Long Distance Custody Cases:

Are the child's best interests kept at a distance?

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1 Introduction

Recent trends have contributed to an increasingly mobile population of parents of young children, who, whether they have custody or simply traditional access rights, find themselves compelled to relocate, with often highly problematic impact on their children. Long-term political and economic instability has contributed to this trend, as much as has the globalization of corporate entities with often inevitable employee transfers from city to city. Similarly, in the military and the RCMP, as in many domains in private industry, inter-city transfers are a requirement for career advancement.

On a perhaps darker side, there is also the phenomenon of the custodial parent who wishes to relocate for the sole purpose of putting a considerable geographic distance between himself (or herself) and the non-custodial parent. And finally, there are parents who relocate for purposes of romance and a new marriage, or to return to a city or country of origin long ago abandoned.

Relocation disputes evidently do not present themselves when a family is intact: if a husband or wife is transferred to a new city, or finds a new career opportunity elsewhere, the spouses will make their decision together as to whether the family will be better off in a new home. Whether the decision is a wise one for the children who are affected is rarely examined by a third party, yet children in these situations may suffer the impact of losing contact with friends and proximate family members, of relocating schools, and so on. It is when spouses are already living separate and apart and the courts are called upon to intervene that such problems attain a particular poignancy for the children involved.

Although we attempt to pay lip service to the concept that "visiting rights" are the rights of the child, we do nothing to constrain the non-custodial parent who decides to move away. The non-custodial parent is free to do as he pleases, and bears the brunt of the impact of any inevitable lessened frequency of contact engendered by the move, as well as any increased travelling expenses. In fact, this author has never seen a judicial precedent constraining a non-custodial parent to visit with his child, even if the child desperately requests such visits (indeed, where a non-custodial parent shows irresponsibility in maintaining regular contact, and the child suffers from the sporadic visiting, this would be valid grounds to seek cancellation – but *not* enforcement – of existing visiting rights).

As such, the only situations which arise to trouble the courts are those in which separated or divorced parents have an existing binding agreement or judgment pertaining to custody and access, and the custodial parent seeks to move any distance significant enough to have an adverse impact on the existing custodial and access arrangement. A responsible parent will petition the Court for permission to move; an irresponsible parent will simply move away, and leave the non-custodial parent to pursue his (or her) recourses. Although one's first instinct in reacting to any move by a custodial parent without permission of the Court would be to invoke the *Hague Convention*, this recourse exists specifically for situations of wrongful removal and wrongful retention of children contrary to law, and ensures the return of such children to the country of origin. Once the narrow issue of a kidnapping is resolved, there remains to be resolved the core issue, which this article will address:

> When may a custodial parent move away with the children? What constraints may be placed on such a move? Is there a difference between conventional custody–access situations and joint or shared custody arrangements?

1.1 Basic Considerations

Here is a concise summary of what the jurisprudence teaches us: the cornerstone and sole test which determines custody and access remains the "Best Interest of the Child." The caselaw in this area has developed in very particular scenarios: kidnappings, petitions for permission to move, and parental alienation situations. Simply put, in cases of kidnapping and parental alienation, the courts do not hesitate to take all measures necessary to safeguard the right of a child to the care and attention of both his parents. In the context of such highly conflictual cases, courts will resort to change of custody, in respect of the principle that the child should be in the care of the 'friendlier' parent. These are situations in which the 'bad conduct' of one of the spouses is not viewed to be merely 'spousal' misconduct, but evidence of parental incapacity.

However, in situations in which there is *no* bad faith on the part of the parents, the resolutions are more complex. In such scenarios, the concept of the right of the child to the care and attention of both parents is critical in the global analysis of the child's best interest (or, let us say, *should* be critical; semantics have become a big problem in these cases). No matter what the current jurisprudence directs as a matter of legal verbiage, the simple reality is that if the custodial parent proves her *bona fides* in her need to relocate (although technically she does not have a burden to do so), and if she proves that she respects the concept of being a 'friendly' parent with respect to access, then the courts will generally permit a move, even if the non-custodial parent is manifestly penalized in the regularity of contact with the child. Access will be adjusted as well as circumstances will permit, but the "right" of the custodial parent to fix the child's residence will be respected, this concept constituting the 'reasonable deference to the custodial parent's opinion' which is approved by the caselaw.

In other words, it is not the distress of the non-custodial parent which will sway the courts; rather, it is a careful examination of all the elements composing the best interest of the child which will determine the outcome – and this is how it should be. And lest we forget, a certain deference to the custodial parent's opinion is appropriate in those cases in which it is the custodial parent who has been bearing the brunt of the child-raising responsibilities, and is for this reason best-equipped to know and provide that which is best for the child.

Of course, the appreciation is different in situations of joint or shared custody, in which the parents have acknowledged their own parental capacity, or an expert has assessed that the children require more care from each parent than a 'traditional' division of custody and access. In these situations, we may avoid the philosophical question of whether it is fair and appropriate to have two 'classes' of parents – custodial and access – since in joint/shared custody situations, it is considered that *both* parents' input in the children's lives is deemed essential. In other words, in situations of joint or shared custody, the courts must necessarily acknowledge the impact of the shared "right" vested in both parents to fix the child's residence.

In both sole and shared custody scenarios, the presence of a prior restriction of mobility agreement remains an element to consider, with mixed reactions by the courts.

Now, the "Best Interest of the Child" test necessarily requires a careful analysis of the following elements, which certainly do *not* constitute an exhaustive list:

– the personalities of the parents and child;
– the intensity of the relationship between each parent and child;

– an analysis of the family dynamics, including determining if there is a primary caretaker, and if there is a parent who has only exercised a peripheral role in child rearing;
– the conduct of each parent, insofar as such conduct evidences parental capacity or incapacity; included here are the concepts of alienating behaviour by a custodial parent, or 'access-friendly' behaviour by a custodial parent;
– a consideration of the presence and involvement of step parents, baby-sitters, and other persons who may be said to have acted *in loco parentis*;
– an assessment of the presence and involvement of extended family on both sides;
– an examination of the child's academic and social environment *in extenso* (including the impact of the child's involvement in his neighbourhood, the length of time the child has lived in a community, the availability of the 'family home', the child's integration in school and extracurricular activities, and so on);

and

– understanding the wishes of the child, including whether such wishes are the result of free will or manipulation.

In other words, the first 'legal' requirement is to determine the psychological question of what would be the best custodial/access arrangements for the child. Once this is determined, then the willingness of the parents to accommodate their child's best interest comes into play. The court will adjudicate the matter with the best interest of the child at heart, whether or not this suits the 'selfish' wishes of either parent. Finally, the conduct (including sins of omission and commission) of either parent will be disregarded, *unless* such conduct is direct evidence of parental capacity or incapacity.

Both parents will be seen to bear an evidentiary burden before the court, with a view to distancing custody hearings from the traditional adversarial model. The courts are finally awakening to the concept that it is the children who have the principal rights in custody hearings, and the parents who bear the obligations.

To support this boldly stated analysis, and to understand this complex interplay of legal, moral, psychological and mundane factual elements which are involved in this area, this article will review the essential Quebec caselaw, in chronological order. This article originally culminated with an analysis of the recent decision in *Goertz vs. Gordon*, [1996] 2 S.C.R. 27, in which the Supreme Court postulated the supremacy of children's rights over traditional parental prerogatives. (Please note that this article does *not* review the so-called *Hague Convention* cases involving international kidnapping of children, because these decisions deal with the application of the international law rules pertaining to the return of these children to the state of their habitual residence, and as such, necessarily do *not* involve actual assessments as to their custody.)

Since that time, there have been a few appellate court decisions across Canada, which have endeavoured to apply the Supreme Court's ruling in *Goertz*. The results have been surprising, and will be examined in the final section of this article. The reader will be left to consider whether it is not time for the legislator to intervene where the courts have declared themselves unable or unwilling to deal effectively with these kinds of cases.

2. The Introductory Jurisprudence

2.1 *Bronfman vs. Moore* [1965] B.R. 181

In *Bronfman vs. Moore* [1965] B.R. 181, two parents engaged in enormous litigation over their one daughter, then 4 years old. Mother had obtained custody the year before, and had moved to Calgary, and then to London, England. Father convinced her to 'cede' the custody of the child to him in Montreal while she went to tend to her dying mother in Calgary. When she returned to Montreal, father refused to return the child to her, so she kidnapped her daughter to Toronto. Father then kidnapped the child back to Montreal. Mother took *habeas corpus* proceedings, and father was ordered to return the child to her custody.

A *five-judge panel* of the Court of Appeal confirmed this order in favour of mother, on these terms (principally), at page 186:

> …l'accord concernant la garde d'un enfant commun ne saurait valoir que pour le temps qu'il subsiste, bien qu'un tel accord puisse influer sur la détermination future de l'intérêt de l'enfant. En principe, pareil accord, lorsqu'il est rompu, ne saurait prévaloir sur l'intérêt de l'enfant, cet intérêt demeurant toujours la considération primordiale.

The Court then dismissed father's assertion that he could provide great luxury for his daughter; it was considered that the mother's constancy of care and affection was of greater importance to the child's well-being. The Court also considered the Tender Years Doctrine, in favour of mother, a consideration which would not necessarily hold today. However, this case remains a precedent for the notion that any 'agreement' between the parties must *only* be considered in the context of the continuation of the child's best interest, a far different perspective than in contract law! This decision may provide guidance in assessing the impact of any prior 'agreement' between the parents as to the fixing of the future residence of their children.

2.2 *Beaudoin vs. Stankevicius* [1972] C.A. 604

In *Beaudoin vs. Stankevicius* [1972] C.A. 604, mother was granted the custody of four children, an eldest 13-year-old son and three younger daughters aged 11, 9 and 3, and this at the time of the divorce. The trial judge had ordered as a precaution that none of the children was to be permitted to leave Canada without prior authorization of the court, in light of mother's past plans to move to Paris. Problems nonetheless immediately arose between the parents (on their respective vacations); father petitioned for a change of custody; the eldest son went to live with his father; and then, mother moved to France with the three girls, without father's consent. As such, the custody trial took place here with only father, son and an uncle testifying; mother did not attend or adduce evidence.

The trial judge awarded custody of the three girls to father. The Court of Appeal maintained this ruling, in a brief but eloquent decision which then echoed through the years, to leave its indelible impact on the 1993 landmark decision in *Droit de la Famille 1826 (infra)*. The Court was satisfied the trial judge had addressed himself to the sole operating rule: the welfare of the children, and that the decision to change custody should *not* be viewed as a sacrifice of the children's interest for the sake of 'punishing' the mother's misconduct in disobeying the court's orders (at page 606).

2.3 *Talsky vs. Talsky* [1976] 2 S.C.R.

The Supreme Court precedent of *Talsky vs. Talsky* [1976] 2 S.C.R. 292 is often cited in the jurisprudence which follows in the area of 'long distance' custody cases even though the geographic element was absent therein, because it is the precedent which makes the distinction between spousal misconduct and parental capacity, albeit in repugnantly sexist terms (at page 294):

> ... a wife who is 'well nigh impossible' as a wife, may nevertheless be a wonderful mother.

In that case, the Tender Years Doctrine was referred to not as a principle of law, but as a rule of common sense, which was merely one of the factors to consider in determining the children's best interests. Finally, there was a strongly worded dissent which spoke to the concept of the father's positive parental capacity, but unfortunately even this dissent was also marred by the demeaning terms used in examining the wife's 'conduct' and its impact on parental capacity.

All in all, *Talsky* was probably a great decision in its time, in advancing the notion that a wife who 'caused' the marriage breakdown should not be penalized by losing her children, but I remain unsure that the children's best interests were impartially assessed in light of the distorting prism of the then contemporary sociological issues presented on each side. It is perhaps another unintended example of judicial reticence to disturb whatever *status quo* exists in children's lives, for fear that change may cause more ill effects than no change at all (this is a guiding principle: if a petitioning parent shows no satisfactory reason to change custody, custody will remain unchanged).

For our purposes, we should retain this quote, from the *dissenting* opinion of Spence, J. (at page 303):

> It is my view that the conduct of the parents should not be considered in an attempt to make any award of custody punitive to the person whose conduct the court found to be improper. Such a course would be exactly contrary to what I have said was the paramount consideration, that is, the welfare of the children, and should be using the children as a whip to beat the misdoer. On the other hand, I am of the opinion that the conduct of the parents is a necessary and most important consideration in assessing their comparative worth as custodians of their infant children.

2.4 *Droit de la Famille 7* [1984] C.A. 350

In *Droit de la Famille 7* [1984] C.A. 350, the parents had agreed that mother have custody of a 2 year old child, and their agreement provided that mother was not to move out of Montreal without father's consent. Nonetheless, mother surreptitiously moved to British Columbia, effectively cutting off father's access rights. Father petitioned for custody and won, and this was confirmed by the Court of Appeal, citing the precedents in *Talsky* and *Beaudoin*.

Mayrand J. stated, at page 355:

> Mais il n'est pas question de la punir de son manque de rectitude en la privant de la garde de l'enfant, si l'intérêt de celui-ci exige encore qu'il reste avec sa mère plutôt qu'avec son père. La faute d'un conjoint (ou ex-conjoint) envers l'autre n'est pertinente dans l'attribution du droit de garde que si elle reflète un trait de caractère ou une inapti-

> tude à sauvegarder les meilleurs intérêts de l'enfant.

The Court then went on to assess respective parental capacity on an essentially *de novo* basis. Although both parents were considered able to assume the custody of the child, the Court gave particular weight to father's plan to return the child to the particularly 'gifted' babysitter who had been taking care of the child from the age of 3 months to 20 months of age. With two working parents, this day care plan was not only important, but also minimized the impact of the 'common sense' rule of the Tender Years Doctrine. The absence of hindrance preventing mother from returning to Quebec was rejected as an element in the appellate court decision, because this could be construed as an unintentional 'order' for her to return here.

Unfortunately in that case, mother had failed to adduce evidence of the 'talent' of the maternal grandparents (who also lived in B.C.), a failure which was no doubt ineluctably bound up with the cost engendered by the geographical distances.

