this point, the changes she has made in her life are recent. They do not establish that she has attained a level of stability that could possibly justify varying the custody regime and returning the children to her day to day care. C.M., who knows the mother well and lives in the same community, is supportive of her efforts but in her affidavit expresses, at most, cautious optimism. Given the overall background and the events of the past few years, that is understandable, and realistic.

[38] The second reason why I am not satisfied it would be in the children's best interests to be returned to their mother's care at this time is that, quite apart from any changes in her circumstances, I cannot ignore the evidence of how well they are doing and have been doing, over the past year, while in the day to day care of their father. All the evidence is to the effect that they are thriving in their current environment. They have been active, involved in various activities, and by all account are doing very well. They have developed a strong bond with the father, his wife, and their young child. This is not evidence that comes only from the father. It is also reflected in the evidence of C.M. C.M. has been involved with these children from some time. She is acutely aware of the challenges that both the father and mother have had in the past. She has had regular contact with the children since they moved to Yellowknife. For those reasons I attach great weight to her evidence.

[39] It is noteworthy that in her submissions at the hearing, the mother focused primarily on her opposition to the children moving to Nova Scotia. She did not forcefully argue that the children should return to her day to day care. She acknowledged that this was probably not a reasonable thing for her to insist on at this time. That is a realistic concession in light of the evidence.

[40] I am not satisfied that the mother has established that the children should be returned to her care. In my view, the evidence establishes that it is in their best interests to remain in the day to day care of their father.

[41] The second aspect of the mother's motion really is about her opposition to the proposed relocation of the children. I now turn to that issue, which is much more difficult.

4. The father's application for leave to relocate

a. The nature of the order sought

[42] Courts apply a more restrictive approach in relocation cases where leave to relocate is sought in the context of an interim application, as opposed to a trial:

> (...) the general reluctance of the court to effect fundamental changes in a child's lifestyle on interim motions has resulted in a slightly more restrictive approach to interim mobility cases, one that recognizes the short-term nature of interim orders and the summary nature of interim motions. As well, since the decision on an interim motion in a mobility case will often strongly influence the final outcome, particularly where relocation is permitted, caution is called for, especially since even more disruption may be caused in a child's life if an interim order permitting the move is later reversed after trial (...)

Datars v *Graham*, [2007] O.J. No.3179 (Ont. Sup. Ct. Jus.), Paragraph 16.

[43] One of the reasons why a more restrictive approach is taken on interim applications is that those types of applications often proceed on the basis of conflicting and incomplete affidavit evidence, as opposed to trials on the merits, where oral evidence is adduced and usually tested through cross-examination.

[44] In deciding how to approach the father's application, regard must be had to the background of this matter which, as noted previously, is somewhat unusual. By all accounts, the 2013 Consent Order was intended to be a Final Order. As it turned out, it was varied only a year later, albeit on an interim basis, as noted above at Paragraph 18.

[45] The present application proceeded without any oral evidence being called, and without any cross-examination taking place. The parties were given the option to do those things but chose not to. But as I have already noted, there was little

factual controversy or dispute about what transpired since the July 2014 Order was made.

[46] Given all of this, I do not think the father's relocation application should be treated as an interim one. He wants to relocate permanently to Nova Scotia with the children. There were good reasons last year for the Court to issue only an Interim Order. But in my view, any Order issued at this point should be Final Order. Prolonging the interim nature of the custodial regime would not be in the children's best interests.

[47] This does not mean that whatever decision is made now can never be varied, of course. But the party seeking a variation would have to meet the strict threshold of showing a material change in circumstances affecting the children.

b. Principles that apply in relocation cases

[48] In a dispute involving a change in a child's residence, the Court must assess what is in the best interests of the child by means of the approach set out in *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27, whether the issue arises at an initial custody hearing or in the context of a variation application. *Ivens* v. *Ivens* 2008 NWTSC 18, Paragraph 25.

[49] The focus of the inquiry must be the interests of the child, not the interests or rights of the parents. The inquiry does not begin with any legal presumption in favour of the custodial parent. Each case turns on its own circumstances. In determining what is in the best interests of the child, the following factors must be considered:

i) the existing custody arrangements and relationship between the child and the custodial parent;
ii) the existing access arrangement and the relationship between the child and the access parent;
iii) the desirability of maximizing contact between the child and both parents;
iv) the views of the child;
v) 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;
vi) disruption to the child arising from a change of custody;

vii) disruption to the child consequent on removal from family, schools and the community he or she has come to know.

Gordon v. *Goertz*, *supra*, Paragraph 49.

c. Application of principles in this case

[50] The mother's reasons for opposing the move are set out in her affidavits, and were reiterated in her written and oral submissions.

