Canadian Family Law Matters

June 2015
Number 354

Legislative Update

Nova Scotia 3

Recent Cases

Spousal Support Extended for Duration of Recipient's Degree Program 4

Child in Need of Protection Due to Forced Access With Father............... 5

Judge Erred in Not Ordering Child Support Due to Custodial Parent's Wealth.............. 6

Child Protection Orders Not Caught Under "Extraprovincial Orders" in BC *Family Law Act* 7

No Requirement That Child Be Represented by Litigation Guardian 8

Other News

Ontario 8

Wolters Kluwer

THE LAW ON RELOCATION OF CHILDREN AFTER MARITAL BREAKDOWN

— Peter S. Spiro. This article originally appeared on The Court (thecourt.ca) (September 5, 2014). © Peter S. Spiro. Reproduced with permission.

One of the most difficult issues in family law is deciding when to permit the "primary caregiver" parent to move with the children to a place far away from the other parent.

Lawyers who work in the area tend to agree that outcomes are highly unpredictable. Ordinarily, only a small percentage of divorcing parents go to court over custody matters. However, it is estimated that in relocation cases as many as 60 per cent may go to court. In addition, an unusually large proportion of the decisions at first instance are appealed.

This high degree of conflict is costly for all those involved, both financially and emotionally. A lengthy court battle is likely to seriously worsen relations between the parents.

The current unsatisfactory state of the law emanates from a Supreme Court of Canada (SCC) decision that is almost twenty years old, *Gordon v Goertz*, [1996] 2 SCR 27 [*Gordon*]. The guiding principles set out in it are fairly general, and there is little insight on how to apply them in practice. The court listed factors such as the nature of the existing relationship between the child and the parents and the "disruption to the child consequent on removal from family, schools, and the community he or she has come to know" (para 49).

There have been over a dozen applications for leave to appeal to the SCC since *Gordon*, all of which have been turned down. The SCC appears to feel that it cannot add anything given the thin legislative guidance it has. *Gordon* continues to exert immense influence. It has been cited almost 1,500 times in reported court hearings over the past ten years.

In *Gordon*, the SCC set out high-sounding principles. The problem is that the criteria that it stated are all highly subjective. This leads to a great deal of variation in decisions. Two different judges, looking at the same set of facts, can easily to come to different conclusions. The difficulty of predicting outcomes encourages litigation.

The Current Law on Relocation

The law of custody for parents who were previously married is governed by the federal *Divorce Act*, RSC 1985, c 3. It provides surprisingly little guidance on the issue of relocation. All it states it that an access parent shall be notified 30 days in advance of

the intention to change the child's place of residence (section 16(7)). It does not give any specific criteria for approving or rejecting the move, nor does it differentiate between a move across town versus a move to a different continent. The access parent who objects may ask for a variation of the custody order, under section 17(5), by which "the court shall take into consideration only the best interests of the child as determined by reference to that change."

In trying to determine what is in the best interests of the child, the SCC in *Gordon* lists "the desirability of maximizing contact between the child and both parents" (para 49). That is not really very helpful, as a move to a distant place will always reduce contact. What one really needs to know is what advantages of the move should be weighed against the disadvantage of reduced contact.

The SCC undermined a logical weighing of the pros and cons by stating that the custodial parent's motive for the move should be considered "only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child" (para 49).

The problem, which is not reconciled in *Gordon*, is that there are two different ways to frame best interests: 1) is it in the best interests of the child to relocate to the new destination? or 2) is it in the best interests of the child to be in the custody of the parent who wants to move (because that person has better parenting talents)? Number (1) is usually false, but number (2) is often true. How are they to be balanced?

In *Gordon* itself, the mother was allowed to move with the child from Saskatoon to Australia, to get training as an orthodontist. There was no discussion in the court about how this served the child's best interests. A plain dentist in Saskatchewan generally makes quite a comfortable income. If there was any evidence provided that she could not get orthodontic training some place closer than Australia, it did not reach the Supreme Court. The only compromise imposed by the court was to have the child travel to Canada for her annual visits, rather than the father going to Australia.

A New Legislative Attempt in British Columbia

Provincial laws determine custody issues among parents who had children together but were never married. With the recent amendments to its *Family Law Act*, SBC 2011, c 25, British Columbia became the first jurisdiction in Canada to set legislative guidelines on relocation. Under BC's law, there is now a substantial presumption in favour of allowing a primary caregiving parent to move with the children.

