TAB 10

Relocation for Dummies

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Continuing Legal Education

RELOCATION FOR DUMMIES

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Custody is a bundle of rights dealing with the care and control of the person of a child. Usually, a judge will deal with custody as a whole and give one parent the right to exercise all of the incidents of custody. However, in some cases, a child's needs and the differing parenting strengths may support a decision to divide the various incidents of custody between the parents. For example, a judge can grant one parent the right to decide a child's religion or social activity and grant the other parent day-to-day care and control and primary residence of a child: *G. (N.D.) v. W. (G.M.)*, 2003 CarswellBC 2690, 2003 BCSC 1650 (Master) (parent with interim custody entitled to choose school and daycare if not unreasonable).

Historically, most judges started from the premise that it was in a child's best interests for one parent to have "custody" and another parent to have "access." While a non-custodial parent should be kept fully informed and may even have a right of consultation on major childcare issues, ultimately the decision on any incident of custody rests with the primary caregiver: *c.f. Gordon v. Goertz*, 19 R.F.L. (4th) 177, [1996] 2 S.C.R. 27, 141 Sask. R. 241, [1996] 5 W.W.R. 457, 196 N.R. 321, 134 D.L.R. (4th) 321, 114 W.A.C. 241, [1996] R.D.F. 209, 1996 CarswellSask 199, [1996] S.C.J. No. 52, 1996 CarswellSask 199F. An access parent who feels aggrieved about a childcare decision is expected to request a court to overrule a custodial parent's decision if it is not in the best interests of the child.

However, courts have been less indulgent of a custodial parent's decision to relocate with a child over the objections of the other parent. If the parents are unable to agree on the issue, a court will review a custodial parent's decision on the point with no preconceived view for or against a custodial parent's position and decide which parent's position better promotes a child's best interests: *c.f. Gordon v. Goertz*, *infra*. Who has the obligation to seek judicial intervention depends on the custody and access arrangements currently in place and any order or agreement between the parties. If a proposed move would interfere with the access provisions of a court order or agreement, the parent prosing to move must seek judicial approval. Otherwise, the Supreme Court of Canada seemed to accept in Gordon v Goertz, supra, that the objecting parent must apply for an order restraining a proposed move.

(a) Generally

In *Gordon v. Goertz*, 19 R.F.L. (4th) 177, [1996] 2 S.C.R. 27, 141 Sask. R. 241, [1996] 5 W.W.R. 457, 196 N.R. 321, 134 D.L.R. (4th) 321, 114 W.A.C. 241, [1996] R.D.F. 209, 1996 CarswellSask 199, [1996] S.C.J. No. 52, 1996 CarswellSask 199F, McLachlin J. held that while a custodial parent had a right to determine where a child should live, if the proposed move would materially change the child's needs or the parent's ability to meet those needs, an access parent who objected to a proposed move could apply to vary the custody or access order under s. 17 of the *Divorce Act*. On such application, a court should not start with a presumption for or against the custodial parent. Each party bore an onus of proving that his or her parenting plan was in the best interests of the child. In deciding whether to approve or deny a proposed move, a court should balance the benefits and detriments of allowing the move against the benefits and detriments of refusing the move.

In deciding what was in the best interests of the child in a relocation context, McLachlin J.

identified four basic points to structure a court's discretion:

1. While there is no presumption in favour of approving a move, a court should give great respect to the *bona fide* wishes of a custodial parent.

2. That a move would result in a significant reduction in access is not a reason to deny the move.

3. The parents' conduct is only relevant insofar as it affects parenting.

4. A custodial parent need not prove that his or her reasons for wishing to move are "necessary." It is sufficient if the move is proposed in good faith and not to frustrate or interfere with access.

The provincial courts of appeal have addressed most of the outstanding issues. However, the law remains discretion driven, which undermines predictability in a particular case.

In *Woodhouse v. Woodhouse* (1996), 20 R.F.L. (4th) 337, 29 O.R. (3d) 417, 136 D.L.R. (4th) 577, 91 O.A.C. 91, 1996 CarswellOnt 1906, [1996] O.J. No. 1975 (C.A.), leave to appeal to the Supreme Court of Canada refused (1997), 99 O.A.C. 80 (note), 209 N.R. 80 (note), [1996] S.C.C.A. No. 402 (S.C.C.), the Ontario Court of Appeal held:

1. The same principles apply to decide whether to permit a proposed move under provincial custody legislation as under the *Divorce Act*.

2. The same principles apply to determine applications to override contractual custody and

access arrangements as apply to vary a prior court order.

