TAB 13

Mobility Update Including Interim Motions

Mobility Update:
When you come to a fork in the road, take it!

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Continuing Legal Education

Mobility Update: When you come to a fork in the road, take it! [1]

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Speaking Notes:

Introduction

Mobility or relocation cases as they are known in the United States continue to be the most vexing issue relating to custody and access matters. Except for high conflict cases, custody trials are on the decline as more parents see the wisdom of working with child therapists to work out their differences with respect to the children's residences and decision making. Most mobility cases are not capable of a compromise and as such, are more apt to be litigated.

Overview

A review of the trial and appellate decisions shows that there is no predictability, except perhaps to come to the conclusion that a person who can ascribe to the label of being a primary care giver is more likely than not to be allowed to move away with the children. Otherwise, the best interests of the child can and has been used by judges so as to justify whatever conclusion they wish to reach always quoting *Gordon* v. *Gertz*[3] as their authority for so doing.

Most appellate Courts favour a move by the primary care giver, such as *Spencer* v. *Spencer*, (2005) 15 RFL (6^{th}) 237 (Alta. C.A.); however, going against the trend is the decision of the Saskatchewan Court of Appeal in *Ingrim* v. *Ingrim* (2005) 15 RFL (6^{th})

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[1] The expression, "if you come to a fork in the road, take it", is attributed to Yogi Berra.

[2] I wish to acknowledge the invaluable contribution made by my associate, Meysa Maleki, in the preparation of these notes.

[3] (1996) 19 R.F.L. (4^{th}) 177 (SCC).

296. The fact that both Courts have, both allowed and denied, similar distance moves in similar circumstances, highlights the present unsatisfactory state of the law. The matter should either be the subject of legislative reform or else the Supreme Court of Canada is going to have to deal with the issue one more time, but this time providing more structured guidance to trial judges and lawyers so as to bring an end to this agonizing area of the law. The present "Yogi Berra" approach is simply not acceptable.

The American Experience

The New Jersey Supreme Court has developed one of the most extensive lists of considerations in relocation cases.[4] The Court set, as a condition precedent to the move, a requirement that the party seeking to move should initially produce evidence including a visitation proposal to establish *prima-facie* that there is a good faith reason for the move and the move will not be adverse to the child's interests. The Court determined that it should look to the following factors before making a decision:

1. The reasons given for the move;
2. The reasons for the opposition;
3. The past history of dealings between the parties in so far as it bears on the reasons advanced by both parties for supporting and opposing the move;
4. Whether the child will receive educational, health and leisure opportunities, at least equal to what is available prior to the move;
5. Any special needs or talents of the child that require accommodation and whether the accommodation or its equivalent is available in the new location;

[4] See *Baures* v. *Lewis*, 770, A. 2D 214 (N.J. 2001) and *Mamolen* v. *Mamolen* 288 A. 2D 795 (N.J. Super. Court Appellate Division 2002)

6. Whether visitation and communication schedules can be developed that will allow the non-custodial parent to remain in a full and continuous relationship with the child;

7. The likelihood the custodial parent will continue to foster the child's relationship with the non-custodial parent if the move is allowed;

8. The effect of the move with extended family relationships here and in the new location;

9. If the child is of age, his or her preference;

10. Whether the child is entering his or her senior year in high school, at which point he or she should generally not be moved until graduation without his or her consent;

11. Whether the non-custodial parent has the ability to relocate;

12. Any other factor bearing on the child's best interests.

Based on the foregoing considerations, the Court then determines whether the custodial parent has presented a *prima-facie* case and if so, the non-custodial parent has the burden of going forward with evidence opposing the move as either not in good faith because the custodial parent's past actions reveal an attempt to hinder the relationship or that the move is contrary to the child's best interests because of schools, special needs, extended family or inability of the non-custodial parent to visit due to distance, work schedule or for other reasons. A mere change in the non-custodial parent's access, even a reduction, although one important consideration as to whether the child's interests will be impaired, is not an independent basis on which to deny the removal of the child.