[51] Her concerns about the move are the following: the move to Nova Scotia will be overly disruptive to the children; it will mean that the children will live far away from her and her blood relatives; the father has not taken any counselling for his issues, which may lead to problems in his current relationship, in which case the children could lose their support network in Nova Scotia; the school curriculum in Northwest Territories is one year behind the curriculum in southern Canada, so the children will be behind and may become targets for bullying; the father may use the move as a means of pushing her out of the children's life; the father's involvement in the children's life is recent; the move will isolate the children from their aboriginal culture and heritage; the move will not be financially advantageous because the father's wife's salary will be lower there than it is in the Northwest Territories.

[52] I do not doubt that the mother is sincerely and genuinely concerned about these things. But many of her concerns are speculative. Others are inconsistent with the evidence.

[53] The possibility that the children will be bullied because they will be behind on the school curriculum, for example, is completely speculative. There is no evidence of the difference between the school curriculum in the Northwest Territories and the one in Nova Scotia.

[54] The mother's concerns about potential issues that may arise in the father's new relationship, and how those might affect the children are also, at this point, speculative. Her fears are understandable, given the problems that she and the father had during their own relationship. However, nothing in the evidence about the father's current relationship gives any indication that similar difficulties are

arising. The father deposes that he has in fact taken counselling, on his own and with his wife, and is prepared to take counselling again if the need arises.

[55] As far as economic consequences to this move, there is little evidence to support the mother's position that the move would place the father's family unit in a more precarious financial position than what it currently is in Yellowknife. Salaries in the Northwest Territories are generally higher than in many places in southern Canada, but so is the cost of living. Such generic considerations are not particularly helpful.

[56] The father has adduced evidence that the move would give the family access to free housing and free childcare. He has also adduced evidence about his current housing costs in Yellowknife and about the financial pressures that the family is facing. On the whole, I am not satisfied that the mother has established that the move would be financially disadvantageous to for the father's family. On the contrary, I am satisfied that the father has established that it would relieve some of the financial pressures the family faces, while also affording the father a meaningful opportunity to improve his employment prospects through upgrading and eventually pursuing other educational opportunities.

[57] With respect to the mother's concern that the father may use the distance to isolate the children from her, again, there is no evidence at all that the father, in the last year, has attempted to prevent the mother from having access to the children. On the contrary, the evidence is that he has encouraged the mother to see the children and taken active steps to facilitate this. The lack of contact between the mother and the children over the past year has not been due to the father's actions. There is no basis to suggest that he will, in the future, attempt to isolate the children from her.

[58] I conclude that many of the reasons why the mother opposes the move are not supported by the evidence.

[59] That being said, some of her concerns are legitimate; this move, as any move, would be disruptive for the children. It would also result in them living at the other end of the country, a significant distance away from where their mother, grandparents, and extended family members live.

[60] I now turn to the examination of the specific factors set out in *Gordon* v. *Goertz*, *supra* and their application and impact in this case. I have already referred to the evidence that relates to most of these factors and will not repeat it. I will simply outline my conclusions as they relate to each of the relevant factors.

i) the existing access arrangements and the relationship between the child and the custodial parent

[61] The children have been in the day to day care of the father for a full year now. By all accounts, they have a very good relationship with him, his wife, and their young step-brother. C.M. has observed the father actively engaged with the children in multiple ways. To her, the children appear happy, well looked after, and involved in many positive activities.

ii) the existing access arrangement and the relationship between the children and the access parent

[62] The July 2014 Order provides for the mother to have liberal and generous access to the children, as can be agreed by the parties. It is undisputed that until very recently, the mother exercised very little access to them.

[63] The father's evidence, which the mother does not dispute, is that there were a number of occasions when the opportunity arose, and sometimes plans were made, for the mother to see the children, but she did not follow through.

[64] As I noted in my decision dealing with summer access, the mother has had very little contact with the children for the past two years which, considering the children's age, is a long time. The relationship between the children and their mother, inevitably, was affected by this. This was one of the reasons why I declined to grant the mother continuous access for the whole summer, and decided that the children should spend at least part of their time in Hay River in the home of their grandparents, as opposed to spending the whole time at their mother's apartment.

[65] Hopefully, the periods of access ordered this summer will have assisted in strengthening the bond between the children and their mother. But I am satisfied that the events of the past few years have eroded that bond.

iii) the desirability of maximizing contact between the children and both parents.

[66] This factor usually militates against allowing a parent to relocate, with the children, to a community far away from where the other parent lives. If it were the only factor to consider, no relocation application would ever be granted.

[67] There is no doubt that the proposed move will mean the children will live a much greater distance away from their mother than has been the case over the past year, and indeed, for their whole lives. That is a factor to consider, and I have considered it.

