

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

D. B. M.

Petitioner

- and -

R. M.

Respondent

Transcript of the Oral Decision delivered by The Honourable
Justice A. M. Mahar, sitting in Yellowknife, in the
Northwest Territories, on the 11th day of December, 2015.

APPEARANCES:

Ms. T. Paradis:

Counsel for the Petitioner

Mr. R. M.:

For himself, the Respondent

1 THE COURT: On December 3rd and 4th, 2015,
2 the Court heard a contested application, with
3 viva voce testimony from both the Applicant and
4 the Respondent, as well as information provided
5 by Mr. Ken Kinnear on behalf of the child.
6 While, technically, this application is pursuant
7 to a Petition for Divorce, the divorce itself is
8 not contested and the application is concerned
9 primarily with the custody and day-to-day care of
10 one of the two children of the relationship.

11

12 BACKGROUND

13 The parties separated at the beginning of
14 November 2012. They entered into a formal
15 Separation Agreement on January 22nd, 2013. The
16 agreement dealt in a comprehensive way with the
17 dissolution of the marriage, including the
18 division of property and the custody of the two
19 children of the marriage, B., born
20 December 1, 2002, and C., born October 4,
21 1997. The parties agreed to share equally the
22 custody of the children and, while the actual
23 arrangement was not specified in the agreement,
24 the practice generally was to have the children
25 alternate between the parents' homes on a
26 week-to-week basis.

27 While this application originally included

1 both children, C. has since begun attending
2 university in Ontario, no longer resides at
3 either residence on a regular basis, wishes to
4 maintain the shared parenting arrangement when
5 she does so reside, and issues concerning her
6 custody are no longer an issue before the Court.

7 On January 15, 2015, the Applicant mother
8 served the Respondent father with a Petition for
9 Divorce. In it, she sought to vary the terms of
10 the agreement, suggesting joint custody but
11 allowing her day-to-day care and child support
12 payable by the Respondent according to the
13 Guidelines. This position was presented at the
14 hearing, but now only applies to the child
15 B..

16 The Respondent did not agree with the
17 proposal in the Petition for Divorce. He seeks
18 to maintain the equal, shared parenting
19 arrangement that the parties entered into upon
20 separation and which is clearly reflected in
21 their Separation Agreement.

22 On March 20, 2015, a Consent Order was made
23 appointing the Office of the Children's Lawyer to
24 present B. in these proceedings. Mr. Kinnear
25 took over carriage of the file. B.'s
26 position is that she wishes to see the agreement
27 varied, giving primary care to her mother, and

1 continuing access to her father. This has been
2 her consistent position for some time.

3

4 ANALYSIS

5 B. and her mother have a very close
6 relationship, which is acknowledged by all the
7 parties. The Application describes her daughter
8 as sensitive and inquisitive. She tries to
9 inspire her daughter daily, and finds ways to
10 stimulate her both intellectually and
11 emotionally. She attempts to encourage her on
12 the road to emotional maturity. The Applicant
13 contrasts this with B.'s relationship with
14 the Respondent, where conversation is more
15 limited and where B. has a fair amount of
16 alone time. The Applicant suggests that B.
17 needs the consistent structure and positive and
18 supportive environment that only she can provide.

19 The Children's Law Act, Section 17(2) (b),
20 states that the wishes of the child in these
21 matters are a factor to be considered. The older
22 a child is, the easier these wishes are to
23 ascertain and the greater the weight they may be
24 given. The wishes of the child are never,
25 however, determinative in and of themselves.
26 They are simply a factor. There are good reasons
27 for this distinction. It would be terribly

1 unfair to force a child to decide between their
2 parents and would open the door to manipulation
3 and pressure.

4 While the Applicant has framed this issue as
5 one relating to B.'s best interests, and
6 while I have no doubt that she believes that
7 B. living full-time with her would be in
8 B.'s best interests, I have serious concerns
9 about this suggestion.