2.5 *Droit de la Famille 120* [1984] C.A. 101

In *Droit de la Famille 120* [1984] C.A. 101, the parents had agreed that mother have custody of an 8 year old child, but mother moved to Smith Falls, Ontario, without father's prior knowledge or consent. Father petitioned for custody and won, and this was confirmed by the Court of Appeal, which reiterated the trial judge's view that the court was entitled to examine the matter *de novo* (as had been done in *Droit de la Famille 7*), at page 103:

> If the Court is convinced that important facts about the future intentions of the custodial parent were deliberately withheld from the other parent, it should permit a subsequent full and unfettered review of the situation in the best interests of the child. [quoting Gomery J. in first instance]

In light of father's parental capacity, and in light of the desirability of returning the child to the family home, in his old milieu and near to both the paternal and maternal extended families, as well as his friends, the child's best interests mandated he be in his father's custody. In reading this decision closely, I remained somewhat concerned by the weight which was granted to the concept of 'credibility' of the mother in her testimony, and I was not convinced that there had *not* been an unspoken 'punitive' element in the decision.

2.6 *Droit de la Famille 190* [1985] C.A. 201

In *Droit de la Famille 190* [1985] C.A. 201, a mother had relocated to Germany (her country of origin) with the son of whom she had custody, and this, in breach of an agreement with father that access rights had been agreed to in order to maintain the close relationship between father and child. Father sought and obtained a suspension of the support payments; on appeal, the Court considered one could obtain suspension of *spousal* support only as a sanction for mother's disobeyal of the court order, however, only after taking into consideration that she otherwise had sufficient assets to support herself. Chouinard J., noting that father *could* have petitioned for a change of custody but failed to do so, commented, at page 203-4:

> De même, la garde d'un enfant n'empêche pas le conjoint bénéficiaire de changer son domicile et d'y amener l'enfant même si des inconvénients en découlent pour l'autre

> partie, sa décision étant suffisamment justifiée par les circonstances variables d'une espèce à l'autre.

This is a fair statement of principle in the area of 'long distance' custody cases. However, there is no question from the further observations of the Court of Appeal, that had that father sought a change of custody, he would likely have obtained it, in light of mother's bitterness and rancor («amertume et rancoeur») and her desire to turn the child against the father (page 204).

In that file, Vallerand J. stated with his usual elegance the complexities such 'long distance' custody cases may entail, at page 206:

> Notre affaire est une fricassée de droits fondamentaux, de droits garantis par la Charte canadienne des droits et libertés, de droits et d'obligations que le Code civil dit primer tous les autres, le tout généreusement épicé de la notion d'ordre public. Bien malin qui saura départager la force irrésistible et la résistance immuable: établir un ordre de priorité entre le droit fondamental et d'ordre public de l'épouse aux aliments, le droit essentiel de l'enfant de voir ses deux parents, le droit garanti de la mère de s'établir là où elle l'entend, le respect des ordres de Cour et que sais-je encore.

2.7 *Droit de la Famille 1185* [1988] R.D.F.

In *Droit de la Famille 1185* [1988] R.D.F. 260, mother had custody of a 3 year old child, and father had significant difficulty exercising his access rights. Mother sought permission to move to Italy, and father replied with a motion to change custody. Custody was granted to father by Rouleau J., on the basis of psychological assessments which indicated (essentially) mother's wish to minimize or eliminate the father from the child's life. As well, continuity of care mandated the child remain in his natural environment in Montreal, where even members of mother's extended family would be remaining (and of course, father's family as well). This case, although supportive of the principle that a child has a right to both parents, and a move by one parent may be denied accordingly, nonetheless, it must be seen through the prism of the alienation which the mother was attempting to create between son and father, at page 264:

> …il faut éviter que l'enfant V… soit victime d'une manipulation de la mère qui l'éloignerait de son père biologique.

2.8 *Droit de la Famille 670* (J.E. 89-1005)

In *Droit de la Famille 670* (J.E. 89-1005, 200-09-000115-896), the Court of Appeal upheld a provisional order by the terms of which a Quebec City mother was given the immediate custody of the youngest child of the parties, and the custody in six months of the two older daughters, the family having lived in Paspébiac until then. The Court considered mother was the more qualified parent, and suspended the change of custody for six months simply in order to permit the older children to complete their school year, without disturbance, in father's care. This is yet another example in which the courts will consider the children's best interests first, and then adjust the 'geographic' component to meet the children's needs.

2.9 *Droit de la Famille 1347* [1990] R.D.F. 595

In *Droit de la Famille 1347* [1990] R.D.F. 595, mother had custody of a 4 year old child,

and sought permission to 'move' to Turkey for eight months with the child, offering a financial deposit as security. This request was denied (with the consequence that the child would be left with father if mother wished to go to Turkey), on the basis that Dagenais J. was not satisfied mother would come back. Turkey is not a signatory to the *Hague Convention* (another risk factor); the child did not speak Turkish; the mother had no determinant bond to Canada; and so on. Again, this is a case which turned on the risk of non-return of the child.

2.10 *Droit de la Famille 1517* [1992] R.D.F. 52

In *Droit de la Famille 1517* [1992] R.D.F. 52, father sought custody of two boys, 3 and 5 years of age, the younger child being 'his' biologically, and the older child being one in respect of whom he was acting *in loco parentis*. Mother had custody of the children, and lived in Florida with them, with her husband (who sought to adopt the older boy). Morneau J. refused father's petition, based purely on an assessment of credibility: mother appeared to the judge to be the 'friendly' parent, whereas father appeared to be 'selfish' (in essence; the psychological evidence having been woefully incomplete in this case) because, for example, he sought summer access with the boys far longer than the number of weeks he was actually off work.

In this case, it is surprising the trial judge did not require the parents to submit to a psychological expertise, to clarify the assessment of the parent-child relationship. The treatment of the access issue was also surprising: if both parents are in the same city, it may have been 'inappropriate' for a father to ask for summer vacation time longer than his days off work, but when a father cannot see his children all year because they are in Florida, then surely it is understandable he would like to have a longer summer vacation period. Nonetheless, insofar as this judgment reflects an assessment of *relative* parental capacity, it may be understood within the context of the traditional test.

2.11 *Droit de la Famille 1518* [1992] R.D.F. 63 (S.C.) and 481 (C.A.)

In *Droit de la Famille 1518* [1992] R.D.F. 63 (S.C.) and 481 (C.A.), a mother had relocated to Singapore with her twin 6 year old daughters, without father's permission. Proof was advanced that the children were doing marvelously in their new home, since mother apparently found a rich husband (so the children were very well provided for materially, an element the Court of Appeal underscored). Father won a change of custody in first instance. The children evidently did not testify nor was there a psychological expertise, because – obviously – mother was not about to bring them to Montreal for this purpose.

The Court of Appeal overturned the custody decision as 'premature', because of the lack of evidence adduced by father as to their best interest. The children were doing well in their new home in Singapore, and there was no allegation of neglect or abuse against mother or her new husband. Similarly, it was recognized that the children would do well back in Montreal, and that their father was able and equipped to assume their custody. However, in the absence of a psychological expertise which would clarify for the Court the core issue of the children's psychological well-being, the trial judge should have taken the 'necessary steps' to obtain this evidence before granting a change of custody, at page 485:

> Or, les enfants n'ont pas été vues ni interrogées. Le premier juge le déplore, comme il déplore l'absence d'une évaluation psycho-sociale qui lui permettrait une meilleure

> appréciation de la personnalité des deux parties et de la situation véritable des enfants. Comme, en l'espèce, l'état psychologique des deux enfants était au coeur même du litige, dont elles constituaient l'objet principal, et que les risques d'incidences psychologiques dévastatrices pour les enfants étaient connus du premier juge, il aurait dû prendre les mesures nécessaires pour être davantage éclairé sur ce point essentiel.

In this unusual situation, mother, *in absentia*, nonetheless adduced sufficient evidence as to the children's well-being in Singapore to rebut any presumption that her removal of them from Montreal could be considered indicative of parental incapacity. The *fait accompli* of the removal of the children from Canada essentially left father with no effective means to adduce evidence in support of a change of custody.

In my opinion, although technically the assertions of the appellate court were correct, there was a manifest failure to take into account the kidnapping parent's non-cooperation with the judicial process: if mother never attends before the Montreal courts with the children to participate in an expertise, should the courts be resigned to doing *nothing*? (This is similar to the appellate court's failure to act in the case of *Droit de la Famille 1549* [1992] R.J.Q. 855, which is otherwise well-known for its comments on the right of children to legal counsel of their choice (at page 862), even if the children in *that* case never did get to have any legal counsel at all because no trial was actually ever held, by order of the appellate court itself…)

2.12 *Droit de la Famille 1522* [1992] R.D.F. 73

In *Droit de la Famille 1522* [1992] R.D.F. 73, a Californian father sought Christmas and summer access rights to the son of the parties, in a context in which father had previously kidnapped and hidden the child for a 16 month period. The child had declared to two experts a wish to live with father, which the trial judge found to result from the father's manipulation. The Court granted summer access in California of six weeks per annum, but refused extra-provincial access rights at other times, so that father would have five days at Christmas, mid-winter break and Easter in Quebec only.

In other words, if one reads this judgment closely, the considerable risk of future kidnapping was a significant factor in refusing extra-provincial access rights which would otherwise have been warranted to maintain the father-son relationship; the judge did not want to incur this risk at times of the year when such kidnapping could have a negative impact on the child's school attendance.

2.13 *Droit de la Famille 1615* [1992] R.D.F. 399

In *Droit de la Famille 1615* [1992] R.D.F. 399, mother had voluntarily ceded the custody of a year old baby to father, albeit in a context of at least some conjugal violence. Their agreement provided for regular access rights, but father promptly moved to Ottawa without mother's knowledge or consent. It took eight to nine months till mother found the child, and then instituted proceedings in Ontario, only to have to abandon them when father moved back to Quebec. Some access resumed, but father tried false allegations of sexual abuse against mother (which failed with the DYP), so mother petitioned for custody. Father argued that the *status quo* should be maintained in that stability of care should be the critical element for the now 3 year old little girl. Plouffe J. granted custody to mother, and he had this to say about father's conduct and its impact on custody, at page 403:

> Bref, le Tribunal constate que l'intimé n'a pas actuellement la capacité parentale requise,

> puisqu'il n'est pas disposé à permettre l'exercice libre et serein de la relation mère-fille. En ce faisant, il nie à son enfant un de ses droits, soit de connaître sa mère. Ce comportement de l'intimé est juridiquement injustifiable et à l'encontre du meilleur intérêt de l'enfant.

This is a clear statement of principle as to the impact of parental misconduct on custody. The corollary of this observation is natural that when the custodial parent adduces evidence of a 'friendly' attitude to the access parent, this will generally be sufficient to defeat a request for a change of custody, *all other things being equal*.

2.14 *Droit de la Famille 1625* (J.E. 92-1122)

In *Droit de la Famille 1625* (J.E. 92-1122, 500-09-001914-910), mother had custody of a toddler *(de facto)*. She then left Montreal for Gaspésie, without consent of father, who then petitioned for custody. The Court of Appeal considered that since it was assessed that father had the better affective relationship with the child, and as long as the child was in Montreal, it could have been in the child's best interest to have remained in the care of mother, under 'surveillance' by father. However, in Gaspésie, the child was in fact being raised by mother's boyfriend and his parents; it was in the child's best interest to be raised by his natural father and companion. In other words, the primary issue the Court had to consider was with which parent would the child be best off, and *then* the *secondary* issue was to consider the impact of geographical distance on access.

2.15 *Oak vs. Rose* (S.C.M. 500-12-173858-881)

In *Oak vs. Rose* (S.C.M. 500-12-173858-881), father was custodial parent of two sons. He sought permission of the Courts to move to Toronto, while mother's petition for change of custody was pending. The children were 7 and 10 years old at the time. Melançon J. granted father's request, even though this would require the boys moving in the middle of the school year, because he had to consider that for the children – from *their* perspective – their 'home' was with their father, and had been so for four years. However, in this decision, the trial judge took into consideration that father was a pilot and mother a stewardess, and that travelling from Montreal to Toronto would not be difficult or costly to arrange. As such, the existing weekend access arrangements could be maintained, and the trial judge specifically ordered father to assume the entire cost of transportation of the children to and from their mother's home in Montreal.

Once again, outside a situation of alienation, the Court was favouring the right of the custodial parent to fix the domicile of the children, even if the access parent suffered consequences, as long as the custodial parent was willing (or ordered) to make necessary accommodations to facilitate access (the 'friendly parent' test). (As a footnote to this judgment, less than two years after this judgment, father voluntarily ceded the custody of the two boys to their mother, and the latter reside in Montreal to this day.)

3. The Current Jurisprudence

3.1 *Droit de la Famille 1826* [1993] R.J.Q. 1728 (C.A.), aff'd [1995] 4 S.C.R. 592 *(sub nom. P.(M.) vs. L.B.(G.))*

In *Droit de la Famille 1826* [1993] R.J.Q. 1728 (C.A.), aff'd [1995] 4 S.C.R. 592 *(sub nom. P.(M.) vs. L.B.(G.))*, the parents had signed several agreements with respect to their 2 year old daughter, the most recent of which being the most explicit in terms of restricting mother's 'right' to move to France with the child. Mother then took the child for a vacation in France (which was permitted by the agreement), but never returned. Father then petitioned for custody. Unlike the Singapore case *(Droit de la Famille 1518, supra)*, mother, although represented by attorney, adduced no evidence in response to father's proof. Indeed, mother's actual whereabouts with the child were unknown; no doubt she was in hiding since father had also instituted proceedings for the return of the child before the French courts, pursuant to the *Hague Convention*.

In first instance, the trial judge refused to change custody, based on an argument of 'continuity of care' since the child had always been in mother's care. Proof was uncontradicted that both parents were capable of caring for the child; the child's 'tender years' militated in favour of continued custody to mother. There was no proof mother's alleged instability insofar as jobs was concerned had any link with her stability as a parent.