3. The recommendations of an independent assessor are useful and valuable to a judge deciding whether to approve a proposed move. More recently, many judges and lawyers appear to have changed their mind about the role of assessments in relocation cases. In a nutshell, the problem seems to be that the mental health considerations that form the basis for most assessor's recommendations do not reflect the considerations upon which a judge should decide whether to allow or deny a proposed move according to the discretion structuring factors established by McLachlin J in Gordon v Goertz. Courts finally seem to accept that mobility is a legal issue, not a mental health issue. Unless a child has some special problems there usually is no need for or benefit from an assessment: c.f. Roth v Carruthers (2002) 10 RFL (5^{th}) 419 (OSCJ)(court disapproving of private assessment after father's motion for court ordered assessment dismissed); Johnstone v Brighton 2004 CarswellOnt 3229 (OSCJ)(need to justify expert evidence on mobility); Sheikh v Sheikh 2004 CarswellOnt 4395 (OSCJ)(no need for assessment; children relatively normal and no clinical or other issues requiring expert opinion evidence); Cade v Rotstein (2004) 2004 CarswellOnt, 50 RFL (5^{th}) 280, 181 (OAC 226 (CA)(trial judge not erring in allowing move contrary to assessor's recommendations).

4. A court should decide a case according to the positions put forward. If a custodial parent states that he or she will not move without a child, then a court should consider "the third alternative" and decide whether it is in the best interests of a child to allow the child to remain with the custodial parent but to restrain the custodial parent from moving the child's

residence.

The following principles also seem relatively settled:

1. That the parties share joint custody by court order or agreement does not prevent a primary caregiver from moving. See *Johnson v Cleroux* (2002) 23 RFL (5th) 176 (OSCJ)(court approving move by mother who shared joint custody and then canceling joint custody because of conflict over move); Luckhurst v Luckhurst (1996) 20 RFL (4th) 379 (OCA)(mother allowed to move with children notwithstanding parents shared custody and children with both parents similar time where mother primary parent); *Burgin v. Howells*, 2004 CarswellNS 59, [2004] N.S.J. No. 54, 2004 NSSC 31 (S.C.) (mother who had primary care and control allowed to move with children).

However, a court may deny a move as too disruptive to a child where the parties share physical custody and the child resides with each parent similar amounts of time, unless one of the parents is clearly the primary parent: *Anderson v. Anderson*, 2003 CarswellBC 475, 2003 BCSC 335 (S.C.) (move denied); *Rotzetter v. Rotzetter*, 2003 CarswellBC 3202, 2003 BCSC 1962 (S.C.) (court refusing to allow mother to move because move too disruptive where children with father more than mother); *Hancock v. Elkins*, 2003 NLSCTD 138, 2003 CarswellNfld 303, 231 Nfld. & P.E.I.R. 90, 686 A.P.R. 90 (T.D.) (mother not allowed to move because of disruption where parents shared custody); *Jantzi v. Jantzi* (2003), 2003 CarswellOnt 5370 (S.C.J.), additional reasons at (2003), 2003 CarswellOnt 5369 (S.C.J.) (mother not allowed to move to be closer to boyfriend where parties shared custody); *B. (C.D.) v. B. (N.O.)*, 2004 CarswellBC 169, 2004 BCPC 11 (Prov. Ct.) (mother not allowed to move children inside province to take advantage of a job offer where parents shared custody on alternating week basis); *MacGregor v Stone* 2004 CarswellOnt 4152 (OSCJ)(court

refusing to allow substantial move where parents shared custody and both highly involved with children).

2. Whether a child will be allowed to move should not be based on broad presumptions arising from a separation agreement. Clauses in separation agreements or court orders that restrict a parent's freedom to move with a child or require a parent to give specified notice to the other parent before moving do not establish a presumptive rule whether a parent can move but are processing clauses: *Krebs v. Yarmel* (2003), 2003 CarswellOnt 2909 (S.C.J.), additional reasons at (2003), 2003 CarswellOnt 4815 (S.C.J.) (agreement limiting mobility not binding); *Richardson v. Richardson* (2003), 2003 CarswellOnt 834 (S.C.J.) (relocation clause merely establishing who should seek court approval). But see *Archibald v. Archibald*, 2004 CarswellAlta 127, 2004 ABQB 116 (Q.B.) (court refusing to approve interim move where mother did not give notice as required under agreement).

3. A court should not routinely impose a restriction on moving in a custody order nor grant permission to move in the absence of a concrete plan to move. Decisions about the best interests of a child should not be made in advance: *K. (M.J.) v. K. (I.)*, 2003 CarswellBC 3262, 2003 BCSC 1968 (S.C. [In Chambers]) (court refusing to give mother permission to move anywhere she wanted without concrete plans and reasons). But see *Jantzi v. Jantzi* (2003), 2003 CarswellOnt 5370 (S.C.J.), additional reasons at (2003), 2003 CarswellOnt 5369 (S.C.J.) (implicit in prior shared custody order that mother would not move without substantial change in circumstances, which had not occurred).

4. The effect of a child's wishes to move or stay depends largely on child's age and maturity, as in other aspects of custody and access: *Spratt v. Spratt*, 2003 CarswellBC 310, 2003 BCSC 161 (S.C.) (wishes of eight-year-old to stay behind carrying little weight where she appeared to have been influenced); *Gravelle v Gravelle* 2004 CarswellONt 3159 (OSCJ)(thirteen year old with emotional problems and ten year old's wishes not solicited).