[68] But the decision to prevent the father from moving for the sake of preserving the possibility of frequent access must be made taking into account the likelihood of this frequent access actually taking place. As the past year has shown, geographic proximity does not necessarily translate into frequency of contact.

[69] The reality is that the mother's track record for exercising access in the past year is not good. Grant it, she was experiencing various difficulties at some points during that year. She has made changes in her life and asks the Court to accept that those changes are permanent ones, and that she has now decided to make her children her first priority. Sincere as she may be, as I already noted, her situation now, and her stated intentions, are similar to what they were a year ago.

[70] Quite apart from this, the mother will have a new baby in a few months. This will take up a lot of her time and energy in the short term. As I understand the evidence and her submissions at the hearing, her spouse will be hunting and trapping this winter, presumably using the camp that they spent some time setting up in the fall of 2014. It appears that the mother will have the primary responsibility for caring for her infant child. This may limit her ability to travel to Yellowknife to exercise access to her other children.

iv) the views of the children

[71] The father deposes that when the children travelled to Nova Scotia, they enjoyed their time there and are excited about the prospect of moving. The mother does not dispute this but argues that it is not particularly surprising, given their age, that they would be getting excited about something like this. She invites the Court

not to attach a lot of weight to this factor, because the children are too young to understand the consequences of this move.

[72] I tend to agree that the children's positive views about the move cannot be given significant weight in this case. At the same time, I do note that that there is no evidence that they have expressed extreme anxiety or concerns about the prospect of moving, as was the case, for example, in *Suchtlandt* v. *Diveky*, 2009 NWTSC 2.

v) 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 children

[73] As would most often be the case, the father and his wife likely want to move to Nova Scotia for a combination of reasons. No doubt for his wife, returning to live closer to where most of her family is a very appealing prospect. In his affidavit, the father deposes his reason for wanting to move is primarily because he thinks he will be able to offer the children a better life there, as it will allow the family to be in a better financial situation and benefit from the support of his wife's large extended family.

[74] I accept, based on the father's evidence, that his reason for wanting to move is at least in part based on his desire to improve the family's financial situation, which is relevant to his ability to meet the children's needs. There is evidence to suggest that overall, the family will be better off financially if they are permitted to move. In the short term, the impact of having access to free housing will be significant. So will, to a lesser degree, the reduction in childcare expenses. In the longer term, the ability for the father to upgrade and improve his employment prospects will benefit the family as well.

vi) disruption to the children of a change of custody

[75] This factor is not relevant here, as the children will remain in the father's care whether he is permitted to relocate or not: he has made it very clear that he will not move without them.

vii) disruption to the children consequent on removal from family, schools, and the community they have come to know

[76] The children are well adjusted in their current environment. They are involved in activities in Yellowknife and have come to know the community since they have moved here. But the disruption as far as no longer being in Yellowknife is not the most significant concern. They have only lived in this city for one year, they have moved a few times already in their young lives, and appear to have been able to adjust well. They are still at an age where changing communities is not as disruptive as it might be in later years.

[77] At the same time, living in Yellowknife gives them relatively easy access not just to their mother, but also to their grandparents, who they are close to. The removal of close access to J.W. and C.M. is a consequence of the proposed move that is significant. C.M. acknowledges this in her affidavit and yet, she is still supportive of the move.

[78] Relocation cases are notoriously difficult to decide because they engage competing and often irreconcilable interests. In *Gordon* v. *Goertz*, the Supreme Court of Canada described the Court's ultimate task in the following words:

> In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

Gordon v. *Goertz*, *supra*, Paragraph 50.

[79] Answering this question is challenging because it requires comparing the children's current situation, which is a known, to the situation that will unfold if the move is permitted, which is, in large measure an unknown.

[80] The mother places considerable reliance on the fact that she was the children's primary caregiver for the first part of their lives, and that the father's involvement is a relatively recent development.

[81] The assessment of each parent's ties with the children is not simply a matter of comparing how many years the children were in the care of one parent or the other. The children were quite young at the time of separation. The father may have been uninvolved for a period of time but since he renewed contact with the children in November 2013, he has been a stable presence in their lives. He has demonstrated his commitment to them and has continued to follow through on that commitment in a number of ways over the past year.

[82] I am satisfied, on the evidence before me, that irrespective of what may have happened in the past, at this time, the father is the parent who has the strongest bond with the children. And he now has a proven track record showing his commitment to their care, and to making them his first priority. The same cannot, unfortunately, be said about the mother.

[83] On the other hand, there is little doubt that the proposed move will be disruptive for these children, and they have already faced a fair bit of disruption in their young lives. It is also clear that such a move will limit the possibility of frequent access to their mother and grandparents. Those are important considerations that cannot be overlooked.