The Court of Appeal unanimously overturned this judgment, granted custody to father, and set down the following legal principles in its landmark ruling:

> (1) The attribution of custody includes the right to choose the residence of the child (a natural corollary of the mobility rights of the custodial parent) (*Droit de la Famille 7, Droit de la Famille 120, Droit de la Famille 190,* all above).
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> (2) A change of the residence of the child may constitute grounds for revision of the original custody order (*Droit de la Famille 7, Droit de la Famille 120, Droit de la Famille 190,* all above).
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> (3) The 'restrictions' upon the custodial parent's mobility rights flow from the assessment of the best interest of the child. (*Droit de la Famille 7, Beaudoin vs. Stankevicius, Talsky vs. Talsky*, all above) We must therefore consider the following elements:
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> > (i) The impact of the presence of an agreement between the parties restricting the choice of residence of the custodial parent (*Bronfman vs. Moore, Droit de la Famille 7, Droit de la Famille 120*, all above);
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> > (ii) The circumstances and reasons for the change of residence – herein may be juxtaposed most vividly the difference between the alienating parent and the 'friendly' parent, as explained above (*Droit de la Famille 7, Droit de la Famille 190, Beaudoin vs. Stankevicius, Droit de la Famille 1518*, all above).
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> (4) The factors to consider in determining the best interest of a child when the custodial parent proposes to move include the following:
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> > (i) The stability and the milieu of the child – continuity of care being

particularly important for young children;

(ii) The age and sex of the child – the Tender Years Doctrine is not a rule of law but one of "good sense" which applies less in modern families where both parents work (*Droit de la Famille 7*, above);

(iii) The conduct of the parents – but only insofar as this may impact upon parental capacity. 'Conduct' includes lifestyle, availability, and 'friendliness' to the access parent. If both parents are fit to have the children, one does not ask which parent is 'more' fit; the question is with which parent will the child's interest be protected. As such, stability, existing affective bonds and continuity of care are predominant;

(iv) The child's wishes – (*Droit de la Famille 1347, Droit de la Famille 1518*, all above).

3.1.1 *Carter vs. Brooks* (1990) 30 R.F.L. (3d) 53

Proulx J. went on to cite six factors considered by the Ontario Court of Appeal in *Carter vs. Brooks* (1990) 30 R.F.L. (3d) 53:

(1) Continuity of custodial care;
(2) Right of the custodial parent to fix the child's residence;
(3) Degree of closeness of the child's relationship to the non-custodial parent;
(4) The reasons for the proposed move [alienation comes in here];
(5) The geographic distance and its impact on access;
and (6) The child's opinion.

In *Carter vs. Brooks*, the appellate court had maintained the lower court's finding that mother should continue to have the custody of her six year old son, but with the restriction that she was not permitted to move out of Ontario, in light of the close father-son relationship (mother had sought permission to move to British Columbia). Morden A.C.J.O. (Tarnopolsky and Krever JJ. concurring) pointed out that although a custodial parent may determine a child's residence (at page 63), this may not be viewed mechanically as a right to *remove* the child (at page 61). In *rejecting* a purely adversarial approach to custody litigation, the Court also viewed that both parents must be held to have an evidential burden, to permit the trial judge to make a proper assessment in the best interest of the children (at page 63; as we will later see, it is this approach which is now been approved by the Supreme Court).

In adopting this reasoning, Proulx J. then distinguished *Droit de la Famille 1518 (supra)* in noting that in that case, the trial judge had permitted mother to file an affidavit (from Singapore, no less), and had authorized a cross-examination by telephone conference. This permitted evidence to be adduced that the children were well taken care of, despite their absence at trial and despite the absence of an expertise. This distinction was essential, because in *Droit de la Famille 1826*, the child was also not heard, nor had there been an expertise. Father was able to present uncontradicted evidence as to his parental capacity, thereby satisfying his evidential burden. Thus the failure of the mother to adduce evidence became fatal to *her* pretensions in this case, in that the judges essentially considered the burden

hers to justify her conduct and to show the child's needs were being met, in the following terms (at page 1741):

> Que savons-nous des motifs de ce départ? De la situation présente de l'intimée, où elle vit, avec qui? Dans quel état est l'enfant? L'intimée a choisi le silence complet depuis qu'elle refuse de revenir avec l'enfant; d'ailleurs, le premier juge dans son jugement a constaté l'absence de l'intimée, son refus, malgré une ordonnance de la cour, d'informer l'appelant de son lieu de résidence et les multiples obstacles qu'elle a mis à assurer la communication de l'appelant avec sa fille. En ignorant ainsi ce qu'il advient de la mère et de l'enfant, et cela considéré dans les circonstances entourant le départ de l'intimée, j'ai peine à croire comment le premier juge ne pouvait pas déduire de toute cette preuve que l'intimée démontrait des lacunes sérieuses dans sa capacité d'exercer la garde et de favoriser un développement équilibré de l'enfant.

As such, mother's breach of the existing court order would not have been in and of itself sufficient to justify a change of custody; at most, this conduct would only justify an examination of the issue of custody. It is the fact of mother's alienating attitude (such as creating obstacles even to telephone contact between father and daughter), mother's disrespect of the court's orders, father's availability and parental aptitude, the prior close ties of father and child, which, when taken together *as a whole*, militated in favour of the change of custody.

This judgment is impeccably reasoned in the context of a particularly complex juridical situation, calling to mind Vallerand J.'s comments about a spicy judicial fricassee. Mother sought to appeal this judgment to the Supreme Court, but leave was denied her on December 14 1995; it is not clear if the child has since been recovered, but one would imagine the father will avail himself of his *Hague Convention* recourses, if he has not already done so.

3.2 *Droit de la Famille 1928* [1994] R.D.F. 134 (cfm'd C.A.M. 500-09-000342-949)

In *Droit de la Famille 1928* [1994] R.D.F. 134 (cfm'd C.A.M. 500-09-000342-949, September 15 1994, Gendreau, Baudouin, Deschamps JJ.) the parents of three young children had signed an agreement on provisional measures (which was supposed to be, as well, their final settlement on accessory measures), to the effect that mother was to have custody of the children, and father, access rights. Father lived in B.C., because he was unable to find gainful employment here, and mother had therefore agreed to move to B.C. in recognition of the notion that the parents should live in proximity to each other. She then breached this agreement, and father sought a change of custody, on a motion to modify provisional measures.

Fréchette J. dismissed father's petition, underscoring it was inappropriate at the provisional level, in light of the dramatic change requested. He went on further to note that it is a natural 'inconvenience' of separation that parents may end up living far apart from each other. As such, he could not correct the alleged ill of these children living far from their father by granting custody to the latter, and therefore imposing upon the children the similar ill of living far from their mother! In the circumstances, in the absence of a reason to *change* custody which must be «grave, sérieuse et précise», he could not acquiesce to father's request.

(It was apparently uncontradicted in this file that the children were doing well here: they were attending school, obtaining excellent results, they had regular music lessons, they were closely

supervised, they had friends in their neighbourhood, they had regular contact with the maternal grandmother. These are, after all, elements which permit a trial judge to assess a child's best interests. Perhaps father was not in a position to adduce evidence that they would have been better off in B.C.) The Court of Appeal maintained this decision, following its own precedent in *Droit de la Famille 1826 (supra)* that the simple allegation of a failure to respect an undertaking to move to B.C. was *insufficient* to justify a change of custody.

3.3 *Droit de la Famille 2079* [1994] R.D.F. 750

In *Droit de la Famille 2079* [1994] R.D.F. 750, mother's custody of a 14 year old daughter and 9 year old son was called into question by her motion for permission to return with the children to the Dominican Republic, where the family had lived until 1990. Father replied with a motion for change of custody. Côté J. maintained custody to mother, and granted father seven weeks summer vacation and two weeks Christmas vacation each year, based on excellent reasoning, as follows:

Both children were manifestly attached to both parents; this was thus *not* a case of parental incapacity. However, mother had always been primary caretaker of the children. Mother was considered a 'friendly' custodial parent, and more likely than father to ensure respect of access rights. The children had lived for seven years in the Dominican Republic, and spoke both French and Spanish. As such, the Court applied the doctrine of the 'least detrimental alternative' to come to the conclusion explained above. In this case, the expert psychologist was Paule Lamontagne (who is well-known to Quebec practitioners), and the trial judge adopted her recommendations completely as to the best interests of the children.

3.4 *MacGyver vs. Richards* (1995) 22 O.R. (3d) 481 (Ont.C.A.)

Notwithstanding the rich jurisprudential history detailed herein, it is the Ontario Court of Appeal precedent in *MacGyver vs. Richards* (1995) 22 O.R. (3d) 481 (Ont.C.A.) which was treated here in Quebec as the landmark decision in the area of 'long distance' custody cases, at least until the correcting influence of the Supreme Court judgment in *Goertz vs. Gordon (infra).*

In *MacGyver*, the parents had separated when their daughter was still an infant, and mother had always had sole custody of her. Father had a deep history of substance abuse, which had broken the marriage, and had limited his involvement in the child's life. He had also had a severely abusive childhood, and was still in a 'critical stage of recovery' from his alcoholism and substance abuse, having joined A.A. in March 1992. In January 1993, he petitioned the court for joint custody of the child, based on mother's plan to marry a corporal who had been transferred by the Department of National Defence to Washington for four years.

In first instance, and in both appellate instances, there was no judicial doubt but to maintain sole custody of the 4 year old child to mother. Indeed, pick up and drop off of the child were to be at the Ontario equivalent of our Le Mitoyen, because of father's past violence and hostility towards mother. What was at issue for the Court of Appeal was whether to maintain the lower court's order restricting mother from moving to Washington with the child. It was clear the child had a good relationship with her step-father (her "bestest friend"), and would benefit from the new family unit (a psycho-social assessment had been conducted to this effect).

Abella J. (Grange concurring; Labrosse JJ. concurring in the result) rendered a judgment the impact of which has reached us in Quebec (as will be seen below, in the few cases decided here in 1995). Yet, with all due respect, not only is this judgment poorly reasoned, but it is manifestly based on a uniquely negative family portrait, and should therefore not be cited out of context. This judgment is of absolutely no aid to the far more typical situations in which both parents are relatively competent, and in may, in fact, have the adverse effect of creating two categories of parents: custodial parents with all the power they wish to come and go as they please, and access parents as second class characters, who must stand around, hat in hand, waiting upon the good graces of the custodial parents.

Abella J.'s *conclusions* are nonetheless certainly validly stated, and perhaps the *outcome* of this case would have been different had it been pleaded in Quebec. However, the entire decision could as easily have been summed up in this observation:

> …the trial judge made it clear that the mother should continue to have sole custody. By deciding that the child should remain in North Bay, the trial judge disregarded the recommendations of an expert assessment that this new family [mother and step-father] would be in the child's best interests…and deprived the child of the opportunity to live in a new family unit.

One wonders how Abella J. can blithely state that the appellate court's judgment should be based narrowly on the brand new situation in which the father had recently developed a warm relationship with his daughter, making the 'assumption' that current sobriety would continue, and then promptly disregard this statement two paragraphs later by noting that father's violent and abusive behaviour had *continued* notwithstanding the new-found sobriety? Indeed, father had stalked, harassed, threatened and otherwise been grossly inappropriate with mother. Father had obviously incited this child, Vanessa, to call her mother a "bitch" and a "home-wrecker". One wonders how this parental misconduct could possibly be disregarded, particularly in light of the psychological assessment concluding the child's interest was best served by the formation of the new family unit in Washington?

With such a provocative fact pattern, it is inexplicable how Abella J. could then reason, *as a matter of general principle*, that custodial parents should be free to make decisions without regard to access parents. Proulx J.'s reasoning in *Droit de la Famille 1826 (supra)* is, in this author's opinion, far more carefully thought out and well-analyzed. Indeed, with all due respect, it is misstating the case to analogize to the comments of La Forest J. in *Thomson vs. Thomson* [1994] 3 S.C.R. 551 (the *Hague Convention* case, where the mother had kidnapped the children from Scotland to Canada). The Supreme Court certainly did comment that:

> The right of access is, of course, important but…it was not intended to be given the same level of protection…as custody.

but this was said in the context of international treaty obligations between national governments, by which nations have taken a first step to protect the residential rights of children! The fact that international law is not yet sufficiently evolved to protect weekend access rights – or perhaps that nation states do not have the financial resources to provide the kinds of mechanisms to protect access as to protect custody – does not mean from the point of view of the *child* that the *child's right to be visited by the non-custodial parent* (Abella J.'s terms!) is not critical to his or her development, and is not a right which the parents themselves must safeguard, according to the ordinary rules of the private law.

For example, international law does not yet systematically protect child support orders (there is no systematic treaty like the *Hague Convention*, only a few piecemeal laws), and surely, child support is as critical as custody – what use is it to determine where a child may live, if he may not eat? La Forest J.'s comment should *not* be considered in the context of the private law obligations of the two parents, who are held to a higher duty to their own children than the state.

Although one may agree with *some* of Abella J.'s statements such as, at page 492:

> It is a mistake to look down at the child as a prize to be distributed, rather than from the child up to the parent as an adult to be accountable.…It is the child's right to see a parent with whom she does not live, rather than the parent's right to insist on access to that child. That access, its duration, and quality, are regulated according to what is best for the child, rather than what is best for the parent seeking access.

It is nonetheless difficult to agree with the bald assertion that:

> …a parent with custody, acting responsibly, should not be prevented from leaving a jurisdiction because the move would interfere with access by the other parent with the child, even if the relationship between the child and the access parent is a good one.

This is a statement which is only reasonable within the context of the fact pattern in *MacGyver*. Indeed, were one to reflect for a moment upon the consequences of Abella J.'s decision, one would have realized that the Court was necessarily condemning this young child to the vagaries of the military life, because the step-father must accept a new D.N.D. posting in a new city (or even a new country) on the average every three years, with potentially devastating consequences for this child, who would be required to change schools, friends and milieu with nary a consideration for her best interest, but rather solely her mother's understandable desire to be with her new husband.

Would this decision have been the same if the biological father had been ordinarily competent and not an abusive alcoholic (as in *Carter vs. Brooks, supra*)? Would this decision have been the same if the biological father had been the corporal himself, and divorce would have led to mother wanting to remain in North Bay while father was off in Washington? What if father had had custody and was subject to repeated inter-city transfers, and mother had been the one to seek custody based on her residential stability? The questions one may easily raise beg for better answers than Abella J. saw fit to consider.

Yet, the three following precedents, all decided in Quebec in 1995, have relied exclusively upon the observations made by Abella J. in *MacGyver* to come to radically different conclusions, depending on whether the trial judge has chosen to quote the acceptable portions of *MacGyver*, or the inflammatory and potentially incorrect statements of principle. None of the three following decisions has even cast a glance at 30 years of Quebec precedent in this area (so much for the distinct society…).

3.5 *Droit de la Famille 2241* [1995] R.D.F. 507

In *Droit de la Famille 2241* [1995] R.D.F. 507, the parties separated when their son was 5 years of age. Mother had been primary caretaker for the first 10 months of the child's life, and then the paternal grandparents had offered to babysit while the parents were at work. Once the child was in school, the parents had agreed to joint custody, with principal residence at mother's home, and father

and grandparents having the child three weekends out of four.

Mother sought sole custody of the 6 1/2 year old child [the trial judge inexplicably misstated the age of the child], and permission to return to the U.S. where she had lived prior to the marriage. Father replied with his own petition for change of custody. Lemelin J. granted sole custody to mother, and permission she relocate, notwithstanding the close relationship of father to son. The trial judge was not pleased with father's attempts at character assassination of mother (page 509), and even the paternal grandmother admitted that she helped her son with child care because he "is young and cannot always care for his son."

This being said, Lemelin J. manifestly considered herself bound by the precedent in *MacGyver*, and although she quoted several of Abella J.'s less inflammatory observations, Lemelin J. also considered (wrongly in this author's opinion), at page 510:

> A parent can change neighbourhoods, provinces, countries, jobs, schools, or friends. Each of these significant decisions may affect the child in some way, but that does not mean that the court has the right to hinder the change.

And this observation is followed by yet another quote from *MacGyver*. One must consider this statement with caution, because it is not a valid statement of the law; the court 'hinders' such changes every day, if the child's best interests so require.

However, this does not change the fact that the conclusion arrived at in *Droit de la Famille 2241* was probably reasonable in the particular circumstances of that case. In fact, mother was not moving to frustrate father's access, and she proved herself to be a 'friendly' parent within the meaning of the caselaw. Generous and regular access was granted to father, with the obligation that the parties share the driving time and meet at the geographic halfway point in Lake George, New York. As in *Oak vs. Rose (supra)*, the Court considered it had discretion to make orders to facilitate and encourage access in light of the burden created by the custodial parent's move. It is easier for the Court to authorize a move when practical solutions may be found to minimize the potential for prejudice to the children in their emotional bond to the access parent.

3.6 *Droit de la Famille 2246* [1995] R.D.F. 530

In *Droit de la Famille 2246* [1995] R.D.F. 530, the parents had joint custody of their 8 and 11 year old children for five years, even though the children generally resided with their mother (father had every second weekend, Wednesday overnights, and liberally shared holidays). Both parents sought to change this to sole custody because of conflicts which had arisen and mother also requested permission to move to Ontario with the children. There was no question that mother was acting in good faith in light of employment opportunities to make this move, which would necessarily involve an 11 to 12 hour driving distance for the exercise of access rights in Montreal.

A clinical psychologist (Dr. Abe Worenklein, who is well-known to Quebec practitioners) assessed that the children had strong attachments to both parents and did not want to spend less time with their father. The expert therefore recommended that the children remain in the Montreal area, in their best interest (page 533). This was further corroborated by their meeting with the trial judge.

Richer J. granted sole custody to mother, but denied her request for permission to move to Ontario, notwithstanding her *bona fides* in requesting the permission. The trial judge, faced with the dilemma of two competent parents, was compelled to compose a more closely reasoned opinion than that proposed in *MacGyver*. Richer J. explained in the following terms why she considered that the best interest of the children was that they remain in Montreal, at page 533:

> One of the reasons why these two intelligent children have adjusted well to the separation of their parents is the fact that they have been able to receive the better part of each parent and continue to develop deep bonds with each parent. These children are also very attached to their home, friends, schoolmates and other relatives of the larger C…'s family with whom they have regular contact and who also play an important role in their stability and well being. …
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> The Court attaches great importance to maintaining regular contacts between both the two parents and the children, since both parents have had such a positive influence on their children.… Because two parents separate from each other does not mean that the children should separate from one of their parents.

Indeed, Richer J. cites the reasonable passage from *MacGyver* (quoted above) with respect to the child's right to be visited, and then she goes on to state, at page 534:

> In the case at hand, the relationship between the father and children was not only a good one, but also one that affected positively the children's stability and happiness. During the last five years of separation, the children have benefited greatly from the considerable involvement of their father even though their primary caretaker was their mother and their main residence was with her. The children's attachment to their mother is also very important as we will see in the next discussion [on the attribution of sole custody to mother].

Richer J. then turned to the issue of whether joint custody should be changed to sole custody in the context of the high-quality relationship each parent had with the children, but also in the context of continued conflict between the parents themselves. Richer J.'s reasoning is at once subtle and well-delineated, and it merits repeating here because of its highly insightful analysis (from page 535):

> On several occasions, the father has also shown a strong tendency to impose his views on the mother and to supervise her life to a certain degree.…he attacks her authority when he should be helping the children to adapt. Each parent has a tendency to be very jealous of the time they may pass with their children, rather than thinking of the children's best interests. The mother's refusal to let the children leave earlier with their father on Friday afternoons is an example.
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> The lack of communication and cooperation is almost total between the parties. Fortunately each parent behaves very well when alone with the children. Nevertheless, the children deserve better than this. They should no longer be exposed to these constant disputes between parents. At times, the children no longer know if they should attend an event or not because of the constant dispute between parents.
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> The father has indeed shown a great tendency to control the situation and the mother at the same time. He scrutinizes what the mother is doing and is very critical of her when she does not adhere to his views. The Court considers that mother has proved to be a reasonable mother, capable of properly looking after her children's well-being and their security among other needs.

As such, I believe it is fair to say that a necessary ingredient for the attribution of joint or shared custody is a basic gentleness of disposition and a desire to be non-confrontational with the other parent. Some parents do not realize that it is not always enough to be 'reasonable' with the other parent; one cannot always be jockeying for position with the other parent, seeking to 'prove' which is the more 'reasonable' position; joint custodial parents are often more able to give in to each other, with mutual respect, as opposed to trying to score points when disagreements arise.

Just as in *Droit de la Famille 691* (S.C.M. 500-12-172515-888, the unreported judgment of Honourable Mr. Justice Tessier dated February 14 1992 denying father's request for joint custody), an otherwise competent and involved father found his status 'reduced' to that of access parent, in order to prevent the children from being subject to an interminable «tiraillement» between their parents were joint custody to have been granted. A non-custodial parent may have a great relationship with the children, but it takes exceptional qualities to be a joint-custodial parent and to make decisions in raising children without fights and power struggles.

3.7 *Droit de la Famille 2283* [1995] R.D.F. 706

In *Droit de la Famille 2283* [1995] R.D.F. 706, mother had custody of her 5 year old daughter, and father had access rights every second weekend from Thursday night to Tuesday morning. The parties had met in Greece, mother's country of origin, but they had settled in Montreal, where they were raising their daughter. They had separated when the child was 3 years of age, and mother had always been the primary caretaker.

Mother petitioned for permission to return to Greece with the child; father replied with a motion to change custody. The interim agreement prohibited either parent from leaving the country. Mother established her strong parental capacity and the *bona fides* of her request to move back to Greece (significant job opportunity as a teacher, whereas in Montreal she was living on welfare with minimal financial contribution by father). Mother also established she would be living in a well-appointed three bedroom apartment in Athens, above the house of her own parents. Mother offered generous access to father (summer, Christmas and Easter).

Father established he had a closely knit family willing and able to help mother in caring for the child. However, the relations between the families had deteriorated, so that this offer was viewed to be unrealistic. It was uncontradicted that father had a warm relationship with his daughter.

To solve this thorny dilemma, Audet J. relied exclusively upon the provocative portions of the *MacGyver* judgment, and in fact quoted the passage which I have reproduced above as an unacceptable statement of principle. Audet J. therefore concluded, at page 709:

> Therefore, the Court finds that in this case, taking into account all the circumstances, the young age of the child and the need for mother to find a stable life in her homeland, the best interests of the child are tied to the mother's own self-fulfillment, happiness and interests, even at this provisional stage of the proceedings.

It was certainly reasonable for the trial judge to have concluded that mother could provide a far better standard of living in Greece than in Montreal in light of the immediate job offers, and this would permit the child to attend a private French school. Mother had also adduced evidence that her diploma

was not recognized in Quebec, so that job opportunities were not available to her here. Yet it is not clear that adequate opportunity was given to father's offer to provide mother greater assistance, with the support of his family, in light of the trial judge's ultimate reliance on the authority of the *MacGyver* judgment, again because of the judicial failure to read the statements in *MacGyver* in the context of the facts of *that* case (an abusive alcoholic father).

3.8 *J.E. vs. J.D.* (LPJ 96-5583, 550-12-015014-938)

In *J.E. vs. J.D.* (LPJ 96-5583, 550-12-015014-938, judgment dated February 26 1996), a judgment rendered by Trudel J., the parents had shared the custody of their 8 and 12 year old children on a one week on, one week off basis. Mother petitioned the Court for permission to move to California, where she had found a good job (having lost her previous job in town), and father replied with a motion for change of custody. During this process, the older child began to align herself more with mother.

Trudel J. denied mother's request, and attributed the better part of the physical custody to father. She noted that in joint custody situations, there is a presumption that the parents have manifestly acknowledged their respective parental capacities. There is also a presumption of the right of children to continue to live in their habitual milieu. Unlike many of the other cases in this area of law, none of the family members had any past ties to the state of California, and in fact the move would entail a cut off from the extended maternal and paternal families in Quebec. Finally, the older child's situational alignment with mother was not sufficient reason to separate the siblings, nor was it sufficient to justify uprooting the children when no advantage to them could be demonstrated. Indeed, mother had failed to indicate who would care for the children after school when she would be at work.

Trudel J. raised the question which one might have expected Abella J. to have raised in considering the children's best interest (at page 12 of the judgment):

> Il faut maintenant considérer l'impact du déménagement en Californie: les enfants seraient brusquement enlevés de leur milieu de vie francophone, retirés de leur milieu scolaire, éloignés de leurs amis, et séparés des autres membres de leur famille (grands-parents, oncles et tantes).

This analysis was presented by Trudel J. as a decisive element in a four-part dissection of the approach she used: she considered the psychological ties of the children to each parent, each parent's parental capacity, the availability of each parent, and the filial ties and continuity of milieu (the citation having been drawn from this fourth criterion in her analysis). Trudel J. essentially was disturbed by mother's admitted failure even to look for a new job in Montreal or Toronto before looking in California.

In fact, Trudel J. was choosing a 'least detrimental alternative', even if she does not say so expressly in her judgment, because, notwithstanding the joint custodial situation, there was clear and uncontradicted indication of at least a degree of parental incapacity insofar as father was concerned, as appears from the joint psychologist's report (at page 7 of the judgment):

> En effet, il [le père] démontre peu de compétence à résoudre des problèmes qui sont d'ordre affectif et dans son mode de réaction, il fait preuve d'une certaine déresponsabilisation.

In the circumstances, one may consider that Richer J.'s solution in *Droit de la Famille 2246 (supra)* would have been far preferable: grant sole custody to mother and generous access to father, but prohibit mother from removing the children to the new city. Of course, this option may not have presented itself at trial if mother was already living in California or indicated that she was not prepared to abandon the job offer if the children's best interest militated against a move.

There is one point of concern in this judgment: Trudel J. appears to have disregarded this important observation by the expert psychologist about the father's reactions to difficulties which arose in his relationship with the older child:

> Par exemple, [le père] exprime la volonté que sa fille reprenne sa place à la maison et en même temps, il transforme la chambre de celle-ci en bureau pour lui, et lui installe un endroit pour dormir dans la chambre de B. On peut aussi questionner le grand respect qu'il a pour la décision de sa fille.
>
> En effet, il démontre peu de compétence à résoudre des problèmes qui sont d'ordre affectif et dans son mode de réaction, il fait preuve d'une certaine déresponsabilisation. Dans ce cadre, ce grand respect peut être facilement interprété comme de la passivité et une résistance à se remettre en question.

Trudel J. carefully analyzed her decision based on five principle criteria: the children's psychological attachments, the parents' child rearing skills, the relative available time each parent has, the extended families and continuity of milieu, and the wishes of the children. In essence, her reasoning is *truly* child-centred in determining that in order to succeed in a custody application, the moving parent must prove a *benefit* to the children when weighed against the harm of uprooting them from their habitual milieu and family ties.

3.9 *Goertz vs. Gordon* [1996] 2 S.C.R. 27

3.9.1 The Facts

The facts of this case are simple and undisputed. The parents separated in 1990, when their infant daughter was 2 years of age. Mother obtained interim custody, but Father spent more time with the child than mother did. The parents entered into a mediated agreement pending the trial which eventually took place in 1993, by the terms of which the child was to reside with both parents on a rotating basis, and if one party moved, the child would remain with the other parent.

In 1993, Mother obtained a judgment granting her custody of the child, with generous access to father. One must keep in mind that the concepts of "custody" and "access" are viewed differently in common law jurisdictions than in Quebec; the language here is one of "parental authority" and "custody," upon which I will comment later. Even after this judgment, Father continued to spend more time with the child than provided for in the 1993 judgment. Mother did not object to this, since she had a busy work schedule which often took her out of town.

In 1994, the mother announced her intentions to move to Australia and the father applied for a change of custody, or an order restraining the mother from moving the child there. The mother cross-petitioned to vary the father's access rights to permit the change of the child's residence to Australia.

The trial judge in first instance rendered a curt judgment, noting that if a judge in 1993 found the mother to be a fit parent to have the custody of the child, this was enough, and the mother should be permitted to move. Father would then have generous access rights to be exercised only in Australia. The Court of Appeal then upheld this order.

The father appealed to the Supreme Court, was granted leave, and then made what may have been his fatal error: he did not seek a judicial stay of the lower court ruling, pending the outcome of his appeal to the Supreme Court (which is not to say one would have been granted, had he even tried).

In a unanimous decision, the Supreme Court allowed father's appeal only to permit him to exercise his access rights in Canada, and the Court otherwise maintained mother's custody of the child. Mother had already moved to Australia with the child, and one is left to wonder if this did not play a part in the Court's decision, particularly in light of the highly critical remarks which were made as to the trial judge's failure to have conducted a full hearing on what solution would be in the best interest of the child.

All nine judges concurred in the practical result insofar as custody and access are concerned. However, McLachlin J. wrote the majority opinion, in which Lamer C.J., Sopinka, Cory, Iacobucci, Major and Gonthier JJ. concurred. Gonthier J. also concurred in part with the minority opinion of L'Heureux-Dubé J., along with La Forest J.

3.9.2 A Preliminary Observation

Unfortunately for Quebec jurists, the majority opinion, and to a lesser extent the minority opinion, generally overlooked the impressive body of caselaw which has developed in this province. It is frustrating to observe a 30 year stream of jurisprudence overlooked, despite the rich contribution the civil law perspective may bring to a difficult case such as *Goertz*. Our different conception of "custody" as compared with the common law perspective has required our caselaw to develop with greater sensitivity. At common law, custody is a suffocating concept, encompassing both physical possession of the child and all decision-making power. In Quebec, custody is viewed from the French perspective of «garde» which entails the physical "possession" of the child, encompassing certain day-to-day decision-making powers. The right to make the major decisions in a child's life insofar as health, education and welfare are concerned is however encompassed by the notion of "parental authority" which remains vested in *both* parents, unless there is reason to deprive a parent of such authority in the child's best interest. (*C.(G.) vs. V.-F.(T.)* [1987] 2 S.C.R. 244; *La garde conjointe, concept acceptable ou non?*, Hon. Claire L'Heureux-Dubé, [1979] 39 R.du B. 835). As such, Quebec jurisprudence is necessarily more nuanced since the non-custodial parent is not as peremptorily categorized as second-class in the face of the omnipotent custodial parent.

Let us not forget that the *Civil Code* never once mentions the words "visiting rights" or "taking out rights"; the only language is that of "custody" and "parental authority".

As a further disappointment, despite the fact that the majority opinion is couched in the most eloquent of terms, and the reasoning is developed with the best of intentions, there was no meaningful outcome for the child herself. The judgment is courageous in underscoring that the rights which

exist in matters of custody and access are rights which enure to the benefit of the children; it is but the concomitant obligations upon the parents which the Court must assess and attribute. The fact of one parent being attributed the "title" of custodian of the child does *not* thereby imbue such parent with "rights and powers" and with a natural upper hand over the non-custodian. Rather, it is both parents who must at all times fulfill their natural obligations to provide the best they are able to provide to their offspring, whose right in turn it is to claim such best efforts. Yet, when it came to apply practically the edicts set out in this exceptional judgment, it is respectfully submitted that the Court failed to provide the full benefit of the judicial protection a properly conducted re-trial would have brought to bear on this child's situaton.

3.9.3 The Supreme Court's Analysis

McLachlin J. clearly stated that the best interest of the child is not only the "paramount" consideration, but the *only* test the court must apply. Procedurally, a motion for variation of a prior custody/access order must be approached in a two stage process. In the first stage, the burden is on the petitioning parent to pass the "threshhold test" of material change since the rendering of the prior custody/access order. A significant change of residence of the child will generally meet this test of "material change". Once this threshhold test is met, the burden is then on *both* parents to advance evidence to the Court as to where the child's best interests lie.

The trial must not be confined merely to the circumstances of the change; this defeats the obligation of the judge to conduct a full inquiry as to the *best* custody/access arrangements which may be determined to benefit the child. Although such a trial is neither an appeal of the previous order nor a trial *de novo*, once the new circumstances make the original custody/access judgment irrelevant or inappropriate, the trial judge should benefit from the complete picture of the new situation (per *Willick vs. Willick* [1994] 3 S.C.R. 670).

Parental conduct is *not* relevant, unless it relates to a presence or absence of parental capacity. Alienating conduct may be such a factor showing parental incapacity. Otherwise, the reason a custodial parent wishes to move is not relevant, insofar as parenting ability is not at issue. (With all due respect, this is perhaps too facile a statement. Uprooting a child from his school and community and the regular access to the non-custodial parent and extended family should presumably *only* be undertaken if the child may derive a benefit from the new residence, otherwise the manifest negative consequences of that uprooting necessarily mitigate *against* a move if the reasons for moving are neutral. This will be examined further, in sections 4.1 and 4.2, below).

It is mandatory to respect the maximum contact principle of s. 16(10) of the *Divorce Act* which provides that a child should have the maximum contact with both parents which his/her interests dictate – although this criterion is not absolute, if a child's interest mandates to the contrary that there be restriction of contact. Nonetheless, Parliament considers that as a general principle, maximum contact with both parents is in the best interests of the child. (Yet again, with all due respect, if this is the general premise, then surely it requires a 'positive' reason to move, else the balance sheet from the child's perspective is necessarily negative because of the inherent breach of s. 16(10) which any long-distance move necessarily entails! Again, this will be discussed in sections 4.1 and 4.2, below).

McLachlin J. soundly rejected the proposition that there be a presumption in favour of the custodial parent in such hearings. A parent's interests are *not* relevant in custody trials. The strong

language of *MacGyver* is politely excused in the most diplomatic terms.

The concept of the custodial parent having the "right" to fix the residence of the child is soundly set aside. Although it is a natural consequence for a custodial parent to seek the fix the residence of the child, the access parent is then entitled to ask a judge to review the matter. At all times, an access parent may challenge the decisions taken by a custodial parent, just as a custodial parent may seek restrictions on the access of the non-custodial parent.

McLachlin J. reasoned as follows:

> The rights and interests of the parents, except as they impact on the best interests of the child, are irrelevant. Material change established, the question is not whether the rights of custodial parents can be restricted; the only question is the best interests of the child. Nor does the great burden borne by custodial parents justify a presumption in their favour. Custodial responsibilities curb the personal freedom of parents in many ways, The Act is clear. Once a material change is established, the judge must review the matter anew to determine the best interests of the child…
>
> Until a material change of in the circumstances of the child is demonstrated, the best interests of the child are rightly presumed to lie with the custodial parent. The finding of a material change effectively erases that presumption.…
>
> …Parliament has placed the duty of ascertaining the best interests of the child on the judge, not the custodial parent.…
>
> …Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the Divorce Act for a contextually sensitive inquiry into the needs, means, condition and other circumstances of "the child" whose best interests the court is charged with determining.

McLachlin J. expressed great concern that if the evidentiary burden were not put equally on both parents to adduce evidence as to the best interests of the child, one would end up placing too much of an emphasis on an adversarially charged process, where "the focus might shift to who has proved what."

Turning to what elements constitute the "best interests" of the child, McLachlin J. opined there were six major criteria for a trial judge to consider, amongst others:

> (a) the existing custody arrangement and relationship between the child and the custodial parent;
>
> (b) the existing access arrangement and the relationship between the child and the access parent;
>
> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
>
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> (f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

In sum, "the ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?" (One should note that this reasoning may be readily applied to situations in which a trial judge must make a "first" determination of custody and access, with the prevailing *de facto* situation of the child constituting the baseline from which the trial judge may extrapolate how the "new fact" of separation or divorce may be integrated in the child's life with a goal of minimizing the child's inevitable anguish. Or should we now worry that this may inspire judges in some exceptional situations to set aside the parents' "right" to separate, if the suffering created for the child is too great…)

McLachlin J. has stated the test as clearly as possible. Perhaps it should also be a matter of pride to the Quebec jurist that Proulx J. in *Droit de la Famille 1826 (supra)* already came to essentially the same conclusions. Of course, it is one thing to be virtuous in one's legal analysis, it is yet another thing to *apply* the postulated tests to real life situations.

One should read together the criteria set out in *Goertz* and *Droit de la Famille 1826*, to address the essential elements which both the Supreme Court and our Court of Appeal consider necessary to analyze to determine a child's best interests in "long-distance" custody situations.

3.9.4 A Critique

In *Goertz*, the Court, in concluding that the trial judge had failed to conduct the "full and sensitive inquiry" required by a true application of the "best interests" tests, nonetheless failed to take the one simple step which could have remedied the weakness of the trial initially conducted: this would be to order a new trial. The Court relied on tired presumptions such as the "probability" that a change of custody would be highly disruptive to the child and concluded that if father's access could be exercised in Canada as well as in Australia, he would be able to provide his daughter with access to her extended family and community in Saskatchewan.

With due respect to the Supreme Court, it strikes me that it would be a matter of expert assessment to determine whether it was not more likely that *any* move at all would not be highly detrimental in light of the close relationship this child enjoyed with *both* her parents, notwithstanding their divorce. For that matter, without a re-trial, how could the Supreme Court know what relative benefits could enure to this child from living with her mother as a student in Australia (who would support them, for instance? And who would take care of the child while mother was at her studies? In Saskatoon, father appears to have assumed a considerable babysitting role; this is the kind of question Trudel J. posed in *J.E. vs. J.D. (supra)*, as opposed to the harm caused to this child by leaving the community, school and extended family she had known all her life in Saskatchewan).

Wherein was there proof that mother's wish to study orthodontics necessitated the move to Australia, a thorny question which, if put, *might* have revealed an underlying alienating dynamic. Any experienced family law practitioner has met one or more custodial parents who consult an attorney for a legal opinion as to the possibility of a long-distance move for apparently conventional reasons, only to discover, after a handful of questions, that the true goal of the moving parent was in fact to put a conti-

nent or ocean between self and the ex-spouse.

Again, with all due respect, a custodial parent who engages in a long-distance move without regard for the children's right and need to maintain a close relationship with the non-custodial parent (in situations in which, of course, the non-custodial parent is well-engaged in the children's lives), is manifestly breaching s. 16(10) of the *Divorce Act*, and is not taking the best interests of the children into account.

As I prefaced my opening remarks about this case, it would seem that since the Court was faced with the *fait accompli* of the mother's move to Australia having already taken place, there was reluctance to take a step which might entail the child having to endure the trauma of a *second* move back to Canada. All in all, the decision was certainly a Pyrrhic victory for the father.

As a footnote to this decision, a nimble-footed practitioner might view the solution to a dilemma such as the one presented in *Goertz* from a different perspective: the mother may have legitimately felt constrained to pursue her graduate level studies in Australia because she was refused admission to two Canadian universities. However, one wonders openly whether the father and his attorney perhaps failed to realize this reflects the fact that few positions are available for such graduate orthodontic studies here in Canada. Had the apparently well-to-do father taken the time to arrange admission for the mother into a nearby American university, perhaps sweetening the pot with an offer to defray part of her tuition, he might have found himself with a far shorter distance to travel to be able to visit with his daughter.

3.9.5 A Comparison to *C.M. vs. Catholic Children's Aid Society* [1994] 2 S.C.R. 165

I would venture what will likely be a provocative and controversial view. Insofar as one may observe an unspoken prejudice in favour of fathers in the early years of jurisprudence on custody disputes, and this, as a reflection of the «puissance paternelle», it strikes me that this has been replaced with a modern and still unspoken prejudice in favour of mothers.

In *C.M. vs. Catholic Children's Aid Society* [1994] 2 S.C.R. 165, the Supreme Court adjudicated in respect of a situation involving a 7 year old little girl – the same age and sex as the child in *Goertz*. This child had been in foster placement essentially since birth, but had benefitted from regular contact with her biological mother. The mother's living situation had improved enormously, and she had sought to recover the custody of her child. Delays were engendered due to snafus in the CCAS's administration of the file, with the unfortunate result that the child had formed her primary affective bond with her foster family, to the detriment of the potential closeness of relationship with her biological mother.

The Supreme Court certainly rendered yet again a courageous decision in emphasizing the right of the child to be in the care of those persons with whom she had formed her primary psychological bond, relegating the biological "rights and claims" of the birth mother to a secondary importance. This was a decision very much in the tradition of *C.(G.) vs. V.-F.(T.) (supra)*. Nonetheless, the Supreme Court, as the courts below, was very much concerned with permitting fresh evidence to be adduced to be *sure* as to the ultimate determination of that particular little girl's best interests.

Now, before I hear criticisms that *C.M.* was decided in the context of youth protection

legislation which provides statutory permission to adduce new evidence at any stage of the proceedings, one might read attentively the remark of L'Heureux-Dubé J. at page 185, where she states:

> That this Court has discretion to admit fresh evidence on appeal is not contested. Section 62(3) of the Supreme Court Act, R.S.C., 1985, c. S-26, as am., reads:
>
> 62.…
> (3) The Court or a judge may, in the discretion of the Court or the judge, on special grounds and by special leave, receive further evidence on any question of fact, such evidence to be taken in the manner authorized by this Act, either by oral examination, by affidavit or by deposition, as the Court or the judge may direct.
>
> For its part, s. 69(6) of the CFSA gives courts discretion to admit fresh evidence on appeal:
>
> 69.…
> (6) The court may receive further evidence relating to events after the appealed decision.

In *C.M.*, the Court had to determine whether to cut off such contact as the biological mother still had with her 7 year old daughter. In *Goertz*, the Court had to determine whether severely to curtail the far greater contact the father had with his 7 year old daughter prior to the move to Australia. Surely, one child was not more or less important than the other.

Yet in *C.M.*, the Court had the benefit of "fresh" evidence which had been adduced at each appellate level up until and including the Supreme Court. In *Goertz*, the Supreme Court relied on the opinion of Carter J., the trial judge, who had relied on nothing more than the affidavits of the parties and their attorneys' arguments – there was not even an actual hearing!

For that matter, Carter J. made it a point of stating he had relied on the extensive eight day trial which had taken place in February 1993. With all due respect, in the life of a 7 year old child, a trial which took place over three years earlier (from the perspective of the May 02 1996 judgment of the Supreme Court) was surely of little use to assess the child's current situation, particularly when it was undisputed that father had continued to play a very active role in the child's life greater than the actual schedule of the generous access rights granted him in February 1993.

Why then did the Supreme Court not consider it important enough at least to request the two parents to adduce new evidence as to the child's current situation, even if a re-trial before Carter J. was not ordered? As queried above, we have no idea who takes care of the child in Australia when mother is at school. Furthermore, the Court does not inquire as to the child's adaptation to a new environment, school and culture. Finally, the Court does not inquire as to the very real possibility of the child's anguish at having lost close contact with one of her two primary caretakers. (Indeed, upon reading the opinion of L'Heureux-Dubé J., one would get the impression that a child may axiomatically have only *one* psychological parent, yet the reality is that a child may be deeply bonded to both parents.)

Could one reasonably conclude that in *C.M.*, the matter was more important because a maternal bond was at issue, whereas in *Goertz*, the matter was less important because a paternal bond was at issue? Where does this leave the child, who has not read the textbooks on parental bonding? The reader is left to contemplate his own views as to possible hidden prejudices.

3.9.6 The Minority Opinion of the Supreme Court in *Goertz*

I will comment briefly on the minority opinion of L'Heureux-Dubé J. in *Goertz* for two reasons: her views hold great sway in this province, and she is supportive of the *MacGyver* decision.

In opening her arguments, L'Heureux-Dubé J supports the "threshold test" to determine if there has been a material change warranting a full hearing as to variation of custody/access, and in this regard, she cites herself with approval in *Willick (supra)*. L'Heureux-Dubé J. then asserts the conventional views as to the best interest test, as to s. 16(10) of the *Divorce Act*, and as to custody and access entailing obligations for parents (as opposed to conferring rights).

She then analyzes the concept of "custody" at common law to include all attributes of "parental authority" as we know it. In other words, the attribution of custody at common law necessarily entails attribution of the "right" to determine the place of the residence of the child. Under the *Divorce Act*, it is necessarily the common law conception of custody which is codified, albeit with the qualification of s. 16(7) which imposes on the custodial parent the obligation to advise the "access" parent of any proposed change of residence of the child.

In this analysis, L'Heureux-Dubé J. is very emphatic in using the language of "rights" – that the custodial parent is vested with the "right" to fix the residence of the child. This is in juxtaposition to the majority opinion of the Court which prefers the language of "obligation" of the custodial parent. Indeed, L'Heureux-Dubé J. quotes Proulx J. in *Droit de la Famille 1826 (supra)* when he too stated that the custodial parent has the "right" to fix the residence of the child, but perhaps this is misleading, since he made his statement within the context of the analysis of how this "right" exists only insofar as the child's best interest is thereby safeguarded, and that such best interest constitutes the clear restriction on the "mobility rights" of the custodial parent.

L'Heureux-Dubé J. notes that provincial statutes at common law also imbue "custody" with decision-making authority, and the "access" parent does not have a right to be consulted about or to participate in the making of decisions of the custodial parent.

It is when L'Heureux-Dubé J. proceeds to analyze the Quebec civil law that one must pause for reflection. Up until this point, it is evident that L'Heureux-Dubé J. is following a model of primacy of custodial parental authority, as Abella J. opined in *MacGyver (supra)*, which essentially empowers mothers and disenfranchises fathers. This is the model which the majority opinion of the Supreme Court soundly rejects, in favour of a child-centered approach in which neither parent is viewed as second class, and the quality of each parent's child rearing skills and devotion to the child are viewed on equal footing. *But this is already the law in the province of Quebec, and has been since the elimination of the «puissance paternelle».*

L'Heureux-Dubé J. quotes herself in *W.(V.) vs. S.(D.)*, S.C.C. No. 23765, May 2 1996 and in *P.(D.) vs. S.(C.)* [1993] 4 S.C.R. 141, in which she argues, as in *Goertz*, that custody at civil law should be viewed as conveying as broad powers of decision-making as in the common law provinces, and an "access" parent has *no* right of consultation or involvement even in major decisions. Yet, the "access" parent (although such an animal frankly still does not exist at civil law), may bring applications to the Court because he remains a parent vested with "parental authority" (the animal which does not

exist at common law). So, an access parent should never be seen to speak to a custodial parent, because his only rights are to bring petitions to Court? With all due respect, I believe this is not a correct reading of the concepts of custody and parental authority, the former being inextricably bound up with the *presence* of the child and the ordinary day-to-day decisions which such presence necessitates (what local practitioners used to call "physical custody"), and the latter entailing decision-making on the grander scale: health, education, welfare (what local practitioners used to call "legal custody") – *C.(G.) vs. V.-F.(T.) (supra)*.

In any event, the opinion of L'Heureux-Dubé J. in *P.(D.) vs. S.(C.)* pertains to religious instruction, in which one supposes it is acceptable that a non-custodial father simply provide religious instruction when the children are visiting with him, and her opinion in *W.(V.) vs. S.(D.)* pertains to international kidnapping which, as in *Thompson*, deals with the limitations of international treaties which only seek to protect custodial rights and not "mere" access rights. Fortunately, in *Goertz*, where it is specifically neither more nor less than actual custody which was at issue, L'Heureux-Dubé J.'s views as to the all-powerful custodial parent are rejected by the majority of the Court.

L'Heureux-Dubé J. approves the approach in *MacGyver*, to which she opposes the approach in *Carter vs. Brooks (supra)*. However, McLachlin J., without explicitly overturning *MacGyver*, nonetheless clearly shows her preference for the reasoning of the Court of Appeal of Ontario in *Carter*, in which Morden A.C.J.O. stated, at page 63:

> I think that the preferable approach in the application of the [best interests of the child] standard is for the Court to weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. I do not think that the process should begin with a general rule that one of the parties will be unsuccessful unless he or she satisfies a specified burden of proof. This over-emphasizes the adversary nature of the proceedings and depreciates the Court's parens patriae responsibility. Both parents should bear an evidential burden. At the end of the process, the Court should arrive at a determinate conclusion on the result which better accords with the best interests of the child.

4. The Latest Muddle

The Supreme Court has spoken. Practitioners across the nation have rejoiced; the law, for once, is limpid. Or is it?

Two recent decisions of the Court of Appeal of Ontario have cogently attempted to apply *Goertz* to the drama of "long distance" custody cases. The outcome has been two completely opposed decisions, neither of which was unanimously decided by its panel, and each of which bearing a dissenting opinion mirroring the majority opinion in the other.

4.1 *Woodhouse vs. Woodhouse* (1996) 136 D.L.R. (4th) 577 (Ont.C.A.)

If ever one could imagine a case in which the letter and spirit of *Goertz* was followed with a passion, then *Woodhouse* is it. This appeal was heard by a five judge panel, however, Dubin C.J.O. did not participate in the decision itself, leaving the judgment to be rendered by Weiler J.A., Houlden and McKinlay JJ.A. concurring and Osborne J.A. dissenting. The case reads as elegantly as *Carter vs. Brooks*

(supra).

In *Woodhouse*, the parents concluded a separation agreement in 1992 by the terms of which the mother had custody of their two young boys, then 2 and 4 years of age, and the father had some access rights: every second weekend without overnights and some shared holidays. The father had requested a restriction of mobility clause, which the mother had refused to accept, assuring the father she had no intention of moving. It should be noted that during the marriage, both parents had had significant roles in caring for the children, as did the maternal grandmother.

The next year, the mother married a man of Scottish origin, and gave notice to the father of her intention to move to Scotland with her new husband. The father petitioned for custody or alternatively an order restricting the mother from removing the children. The mother petitioned for permission to move to Scotland with the children. There was no issue of the mother seeking to alienate the children from the father.

The appellate court upheld the trial judge's 1994 finding that, although the children should remain in the custody of the mother, she was also restricted from fixing their residence outside the judicial districts of Peel, Halton and Hamilton-Wentworth (essentially covering the areas in which members of the extended families of the children actually live). As well, the appellate court also maintained the order increasing the father's access to every second weekend including overnights; plus an overnight in the off week; plus one half of summer vacation, Christmas vacation and spring break. Finally – and this is a point of some importance to the practitioner – the support payments owed to the mother were increased from $ 7,200 to $ 13,000 per annum.

The opinion is written by Weiler J. and is clear and cogent.

At page 589, the court considered that the separation agreement of the parties certainly does not bind the court insofar as the best interests of the children must always be considered paramount. However, such separation agreements may be fairly considered to reflect at least the parents' views as to the best interests of their children in the past.

At page 590, the court sagely points out that sections 16(10) and 17(9) of the *Divorce Act* which seek to protect the right of a child to maximum contact with both parents, exist not to protect fathers by reason of a title or biological status, but rather as a function of "the actual involvement of the parent…"

As well, at least this appellate court panel actually drew its attention to the appropriate issue and stated the proper test, at page 590:

> Here, the benefits to the child of the new location must be weighed against the continuance of full contact with the child's access parent, its extended family, and its community.

Citing *Goertz* with approval, the appellate court analyzed the necessary criteria, at pages 590 *et seq.:*

> – the existing custody arrangement;
> – the existence of a new family unit;
> – the position of the custodial parent;

– the ability of the custodial parent to meet the needs of the child;
– the economic effect of any decision restricting mobility;
– the proposed relocation and the effect of this disruption on the children;
– the relationship between the children and each of their parents;
– the views of the children;

and – the desirability of maximizing contact between the child and both parents.

The court's ultimate analysis of the facts as they relate to these necessary criteria may be found at pages 592-3:

> The trial judge found the distance of the proposed move daunting. The probable effect of the move on the children was predictable. Having gone through the disruption of their parents' divorce and the adjustment of having their mother's new partner come to live with them, they would have to leave their father, paternal grandparents, neighbourhood friends, and, in the case of Michael, his school. The trial judge found that during the marriage both parents had been involved in caring for the children. Following the breakdown of the marriage, the father had paid support regularly and had exercised access consistently.
>
> Evidence of the relationship between the children and their parents, as well as of the views of the children, was placed before the court by way of an assessor's report, which was ordered on the consent of the parties. The assessor found that the children had a loving relationship with their mother and that they also liked and had a good relationship with John Murray. The assessor indicated that, contrary to what he had been led to believe by the mother, the children's relationship with their father was a close, comfortable and loving one. Michael stated that he wanted to go to Scotland so that his mother would not have to work (outside the home). Michael also indicated that when he did not see his father he missed him, that he liked going to Burlington [Ontario] to visit his father and that he liked to see his dad all the time.

These factual observations are so typical of what often transpires in long distance custody cases, that the court's comments could be transposed from decision to decision: children already have a difficult job adapting to the separation of their parents and the arrival of new adults into their lives. Once they have negotiated this difficult course, and have struggled to maintain their loyalties to <u>both</u> their parents notwithstanding divorce, the effect of a further move can only serve to de-stabilize children yet again in their primary affective bonds to their two parents.

Of course, this reasoning is predicated upon there being a significant relationship between the children and the non-custodial parent. As well, this reasoning is predicated upon the reason for the move being extraneous to the children; a move which is planned, for example, to permit a child to attend a special school to develop his gifts or overcome his handicap, would certainly be considered in a different light. Finally, since many moves in these cases are, at least ostensibly predicated, upon economic grounds, a simple remedy may be offered or ordered to avoid the move: simply increase the support payments.

And lest we forget, the fact of making support payments after divorce, or of being a bread-winner during marriage, must not be discounted as somehow not relevant to a child's best interests. When both parents work, this question does not arise, because the parents are on an equal footing in terms of struggling to find decent time to spend with their children. But in the more 'traditional' models of marriage, where father works, and mother stays at home to raise the children, the father is often reduced to the role of anonymous provider, while the mother attains a higher status by dint of the extra

time she is able to spend at home with the children – by reason of the father's efforts! Whatever the division of childrearing responsibilities, both parents must be accorded great respect for their contributions and struggles to provide the best for their children, *without penalty*.

In *Woodhouse*, there had arisen the problem of the mother's failure to return from Scotland with the children on an agreed upon date some months earlier. The trial judge had not appreciated the mother's attitude insofar as she had surreptitiously sought and obtained an interim custody order in Scotland, and the father had to obtain an interim custody order in his favour in Ontario before the mother would accept to bring the children back to Canada (also upon the condition that the father would not execute his interim custody order).

Let us say that it was perhaps fortunate for the father in *Woodhouse* that the mother's conduct had taken place *in facie*, so to speak, so that the trial judge could not ignore the mother's actions and her attitude in not placing sufficient importance on the children's contact with their father (page 597). It is perhaps a sad truth that although many such incidents play out between parents and children day to day, it is generally only those which take place under a judge's nose, and in contempt of his order, that will inspire him to order redress. It is all too easy for a trial judge to dismiss distinct incidents which take place prior to trial as being "misunderstandings" or "momentary lapses of judgment."

As for the expert assessment in *Woodhouse*, it had been agreed to by both the parties prior to trial. As such, it was viewed by the court as not being partisan, and in any event, it was merely a piece of evidence amongst others, and not to be viewed as determinative of the ultimate issue (at page 593). This is wholly appropriate: the function of an expert is not to usurp the decision-making role of the trial judge, but rather to permit a better quality of evidence to be before the court.

In this regard, the appellate court drily noted the Supreme Court's comment in *Young vs. Young* [1993] 4 S.C.R. 3 to the effect that expert assessments should not be viewed as necessary or advisable in all cases, but then added, at page 594:

> In "Developments in Family Law: The 1993-94 Term" (1995), 6 S.C.L.R. (2d) 453 at 466-468, Professor N. Bala finds the tendency on the part of some of the justices in Young, supra, to dismiss the value of health professionals disturbing. The wishes of the children are among the considerations a court is required to take into account in determining the best interests of a child. To expect children to come to court to express their views as witnesses puts them in an extremely difficult emotional situation. Furthermore, parents cannot be expected to give an unbiased picture of their children. As Bala indicates in "Assessing the Assessor: Legal Issues" (1990), 6 C.F.L.Q. 179 at 180 and 225, an assessor may be of assistance in inter alia settling a dispute between parents, evaluating the strength of a child's bond to each parent without creating loyalty conflicts by direct interrogation, expanding the amount of information available to the court, and assisting courts to appreciate the "common sense" importance of stability and continuity in a child's life.

In viewing the expert report as being a useful tool for the trial judge, the appellate court had to deal with the mother's argument that the expert himself was being dogmatic in beginning with a preconceived notion that frequency of access with the non-custodial parent is essential. The appellate court had already carefully considered sections 16(10) and 17(9) of the *Divorce Act* which, after all, codify this very principle that maximum contact with both parents is the rule. However, the court was invited to consider that McLachlin J. in *Goertz* only sought to protect <u>regular</u> access, and not necessarily

frequent access. Weiler J. had this to say, at page 596:

> …In determining the child's best interests, the child's relationship with the access parent is a factor to consider. It cannot be denied that frequency of access bears some correlation to the child's relationship with the access parent. While it is the quality of the child's relationship and not simply the frequency of access which is the consideration, in general, the more frequently access has been, and can be, exercised, the stronger that relationship will be: see Kelly, "Current Research on Children's Postdivorce Adjustment", Family and Conciliation Courts Review (1993), Vol. 31(1), p. 29 at 39; Johnston, "Research Update: Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making", Family and Conciliation Courts Review (1995), Vol. 33(4) p.415 at 419. In Gordon, supra, McLachlin J. implicitly recognized this at p. 28 [p.343, para. 53] of her reasons when she noted that the child's close relationship to her father had been greatly diminshed as a consequence of her mother's move. McLachlin J. found, however, that the means and the ability of the father to bridge the distance created by the move would help to attenuate the impact on the child of the diminished relationship with him. It was not disputed that the father had the time, and both parents had the means, to enable the father to exercise access.
>
> The parties in the instant case are in greatly different circumstances. Unlike the situation in Gordon, supra, the relationship between the children and their father has not been diminished for the past year.… [italics added]

Having engaged in this thoughtful and exhaustive analysis, in a totally child-centred fashion, the appellate court concluded there had been no manifest error or significant misapprehension of the evidence that would justify the appellate court in interfering in the trial judge's findings.

Osborne J. wrote a dissenting opinion, in complete opposition to the views of the majority. Essentially, the dissenting judge espoused the mother's argument that the trial judge and the expert assessor had erred, as follows:

> In my view, the majority's reasons in Gordon support the general proposition that one should not proceed on the basis of any presumptions about what is in the children's best interests. The proper course is to consider the individual circumstances of the child whose best interests the court has been called upon to ascertain. In contrast with the approach that I think has now been established by the majority in Gordon v. Goertz, in my opinion both the assessor and the trial judge in the instant case proceeded on a general assumption that there is a positive correlation between the frequency of access and the best interest of the children in all cases. [page 604]
>
> The assessor's comments that I have noted, and particularly his general observation that "if children are to do well in separation and divorce they have to have involvement from both of their parents" reveal his basic pre-disposition in favour of maintaining frequent access by the non-custodial parent. His comments strongly suggest that he would oppose any significant move by any custodial parent if it would in any material way reduce frequent access. In my view, this presumptive type of reasoning has been foreclosed by McLachlin J.'s reasons in Gordon v. Goertz. [page 606] [italics added]

Unfortunately for the dissent, the law provides this general 'assumption' (it is a principle, rather than an 'assumption'); the research in child psychology supports this general observation; and finally, it was a simple finding of fact that the children in this file were very much attached to their non-custodial parent.

In other words, the dissenting opinion bridled at the very notion that one might approach an assessment with the view that, all other things being equal, a move which separates a child from one of his parents in a significant fashion could be detrimental to him.

Osborne J. does not attempt to respond to the assessor's supposedly dogmatic view that the children would benefit most from the continued involvement of both their parents. He does not venture any opinion as to how the children may benefit from being in Scotland, home of their stepfather, but a community with which neither their mother nor their father has any ties. Rather, Osborne J. comes clean at page 607:

> The custodial parent's decision to move should be given great respect because it is accepted that there is a real connection between the best interests of the children and the best interests of the custodial parent.

In other words, as long as the mother will be happier because her interests – romantic or otherwise – are promoted, the children will learn to be happy, father or no father. Indeed, Osborne J., again without analysis of what might be of interest to the children in Scotland, simply notes, at page 608, that "asking the non-custodial parent to move may be more in the children's best interests than requiring the custodial parent to stay." He does not explain why he makes this statement, penultimate to his proposed granting of the mother's appeal, but it would be innovative indeed if the courts did take the view that one or the other of the parents could indeed be ordered to move, if the destination is where the children would be best off.

4.2 - *Ligate vs. Richardson* (Ont.C.A.) June 23 1997

This judgment, which lies in direct apposition to the decision in *Woodhouse*, is nonetheless mitigated at the outset by simply noting the short distance involved in the custodial parent's planned move: the 100 km or so between Metropolitan Toronto and Cambridge, Ontario. This is the move which was at the heart of the decision, with the appellate court permitting the move in a 2:1 decision.

The parents had separated in 1990 when their adopted daughter was 1 year old. They had signed a separation agreement, providing for custody to the mother who was the child's primary caretaker, and reasonable access to the father. There was also a restriction of mobility clause in the agreement, and the parties agreed to shared decision-making on issues pertaining to health, education and religion.

In 1994, by the time the child was 5 years of age, the father's access had gradually and amicably increased to every second weekend, with an overnight visit in the off week, and holiday access. The mother continued in her role as primary caretaker of the child, without opposition by the father.

In the interim, the mother formed a serious relationship with a boyfriend, and together, they found a home in Cambridge, Ontario, to which they proposed to move, with the child, Ashley. The father opposed the mother's proposed move, and each party petitioned the court for relief. Mediation was tried unsuccessfully. The child became aware of the increasing tension between her parents.

The trial judge refused to permit the move, but maintained custody to the mother, while specifying the father's access to avoid disputes. The trial judge weighed the negative impact on the child

of the disruption of her close and loving relationship with her father were the move to take place, as opposed to the mother's failure to demonstrate a benefit to the child of the move to Cambridge.

It should be noted that the mother had offered to share the driving with the father, in order to meet him half way, and reduce the travelling time. As well, the mother had adduced evidence of the high standard of living in Cambridge, Ontario, and that there were high quality community facilities, including school and synagogue, to offer to the child.

In overturning the lower court's decision, Moldaver J. (Morden A.C.J.O. concurring), noted that the decision of *Gordon vs. Goertz* had been rendered in the interim, and that the trial judge's reasoning had to be examined from the perspective of the analysis of McLachlin J. In particular, the absence of a compelling reason to move should not be held against the custodial parent, if benefits can be shown for the child, or at least if harm is not caused, as at page 17:

> In this case, there can be no suggestion that the reason for the move reflected adversely on Ligate's parenting ability. To the contrary, she testified that in her opinion, the move would enhance the quality of Ashley's life in many ways. Likewise, it cannot be said that the move was designed to frustrated Richardson's access. Ligate appreciated the importance of Ashley's relationship with her father and she was willing to make accommodations to reinforce their relationship and ensure that the move would impinge as little as possible on Richardson's existing access rights. To this end, she was prepared to share the task of driving Ashley between Cambridge and Toronto, allow Richardson reasonable access to Ashley in the Cambridge home, ensure that Ashley received proper training in Judaism, increase Richardson's holiday access to compensate for the loss of his mid-week access and install a phone system which would enable Richardson to speak to Ashley whenever he wished at no cost.

All this sounds reasonable on the surfance, until we read the dissenting opinion of Blair J. The muddle begins in the semantic squabble between the majority and the dissent on the notion of whether one may legitimately ask "why" the custodial parent wishes to move. From the majority viewpoint, this question is irrelevant, by reason of the Supreme Court judgment in *Goertz* (page 20). To be explicit, the majority considers that *Goertz* stands for the proposition that the reason for the move or even the absence of any reason to move is all wholly irrelevant. One may only look at the impact of the move, such as the possible disruption to the child (page 21), of course, with the then obvious comment that such disruptive effects would exist whether the move was made for compelling reasons or for "unnecessary" reasons (page 22).

This is a completely irrelevant observation; why would one move for an "unnecessary" reason, knowing the effect of the move would be disruptive? The entire point of the exercise is to weigh all the elements, positive and negative, which a move may entail. Certainly it is fair to say that most any move will likely be disruptive to the child. So, is it not then the entire point to know whether there is a positive reason for the move which might counterbalance for the child the negative impact of the disruption engendered by that very move?

As Blair J. so pithily put it, at page 52:

> The [Supreme Court] made it clear that a trial judge should consider "the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child" (supra, p.202). At the same time, however, the court

> made it equally clear that the trial judge is to focus on the best interests of the child and not on the interests or rights of the parents; that the trial judge is to consider the disruptive effect of the move on the child and on the child's relationships to family, friends and community; and that the trial judge is to give "great respect and the most serious consideration" to the views of the custodial parent (see pp. 201-202). How is the trial judge to perform this gymnastic exercise without asking – at least in its broadest and most general sense – the first question that must come to anyone's mind in such a situation: Why?
>
> Courts do not operate in a vacuum of unreality. It is simply a practical impossibility for the trial judge to consider the evidence pertaining to the latter factors outlined above without assessing and weighing what I might call "the various considerations surrounding the move". To the extent that such considerations go only to the custodial parent's motive for the move (absent a connection to parental ability) they are irrelevant. However, I do not construe the Supreme Court of Canada's admonition in this respect as eliminating the trial judge's ability – indeed, obligation – to consider and weigh evidence which may, in one sense, be said to go to the reasons for the move but which may also be relevant, and important, to the other considerations mentioned. [italics added]

In other words, Blair J. considered that his colleagues were being led astray by the trial judge's choice of words in stating in conclusion that: "There are no compelling reasons why I should allow the move." In fact, the trial judge had properly examined extensively the impact of the move on the child, rather than merely the "reasons" for the move (page 42), particularly in light of the current political correctness about not talking about those "reasons." The trial judge had felt that Ashley's best interests were jeopardized by the loss of mid-week access with her father; the inevitable shortening or some missing of weekend access; the effect on Ashley's religious training; and the deterioration of the strong father/daughter relationship which would ensue.

In any event, despite this clarification by Blair J. that the trial judge had properly directed her attention to the relevant issue, this first ground of appeal was decided in the mother's favour, and it was held that the trial judge had improperly considered the "absence of a compelling reason to move" as being a strike against the mother's petition.

As a second ground for appeal, the mother argued that the trial judge had placed undue emphasis on the restriction of mobility clause in the original separation agreement. The trial judge had stated:

> In the case at bar, the parties had a Separation Agreement that contemplated that they would live closely to one another for Ashley's sake. The Agreement states that they will treat Ashley's welfare as their paramount concern. The Court therefore presumes that the parents have taken the child's best interest into account.

Moldaver J. (Morden, A.C.J.O. concurring) reasoned that the trial judge was obviously treating the presence of this clause as putting a burden of proof on the mother to justify the move in "contravention" of the agreement, the whole, as ostensibly posited in *Carter vs. Brooks (supra):*

> What if there is an existing agreement between the parents that the custodial parent will not move the child without the permission of the other parent? Is it not reasonable to think that the agreement, at least at the time it was made, reflects the parties' views of the best interests of the child? If this is so and it is felt that the broad test should be administered by the application of a burden of proof, should not the burden be

> on the custodial parent to show why the agreement no longer reflects the best interests of the child?

With all due respect, perhaps the appellate court was not giving the trial judge enough credit. Just because the trial judge cited this short passage does not mean that she had failed to read the entire judgment in *Carter*; having read the entire judgment the trial judge would be manifestly aware that the answer to that reflective question is that each parent should bear an evidential burden, a position later affirmed in *Goertz*.

The trial judge considered that the prior agreement of the parents indicated a common vision as to the best interest of the children at the time the agreement was concluded. It is entirely reasonable for a court to draw this inference; after all, if the custodial parent's opinion should be granted great respect in the here and now, then should one not also grant great respect to that parent's opinion as expressed in a pre-existing separation agreement?

The separation agreement was simply a factor for the trial judge to consider, and could no more be set aside than any other piece of evidence as to the child's past custodial and access arrangements. From the perspective of the majority judges, this would have been fine if the trial judge had not in addition also considered the existence of this restriction of mobility clause as creating a "hurdle" for the custodial parent to overcome. From Blair J.'s perspective, the trial judge had properly weighed this element, with all due consideration for the larger picture of the ensemble of elements which make up the child's best interests.

The only real difference between the majority and dissenting opinion in *Ligate* is the attitude which the justices wish to read into the trial judge's analysis. The existence of this restriction of mobility clause was certainly relevant and necessary to weigh; the question became one of philosophy: the trial judge was somehow viewed as having given a little too much weight to this element.

This would be acceptable, if the majority had not swung in precisely the opposite direction on the third ground of the mother's appeal, which was the deference to be granted to her opinion as custodial parent of the child. Up until this point, the majority view was *not* to grant too much weight to the joint parental opinion, as expressed in the prior separation agreement, since, after all, what was now at issue was the court's opinion of what constituted the child's current best interest.

However, the majority justices considered that the trial judge had erred in failing to give sufficient weight to the mother's current opinion, in the following, rather telling terms, at page 30:

> Ligate's request to move to Cambridge did not follow immediately upon the heels of her separation from Richardson. Rather, it came after the couple had separated for several years. In the interim, Ligate formed a new and promising relationship with Hume and they decided to purchase a home in Cambridge, a distance of approximately 100 kilometres from Toronto. Unquestionably, Hume and Ligate considered the move to Cambridge to be advantageous in terms of their own personal and professional needs. Likewise, Ligate believed that the move would be advantageous to Ashley and would provide her with a host of benefits and amenities that Toronto could not provide.
>
> *Ligate's views were entitled to great respect and the most serious consideration. The trial judge erred in failing to give them the weight they deserved.* [italics added]

As in the dissenting opinion in *Woodhouse*, the crux of the philosophical difference between the "mothers first" proponents and the "children first" proponents may be found right here. Moldaver J. first excludes the possibility that mother's motive was "improper" – that is fine. But then, he is quite transparent that the evolution and purpose of the proposed move was to meet the needs and desires of the adults, not the child.

The one statement which actually refers to the child is unconvincing. There is nothing in the evidence which was adduced in this file which would justify the court concluding that, as a matter of course, Cambridge was a community "better than" Toronto. Comparing the two communities was completely beside the point. There are certainly "benefits and amenities" in Toronto which can match those in Cambridge, even if, as mother asserted, Cambridge has the second highest standard of living in Canada.

It would be wise for courts to avoid this path, lest we find judges commenting on whether it is better to live in Côte St-Luc or Westmount, Sillery or St-Foy, St-Jovite or St-Jérôme.

Rather, it appears that what Moldaver J. is trying to say is that since it is the mother's opinion that Cambridge would be a better community for Ashley, the courts should and *must* defer to that opinion, because of what McLachlin J. said at page 60 (which he paraphrases in the sentences italicized above).