10 B. has been described by everyone as a
11 socially advanced, emotionally mature, and
12 intellectually gifted child. Apart from some
13 understandable sleep issues that manifested
14 shortly after the separation, she appears to have
15 been thriving under the shared parenting
16 arrangement. She has been doing well in school
17 and appeared happy and well adjusted. It is only
18 in the last year, since this application was
19 filed, that she has been undergoing some
20 difficulties. This application and the resulting
21 pressure from both of her parents has made her
22 anxious and unhappy.

23 Her father has discussed with B. the
24 financial consequences of changing the
25 arrangement - specifically, that he may have to
26 downsize his home due to the additional expense
27 of child support. He has at times been angry and

1 frustrated and has discussed more of this with
2 his daughter than was appropriate.

3 The pressure from the Applicant mother is
4 more difficult to characterize. I found the
5 mother's description of how this request to vary
6 came about troubling. When the suggestion of an
7 uncontested divorce was raised by the father, the
8 mother went to B. and told her to decide what
9 she really wanted. Did she want to keep going
10 back and forth between the two of them, or did
11 she want to live with her mom and visit her dad?
12 The weight of this entire matter was placed
13 squarely on her 12-year-old shoulders. This was
14 presented under the guise of giving her a choice,
15 and I am sure that the Applicant believes she was
16 empowering her daughter, but there was never any
17 real choice. When her mother told her to decide
18 what she really wanted and not to be concerned
19 about anybody's feelings, the feelings in
20 question were her father's. If the Applicant had
21 had any inkling that B. might have wanted to
22 live primarily with her father, this conversation
23 would never have happened. It is also clear that
24 the Applicant kept the pressure up, with B.
25 finally having to tell her to stop talking about
26 it. This is in the context of a child who can
27 say such innocently revealing things as "I don't

1 needs a counsellor. I have my mother," and in
2 reference to her mother, "I'm not being
3 manipulated - I don't think..."

4 When the Applicant was cross-examined by
5 Mr. Kinnear, she was asked whether or not she had
6 told B. that if B. did not decide she
7 wanted to change the living arrangements, she
8 would not be able to be her mother anymore. The
9 Applicant denied this, saying B. must have
10 misunderstood her. I am not sure what she could
11 possibly have said to cause her sensitive and
12 intelligent daughter to come to that
13 misunderstanding, but whatever it was, it was not
14 benign.

15 Mr. Kinnear described B. as a peacemaker
16 and suggests that her position in this matter may
17 well be what she perceives as the easiest way to
18 bring this conflict to an end. This is also
19 troubling, because it means she is less afraid of
20 her father's reaction to ending the shared
21 parenting regime than she is of her mother's
22 reaction to maintaining it. This suggests that
23 the pressure from her mother is far more
24 significant to her than the pressure from her
25 father.

26 Higher courts have consistently held that in
27 most cases the best interests of a child will be

1 reflected in a living arrangement that maximizes
2 the child's contact with both parents. An equal
3 and shared parenting regime, as reflected in the
4 Separation Agreement in this case, is one of the
5 simplest ways of accomplishing this goal. It is
6 commendable that the parties were able to make
7 this work for three years, four if we include the
8 year since the petition was filed, and
9 unfortunate that this could not simply have
10 continued.

11 The Applicant suggests that reducing the
12 Respondent's access to one weekend every two
13 weeks would actually benefit his relationship
14 with his daughter, which is somewhat
15 self-serving. She has testified that she values
16 B.'s relationship with her father. Yet at
17 some point in the recent past she was considering
18 moving to Hay River, which would certainly not
19 suggest any value being place on this
20 relationship. During the course of her
21 testimony, it became obvious that she sees
22 herself as the only really competent parent.

23 During her testimony, the Applicant appeared
24 to have a difficult time acknowledging anything
25 positive about the Respondent or his relationship
26 with B.. She took many opportunities to cast
27 the Respondent in a negative light and was

1 evasive and non-responsive to questions which ran
2 counter to her own interests. I contrast this
3 with the Respondent's comments about the
4 Applicant, and I quote: "she benefits from
5 living with her mother, just as she benefits from
6 living with me," and, speaking about both of the
7 children, "Mom has a huge positive influence in
8 their life".

9 The Applicant is clearly an intelligent and
10 well educated person. With no insult intended to
11 the Respondent, she is more articulate and subtle
12 in her use of language than he is. In spite of
13 this, the Applicant displayed a consistently
14 negative attitude towards the Respondent during
15 her testimony. If this is the case in court,
16 when she would be expected to present herself in
17 the most positive light, I have some concern
18 about how she is dealing with her obvious
19 feelings about her ex when she is alone with the
20 children.

21 Mr. Kinnear, who the Court commends for
22 doing an excellent job of balancing the highly
23 nuanced responsibilities of acting for a child in
24 circumstances like this, told the Court that he
25 saw no evidence of alienation, as it is commonly
26 understood, in his dealings with B. I
27 agree. "Alienation" as a legal term is used to

1 describe rather severe behaviour and
2 consequences, which are not present in this case.
3 I have not been asked to make such a finding, nor
4 is the Respondent seeking anything other than the
5 continuation of the shared custody arrangement.

6 It was suggested by counsel for the
7 Applicant, however, that the shared parenting
8 arrangement is not working. I do not believe
9 this to be the case. Both parents were able to
10 provide a good environment for their children for
11 three years - four, actually - and I see no
12 reason why they could not do so again. I do not
13 know why their relationship has deteriorated to
14 the extent that it has over the last year, but I
15 believe that two capable people who are committed
16 to the welfare of their children can fix it.

17 It is fair to say this, however: if a court
18 is faced with a breakdown in a shared parenting
19 arrangement where one parent is supportive of the
20 child's relationship with both parents and the
21 other is not, the Court could easily decide to
22 award primary custody to the parent who it
23 believes is doing the least damage to all the
24 important relationships in the child's life.

25 I see nothing broken about B.'s
26 relationship with her father and nothing about
27 her life with him that causes me concern. She is

1 blessed in having a good relationship with both
2 of her parents. She may not be constantly
3 engaged in her father's home the way she is at
4 her mother's, but that is not necessarily a bad
5 thing, given that independence is something that
6 parents often try to encourage. She may not have
7 the sort of deep emotional connection with her
8 father that she does with her mother, but she
9 obviously loves him and he her. Her friends are
10 welcome in her father's home, she and her father
11 go on outings to Tim Horton's together, he annoys
12 her by trying to interest her in golf and
13 placates her by letting her drive the cart; all
14 of these things are features of an ordinary and
15 healthy life.

16 Cutting through all the complicated
17 competing arguments, at the bottom of this
18 application is the Applicant's strong desire to
19 have her daughter more or less to herself and the
20 daughter's stated preference for spending time
21 with her mother rather than her father. It would
22 be tragic if the courts undertook to decide
23 custody based on which parent is a child's
24 favorite, or based on which parent that child is
25 most anxious to please. The application to vary
26 the custodial arrangements for B. is denied.

27 Given the absence of counsel for the

1 Respondent, Ms. Paradis, I was planning on
2 finalizing the divorce order. Is that something
3 that you are seeking at this point in time as
4 well?

5 MS. PARADIS: No, sir.

6 THE COURT: So simply an order with
7 respect to the Separation Agreement?

8 MS. PARADIS: That's correct.

9 THE COURT: Because the way the
10 applications were framed, it was framed as a
11 petition for a divorce in response to that
12 petition. But you are not seeking the Divorce
13 Order at this point?

14 MS. PARADIS: That's right. Your Honour, in
15 order to commence an application with respect to
16 these children, we had to start it by Petition
17 for Divorce, otherwise we'd have two separate
18 actions.

19 THE COURT: Very well. Then the Order
20 will stand as I just stated.

21 Given the absence of counsel, if anybody
22 wishes to make an application with respect to
23 costs, they can do that further down the road. I
24 know costs were asked for in both applications,
25 but in the absence of counsel, I do not see any
26 point in getting into that at this point in time.

27 As an aside, she sounds like a wonderful

1 little girl, and I hope that everybody can do
2 what they need to do to make this situation work
3 for her. I hope that getting this done before
4 the holidays gives you both a chance to have some
5 time to work on that. Close court.

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Certified Pursuant to Rule 723
of the Rules of Court

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Jane Romanowich, CSR(A)
Court Reporter

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