However, this presumption is somewhat tempered. The moving parent must show that "the proposed relocation is made in good faith," and one of the criteria to assess this is "the reasons for the proposed relocation" (sections 69(4)-69(5)).

BC's reform followed from a White Paper on *Family Relations Act* Reform, which reviewed the problems with the pre-existing situation under *Gordon*. It noted that "Professor Rollie Thompson argues that the governing relocation test from *Gordon v. Goertz* and subsequent cases is so open-ended and flexible that there is little certainty in relocation law" (69).

Subsequently, the same Professor Thompson commented on BC's legislation, and criticized it for the distinction it makes based on the proportion of time that children live with each parent. He suggests that it will only increase the incentive for divorcing parents to fight over that right ((2012) 30 CFLQ 235 at 263).

Arguably, it would be more appropriate to look not at labels but at the quality of behaviour. For example, does the non-custodial parent have a close relationship with the child, exercising regular and frequent access? Does the non-custodial parent properly abide by the financial support obligations? Using such performance based criteria would reward and incentivize good behaviour.

Justification for Relocation is the Ultimate Policy Decision

It is regularly noted that the most unrealistic aspect of the *Gordon* decision is the suggestion that the motive of the parent who is moving can be disregarded. Professor Thompson finds that in practice judges often take a different view: "Most parents want the court to consider their good reason for the move. Only parents with no good reason for the

move try to argue a strict application of *Gordon* . . . Any sensible relocation analysis requires a careful consideration of the reason for the move" ((2012) 30 CFLQ 235 at 247).

In terms of the principles of implicit contract and legitimate expectations, one could argue that the burden of evidence should be on the custodial parent who is seeking to relocate. Both parents freely made the initial decision to form a family and have children in that particular city. There is arguably a presumption of some implied commitment to remain there for the sake of the other parent if the marriage breaks down. A move away should not be banned, but it should not be lightly undertaken either. The law should be aimed at discouraging relocation unless a good objective reason exists to justify it.

There is a high societal priority to having a child maintain contact with both parents, assuming that both of them are committed and caring parents. There is a considerable volume of research that finds better outcomes for such children, with a resulting reduction in the societal burden. One might argue that "primary caregiving" custody is a qualified privilege. As a matter of practicality and stability, when parents split up, it makes sense to have the child live in just one home. That does not mean that the non-custodial parent should be written off and ignored.

As noted above, BC's amendment to its *Family Law Act* does allow the reasons for the move to be looked at. It remains to be seen how carefully this will be interpreted. The emphasis on "good faith" may suggest that it was meant primarily to exclude moves that are made purely to spite the other parent.

The larger policy question is whether society should impose more specific, clearly defined requirements to justify a move. For example, legislation could specify the need to show factors such as economic necessity, where the custodial family unit has a low income in the current location; or reunification with a supportive extended family, such as where a custodial mother is alone in her current location.

Where a relocation is permitted, the *Child Support Guidelines* or some other financial adjustment should factor in the costs of transportation, to help encourage continuing contact with the child by both parents.

Conclusions

Each case has a unique fact situation, and judicial discretion will always be necessary. However, there is strong evidence that the current state of the law allows too much discretion, and leads to excessive unpredictability and inconsistency in judicial decision making. The *Divorce Act* should be amended to set clearer rules than the ones that emerged from the Supreme Court's decision in *Gordon*.

Recent amendments to BC's *Family Law Act* have made an attempt in this direction. The position taken in that legislation is a useful starting point. It could be argued that it leans too heavily toward a presumption that the primary caregiver will be allowed to relocate, absent bad faith.

Additional social science research needs to be brought to bear on the issue. This would help determine whether the new national legislation should impose more stringent criteria for allowing a relocation. This could include criteria requiring the relocating parent to demonstrate a valid motive for the move.

LEGISLATIVE UPDATE

Nova Scotia

Bill 108, the *Financial Measures (2015) Act*, received Royal Assent on May 11, 2015. Bill 108 amends the *Domestic Violence Intervention Act*, SNS 2001, c. 29, to allow provincial and family court judges to issue emergency protection orders under the Act.

Bill 82, *An Act to Amend Chapter 66 of the Revised Statutes, 1989*, the *Change of Name Act*, and Chapter 494 of the Revised Statutes, 1989, the *Vital Statistics Act* received Royal Assent on May 11, 2015. Bill 82 amends the *Change of Name Act*, RSNS 1989, c. 66, and the *Vital Statistics Act*, RSNS 1989, c. 494. The change to the *Change of Name Act* lowers the age at which parental consent is no longer required for a change of name from 19 to 16 years of age.