[84] As I have already noted, I attach great weight to the evidence of C.M. She and J.W. stepped in to look after these children when both their parents were going through difficult and unstable times, and were unable to care for them. Her reaction and approach when the father contacted her about renewing contact with the children in the fall of 2013 was fair but firm, and denotes a realistic, balanced, and cautious approach. The steps that she and J.W. took to ensure that the children were not exposed to their mother's alcohol abuse is another demonstration of their commitment to put the best interests of the children first. C.M. is obviously committed and attached to these children. She too stands to lose the opportunity for easy and frequent access to them if they relocate. Yet, she is supportive of the father's application. In my view, that speaks volumes.

[85] I have given this matter careful and anxious consideration, and conclude that the father should be permitted to relocate with the children. He should not be forced to remain in Yellowknife and continue to struggle financially. The children will benefit from the improvement of the family's financial situation and from the support of the father's wife's extended family. Given the commitment that the father has demonstrated to his children over the last two years, the Court has to

trust that if things do not work out and the children are unhappy in Nova Scotia, either because they miss their mother and grandparents too much, or for any other reason, the father will put their well-being first and do what is in their best interests.

[86] The mother should have the opportunity of having significant periods of access. The father has indicated a willingness to pay for one access visit per year. In my view, he should be responsible for assuming a greater portion of the access costs.

[87] The relocation is the father's choice, and is premised on the notion that it will improve the family's overall financial situation. By contrast, the mother's financial situation, for the time being, is such that her ability to cover costs of travel between the Northwest Territories and Nova Scotia is questionable. Having the father cover the costs of only one access visit may well mean that in-person access would only occur once a year. That is not desirable. It is in the children's best interests to maintain a strong connection with their mother, and in-person access visits are one way to help this happen. In addition, in-person access in Hay River will also provide an opportunity for the children to maintain the bond with their grandparents, which is also in their best interests.

[88] I do not propose to be overly specific in dealing with access. Instead, I will outline broad parameters for the parties to work with. It is my hope that the parties will be able to agree on the details of the access terms. If they are unable to, this Court retains jurisdiction to deal with any application by either party to set the terms of access. The jurisdiction of this Court over this matter does not end with the issuance of the Order arising from these applications.

5. The father's application for child support

[89] The father claims child support. This issue was not the focus of the parties' submissions at the hearing. The father addressed it briefly in his written submissions but not in oral submissions. The mother did not address it at all.

[90] There is limited evidence before the Court to deal with this issue. Ordinarily, absent a hardship claim, child support is determined based on the payor parent's income and on the number of children to be supported. Non-custodial parents have a legal obligation to provide support for their children.

[91] There is no evidence before the Court as to the mother's current income. She said during the hearing that she works at one of the hotels in Hay River. I take into account that she will be on maternity leave for some time. This will have an impact on her income.

[92] Taking into account the increased costs that the mother will have for access, and her overall circumstances, as well as the uncertainty about what her income will be in the coming years, I will make a child support as part of this order in a relatively modest amount. I will require the parties to exchange income information every year. With that information, they can discuss adjustments to the child support having regard to the *Child Support Guidelines* and other relevant considerations, such as the access costs. If they are unable to reach agreement about what the amount of child support should be, either of them will be at liberty to bring the matter back before this Court.

D) CONCLUSIONS

[93] For those reasons:

A. The mother's application to have the children returned to her day to day care is dismissed.

B. The father's application is allowed and the following Order will issue:

1. The children will be in the sole custody of the father;

2. The father has leave to relocate with the children to Nova Scotia;

3. The mother will have generous access to the children as can be agreed between the parties, including:

a) in-person access in Hay River, as follows:

i) no less than six weeks every summer;
ii) no less than ten days during the Christmas holidays;
iii) no less than 7 days during Spring break;

iv) at any other time and on terms that can be agreed to by the parties;

The father will be responsible for the costs of two of the above-mentioned in-person access visit;

b) telephone and Skype access as can be agreed by the parties;

4. This Court will retain jurisdiction to deal with any issue that may arise with respect to access;

5. The mother will pay child support in the amount of 250.00 per month, commencing on September 1, 2015, payable on the first day of each month;

6. The parties will provide each other, no later than June 30 of each year, copies of their Income Tax Returns and Notice of Assessment for the previous taxation year.

The Clerk of the Court will prepare Formal Orders reflecting the terms of this decision.

L.A. Charbonneau
J.S.C.

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

The Applicant and the Respondent represented themselves

S-1-FM-2013-000047

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TASHA SOUND

Applicant

- and -

ALBERT BERNHARDT

Respondent

MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU
