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Case Name:

Pigott v. Nochasak

Between

**Paul Pigott, Applicant, and
Zippora Nochasak, Respondent**

[2011] N.J. No. 211

2011 NLTD(F) 26

Docket: 200902U1019

Newfoundland and Labrador Supreme Court,
Trial Division - Family Division
St. John's, Newfoundland and Labrador

J.D. Cook J.

Heard: May 2 and 3, 2011.

Judgment: June 15, 2011.

(90 paras.)

Aboriginal law -- Aboriginal status and rights -- As consideration in family law proceedings -- Application by father for sole custody of child, born in 2000, allowed -- Parties married in 2001, separated in 2006 and divorced in 2010 -- Mother was of Inuit heritage -- Both were fluent in Inuktitut and spoke to child in Inuktitut -- Child resided primarily with father from 2007 onward -- Mother sought sole custody in Ottawa -- Child's best interests served by continuation of father as primary parent -- Father, despite non-Inuit heritage, was sufficiently attuned to child's cultural needs -- Mother's past inability to be child-focused or exercise parenting rights under 2008 interim order was significant -- Children's Law Act, s. 31(2) -- Divorce Act, s. 16(8).

Family law -- Custody and access -- Considerations -- Best interests of child -- Child's cultural heritage -- Conduct of parents -- Failure to exercise existing rights -- Primary caregiver -- Status quo or maintenance of stable environment -- Custody -- Sole custody -- Application by father for sole custody of child, born in 2000, allowed -- Parties married in 2001, separated in 2006 and divorced in 2010 -- Mother was of Inuit heritage -- Both were fluent in Inuktitut and spoke to child in Inuktitut -- Child resided primarily with father from 2007 onward -- Mother sought sole custody in Ottawa -- Child's best interests served by continuation of father as primary parent -- Father, despite non-Inuit heritage, was sufficiently attuned to child's cultural needs -- Mother's past inability to be child-focused or exercise parenting rights under 2008 interim order was significant -- Children's Law Act, s. 31(2) -- Divorce Act, s. 16(8).

Application by the father for sole custody of the child with access for the mother. The parties married in 2001, separated in 2006 and divorced in 2010. Their only child was born in June 2000. The child was initially parented by both parties post-separation. From September 2006 onward, the child was primarily parented by the father, who was non-Inuit. The parties jointly agreed that the child would be encouraged to speak the Inuktitut language, in which both were fluent, and would be enrolled in French immersion upon commencing kindergarten. In 2007, the mother sought to relocate with the child to Halifax while she continued her studies. In 2008, an interim order provided for joint custody with the principal residence with the father for the balance of the school year, and the principal residence with the mother when school was out. The father testified that he continued to primarily parent the child despite the interim order. He now sought sole custody. He contended that the mother exercised infrequent access and was not focused on the child. He took issue with a party the mother threw at his residence while exercising access. He contended that the mother did not pursue significant Inuit cultural activities with the child and often spoke English to her rather than Inuktitut. The father recently completed a Master's degree focusing on the Inuktitut language and worked full-time in broadcast journalism. The child continued her French immersion schooling. She excelled at school and was involved in numerous extracurricular activities. The mother sought sole custody in Ottawa, where she presently resided. The mother submitted that Ottawa was a suitable city for promoting the child's Inuit culture French language skills. She asserted that she retained a close bond with the child despite her recent focus on her education and career. She contended that she was the only parent able to provide Inuit culture to the child, as she was of Inuit heritage and the father was not. **HELD:** Application allowed. The child's best interests were served by continuation of the father as her primary parent. Both parents expressed a strong desire for the child to be spoken to in Inuktitut and that she have knowledge of the Inuit culture. Despite the father's non-Inuit heritage, he communicated with the child in Inuktitut and had engaged in writing an Inuktitut dictionary in an effort to save a dying dialect. He was sufficiently attuned to the child's cultural needs. The mother's lifestyle changes effective took her out of the child's daily life and rendered her unable to actively promote Inuit culture with the child. Her inability or unwillingness to be child-focused in the past was significant. It was also significant that the mother did not exercise her parenting rights as per the 2008 interim order. The child lived in a stable environment with the father, had achieved success in school, and had become tri-lingual by age 10. The father's contributions in that regard could not be ignored. Geography and the mother's prior lack of focus were an impediment to an order of joint custody. The father was awarded sole custody in Corner Brook. His mooted plan of moving to Wales with his new partner and the child was not in the child's best interests. The mother was granted access for one month per summer plus one week of Christmas access.

Statutes, Regulations and Rules Cited:

Children's Law Act, RSNL1990 CHAPTER C-13, s. 31(2), s. 31(3)

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 16(1), s. 16(4), s. 16(5), s. 16(6), s. 16(7), s. 16(8), s. 16(9), s. 16(10)

Court Summary:

A minority parent should not necessarily become a child's primary parent even when both parents desire that the child speak Inuktitut and is to learn the Inuit culture. This is because this is but one factor to be considered, in conjunction with all other needs and circumstances of the child, to determine which parent will better promote the child's overall best interests.

Child's best interests dictate that primary parenting should continue with father, a Caucasian, who was more child-focused and sufficiently attuned to all of the child's needs, including ensuring that child's Inuit cultural needs be met.

Cases cited:

Van de Perre v. Edwards, 2001 SCC 60.

D.(W.) v. C.(L.), 2004 SKQB 10.

MacDonald v. MacDonald (1998), 161 Nfld. & P.E.I.R. 39 (Nfld. C.A.).

Furlong v. Furlong, 2009 NLUFC 87.

Statutes, Regulations and Rules cited:

The *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 31(2) and the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) ss. 16(1),(4)-(10).

James G. McLeod & Alfred A. Mamo, *Annual Review of Family Law 2009* (Toronto: Thomson Carswell, 2009).

Counsel:

Ernest Gittens: Counsel for Paul Pigott.

Zippora Nochasak: Present and Self Represented.

REASONS FOR JUDGMENT

1 J.D. COOK J.:-- This decision will determine which parenting regime is in Anika Eda Nochasak-Pigott's ("Anika") best interests.

BACKGROUND AND POSITIONS OF THE PARTIES

2 Anika who was born June 26, 2000 at Happy Valley-Goose Bay is the only child of Paul Pigott and Zippora Nochasak who were married at Nain, Labrador August 11, 2001. They separated in October 2006 and were subsequently divorced in October 2010.

3 Following separation Anika was parented by both Mr. Pigott and Ms. Nochasak. Anika has however, since in or about September 2006, been primarily parented by her father.

4 Following Anika's birth, Mr. Pigott and Ms. Nochasak made a joint decision that, unlike with Ms. Nochasak's children from her first marriage; Anika would be encouraged to speak the Inuktitut language, a language with which both parents were familiar. Both parents spoke only in Inuktitut to Anika prior to separation, but Mr. Pigott maintains that he had to encourage Ms. Nochasak as she often spoke to Anika in English.

5 Anika did not commence speaking English until her mother returned to work when Anika was three at which time she started to attend daycare. Both parents also jointly agreed to Anika being enrolled in French Immersion when she started Kindergarten in 2005 at Happy Valley-Goose Bay. Anika continued however to be spoken to in the Inuktitut language in her parents' home.

6 Following completing courses in Labrador, Ms. Nochasak wished to parent Anika in Halifax where she was going to continue her studies in the fall of 2007. Mr. Pigott disagreed and court proceedings were commenced which led to a March 27 and 28, 2008 Supreme Court trial before Goodridge, J. An April 14, 2008 interim court order of Goodridge, J. provided for both parents having joint custody of Anika with her principal residence being with her father from the date of the hearing to April 30, 2008 and from October 1, 2008 to June 15, 2009, (balance of the school year). Anika's principal residence was to be with her mother from May 1, 2008 to September 2008, (when Anika was not attending school).

7 Mr. Pigott testified that Ms. Nochasak did not parent Anika from May 1, 2008 to September, pursuant to the court order.

8 The interim court order stated that both parents were to have mutually agreed generous access but failing such were to have specified access which included Mr. Pigott having three continuous weeks of access during the summer of 2008 and Ms. Nochasak having access during her academic school break, if she returned to Happy Valley-Goose Bay during such break.

9 Leave was also granted to Anika's parents to return to court after June 2009 if they could not reach an agreement on custody and access, which included where Anika's principal residence would be.

10 Apart from interim travel applications and orders, parenting has not been determined by a further court order and Anika has continued to be primarily parented by her father.

11 The current application before this Court results from Mr. Pigott filing, a May 27, 2010 originating application for sole custody of Anika with access for Ms. Nochasak "depending on appropriate living arrangements". Although Ms. Nochasak did not file a response to the originating application, she did attend at the court hearing at which she also sought sole custody of Anika who would live with her at Ottawa, where Ms. Nochasak presently resides.

12 Since separation Mr. Pigott has upgraded his education which included completing a Master's degree at Memorial University of Newfoundland where his thesis was the Inuktitut language of Labrador.

13 Mr. Pigott's work, initially as a freelance broadcaster in Labrador, led to him being employed full-time by the CBC. His studies and work requirements necessitated moving from Happy Valley-Goose Bay to St. John's and then from St. John's to Corner Brook, where he presently resides.

14 Although continuing to foster the Inuktitut language and culture with Anika, she has also continued her French immersion schooling and has, and is, involved in numerous extra-curricular activities, especially sporting activities; she continues to do well in school and in such extra-curricular activities.

15 Mr. Pigott submits that Anika's mother's access has been extremely infrequent since she went to Halifax and then to Ottawa. He contends that this is because she is not child-focused.

16 Mr. Pigott also submits that he was not happy when Ms. Nochasak parented Anika, at his request, at his home in St. John's during his absence for three weeks in April 2010. He maintained that Ms. Nochasak caused Anika to miss days of school, most of her soccer practices and all of her swimming and tennis lessons. He also submits that Ms. Nochasak held a "twenty plus" party at his home with people who did not even know Anika being at this party where alcohol was consumed.

17 Mr. Pigott testified that upon his return, his apartment was quite dirty and there was: food rotting in the refrigerator and cupboard, broken glass on the kitchen floor and a waste bin full of empty alcohol bottles. He believes such concerns raise a serious safety issue for Anika and that Ms. Nochasak treated her time with Anika as a "holiday" as opposed to a real parenting situation.

18 As a further example of Ms. Nochasak having difficulty being child-focused, Mr. Pigott refers to Christmas and spring access difficulties with Ms. Nochasak. He also emphasizes that as late as February 25, 2011 Ms. Nochasak verified by e-mail that she was not sure she would be staying in Canada as she may be moving to Texas with her fiancé, (Steven).

19 Mr. Pigott contends that although Ms. Nochasak is fluent in Inuktitut, she often spoke English to Anika when they were together and only spoke Inuktitut to Anika after being encouraged by him. He also contends that Ms. Nochasak has not pursued any significant Inuit cultural activities with Anika during her infrequent visitations.

20 Mr. Pigott commenced a relationship some 20 months ago, which continues today, with Ms. Helen Toozer, a resident of Cardiff, Wales; who resides with Mr. Pigott 10 to 15 days monthly.

21 If Ms. Toozer continues to reside in Cardiff, Wales, where she earns a substantial income, Mr. Pigott suggests as a first parenting option, after the 2011 school year, that Anika reside at Cardiff with him and Ms. Toozer. She would be enrolled in the Howell's School of Languages for Girls at Cardiff. He and Ms. Toozer maintain that the school is culturally diverse with an emphasis on languages. He also maintains that this is not a big travel difference between traveling to Ottawa from Cardiff versus travelling from Corner Brook to Ottawa. Under this parenting regime, Mr. Pigott would agree to pay all costs, including scheduled visits for Anika to her mother and Anika still having telephone and internet access including Skype.

22 If option one is not accepted, Mr. Pigott would continue his work and continue to live in Corner Brook. Ms. Toozer would immigrate to Canada and Anika would continue to be parented by him but with supplementary help from Ms. Toozer. Mr. Pigott would continue to speak Inuktitut to Anika as has been his wish since her birth. Anika would continue her schooling in French Immersion, and continue to be involved in a wide variety of extra-curricular activities, especially sporting activities. Anika would have her own bedroom and live in a clean, safe environment.

23 Mr. Pigott maintains that his life choices have been in Anika's best interests. He also maintains that he has taken responsibility for Anika for the past five years and Ms. Nochasak has not taken on that role.

24 Mr. Pigott submits that Anika is a "special child" with incredible potential but she requires stability. He confirms that Inuktitut is spoken on a daily basis and he has encouraged Anika to acquire knowledge of the Inuit culture. He would also encourage the continuation of acquiring more knowledge of the Inuit culture as well as trying to live the Inuit culture by taking Anika on trips to such places as Nain.

25 Mr. Pigott would encourage Skype, telephone and internet communications between Anika and her mother, as well as fixed visitations.

26 Mr. Pigott says that there are approximately one hundred Inuit living in Corner Brook including one where Anika attends school. He also advised that Anika has given presentations on the Inuit culture to students at St. Theresa's in St. John's and at C.C. Loughlin in Corner Brook.

27 Ms. Toozer testified that she is aware of the importance of the Inuit culture for Anika and emphasized that Mr. Pigott has written a dictionary in Inuktitut as he is trying to save a dying dialect.

28 Ms. Nochasak wishes sole custody of Anika with reasonable access for Mr. Pigott to their daughter. She asserts that following some parenting by both parents, after separation, she and Mr. P. agreed that she could, and should, continue her schooling which would enable her to secure a career; Anika would continue to live in Happy Valley-Goose Bay with Mr. Pigott, because she is a Labrador child. She appears to rely on a letter tendered in evidence to support a future parenting agreement.

29 Ms. Nochasak says she completed her schooling in Hospitality Management in Dartmouth, Nova Scotia in May 2010 but she now has a career as a medical receptionist where 80 percent of the patients are Inuit. This seems to conflict with Ms. Nochasak saying she works with Tungasuvvingot Inuit as the Cultural Program Coordinator "right now" plus she is making a film with Zacharius and in the Fall going to Greenland for two weeks with Adventure Canada.

30 Ms. Nochasak submits that the time has come for Anika to be parented by her biological mother as she is Anika's "identity" and it is time that Mr. Pigott became the access parent.

31 Ms. Nochasak presently resides, in a bachelor apartment in downtown Ottawa but intends to vacate this apartment and rent a two bedroom home instead. She maintains that Ottawa is a much better city than Cardiff or Corner Brook in which to raise Anika.

32 Ms. Nochasak testified that she speaks Inuktitut every day in Ottawa and she would communicate with Anika in the Inuktitut language and they would live the Inuit culture. She contends that there are 2000 Inuit people living in Ottawa and such organizations as the National Inuit Homes Association, the Inuit Children's Center and the Inuit Art Foundation add to her position that she is able to raise Anika in Ottawa in the traditional ways of the Inuit Culture.

33 Ms. Nochasak also wishes Anika to have contact with her older sisters, most of whom live in Ontario.

34 Ms. Nochasak also emphasizes that one hears French being spoken every day in Ottawa and Anika could hear it spoken every day in Ottawa, including on busses and on the streets of Ottawa and such is not the case in Corner Brook.

35 Although conceding that she and Anika have not lived together, except for very short periods of time over the past four years or so, Ms. Nochasak still maintains that there is a close bond between her and Anika.

36 During cross-examination Ms. Nochasak confirmed a limited involvement in Anika's life over the past four or five years. She says that this was because of a number of things including schooling and different jobs. She admits not being child-focused over the past three years because she was grieving over her separation from Mr. Pigott and the death of a daughter from her first marriage. She stresses however that now "I'm here". She downplays her engagement to Steven from Texas and her intent to move to Texas with this gentleman, asserting that at the moment they are just friends.

37 Ms. Nochasak also admits not speaking Inuktitut to her four children during her first marriage. She nonetheless says it was her idea to speak Inuktitut to Anika and Mr. Pigott "supported" it as opposed to promoting it. Mr. Pigott takes, as stated, a contrary view.

38 Ms. Nochasak admits Anika missed some school, soccer, swimming and tennis when she parented her for three weeks in 2010. She denies that there was a lot of drinking at the party which she held at Mr. Pigott's and Anika's residence and also denies broken bottles being left on the kitchen floor.

39 Ms. Nochasak acknowledges unexpectedly meeting Anika in Toronto after seeing a movie with two of her other daughters, when Anika was visiting with her father; she admits not attempting to get together that evening with Anika because she had other plans.

40 Ms. Nochasak wishes Anika schooled in Canada because she is a Labrador/Canadian child who would have a better chance of maintaining her culture here in Canada as opposed to in Wales.

41 Ms. Nochasak does not wish Anika to lose her language and her identity.

42 Ms. Nochasak also submits that she is Anika's identity and she is the only one who can give her Inuit culture and Anika is missing out on her Inuit family and culture every day.

43 Ms. Nochasak admits disagreements between herself and Mr. Pigott as well as both having different views.

ANALYSIS

A. Applicable Law

44 The parties are divorced; therefore the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) applies. Despite this our courts have consistently found the relevant provisions of the *Children's Law Act*, R.S.N.L. 1990, c. C-13 (the "*CL Act*"), as it affects the needs and circumstances of a child, as instructive.

45 Because the only orders to date have been interim, there is no requirement for either party to prove a material change in circumstances.

46 I deem the following as the most relevant provisions of the *Divorce Act*:

16.(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

...

Joint custody or access

- (4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

Access

- (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

Terms and conditions

- (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

Order respecting change of residence

- (7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

Factors

- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

Past conduct

- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

Maximum contact

- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

47 Pivotal in the above noted is section 16(8) which obligates the court to only take into consideration, "the best interests of the child of the marriage as determined by the condition, means, needs and other circumstances of the child". A similar binding principle is provided for in section 31.(1) of the *CL Act*. Section 31.(2), in part, is instructive as well.

48 I deem the following enumerated needs and circumstances provided for in section 31.(2) as relevant to these proceedings:

- (2) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a 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 claiming custody of or access to the child,
 - (ii) other members of the child's family who live with the child, and
 - (iii) persons involved in the care and upbringing of the child;
 - (b) the views and preferences of the child, where the views and preferences can reasonably be ascertained;
 - (c) the length of time the child has lived in a stable home environment;
 - (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and the special needs of the child;
 - (e) the ability of each parent seeking the custody or access to act as a parent;
 - (f) plans proposed for the care and upbringing of the child;
 - (g) the permanence and stability of the family unit with which it is proposed that the child will live; and
 - (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

49 Section 31.(3), as with section 16.(9) of the *Divorce Act*, which deals with assessing a person's ability to act as a parent where there has been family violence is irrelevant to these proceedings as no such issue has been raised by Mr. Pigott or Ms. Nochasak.

50 In **James G. McLeod & Alfred A. Mamo**, *Annual Review of Family Law 2009* (Toronto: Thomson Carswell,

2009), at pages 96-97, it quotes Bastarache, J. in **Van de Perre v. Edwards**, 2001 SCC 60 where he emphasized that judges should not give more importance to a child's cultural heritage than the family and parents have given to it prior to court proceedings. Nor should a court assume it had to grant custody of a biracial child to a minority parent to ensure the child appreciates his or her own culture. See also: ... **D.(W.) v. C.(L.)**, 2004 SKQB 10 where the mother, even though she was the biracial children's minority parent, was unable to disrupt the *status quo* with the father who understood children's background and appreciated importance of maintaining their culture.

51 There is no doubt that a principal issue is which parent will consistently ensure that Anika is spoken to in Inuktitut and help her to expand her knowledge of the Inuit culture. This however is only one factor, as the overall healthy development of a child must be considered; this is a question of fact to be determined by courts on a case-by-case basis. There is no principle that a minority parent should necessarily be granted custody. See: **Van de Perre v. Edwards** (*supra*), at paragraph 37.

B. Considerations

Preliminary Issue

52 I cannot accept that the wording of the undated letter from Mr. Pigott to Ms. Nochasak (ZN #1), constitutes a binding agreement as to the specifics of how Anika is to be parented in the future.

Who should be Anika's primary parent?

53 I have concluded, for the reasons which follow, that Anika's best interests will be served by having this 10 year old child continue to be primarily parented by her father.

54 I will initially deal with Anika speaking Inuktitut as both parents wish this to continue.

55 Although not determinative of the issue, I find Mr. Pigott's evidence more credible than Ms. Nochasak's concerning who insisted on Inuktitut being spoken to Anika. It also cannot be ignored that during Ms. Nochasak's first marriage, English, not Inuktitut was spoken by Ms. Nochasak to her daughters.

56 What is important for the purpose of this decision however is that both parents presently have expressed a strong desire for Anika to be spoken to in Inuktitut by them and that they also desire that Anika has knowledge of the Inuit culture.

57 Since separation, Anika has been primarily parented by her father. Although Mr. Pigott is a Caucasian and Ms. Nochasak is an Inuit, Mr. Pigott not only is able, but he has communicated with Anika in the Inuktitut language. He has also completed a master's degree with his thesis being on the Inuktitut language of Labrador. Mr. Pigott has also completed, or partially completed, writing an Inuktitut dictionary because he is trying to save a dying dialect.

58 Mr. Pigott has continued to speak Inuktitut to Anika since her birth; this has led to Anika not only being fluent in the Inuktitut language but has also enabled her to speak to fellow students on the Inuit culture at St. Theresa's School in St. John's and at C.C. Loughlin in Corner Brook.

59 Mr. Pigott has also attempted to get Anika to eat food consumed similar to those who live in a primary Inuit culture, mostly without success, because Anika does not like much of this food.

60 I have concluded that all of the foregoing clearly illustrates a strong and consistent effort by Mr. Pigott to ensure that Anika speaks the Inuit language as well as having knowledge of the Inuit culture, something deemed important by both parents. In short, I find that he is sufficiently attuned to the cultural needs of Anika and, he will see that this child's cultural needs are met.

61 The efforts of Ms. Nochasak are not as commendable since she left for Dartmouth, Nova Scotia and went from

there to Ottawa.

62 Ms. Nochasak made a decision to upgrade her schooling followed by attempting to then secure employment. She has had success in both (although her future career path seems somewhat uncertain); nevertheless, she is to be commended for the success that she has achieved. Her lifestyle changes however have, more or less, effectively taken her out of Anika's day-to-day life. This has resulted in Ms. Nochasak not only being unable, except for very limited periods of time, to speak to Anika in the Inuit language but also being unable to actively promote the Inuit culture with Anika.

63 Quite apart from Anika's substantial global accomplishments, which I will subsequently deal with, Mr. Pigott has a very lengthy proven track record of speaking to Anika in the Inuktitut language, as well as promoting the Inuit culture. Ms. Nochasak does not have such a proven track record. I deem this as significant evidence.

64 It may very well be that Ottawa has more Inuit residents than Corner Brook and it may very well have more opportunities for Anika to develop her Inuit cultural heritage than Corner Brook; I have doubt however whether Ms. Nochasak will promote such based primarily on Ms. Nochasak's past inability or unwillingness to be child-focused; examples of not being child-focused follow.

65 The extremely limited amount of time that Ms. Nochasak has interacted with Anika cannot be ignored. In addition, when she did interact, for example when she was given the opportunity to parent Anika in Mr. Pigott's three week absence from his home in April 2010, she was clearly not child-focused because she did not ensure that Anika made it to school every day, as well as not ensuring that Anika attended all soccer, swimming and tennis lessons. I also accept Mr. Pigott's evidence that his residence was more or less, a mess, upon his return and there was indeed a party given by Ms. Nochasak which included persons unknown to Anika. Ms. Nochasak also did not deny that alcohol was consumed when she testified that there was not "a lot" of drinking at the party.

66 I am also somewhat concerned that Ms. Nochasak did not make arrangements to get together with Anika, after a chance meeting in Toronto, because she refused to alter her plans for that evening.

67 Ms. Nochasak also, as late as February 25, of this year, communicated with Mr. Pigott by e-mail wherein she indicated that she was engaged to a gentleman named Steven, and she was considering moving to Texas with this man. I find that the e-mail shows that Ms. Nochasak was, just over two months prior to the trial, putting her own interests ahead of Anika's and it is clearly another significant example of not being child-focused.

68 It is also of some significance, that Ms. Nochasak did not exercise parenting of Anika during the summer of 2008 as provided for in the interim order of Goodridge, J. following the interim access hearing in March 2008.

69 The evidence, in my view, clearly illustrates that despite Ms. Nochasak's extensive physical absence from Anika's life, Anika has done exceptionally well globally; she is a well rounded child who speaks Inuktitut and knows the Inuit culture, and she is also trilingual. All of this has been accomplished while being parented solely by Mr. Pigott.

70 I will not move on to analyze Anika's best interests with reference to her condition, means, needs and other circumstances, as required by section 16.(8) of the *Divorce Act* and I will do this in conjunction with the relevant specific needs and circumstances provided for in section 31.(2) of the *CL Act*.

(2) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a 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 claiming custody of or access to the child,
- (ii) other members of the child's family who live with the child, and
- (iii) persons involved in the care and upbringing of the child;

...

71 The evidence shows love, affection and emotional ties between Anika and her father and mother. Even though there has been an extensive physical absence by Ms. Nochasak in Anika's life, Anika is a biracial child. Despite both parents promoting knowledge of the Inuit language and Inuit culture, I am not prepared to conclude that there is stronger love, affection and emotional ties between Anika and her mother than between Anika and her father, especially when one considers the intensive "hands on" parenting of Anika by her father.

- (b) the views and preferences of the child, where the views and preferences can reasonably be ascertained;

72 Credible evidence of Anika's views and preferences has not been provided to the Court.

- (c) the length of time the child has lived in a stable home environment;

73 Anika has lived primarily with her father for more than four years. I am satisfied that the home environment which he has provided has been quite stable. There is no evidence that Ms. Toozer presently living with Mr. Pigott on a part-time basis adversely affects such stability.

- (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and the special needs of the child;
- (e) the ability of each parent seeking the custody or access to act as a parent;

74 Anika has no special needs and she has always been provided with the necessities of life. She can speak the Inuit language and has knowledge of the Inuit culture, so much so that she has made presentations concerning the Inuit culture to schoolmates in two of her schools, where she does well.

75 Anika is trilingual because she can speak in Inuktitut, English and French. She is also active in numerous extracurricular activities, especially in sports.

76 Mr. Pigott's ability and willingness to provide guidance in facilitating the foregoing cannot be ignored and I attach much weight to it, just as I do to Ms. Nochasak's lack of facilitating such endeavours. I do not doubt Ms. Nochasak's ability but I do, for the reasons cited previously, doubt her willingness.

- (f) plans proposed for the care and upbringing of the child;

77 Mr. Pigott wishes Anika to be parented by him, with supplemental parenting support being provided by Ms. Toozer, in either Cardiff, Wales or in Corner Brook. Ms. Nochasak wishes to care for Anika in Ottawa. Both parents wish to have sole custody with the other parent having specified access. Both parents wish Anika to continue with French Immersion and to continue to speak three languages. There is no evidence to suggest that both parents do not wish Anika to pursue post-secondary education.

- (g) the permanence and stability of the family unit with which it is proposed that the child will live; and

78 I am satisfied that Mr. Pigott's relationship with Ms. Toozer is, as far as can be reasonably ascertained from the known facts, permanent and stable. I accept, that Ms. Nochasak and Steve are presently just friends and I attribute no weight to Ms. Nochasak being presently unmarried and living alone.

- (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

79 Both parties are the biological parents of Anika.

80 A careful, cumulative analysis of all considerations leads to only one inevitable conclusion; namely, that Anika should be primarily parented by her father because, I find that this will continue to promote Anika's best interests.

Joint or sole custody?

81 There is no presumption in favour of joint custody; a principal component of which is joint decision-making: **MacDonald v. MacDonald** (1998), 161 Nfld. & P.E.I.R. 39 (Nfld. C.A.).

82 Decisions in this Province illustrate that there is wide discretion in the type of parenting arrangements which can be ordered provided it meets a child's best interests. See: **Furlong v. Furlong**, 2009 NLUFC 87, at paragraphs 56 and 57.

83 Mr. Pigott resides in Corner Brook and Ms. Nochasak resides in Ottawa and both appear to want to continue to reside in these cities. If joint custody is ordered, I believe that geography will be an impediment to such being successful. Also, although their relationship cannot be described as fractious, cooperation between Mr. Pigott and Ms. Nochasak since separation has not always been harmonious. Because of these reasons, and the fact that Ms. Nochasak does not have a consistent track record of being child-focused, I have concluded that joint decision-making would be ineffective. I will therefore make an order of sole custody to Mr. Pigott because I have concluded that it would make more sense, be more practical and be in Anika's best interests. Such order will however be subject to Mr. Pigott having to keep Ms. Nochasak informed of Anika's health, educational and extracurricular pursuits and achievements as well as Anika's overall well-being.

Where should Anika live?

84 I have already indicated that Mr. Pigott should have sole custody of Anika and her principal residence should be with him. I will next determine where that should be.

85 I find the evidence is unconvincing as to Anika residing in Cardiff, Wales. I am more convinced that Anika's best interests, including maintaining to speak the Inuktitut language and absorbing more of the Inuit culture can be best achieved by Anika living in Canada. I am also convinced that Anika's substantial accomplishments thus far can be advanced even further by living with her father in Corner Brook as opposed to living with her father in Cardiff. In Corner Brook, Anika's father has provided a safe, loving and caring environment where he has responsibly attended to Anika's global needs. There has also been no evidence adduced to show that Anika has encountered problems, while living with her father in Corner Brook, because she is Inuit and has facial features of a child of mixed racial heritage.

Future contact between Anika and her mother.

86 Section 16.(10) of the *Divorce Act* obligates the court to give effect to the principle that child of a marriage should have as much contact with each spouse as is consistent with the child's best interests.

87 Because both parents have a long-time expressed desire for Anika to speak the Inuit language and to learn, and live where possible, the Inuit culture, Anika should, in my view, have a reasonable amount of interaction with her mother, an Inuit. Ms. Nochasak's access in the ensuing order will do just that, within the scope of such access being in Anika's best interests and as limited by geography.

Child Support

88 At the parties' request, I have not dealt with making an order for child support. Leave is granted to file a child

support consent order or to apply to me for directions.

Costs

89 I see no reason to exercise my discretion by not following the general principle that costs follow the event. Party and party costs are therefore awarded to Mr. Pigott.

ORDER

90 Flowing from my findings and conclusions, the following is ordered in Anika's best interests:

1. Sole custody of Anika Eda Nochasak-Pigott, born June 26, 2000, is awarded to her father Paul Pigott.
2. Mr. Pigott shall regularly provide Ms. Nochasak with information concerning Anika's health, education, religion, extracurricular activities and pursuits and her overall well-being.
3. Ms. Nochasak will be permitted to parent Anika at her home for the months of July or August commencing with the month of August 2011 and alternating each year thereafter.
4. Ms. Nochasak shall be permitted to parent Anika for seven consecutive days during each of Anika's school Christmas vacations. Such parenting shall include Christmas Day on alternating years commencing for Ms. Nochasak in 2012.
5. Mr. Pigott shall be permitted reasonable telephone and internet access including Skype during Ms. Nochasak's summer and Christmas access to Anika. Ms. Nochasak shall be permitted reasonable telephone and internet access including Skype when Anika is being parented by Mr. Pigott.
6. Mr. Pigott shall be responsible for Anika's travel costs for summer and Christmas access.
7. Ms. Nochasak shall be permitted reasonable access, including physical access, upon reasonable notice to Mr. Pigott, if and when she visits Corner Brook or any other place where Anika may be with her father.
8. Each parent shall ensure that telephone, internet and Skype facilities are available within their homes.
9. Mr. Pigott shall annually advise Ms. Nochasak, in January of each year commencing January 2012, of Anika's newly-acquired knowledge and interest in the Inuit culture.
10. In the event of a serious illness, accident or other misfortune involving Anika, the parent then parenting Anika shall immediately notify the other parent.
11. Neither parent shall make disparaging comments about the other, in Anika's presence, or attempt in any way to frustrate this order.
12. This order may be mutually varied by Mr. Pigott and Ms. Nochasak, in writing, if required by either.

Order accordingly.

J.D. COOK J.

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