5. A parent's motive for a proposed move is irrelevant except where it is patently unreasonable or to frustrate access: *Andrushko v. Remillard* (2003), 2003 CarswellNfld 35, 663 A.P.R. 82, 222 Nfld. & P.E.I.R. 82 (T.D.) (mother's only reason apparently to get away from father).

6. A short distance move usually has insufficient effect on the child's relationship with the stay-behind parent to induce a court to prevent the move: *St. Laurent v. St. Laurent*, 2002 CarswellAlta 1252, [2002] A.J. No. 1248, 2002 ABQB 899, 32 R.F.L. (5th) 459 (Q.B.) (50 mile move within "commuting" distance).

Although judges insist on discussing mobility disputes in the context of the best interests of the child, the child's interests usually have little to do with a proposed move: *H. (L.J.) v. P. (L.J.)*, 2002 CarswellYukon 121, 2002 YKSC 51, [2002] Y.J. No. 110 (S.C.) (child's special needs driving force behind move); *N. (R.B.) v. N. (M.J.)*, 2002 CarswellNS 513, 2002 NSSF 51, 210 N.S.R. (2d) 161, 659 A.P.R. 161 (S.C.), additional reasons at (2002), 2002 CarswellNS 520, 33 R.F.L. (5th) 383, 210 N.S.R. (2d) 169, 659 A.P.R. 169 (S.C.), affirmed 2003 CarswellNS 212, 2003 NSCA 65, 40 R.F.L. (5th) 286, 217 N.S.R. (2d) 1, 683 A.P.R. 1 (C.A.) (child's special needs influencing court's decision to allow move). Most parents want to move for personal or career/employment reasons and want to take their children along. A court's task is to balance one parent's right to move ahead with his or her life against the other parent's right to continue his or

her relationship with the child. Regardless of what judges may state, most mobility cases involve a comparison of the reasons for a proposed move with the extent of the disruption of access. See *Jantzi v. Jantzi* (2003), 2003 CarswellOnt 5370 (S.C.J.), additional reasons at (2003), 2003 CarswellOnt 5369 (S.C.J.) (mother's wish to be closer to boyfriend insufficient reason to justify disruption to shared parenting regime).

However, a court errs in deciding a mobility case by reference to the interests of the parents, instead of focusing on the pros and cons to the child of moving or not moving: *Young v. Young* (2003), 34 R.F.L. (5th) 214, 2003 CarswellOnt 63, [2003] O.J. No. 67, 223 D.L.R. (4th) 113, 168 O.A.C. 186, 63 O.R. (3d) 112 (C.A.); *Hartwick v. McIntyre*, 2003 CarswellNB 210, 2003 CarswellNB 211, 2003 NBCA 33, 36 R.F.L. (5th) 169, 259 N.B.R. (2d) 291, 681 A.P.R. 291 (C.A.).

The weight of judicial authority since *Gordon v. Goertz* supports a court allowing a move that is proposed in good faith and not intended to frustrate an access parent's relationship with a child, so long as the primary caregiver parent is prepared to accommodate the interests of the child and the access parent by restructuring access and perhaps by reducing child support to acknowledge the increased costs of access: *Cade v. Rotstein* (2004), 2004 CarswellOnt 363, 50 R.F.L. (5th) 280, 181 O.A.C. 226 (C.A.), additional reasons at (2004), 2004 CarswellOnt 829 (C.A.) (mother allowed to move with children from Ontario to New York); *Jackpine v. Gamsby* (2004), 2004 CarswellOnt 407 (C.J.) (mother allowed to move children to maintain new family unit to be with partner who could support family); *Q. (K.K.) v. R. (F.W.)*, 2003 CarswellBC 3000, [2003] B.C.J. No. 2748, 2003 BCSC 1682 (S.C.) (mother allowed to move children to Qatar where new husband had been transferred, notwithstanding mother had left children with father until court decided issue while she went with husband); *H. (L.) v. W. (G.)*, 2003