Although, obviously our Courts are not bound by jurisprudence in the United States, I believe that the foregoing considerations are helpful in the gathering and preparation of evidence for mobility cases in Ontario. Our arguments can be structured to incorporate the foregoing factors and then provide evidence to the Court with a clear link as to how it impacts on the best interests of the child.

Legislative Change

The same dissatisfaction in the application of the law by the Courts that we are experiencing in Canada has manifested itself in the United States and most legislatures have now enacted specific provisions relating to the relocation of children by parents after separation. Some states set up a rebuttable presumption that the intended move will be permitted and others have the opposite presumption putting the onus initially on the moving party. Some of the legislation also sets out different criteria depending on the distance from the current residence.

One of the underlining difficulties with finding a solution to this crucial problem is the frequent framing of the problem as a gender issue. A clear example of this has taken place in California. In the case of *Re. Marriage of LaMusga* (2004), the California Supreme Court prevented a mother from moving two young boys, 2,400 miles away from their father, on the basis that the move was likely to adversely impact on the non-custodial parent's relationship with the children and as such would be detrimental to the children's best interests. The decision caused an outcry by women's groups on the basis that opposition to relocation by fathers was often nothing more then a tool used by non-custodial fathers whose primary goal was to make their ex-wives suffer. Feminists vowed

to educate legislators and judges that ex-husbands are sometimes more interested in exerting control over and making life difficult for their former wives than in maintaining beneficial relationships with their children and that, therefore, the needs of the children and custodial parent must be given priority. The California legislature introduced a Bill that would have made it easier for custodial parents to be able to move away and the father's rights groups then mounted a concentrated opposition to it, resulting in the Bill being withdrawn. We have to get away from this destructive cycle and focus on the children involved in these cases rather than their parents.

In Ontario, a Bill just introduced in the legislature provides for amendments to the *Children's Law Reform Act*[5] so as to make spousal and/or child abuse a relevant factor in the determination of custody. Although the legislation does not specifically refer to mobility cases, obviously these factors would also be taken into consideration in determining whether a move would be in the best interests of the children.

Recent Clinical Articles on Relocation

- Sanford L. Braver et al., *Relocation of Children /After Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J.FAM. PSYCH. 206 (2003).

The authors argue that the recent trend to permit divorced parents to move away with their children is largely based on Judith Wallerstein's (1995) opinion that "in general, what is good for the custodial parent is good for the child". This study is the first to provide direct evidence on relocation by dividing college students into groups on the basis of their divorced parents' move away status. On most child outcomes, the ones

[5] R.S.O. 1990, chapter c.12.

whose parents moved away are significantly disadvantaged. This suggests courts should give greater weight to the child's separate interests in deciding such cases.

This study has been criticized by some as being not scientifically reliable, but nevertheless, is one of the very few articles that are written based on a study rather than mere opinions of the author.

- Joan B. Kelly and Michael E Lamb, *Developmental Issues in Relocation cases Involving Young Children: When, Whether, and How?* 17 J.FAM. PSYCH. 193 (2003).

The authors' thesis is that relocation cases stress and often disrupt the psychologically important parent-child relationships and this may, in turn, have adverse consequences for children. This article discusses the developmental attachment of infants and toddlers and the ways in which relocation is likely to affect young children of different ages: recent trends in judicial decisions regarding relocation; factors to consider when deciding whether or not to permit relocation; ways of promoting long-distance relationships, between young children and their nonmoving parents; and implications for legal policy and clinical practice.

- Lucy S McGough, *Starting Over: The Heuristics of Family Relocation Decision Making,* 77 ST. JOHN'S L. REV. 291 (2003)

This author examines the evolution of doctrinal backdrop of the issue of custodial relocation and examines spread of litigation rules for resolving relocation issues. The author concludes that the process of resolving relocation disputes through counselling, education and mediation should, to the maximum extent possible, be substituted for litigation.

Case Review: Mobility Update Including Interim Motions

The following is a review of mobility cases in 2005. The synopsis of the cases has been extracted from Jay McLeod's weekly news letter on eCarswell and reflects Jay's thoughts on this important issue. Now and for many years to come, Jay's analysis and opinion will continue to guide our thinking on this and other family law matters.

Court of Appeal Decisions

***Spencer v. Spencer*, 2005 CarswellAlta 1045 (Alta. C.A.).** No BIG surprise here. A custodial mother who wanted to move from Alberta to Victoria, B.C., where her new husband's family resided and he had been offered a more attractive job, was allowed to go. The only surprise was that she had to appeal to get to do it in the circumstances. The chambers judge had refused to allow her to move even after finding that the father was not in a position to assume parenting responsibilities. It got worse. Paperny J.A. noted that the father's contact with the children had been minimal and practically would not be all that much affected by the proposed move so that maybe the effects of the move would not even amount to a material change. That seemed to be stretching it, given the distance involved, but I guess if he was not seeing the children much while they lived close by, the fact that he would not see them much when they lived farther away didn't change things all that much. He still would not see them much. Except, now it would be a "could not" instead of a "did not." Anyway, Paperny J.A. went on to conclude that, even if the move was a material change, the judge still should have let the mother move. It seemed to me that the most interesting comment was that in deciding what was in the best interests of a child in a relocation case, a court should not rely too much on a custodial parent's representation that he or she will not move without the child. This forces the parent into a

"classic double bind." A parent who is unwilling to remain behind with the child, risks a court concluding he or she put his or her interests ahead of the child's. On the other hand, advising the court that the parent would forego the move undermines the submissions in favour of the relocation. As an aside, McLachlin J. did not raise this "third option" in *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.), Weiler J.A. did in *Woodhouse v. Woodhouse* (1996), 20 R.F.L. (4th) 337 (Ont. C.A.). As Paperny J.A. noted, this "easy out" of maintaining the *status quo* may prove overly attractive to some judges and allow them to avoid the hard question of whether a custodial parent has to choose between a personal life and the children, even when it is clear that it is in the children's best interest to be with that parent and in the parent's best interest to have a life. Very "*McGyver v. Richards*y." Paperny J.A. held that the judge overemphasized the desirability of maximizing contact with the access parent and failed to give adequate respect to the custodial parent's wishes. She clearly favoured forcing the choice to be between moving with the mother or remaining behind with the father. This is one of the more honest and thoughtful relocation cases in a while.

***Ingram v. Ingram*, 2005 CarswellSask 398 (Sask. C.A.).** Mobility denied at trial and on appeal. The mother, who had been the children's primary caregiver, wanted to move back to Alberta to be near her family and further her education. The trial judge denied the move primarily because it would be too disruptive to the children who spent about a third of their time with their father. The Saskatchewan Court of Appeal referred to the narrow scope of appellate review and dismissed the appeal. There really is not much here except that the Court of Appeal did not feel inclined to intervene, which is at least unusual. Just

goes to show you there are two ways to look at these cases. This way and the next way.

***Christmas v. Christmas*, 2005 CarswellAlta 819 (Alta. C.A.).** Mobility allowed on appeal. The trial judge denied the mother's request to move inside the province from Cold Lake to Edmonton because of the disruption such a move would cause to the father/children relationship. The Court of Appeal allowed the appeal and ordered a new trial; the first because the judge forgot the second half of the equation -- take into account the benefits of the move, not just the detriments; and the second, because courts of appeal do not like to make factual decisions. That is all behind them. Unless the move from Cold Lake to Edmonton was a lot less intrusive than the last move, these two cases seem almost irreconcilable, which confirms that there are two ways to look at these things -- pro-custodial parent or pro-access parent. In the absence of bad faith or no reason for the move, there really seems to be no other way of reconciling mobility cases.

Mobility and shared parenting

***Whalen v. Whalen*, 2005 CarswellNfld 161 (N.L. C.A.).** Now this one is bizarre. The parties had gone through interim custody and access orders. At trial, the judge rejected the mother's request to move to Ottawa and ordered equal shared parenting that would pretty much prevent a future move, or so you would think. The mother appealed both the order refusing the move and the shared parenting order. Welsh J.A. noted the narrow scope of appellate review in custody cases in particular and confirmed that the mother did not have to prove a material change to alter an interim order at trial. The mother's complaint was that the judge only applied the *Gordon v. Goertz* factors to deny her move

when the *Children's Law Act* s. 31(2) listed additional factors that a court *must* consider in deciding the best interests of the child, some of which she thought helped her case. Welsh J.A. agreed that the factors had to be taken into account but noted they were not all that much different. What did matter was that the trial judge had stated that if the mother moved with the child the father would probably go too but then turned around and held that a move would cut back the contact time between father and child. He was wrong at least one of the times. The mother was also upset that the judge ignored she only had short-term contract jobs in Newfoundland but a full-time secure position in Ottawa if she moved. That seemed to do it. There was no reason to prevent her from moving -- she had a good reason and a good childcare plan when she got there. Since the father was unemployed there was nothing stopping him being unemployed in Ontario rather than Newfoundland so the part stopping her from moving made no sense but, if the father tagged along, the equal parenting was still fine. So, leave the equal parenting and if she moved and he didn't and they could not sort out the new equal schedule, they could come back for help. Honest.

Mobility, scope of appellate review, and expert reports

***Mackintosh v. Mackintosh*, 2005 CarswellMan 80 (Man. C.A.).** The father appealed a decision that allowed the mother to move with the parties' ten-year-old son from Brandon, Manitoba to Edmonton, Alberta where she had been transferred with the military. His real problem was not the judgment as much as the fact the mother left as soon as she was allowed, the appeal was delayed, and the Court of Appeal did not release its reasons for another four months. Now the father was forced not only to get a court to

reject the move but also to remove the child from his primary caregiver and drag him back, just like in *Gordon v. Goertz*. Although the parties shared joint custody, the mother had always been the primary caregiver. In most cases, that would be about it for an appeal. Deference to the trial judge and a reasonable decision to move, taking into account *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.). However, the judge apparently did not consider the evidence of the father's expert witness who recommended against the move. There's a surprise -- that a social worker recommended against a move, not that the judge missed it. The latter was an error of law though, according to Hamilton J.A. That did not bode well for the mother in light of the fact the father offered an apparently more stable home than the mother could provide being in the military. However, like I said, it took a while for the appeal to get heard. Hamilton J.A. held that he could not roll back time and if it was bad to disrupt the child before, it was at least as bad to disrupt him now that he was settled in the new place. Move grudgingly accepted, but no costs. You cannot unscramble an egg so, if you get permission to move, beat it right away.

Mobility, scope of appellate review and fresh evidence

***Henderson v. Henderson*, 2005 CarswellBC 1174 (B.C. C.A.).** The trial judge allowed a mother to move with the parties' children notwithstanding she announced her decision to do so shortly after the parties signed an agreement for joint/shared custody that impliedly assumed she would remain. The father appealed and tried to introduce "fresh" evidence that was really "new" evidence. Rowles J.A. ran through the rules and case law on both. Her comments on this alone make the case worth reading. As you read along, it seemed clear the mother signed the agreement to get what she wanted and then when she had it

decided to dump the agreement to move. I thought for sure that the Court of Appeal would allow the father's appeal, but no. Rowles J.A. held that there was no need for the mother to prove a material change since the time of the agreement because this was a first instance custody order. Courts are not bound by agreements. There is case law to the contrary in a mobility context -- *Woodhouse v. Woodhouse* (1996), 20 R.F.L. (4th) 337 (Ont. C.A.) and the result marginalizes settlement agreements, which seems inconsistent with recent SCC case law but the alternative was to overrule the trial judge which the BCCA is reluctant to do since *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.). That the mother effectively breached the agreement was not a big factor in a custody case. Perhaps not, but it must say something about her credibility and motives. Anyway, appeal dismissed. This is about as strong a scope of appellate review case as you are likely to find. The facts pointed to a different result, even for pro-move people, I think. If that did not appeal to your sense of morality, read on.

Interim Mobility Decisions

***M. (P.D.) v. M. (J.D.)*, 2005 CarswellBC 1922 (B.C. S.C. [In Chambers]).** Interim mobility, by the numbers. The mother rushed into court for an interim order allowing her to move to solidify her new relationship. The urgency was school was about to start. The father wanted the children to stay behind and suggested the new relationship was not stable. Macaulay J. disagreed and let the mother go. I thought it was a bit easy but if you accept that the relationship was stable and beneficial and the children were better off with mother there really was no reason to stop her, though I suspect most courts would.

***Walters v. Djafar-Zade*, 2005 CarswellBC 1163 (B.C. Master).** Interim custody and mobility. A mother wanted to move to Australia with the parties' three children almost immediately, allegedly for employment reasons. FYI -- judges hate this. Urgency is a big factor in interim moves but you cannot create your own by waiting until the last minute to seek approval for a move. The mother claimed she had arranged new employment in Australia where her new partner was from and returning to, also for employment reasons, but there was nothing in the material suggesting that the company would not try to accommodate her need to get court approval to move or why she waited so long to seek approval or even why her partner had to move immediately. The father had an arguable case for custody or at least to prevent the move and allowing the move would mean pulling the children out of school just before the end of the school year. No urgency; move not the inevitable result at trial; no interim move.

***Peters v. Peters*, 2005 CarswellNS 213 (N.S. S.C.).** Interim mobility. A shorter version of the last one with the same theme. Ferguson A.C.J.S.C. denied a mother interim permission to move for employment reasons but left her with interim custody where she had not made out a case for urgency and a move was not the inevitable result at trial. Pick one of the two.

***White v. Richardson*, 2005 CarswellOnt 1633 (Ont. S.C.J.).** Interim custody; interim mobility. After the parents separated in July 2004, the mother moved from Ontario to British Columbia with their eight-year-old son. The father did not appear to object or at least did not commence proceedings for the child's return. In September 2004, the mother

had to return to Ontario for a job training program for two weeks and arranged with the father to care for the child during her time there. When it was time for her to return to BC, the father refused to let the child go, so the mother went alone and claimed custody in Ontario. The child was a little young to have a strong opinion and did not want to express one anyway, although the OCL indicated he was concerned about the mother's somewhat hasty decision to relocate, which sounded a lot like coaching to me. Anyway, both parties relied on the *status quo* -- the mother to support her interim move and the father to retain the child. For systemic reasons, it took about nine months to get this motion heard, so Gordon J. felt compelled to point out that *status quo* could not be manufactured by delay in the court process. The *status quo* at separation was mother as the primary caregiver. Both parents had proven they could care for the child. The mother's problem was that she wanted interim custody in BC, which involved an interim move and the father had an arguable case for custody in Ontario. There was no urgent necessity associated with the mother's move and it could hardly be said that moving was the inevitable result at trial so the child stayed behind, which seemed strange when you think about it since the father appeared to have acquiesced in the mother moving the child to BC and she did not acquiesce in him retaining the child in Ontario. The mother's mistake was commencing proceedings in Ontario. She should have used BC and then enforced the BC order.

***Verlaan v. Baird*, 2005 CarswellBC 310 (B.C. S.C.).** Interim mobility. This was a first instance mobility case where mother wanted an interim order allowing her to move from North Vancouver to Victoria with their eight-year-old daughter for career reasons.

Neither parent had shown much reluctance about ignoring court orders when it suited his or her purposes. However, the mother was also inclined to allow her dislike for the father to interfere with his access and relationship with the child. Williamson J. agreed that *Nunweiler v. Nunweiler* (2000), 5 R.F.L. (5th) 442 (B.C. C.A.) rendered *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.) applicable to first instance relocation cases as well as variation cases, but declined to let the mother go because of concerns that she would use the opportunity to further marginalize the father and because an assessor was lukewarm at best to the idea. The assessor was concerned that the child was shy, did not make friends well, and had a good relationship with the father and his family. I think Williamson J. went on a bit long. This was an interim move case and the father had an arguable case for trial, so the mother had to stay. At least until trial. No interim moves without urgent and pressing necessity or the move will be the inevitable result at trial -- my words, not hers.

Interesting trial level Decisions

Ontario

Mobility, Finding Neverland

***Pike v. Cook*, 2005 CarswellOnt 297 (Ont. S.C.J.).** I will apologize in advance for going on with this one because it really is an interesting case raising conduct, reason for the move, collateral family, and real custody in the context of a mobility/relocation debate. This is one of the few cases where a mother with a good reason for moving was not only not allowed to move the child, but the child was ordered back after being allowed to move on an interim basis. The mother was allowed to move with the parties' nine-year-old son from Cornwall, Ontario to Philadelphia, Pennsylvania on an interim

"without prejudice" basis. The father, an unemployed former bar manager, and his parents were long-time residents of Cornwall. The father planned to devote his time to managing a building he owned and from which he earned $2,673 monthly net income. The mother was a registered nurse who worked at Temple University earning $60,000 US. She and the child lived with her fiancée, who also worked at Temple and earned the same income, and lived in an upper middle income neighborhood. The child was enrolled in a good school and doing well. The mother and father had cohabited for four years during which they shared parenting of their child. After separation, the parties shared parenting on an alternating week basis for six and a half years until problems developed between them. In 2002, the mother obtained an uncontested order for sole custody with the father having weekend access. In May 2003, the mother took a summer position at Temple University and quit her job in Cornwall when her employer would not give her a leave of absence. The mother subsequently took an extended position with Temple without telling the father and obtained an interim without prejudice order allowing her to take the child to Philadelphia on the basis that it was a short-term venture and she had been the child's primary caregiver from birth, neither of which Hackland J. decided was true when the matter finally came back for trial a year later. Hackland J. agreed with the father that the mother had provided the judge with a misleading picture of events and suggested that the order might not have been made if the truth were known. Perhaps, but the "bun fight" over past parenting may have been in the eyes of the beholder. I would like to think I participate fairly in homecare but suspect my darling wife would disagree. Anyway, another observation. Unless you are going to punish the mother for what she said or the way she viewed reality, Hackland J. was faced with a situation where the child

was settled in a good home in a good neighborhood in a good school in a stable fully employed two-parent home. No custody order can be "without prejudice" because a judge errs in ignoring reality: *c.f. Sodhi v. Sodhi* (2002), 25 R.F.L. (5th) 420 (Ont. C.A.) (court ignoring child's circumstances after unilateral removal). The mother even announced she was staying in Philadelphia whatever the court decided about mobility -- usually a good gamble. But not here. Hackland J. obviously saw this as yet another attempt at judicial manipulation by the mother and ordered the child back. If the mother returned, she could have primary care and control but, if not, dad could. Now, explain how it is in the best interests of this child to uproot him from a good environment and stick him with unemployed dad? A social worker with the OCL interviewed everyone and concluded the child wanted alternate week access like before and was unhappy with his current weekend access with dad. The mother then retained a psychologist to prepare an assessment. The assessor acknowledged he did not have much experience in relocation cases and did a "rush job," although the main difference between the two seemed to be fewer collateral interviews, and decided that the mother, who had been the primary caregiver throughout the child's life, should be allowed to keep the child in Pennsylvania. Since Hackland J. did not accept the mother had been the primary caregiver, he did not accept the conclusion. Hackland J. also seemed concerned that the mother's decision to move had been an economic career decision, not a parenting decision. We call that the reality of these cases. The assessor also conceded that the best thing would be for mother to come back so everyone could play nice again. Like that will happen, even if she comes back. Add to this that the mother could find work at some wage somewhere within an hour or so drive of Cornwall and she had a choice -- come back with the child or lose the

child. I'd appeal. You do not disrupt what seems to be working to get "the ideal" solution of everyone together when you could improve the contact time by increased access. On the other hand, everything Hackland J. said at paragraph 21 about the good contacts with Cornwall and the benefits of living there for the child makes sense -- so long as you accept that the mother has no right to get on with her life in a meaningful way.

Other Provinces

Mobility in the international setting

***Dittberner v. Dittberner*, 2005 CarswellBC 751 (B.C. S.C.).** The parents had lived all over the world but ended up in British Columbia. Things were not good. While in Luxembourg visiting her sick father, the mother saw a former flame's picture in the paper and renewed acquaintances. She explained to the father that she wanted to return to Luxembourg where her employment opportunities were better, but wanted him to come as well. What she didn't tell him was that this was so he could keep his relationship with the child after she left him. Though he was initially tempted to move, the father rejected the suggestion when he learned that they would not be there as a family. It was a rollercoaster of a ride whether the mother would be allowed to move but, in the end, Boyd J. approved the move. I was surprised. At best, the mother wanted to be closer to her family and newfound old boyfriend. It helped that the mother was willing to agree to generous access, a child support reduction to reflect access travel costs, and even arranged accommodation in Luxembourg for the father when he visited. However, Boyd J. pointed out that, with the mother's credentials, she would have a better career and more money there than in BC. Boyd J. declined to interview the children or order an assessment, as the father wanted, since the children were too young for their wishes to

really count. I guess the father should have moved because he really did not have much of a career where he was. As is often the case in mobility litigation, no costs. Losing is enough.

Relocation and the overly-mobile parent

***Kotylak v. Kotylak*, 2005 CarswellSask 124 (Sask. Q.B.).** The parties shared custody of their three children, aged four, two and one, following separation. Things seemed to be working about as well as these things ever work until the mother took it upon herself to move nine hours away back to Alberta but to insist that she keep her regular custody/access. The father took the position that this was too hard on the children and claimed primary care and control. The mother responded with the same claim for herself. This is sort of a mobility case but not really. The issue was whether the children should live with dad in the former home or mom in her new home with her parents. Paternal grannie had played a big role in the children's lives since she lived close by while the family was together and helped out on a regular basis because the mother had depression problems. The father was more stable and offered a more stable home with family and friends all within hollerin' range. The mother created the problem by deciding to move home to her family for emotional support when the marriage broke down, which, while understandable, hardly justified uprooting the children to such an extent. Joint custody with primary care and control to dad. The distance also limited the mother's access. A nine-hour drive was too much every week, even if the parties had been doing it. Instead, Kyle J. ordered weekend access once every three weeks in Saskatchewan and divided holidays and vacations in Alberta and Saskatchewan with the parents sharing travel by

meeting at a halfway point. Kyle J. pointed out it would help if the father got out of the house on access weekends so the mother could exercise access in the matrimonial home.

Mobility, with a twist

***N. (D.) v. N. (M.)*, 2005 CarswellBC 1728 (B.C. Prov. Ct.).** The parties were the parents of a five-year-old child. The mother left home at 16 to make her way in the world. She bounced around until ending up with the father, who had lived in the same area most of his life. Both parties had participated in parenting during cohabitation. The child remained with the mother after the parties separated in 2002 but the father continued to exercise regular and frequent access. In December 2004, the mother left the child with the father while she traveled to Red Deer, Alberta and the father promptly obtained an *ex parte* order for interim custody. Rather than waste time debating the propriety of the *ex parte* order, the parties proceeded directly to a full and final custody hearing. De Walle Pr. J. treated the case as a mobility case since the mother had moved away to pursue a new relationship and wanted to child to join her. De Walle Pr. J. would have ordered joint custody if the parties had continued to live in the same community. However, the mother's move made this impossible. It was now a question of leaving the child with dad or moving her to mom. Sort of the other side of *Gordon v. Goertz* without the distance. De Walle Pr. J. seemed concerned about the mother's lack of stability, the disruption to the child's lifestyle and relationships, and decided to leave the child with the father. When you read the facts, the result seemed rather a slam dunk. The mother careened from relationship to relationship and place to place. There was no reason for the child to do the same.

Mobility and breaking your word

***Foreman v. Foreman*, 2005 CarswellAlta 621 (Alta. Q.B.).** This one makes a good contrast to *Henderson, supra.* The mother had tried unsuccessfully to move to be with her new partner in the past only to settle her application by minutes of settlement that clearly assumed shared parenting and her remaining. Almost as soon as the agreement was signed, the mother again applied to move to be with her new husband who turned out to be that former new partner. Slatter J. pointed out that the mother had planned this all (including the marriage) before she signed the agreement. There was no material change to vary the order and, even if you focused on the agreement, no reason to release her from her bargain in light of *Miglin*-type reasoning. Along the way, Slatter J. pointed out that *res judicata* applied in family law cases and how. This is a more satisfying read and result than *Henderson, supra* if you are into any sense of primal justice. The mother lost and had to pay costs. If you don't like that, the parties' agreement provided that a party who successfully sued to enforce the agreement was entitled to costs and the father could have them on that basis too. Well worth reading.

Mobility or not

***Whalen v. Whalen*, 2005 CarswellNfld 48 (N.L. U.F.C.).** Cook J. rejected a mother's request to move with the parties' two children, aged two and four, from St. John's to Ottawa for employment purposes. The parties had agreed to the mother being the primary caregiver with the father enjoying generous access. An assessor pointed out that the children had a close relationship with both parents that should be maintained. Cook J. also relied on the maximum contact principle in the *Divorce Act* s. 16(10) and the Report of the Special Joint Committee on Child Custody and Access from December 1988,

which was unabashedly pro-fathers, to deny the move and order equal physical parenting in St. John's. Don't worry that the children had not lived all that long in St. John's or that the result left the mother worse off financially because Cook J. did not. Contrast *Horn v. Good*, 2004 CarswellNB 673 (N.B. Q.B.) where the parents agreed to interim shared custody whereby neither would remove the child but Athey J. awarded custody to the mother and then allowed her to move according to *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.) since the father really did not want custody and declined to put himself out for access even. There was no reason to change the child's primary residence or stop the mother from moving. For good measure, Athey J. denied joint custody as unworkable because of the distance, as if this was a rule in mobility cases.

Mobility déjà vu.

***Saunders v. Saunders*, 2005 CarswellNS 58 (N.S. S.C.).** The parties agreed on shared custody that seemed to be working. Now the mother wanted to move with the child to Dubai in the United Arab Emirates where her new husband worked. The husband had been a pilot with Air Canada but because of concerns about the airline industry in Canada, took a position with Emirates Air and moved to Dubai. Not unnaturally, the mother wanted to go with him. This looks like the last case except that the mother did not look for love in another place, the other place lured her love away. Also there was no suggestion that she was interfering with the father's relationship with the child. In fact, neither the mother nor the father nor their respective partners had anything bad to say about any of the other players. Dellapinna J. held that if the mother was committed to moving, as appeared to be the case, the child's life was going to be fundamentally disrupted by the loss of frequent contact with both parents. The difference was that if he

moved, the parties' son would have major culture shock adjustment, including loss of his beloved hockey and lacrosse teams, in addition to losing contact with one co-parent, whereas if he stayed he would just lose contact with the other co-parent. The lesser of the two evils was to leave the child with the father and give the mother generous access. Again the result seems harsh on the mother but this time there was no indication that she was the better custodial parent. If she had stayed, the parents probably would have continued to share custody. From a child-focused point of view, it is difficult to argue with the result. Shared parenting that worked, both parents capable of parenting, child equally disrupted from reduced contact with a parent whichever way the decision went but with culture shock one way only.