CarswellSask 515, 2003 SKQB 342 (Q.B.) (mother allowed to move with children where no indication reduced access detrimental to children); *Krebs v. Yarmel* (2003), 2003 CarswellOnt 2909 (S.C.J.), additional reasons at (2003), 2003 CarswellOnt 4815 (S.C.J.) (mother allowed to move to pursue professional career); *G. (E.) v. P. (D.)*, 2003 CarswellBC 2005, [2003] B.C.J. No. 1911, 45 R.F.L. (5th) 342, 2003 BCCA 425 (C.A.) (mother with *bona fide* reason allowed to move); *Griffith v. MacNeil*, 2003 CarswellSask 588, 2003 SKQB 377 (Q.B.) (mother allowed to move to marry and live with new husband); *E. (D.G.E.) v. E. (J.)*, 2003 CarswellBC 2667, 2003 BCPC 348 (Prov. Ct.) (mother allowed to move to pursue new relationship); *Singer v. Singer* (2002), 2002 CarswellOnt 4473, 35 R.F.L. (5th) 208 (S.C.J.), affirmed (2003), 2003 CarswellOnt 3113, 175 O.A.C. 1, 42 R.F.L. (5th) 202 (C.A.), leave to appeal refused (2004), 2004 CarswellOnt 51, 2004 CarswellOnt 52 (S.C.C.) (mother allowed to move to Germany for employment reasons); *Spratt v. Spratt*, 2003 CarswellBC 310, 2003 BCSC 161 (S.C.) (mother allowed to move because partner transferred); *Carmichael v. Douglas*, 2003 CarswellBC 916, 2003 BCSC 611, 37 R.F.L. (5th) 259 (S.C.) (mother allowed to move to be near family for support); *Ganson v. Ganson*, 2003 CarswellBC 787, 2003 BCSC 544 (S.C.) (mother allowed to move to improve employment prospects); *K. (M.J.) v. K. (I.)*, 2003 CarswellBC 3262, 2003 BCSC 1968 (S.C. [In Chambers]) (mother allowed to move to improve employment prospects and quality of life for her and children); *Burgin v. Howells*, 2004 CarswellNS 59, [2004] N.S.J. No. 54, 2004 NSSC 31 (S.C.) (mother allowed to move to England for better employment prospects); *Dario v. Rivers*, 2004 CarswellBC 529, 2004 BCSC 347 (S.C.) (mother allowed to return with child to family in Ontario after father left her for another woman). This "bias" has been particularly evident in decisions from the Ontario court of Appeal for some time: see Rushinko v Rushinko (2002) 27 RFL (5^{th}) 173 (OCA)(appeal alloweds from decision denying

move per curiam).

However, there is no guarantee that a judge will follow this trend in a particular case: *Hancock v. Elkins*, 2003 NLSCTD 138, 2003 CarswellNfld 303, 231 Nfld. & P.E.I.R. 90, 686 A.P.R. 90 (T.D.) (mother not allowed to move child because of disruption to child; primary care transferred to father); *Markin v. Gysel*, 2004 BCSC 364, 2004 CarswellBC 585 (S.C.) (move too disruptive to child's relationship with father); *Bernard v. Kleim*, 2003 CarswellAlta 1576, 2003 ABQB 910 (Q.B.) (mother not allowed to move simply to escape father); Gravelle v Gravelle 2004 CarswellONt 3159 (OSCJ)(Eberhard J expressly accepting trend in favour of reasonable bona fide moves).

In *Bartlett v Bartlett 2004 ONCJ 276 (OCJ),* King J emphasized that the extent of disruption and change in a child's lifestyle associated with a move was a major consideration in deciding whether to allow a proposed move. The children, aged 8 & 10 had lived in Canada for most of their lives. They had attended the same school, lived in the same neighborhood and had the same circle of friends and relatives since they started school. They enjoyed quality time with their father before and after separation. The custodial mother wanted to return to Japan to acquire a better job, be closer to her family, and enjoy a better lifestyle. If she took the children with her, they would loose not only their familiar environment and friends but also would have to learn a different language and adjust to a very different culture. The effect of such a move on their relationship with their father would be immense and detrimental. The cost of travel to and from Japan was prohibitive given the parents' resources, even with an adjustment in the father's support payments. The disruptive effects of the move far outweighed any benefits that might be associated with the move from the children's point of view.

In *D. (R.) v. D. (U.S.)*, (2003), 2003 CarswellYukon 169, 2004 YKSC 14 (S.C.), a judge

denied a mother permission to move for education purposes for one year in order to strengthen the father/child relationship through more access. The mother renewed her request to move within the year when the father did not exercise the access he had been given. Veale J. held that the mother's request was premature until she provided confirmation of her college acceptance, if she wanted to leave before the year was up.

A parent who insists on moving regardless of whether the children are allowed to move, forces a court to decide whether the child is better off with the "move away" parent or the "stay behind" parent. In most cases, this analysis favours the primary parent: *Singer v. Singer* (2003), 2003 CarswellOnt 3113, 175 O.A.C. 1, 42 R.F.L. (5th) 202 (C.A.), leave to appeal refused (2004), 2004 CarswellOnt 51, 2004 CarswellOnt 52 (S.C.C.) (children better off with primary parent in Germany). But see *Hancock v. Elkins*, 2003 NLSCTD 138, 2003 CarswellNfld 303, 231 Nfld. & P.E.I.R. 90, 686 A.P.R. 90 (T.D.) (primary care transferred to father who had shared significantly in parenting); *L. (C.A.) v. L. (G.G.)*, 2003 CarswellBC 2352, 2003 BCSC 1392 (S.C.) (custody transferred to father where mother insisted on moving in face of order that she not do so); *Allen v. Maddin*, 2003 CarswellSask 632, 236 Sask. R. 280, 45 R.F.L. (5th) 18, 2003 SKQB 417 (Q.B.) (primary residence transferred to father where mother moved in violation of order).

In *Wheeldon v. Wheeldon* (2003), 2003 CarswellOnt 3659 (S.C.J.), a mother moved to Windsor from Timmins to be with her boyfriend and left the children with their father pursuant to a consent interim order that they not be moved pending trial. Although the trial was delayed, she stayed in constant contact with the children. At trial, Riopelle J. approved the move. It was in the children's best interests to live with the mother, who was committed to living in Windsor in her new relationship.

In *Cade v. Rotstein* (2004), 2004 CarswellOnt 363, 50 R.F.L. (5th) 280, 181 O.A.C. 226 (C.A.), additional reasons at (2004), 2004 CarswellOnt 829 (C.A.), the Ontario Court of Appeal rejected an appellant father's allegation that the trial judge had erred by permitting a proposed move by the mother where an assessor had concluded that the move was not in the child's best interests. While it is dangerous to generalize, most assessors are not inclined to approve moves that involve a significant disruption to a child's life with the other parent. Often, assessors' opinions do not reflect McLachlin J.'s discretion-structuring factors in *Gordon v. Goertz* and amount to little more than a conclusion that children are better off with both parents nearby. Arguably, courts should not order assessments in mobility cases unless a child has a particular problem, since the issue in most cases is a legal one, not a therapeutic one.

In *Johnstone v. Brighton* (2004), 2004 CarswellOnt 3229 (S.C.J.), a father who objected to the mother's proposed move from London, Ontario to Philadelphia, Pennsylvania arranged for a clinical psychologist to review recent studies and literature on move away cases and children's attachment to their parents and do a report to assist the court in deciding whether to permit this move. The psychologist did not meet with either parent or the child in preparing his report. Even assuming the psychologist was an expert on the issues involved, Campbell J. held that the report did not meet the threshold for the admission of expert evidence/reports and the evidence was inadmissible. There was no evidence the child had any attachment problems and the court did not need the other information. At best, the information was "helpful," which was insufficient to justify the time and cost of allowing the expert evidence, especially in light of the mother's intention to call her own expert to provide reply and rebuttal evidence.

In *Sheikh v Sheikh* 2004 CarswellOnt 4395 (OSCJ), Flynn J refused to order an assessment

over a father's objections primarily because there was no clinical issue. The children were relatively normal and there was no apparent need for any expert evidence on their needs or the parents ability to meet those needs. The case had been outstanding for some time and there was no reason to delay things further for expert input. In a related vein, the mother had also objected to the particular assessor as having a preconceived bias against relocation. While Flynn J did not have to decide the issue in light of his decision that there was no need for an assessment, he noted that there might be some merit to the mother's concern.

In *E. (D.G.E.) v. E. (J.)*, 2003 CarswellBC 2667, 2003 BCPC 348 (Prov. Ct.), Doherty Pr. J. allowed a mother to move from BC to Florida to continue her new relationship, but ordered her to attorn to the jurisdiction of the BC courts for future disputes, so the father would not have to litigate in Florida. With respect, while the idea of shifting some of the inconvenience to the "move away" mother makes sense, it is difficult to see how the "agreement" gives a court jurisdiction that it otherwise would not have under local custody legislation, unless the Florida court respects the attornment.

In *Bjornson v. Creighton* (2002), 2002 CarswellOnt 3866, [2002] O.J. No. 4364, 31 R.F.L. (5th) 242, 62 O.R. (3d) 236, 166 O.A.C. 44, 221 D.L.R. (4th) 489 (C.A.), leave to appeal refused (2003), 2003 CarswellOnt 1387, 2003 CarswellOnt 1388, 314 N.R. 398 (note) (S.C.C.), the Ontario Court of Appeal adopted a clear pro-custodial parent posture, reminiscent of its prior decision in *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432, [1995] O.J. No. 770, 1995 CarswellOnt 90, 22 O.R. (3d) 481, 123 D.L.R. (4th) 562, 84 O.A.C. 349 (C.A.), when it allowed a mother's appeal and allowed her to move back to Alberta, with the parties' six-year-old child, over the father's objection. In doing so, the court clearly accepted a custodial parent's right to make a fresh start when his or her relationship ends. The court had little difficulty reversing the

trial judge, who had denied the wife permission to move, notwithstanding the narrow scope of appellate review usually applied in custody appeals. The court held that the trial judge had overemphasized the effect of the child's reduced contact with his father and given insufficient weight to the honest and reasonable wishes of the mother to return to her family, friends and career in Alberta.

Most courts appear sympathetic to a primary caregiver's wish to move to escape an abusive and controlling spouse, but are unlikely to expressly admit this: *T. (M.D.) v. W. (K.J.)*, 2003 ABQB 1009, 2003 CarswellAlta 1857 (Q.B.) (mother allowed to move away from abusive relationship notwithstanding disruption to child); *M. (S.) v. A. (H.)*, 2003 CarswellBC 2389, [2003] B.C.J. No. 2260, 2003 BCSC 1459 (S.C.) (mother allowed to move away from abusive relationship notwithstanding no apparent reason for move); *Lawless v. Lawless*, 2003 CarswellAlta 1409, 2003 ABQB 800 (Q.B.) (court refusing to order return of children where mother unilaterally moved to escape father's violence). But see *H. (W.) v. H. (T.)*, 2003 CarswellBC 456, 2003 BCPC 51 (Prov. Ct.) (mother not allowed to move without plan notwithstanding father abusive).

In *Stringer v. Stringer*, 2003 CarswellBC 2824, 2003 BCSC 1739, 48 R.F.L. (5th) 422 (S.C.), Humphries J. refused to allow a primary caregiver to move from BC to Quebec, primarily to escape an unpleasant relationship with the father that bordered on abusive, because the proposed move was poorly thought out. She was moving "away" from the father rather than "to" anything. Her proposed access plans, while generous, were not realistic given the family finances. However, Humphries J. acknowledged that if the father could not help the mother out of her perilous financial circumstances, he had little choice but to let her move with the child. It was in the child's best interest to live with the mother. The only question was "where."

A court is unlikely to approve a proposed move if it is satisfied that the parent proposing the move will use the opportunity to frustrate or deny access to the other parent: *Orrock v. Dinamarca*, 2003 CarswellBC 2845, 2003 BCSC 1745, 45 R.F.L. (5th) 220 (S.C.) (mother's proposed move to Chile to be near family and friends denied where likely to use move to minimize father's relationship with child); *Anderson v. Anderson*, 2003 CarswellBC 475, 2003 BCSC 335 (S.C.) (father likely to interfere with access if allowed to move). But see *Dario v. Rivers*, 2004 CarswellBC 529, 2004 BCSC 347 (S.C.) (mother allowed to move in spite of risk she might try to limit access where father was unreasonable and controlling).

A court may also deny a proposed move if a parent seeks permission to move prematurely or with a poorly thought out plan: *Andrushko v. Remillard* (2003), 2003 CarswellNfld 35, 663 A.P.R. 82, 222 Nfld. & P.E.I.R. 82 (T.D.) (only apparent objective to move away from father); *H. (W.) v. H. (T.)*, 2003 CarswellBC 456, 2003 BCPC 51 (Prov. Ct.) (move poorly thought out with no objective beyond getting away); *Stringer v. Stringer*, 2003 CarswellBC 2824, 2003 BCSC 1739, 48 R.F.L. (5th) 422 (S.C.) (poorly thought out move refused, even though wife trying to escape abusive relationship); *Bernard v. Kleim*, 2003 CarswellAlta 1576, 2003 ABQB 910 (Q.B.) (mother not even finding out if child's special needs could be dealt with properly in proposed locale); *Orrock v. Dinamarca*, 2003 CarswellBC 2845, 2003 BCSC 1745, 45 R.F.L. (5th) 220 (S.C.) (poorly thought out move to Chile refused); *Markin v. Gysel*, 2004 BCSC 364, 2004 CarswellBC 585 (S.C.) (move premature where mother had no evidence of actual employment prospects or financial consequences of move); *D. (R.) v. D. (U.S.)*, (2003), 2003 CarswellYukon 169, 2004 YKSC 14 (S.C.) (need for mother to confirm college acceptance where that was reason for move).

In *Rudge v. Rudge*, 2003 CarswellBC 2315, 2003 BCSC 1440 (S.C.), the court denied

permission to move to a mother who wanted to move inside the province to be with her boyfriend. Although she promised to accommodate the disruption to the father, her proposals were poorly thought out and unrealistic. In addition, she tried to gloss over the father's involvement in the child's life. The mother had no reason to move except to be with her boyfriend, who refused to move.

In *Nunweiler v. Nunweiler*, 5 R.F.L. (5th) 442, 2000 BCCA 300, 186 D.L.R. (4th) 323, 78 B.C.L.R. (3d) 1, [2000] 8 W.W.R. 30, 137 B.C.A.C. 1, 223 W.A.C. 1, 2000 CarswellBC 958, [2000] B.C.J. No. 935 (C.A.), the British Columbia Court of Appeal held that the discretion-structuring factors from *Gordon v. Goertz* applied to cases where a court was asked to decide custody for the first time and one of the parents wanted to move with a child, notwithstanding McLachlin J.'s reason for giving great respect to a custodial parent's views, was that such parent had been awarded or entrusted with a *prima facie* right to make decisions on behalf of a child, including where a child should live.

Most courts appear to have adopted the BCCA's position in *Nunweiler v. Nunweiler* with minimal discussion: *Markin v. Gysel*, 2004 BCSC 364, 2004 CarswellBC 585 (S.C.) (*Gordon v. Goertz* applying at first instance); *Bjornson v. Creighton* (2002), 2002 CarswellOnt 3866, [2002] O.J. No. 4364, 31 R.F.L. (5th) 242, 62 O.R. (3d) 236, 166 O.A.C. 44, 221 D.L.R. (4th) 489 (C.A.), leave to appeal refused (2003), 2003 CarswellOnt 1387, 2003 CarswellOnt 1388, 314 N.R. 398 (note) (S.C.C.) (Court of Appeal adopting *Nuweiler v. Nunweiler* with minimal discussion); *Anderson v. Anderson*, 2003 CarswellBC 475, 2003 BCSC 335 (S.C.) (same rules at first instance); *Greenfield v. Garside* (2003), 2003 CarswellOnt 1189, [2003] O.J. No. 1344, 39 R.F.L. (5th) 281 (S.C.J.) (same rules on interim motion); *Carmichael v. Douglas*, 2003 CarswellBC 916, 2003 BCSC 611, 37 R.F.L. (5th) 259 (S.C.) (same rules at first instance).

In *Prest v. Cole*, 2003 CarswellNS 442, 2003 NSSC 243, 49 R.F.L. (5th) 168 (S.C.), Pickup J. refused to allow a mother to move from Halifax to BC because the father had previously agreed to the mother having custody on the understanding she would not undertake such a move. Nothing had happened since that time, other than she wished to move, which was not in the circumstances a "material" change entitling her to vary the prior order to allow her to move and restructure access. Interestingly, Pickup J. also rejected the mother's suggestion that she could make up for the absence of physical contact between father and child by generous "*e*- parenting."

Whether a court will order the return of children unilaterally removed by a parent appears to depend on the reason for the move, whether the move likely will be approved at trial, and the disruption to the child: *Lawless v. Lawless*, 2003 CarswellAlta 1409, 2003 ABQB 800 (Q.B.) (court refusing to order return of children removed to escape abusive relationship because of disruption to children).

In *McMurray v Gerow* 2004 CarswellOnt 3199 (OSCJ), a mother had been ordered not to remove the child from Ontario but by agreement had been allowed short visits with the child to see the child's grand-mother in Connecticut. On one of the visits the mother alleged that her circumstances had changed and unilaterally decided not to return the child to Ontario. The court ordered the mother to return the child and the mother's application for leave to appeal was dismissed. The mother moved to set aside the order refusing leave and for an order granting leave on the basis that the child's best interests were not served by forcing the child to be returned to Ontario where she would have to live in a shelter since the mother had no alternative accommodation and insufficient resources to maintain the child. The mother also pointed out that in mobility cases, great respect and serious consideration should be given to the views of the custodial parent. The motion was dismissed and leave to appeal was refused. Eberhard J held

that it did not service to the best interests of children for courts to sanction unilateral acts by parents who relocate contrary to a court order in particular. All children under a court's jurisdiction would thereby be placed in jeopardy of uncertainty and chaos. If the mother's circumstances had indeed changed, there were procedures for her to obtain permission to move and she could not ignore these procedures. That the mother had unilaterally created an emergency situation around the mobility issue could not be allowed to divert the court from its responsibility to decide the issue on the merits. The mother had jeopardized the child's interests, not the court or the father and she could not shift responsibility as she was trying to do. While the message is clear and probably had to be made, it is difficult to see how ordering the child's return is in the particular child's interests at the time.

In *Hartwick v. McIntyre*, 2003 CarswellNB 210, 2003 CarswellNB 211, 2003 NBCA 33, 36 R.F.L. (5th) 169, 259 N.B.R. (2d) 291, 681 A.P.R. 291 (C.A.), the NBCA held that a judge erred changing custody because a parent unilaterally moved with a child by failing to take into account the effect on the child of changing caregivers. For most judges, it appears that continuity of care outweighs continuity of environment.

The onus is on a spouse seeking to move on an interim motion to prove a pressing reason for an immediate move if there is a triable issue whether he or she should be allowed to move. Courts are more inclined to allow an interim move if a move is the inevitable result at trial: *Davis v. Nusca* (2003), 2003 CarswellOnt 3540, [2003] O.J. No. 3692 (Div. Ct.) (interim move to Sweden). In *Roberts v. Young* (2004), 2004 CarswellOnt 1700 (S.C.J.), Wildman J. allowed a mother to return with the children to Manitoba on an interim motion. The father had left the family and moved from Manitoba to Ontario. The mother followed with the children to attempt reconciliation. When this proved unsuccessful, Wildman J. allowed her to return home with the

children. The father had not raised an arguable case that she would be denied permission to move at trial and there was no reason to delay the children's return to their familiar surroundings.

In *Gravell v Gravelle* 2004 CarswellOnt 3159 (OSCJ), Eberhard J oadded the caveat that a court need not feel inclined to allow an interim move if the urgency was self generated by the parent seeking permission to move in order to manipulate events in favour of a proposed move.

Whether a judge will approve a move on an interim motion depends on the reason for the proposed move, any urgency surrounding the move, and the effect of a short-term disruption of access on the children: *Goodship v. McMaster* (2003), 2003 CarswellOnt 4502 (C.J.) (no urgency associated with proposed move preventing mother waiting for trial); *Greenfield v. Garside* (2003), 2003 CarswellOnt 1189, [2003] O.J. No. 1344, 39 R.F.L. (5th) 281 (S.C.J.) (interim move allowed on appeal); *Archibald v. Archibald*, 2004 CarswellAlta 127, 2004 ABQB 116 (Q.B.) (court refusing to authorize interim move where mother did not give notice required under separation agreement); *Zunti v. McIntosh* (2004), 2004 CarswellOnt 406 (S.C.J.) (interim move premature; too many uncertainties and no reason to rush into move); *Bingham v. Kopperud*, 2003 CarswellSask 536, 2003 SKQB 350 (Q.B.) (interim move denied; interim custody transferred to father).

In *Groleau v. Morey* (2004), 2004 CarswellOnt 462 (S.C.J.), the court denied a mother permission to move on an interim basis where she had no good reason for moving. Although she might be able to convince a judge to allow her to move after the trial, there was nothing urgent or pressing to justify denying the father his day in court.

In *Suggitt v. Suggitt* (2003), 2003 CarswellOnt 4733 (S.C.J.), additional reasons at (2003), 2003 CarswellOnt 4734 (S.C.J.), Shaughnessy R.S.J. thought there was sufficient confusion on whether interim mobility cases were primarily interim custody cases or early mobility cases that

he granted leave to appeal an interim order allowing a move from Bracebridge to Barrie based on *Gordon v. Goertz*. Rather than ordering the child's return pending the appeal, Shaughnessy R.S.J. simply noted that the appeal could be expedited.

Practically, if a parent is allowed to move on an interim motion, he or she is likely to sever all local contacts and establish contacts in the new jurisdiction, as happened in *Gordon v. Goertz*. The issue then becomes whether a child should remain with the parent in the new jurisdiction or live with an access parent in the former jurisdiction. A custodial parent will win most of these contests.

When a court allows a move, it should restructure access to maximize the child's contact with the "stay behind" parent, insofar as practical given the distance involved and everyone's schedules: *Krebs v. Yarmel* (2003), 2003 CarswellOnt 4815 (S.C.J.) (court restructuring access and defining post-relocation parenting roles); *Burgin v. Howells*, 2004 CarswellNS 59, [2004] N.S.J. No. 54, 2004 NSSC 31 (S.C.) (access restructured in light of move; pending move to England, father to have as much access as practical); *Dario v. Rivers*, 2004 CarswellBC 529, 2004 BCSC 347 (S.C.) (access restructured to reduce risk of mother trying to restrict access); *Smith v. Donovan*, 2004 CarswellNS 120, 2004 NSSF 28 (S.C.) (court specifying father's access following move by mother and child).

In *Johnstone v Brighton*, supra, Campbell J imposed so many conditions on a mother's move that it is difficult to say which of the parents was more successful in the case. Campbell J was not prepared to allow the move until the mother took various steps to preserve the father's relationship with the child and ensure that he could deal with any access problems in Ontario rather than in the United States where she planned to move.

Courts have limited room under the Guidelines to restructure child support to take into account an access parent's increased access costs when a custodial parent is allowed to move: *McDermott v. McDermott*, 2003 CarswellBC 19, 2003 BCSC 38 (S.C.) (father required to pay his access costs after mother moved away in addition to support); *Carmichael v. Douglas*, 2003 CarswellBC 916, 2003 BCSC 611, 37 R.F.L. (5th) 259 (S.C.) (father required to pay access costs as well as Table amount after mother moved away). But see *Spratt v. Spratt*, 2003 CarswellBC 310, 2003 BCSC 161 (S.C.) (court allowing parties to set off access costs against child support).

Some courts have gotten around this problem by ordering a custodial parent to share access transportation as a condition of allowing a move. See e.g Norris v Norris 2004 CarswellOnt 4372 (OSCJ)(mother to deliver child; costs about same as child support). But see *O'Neill v. O'Neill* (2003), 2003 CarswellOnt 4703 (S.C.J.) (court refusing to order mother to share access transportation where father moved away); *Laurie v. Laurie*, 2004 CarswellMan 120, 2004 MBQB 59 (Q.B.) (mother to share access transportation after a move as condition of custody).

In *Burgin v. Howells*, 2004 CarswellNS 59, [2004] N.S.J. No. 54, 2004 NSSC 31 (S.C.), a mother who wanted to move got around the problem of accommodating the father's increased access costs associated with the move by agreeing to cancel spousal support since she was moving to improve her employment prospects anyway.

On a more mundane but equally important level, there are indications that courts may be less likely to order costs in mobility cases than other family litigation to reflect the highly emotional nature of the issue: e.g. *Johnstone v Brighton*, supra (judge suggesting no costs). In *Norris v Norris* 2004 CarswellOnt 437 (OSCJ), Gordon J noted that while there was a presumption under the Family Law Rules that a successful party was entitled to costs, a court

had a discretion to reduce or deny costs in an appropriate case. Judges should decide on a case by case basis whether the circumstances justified a reduction or no costs. Given the seriousness of the issue, the father was entitled to litigate whether the child should be allowed to move and was not unreasonable in how he conducted his case, with the result that Gordon J reduced the costs that might otherwise have been ordered.

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