Unfortunately, Moldaver J. appears to have fallen into the same trap that he accuses the trial judge of succumbing to, by quoting a segment of a judgment out of context. McLachlin J.'s comment about "showing great respect to the custodial parent's opinion" was not intended to give this factor a disproportionate weight, as if this opinion is what should persuade the court. Indeed, it is McLachlin J.'s very next paragraph, still at page 60 of the judgment in *Goertz*, in which she re-places the element of "respect of the custodial parent's opinion" in its proper context as simply an element to be weighed, amongst all the others, in the critical judicial process of the assessment of the best interest of a child.

Turning to the practical issues, Moldaver J. did not consider that a 100 km distance should be viewed as an impediment to father's access, particularly given the mother's willingness to share in the driving, and her willingness to increase the father's holiday time with Ashley. Moldaver J. pointed out that travelling from one end of Metropolitan Toronto to the other can readily take the hour or so a trip to Cambridge would take. Finally, Moldaver J., citing with approval the dissenting opinion in *Woodhouse*, soundly rejected the expert evidence that it was far preferable to maintain proximity of the parents' residences, for the child's sake.

This view of long-distance custody cases has been put forward many times before. It remains two-dimensional and static, and lacks insight as to the realities created for children subjected to bi-weekly travelling. What is of particular concern in *Ligate* is that the appellate court judge made these observations with complete disregard for the lengthy analysis of the facts which the trial judge had carefully set out in first instance. It is a profound rule of appellate courts not to interfere in such findings of fact, yet the following is the reality that the trial judge wanted to avoid for Ashley (page 59 of the appellate court judgment, pages 26-27 of the judgment in first instance):

> I am further satisfied that the drive could take close to two hours, depending on the traffic and weather, and that Ashley would be late every access weekend for her

> Friday evening [Shabbat] meal with her Father's family. It was my observation of Ligate, throughout the Trial, that she is a tense person and understandably angry with Richardson's failure to provide his consent to the move. While I do not doubt her sincerity and her willingness to not only make this drive on a Friday evening but to drive half way back to Toronto to meet Richardson on the Sunday evening drop off, I am of the view that it would take its toll on her, as well as on Ashley's relationship with her Father. Resentment would eventually creep into those drives. On cross-examination, Ligate admitted that she would not force Ashley to drive to Toronto after school if the child said she did not want to go. She did, however, think that there were ways of reasoning with the child or bribing her to go. I am not convinced that reasoning would overcome the child's reluctance if she was tired and did not want to go, nor am I convinced that bribery would work. Further, Hume has told the 5 year old child that she could make up her mind if she wanted to go. In the end, Ligate would give into the child's wishes and the child would miss her access weekend with her Father. Missed weekends would not be in Ashley's best interests, and even if Richardson did drive to Cambridge for the day, it would not, in my view, make up for the lost weekend.

And to make matters worse <u>for the child</u>, no one thought to factor into the equation that as this child gets older, she will have more and more activities centered in Cambridge, which will be adversely affected by the weekends spent in Toronto (missed sport practices or dance recitals, for example). Essentially, the majority view was that it was enough to make reasonable accommodations to the father *qua* visitor in the child's life, whereas the minority view (upholding the trial judge's view) was that one must look at the father *qua* co-parent in the child's life, and strive to maintain reasonable proximity between the two parents, for the child's sake.

These positions are certainly irreconcilable. The clear language of McLachlin J. seems subverted, in this author's opinion. Now, having been reduced to a complete state of confusion, let us take a brief look at the other recent post-*Goertz* cases, to see if anything else useful has come from the Supreme Court's pronouncement.

<u>4.3 *Luckhurst vs. Luckhurst* (1996) 20 R.F.L. (4th) 373 (Ont.C.A.)</u>

In *Luckhurst vs. Luckhurst* (1996) 20 R.F.L. (4th) 373 (Ont.C.A.), the parents shared custody of their 9 year old twin sons, whose primary residence was with the mother. There was a restriction of mobility clause in their divorce agreement. The mother petitioned the court for leave to move from London, Ontario to Cobourg, Ontario, where her new partner had found a good job. The parents themselves both had gainful employment in London, Ontario. The distance between these two cities is about 295 km.

The appellate court upheld the lower court's finding that permitted the mother to move, given in particular her willingness to drive the children to a halfway point, to compensate for some of the inconvenience which would be caused for the father in the exercise of his access to the children. This solution was approved insofar as the structured reasoning in *Goertz* permitted the court to favour the continued stability of custodial care for the children with their mother, while at the same time protecting and safeguarding the children's access with their father. Essentially, the mother was "rewarded" for being an access-friendly parent who showed a manifest willingness to facilitate the father's access.

<u>4.4 *Woods vs. Woods* (1996) 110 Man.R.(2d) 290 (Man.C.A.)</u>

In *Woods vs. Woods* (1996) 110 Man.R.(2d) 290 (Man.C.A.), the father had primary custody of two sons, 6 and 14 years of age, pursuant to the agreement of the parents and judgment of the court, which also stipulated a restriction of mobility clause. He petitioned the court for leave to move from Winnipeg, Manitoba, to British Columbia, in order to find gainful employment (the mother was contributing a modest $ 150 per month for the support of the children, and the father was unemployed).

The appellate court upheld the lower court's finding permitting the father to move, again, given a willingness by the father amicably to arrange access with the mother at least twice yearly. It should be noted that mother was not cross-petitioning for custody herself. Father's motivation to move in order to improve the financial lot of the children was considered a highly relevant justification for the move, however, mother was permitted to terminate support payments as compensation to her for the increased cost of exercising access. It should also be noted that father's desire to find gainful employment was also viewed favourably as a desire to be a good parental role model to the two young boys (of course, one wonders whether the court would have made this observation had the custodial parent been the mother).

This decision may be viewed as reasonable, insofar as the purpose of the move was to bring a direct benefit to the children: adequate material support. It is not as if the father declared a need to follow a new girlfriend to B.C., in disregard of the consequences for the children, as we have seen in many cases where the sole purpose of the move has been a custodial mother's desire to follow a new boyfriend to a new destination, without regard for the harm caused to the children by a move which is otherwise precipitous and pointless from <u>their</u> point of view.

<u>4.5 *Droit de la Famille 2518* [1996] R.D.F. 725 (Que.C.A.)</u>

In *Droit de la Famille 2518* [1996] R.D.F. 725 (Que.C.A.), a little boy was born to unmarried parents, and was whisked away by mother from Montreal to Vancouver, at the tender age of two weeks, without prior notice to father. The mother attempted proceedings in B.C., but the court declined jurisdiction in favour of the province of Quebec.

The father then instituted proceedings in Hull, Quebec, and by the time the trial took place and judgment was rendered, the child was a year old. Father had not seen him since mother's departure, claiming he did not have the means to travel to B.C.

The trial judge in first instance considered that it was of primary importance to permit the establishment and development of a bond between father and child, and so granted a joint custodial order, by the terms of which the child was to spend three months at a time with each parent, in each city, on a rotating basis, and this, for a reasonable period of time.

Before the Court of Appeal, both parents argued that this joint custodial solution was <u>not</u> workable for either of them, and was set aside accordingly. Rothman, J. (Proulx and Robert JJ. concurring) opined, at page 727:

> Appellant's conduct, in leaving with the child as abruptly as she did, may have been reprehensible. But on the record before us, we cannot say that her conduct was such as to reflect a lack of concern for the best interests of the child or to indicate an

> inability to look after the child, so as to deprive her of custody.
>
> It is well established law that blameworthy conduct of a custodial parent towards the other parent is not, in itself, sufficient reason to deprive the custodial parent of custody. Nor is it sufficient reason, in itself, for not awarding custody. Reprehensible conduct will only be relevant if it reflects an inability to safeguard the best interests of the child (*Gordon c. Goertz*, (1996) 2 R.C.S. 27.).

and at page 728:

> While one may well presume that, ordinarily, it is in the best interests of the child to maintain close bonds with both parents following their separation, this is not always free from practical difficulty. In most cases, following a separation or divorce, the bonds between the non-custodial parent and the child are limited to rights of access. This does not mean that the non-custodial parent is deprived of all parental authority (*P.(D.) c. S.(C.)*, (1993) 4 R.C.S., 164), although distance, the age of the child, financial considerations and other circumstances sometimes make the exercise of these rights less easy.
>
> In the present case, it may be appropriate to note that the record contains no evidence other than the testimony of the parties. No experts were called by the parties and no expertise was ordered by the Court prior to making the joint custody order.

The Court then rejected the original joint custody order, in that it did not respect the reality that mother had been the primary caregiver of the child and the parent to whom the child was most closely bonded – an unhappy reality created by the poor judgment of the mother, to the ultimate long-term detriment of the child who was deprived willy-nilly of the opportunity to form a primary affective bond with father too!

The Court considered that the three month rotating schedule would be de-stabilizing for the child – without itself ordering an expertise to determine whether such a schedule would in fact be de-stabilizing, and for that matter, without itself ordering an expertise to determine whether there existed another alternative not yet contemplated by the parties. And again, the Court of Appeal makes a teasing mention of the expertise that "should have been" ordered in first instance, while disregarding the unanimous view of first instance judges that one cannot force unwilling parents to participate in a psychological expertise as to custody, even though psychologists are themselves ethically not permitted to conduct an expertise as to custody without assessing both parents. This is known in the vernacular as a Catch-22.

Finally, the Court adopted the tired, traditional formula of confirming custody to the mother "with whom [the child] has lived since birth," while granting "liberal access" to father: a month in the summer at father's home, and other mutually agreeable times in Vancouver, should the father travel there. One is left speechless at the ultimate futility of the entire exercise, but this ultimately reflects the continuing judicial view that the court cannot require the custodial parent to fix the residence of the child at such place or in such city as may actually reflect the child's best interest.

4.6 *Chilton vs. Chilton* (1996) 26 R.F.L. (4th) 124 (B.C.C.A.)

In *Chilton vs. Chilton* (1996) 26 R.F.L. (4th) 124 (B.C.C.A.), the parents shared custody of their seven year old son, whose primary residence was with mother. The father was to pay generous

spousal and child support for about a year, after which the spousal support component would cease. The mother completed a travel course, and obtained an offer of employment in Hawaii, and so petitioned the court for permission to move there with the child, while the father petitioned the court that mother be enjoined to stay, else that custody be granted to him.

The appellate court upheld the lower court's finding that permitted the mother to move, in application of the methodology of reasoning set out in *Goertz*. The appellate court considered that the trial judge had properly weighed the desirability of maximizing contact between the child and both parents and the mother's wish to establish a career in Hawaii, to support herself and the child (leaving one to wonder why the father did not simply offer to resume the spousal support payments instead – although it may be hard for a man to make this choice, one wonders if such an offer would not have influenced the trial judge).

The trial judge had carefully weighed the possible advantage of the move to Hawaii against the possible disruption to the child's life in being removed from his school and community as well. The child's adaptability and sociability and the possibility of compensating father with longer access periods were noted, as was the *de facto* reality for the child of having been principally in the care of mother since the separation of the parties. Finally, despite the prior joint custodial agreement, the court was not prepared to "read in" a requirement that the parents continue to live in close proximity to each other (one might of course ask: and why not read in such a requirement, if the children's interest is at issue?).

There is no question that the precedent at least superficially created by *Goertz* can be seen in the above recent cases to be reduced to a meaningless jumble of legal verbiage, serving only to pay lip service to a higher ideal, while persistently upholding biased attitudes as to the primacy of parental mobility over children's stability.

4.7 *Levin vs. Levin* [1996] B.C.J. No. 2496 (B.C.C.A.)

In *Levin vs. Levin* [1996] B.C.J. No. 2496 (B.C.C.A.), the three children, 11, 10 and 7 years of age, resided with mother in Port Alberni, B.C., in her custody, pursuant to a 1994 divorce judgment. Father had access rights, and there was an order of joint guardianship as well. The parties had been before the courts three further times in the same year of 1994, when, on each occasion, father successfully prevented mother from changing the residence of the children. The last judgment of the court enjoined her not to change their residence without the court's authorization.

In 1995, mother again attempted to obtain permission to move, by reason of the job opportunity of her new husband. The trial judge dismissed the petition, although this was before the decision in *Goertz*.

The appellate court upheld this decision based on the failure of mother to satisfy the threshold test, insofar as the prior court order had already prohibited a move having considered the possibility of such a change. This mother probably only lost because of her incessant litigiousness over a period so shortly after the original divorce order (these parents were in court on an almost monthly basis). After all, in the other contemporary jurisprudence in this area, the fact of parental employment opportunity has been readily accepted as a justification to change a child's residence (meaning, of course, that the courts are still necessarily and systematically asking why the custodial parent is seeking to move, even though *Goertz* at least superficially states that that very question is taboo; in my view the question "why"

remains wholly appropriate insofar as it is the most direct way of learning what the custodial parent's opinion is to which we are supposed to show such deference!).

4.8 *Bruce vs. Bruce* (1997) 26 R.F.L. (4th) 219 (B.C.S.C.)

In *Bruce vs. Bruce* (1997) 26 R.F.L. (4th) 219 (B.C.S.C.), the parties had separated when their daughter was three years old, and agreed that mother have custody, and father have access rights. Several years later, mother and her new boyfriend moved to Vancouver Island with the child, now eight years old, thereby adversely affecting father's ability to exercise his access rights, since he still resided in Coquitlam, B.C. (a distance of apparently about 200 km). The mother petitioned the court to reduce the father's access rights, and father counter-petitioned for a joint custody order, with primary residence to him.

The father's case was well-presented to the court, insofar as important evidence was adduced about mother's six moves since the separation of the parties, thereby leading to the child having changed day care on four occasions, and elementary school on two occasions. As such, the child was being subjected to a third elementary school by the most recent move to Parksville, B.C. Father also adduced solid evidence about the warm and loving environment he could provide the child, including access to the extended family.

On the other hand, the mother had chosen a move to a community to which she had no ties; with a man she had known for only a year; this partner was not brought before the court to testify; and for that matter, the mother had quit a long-term $ 49,000 a year job to throw her lot in with this latest in a series of boyfriends.

Unfortunately, the trial judge viewed askance the father's delay in petitioning the court, insofar as the move was now a *fait accompli*. Nonetheless, a careful elaboration of the principles set out in *Goertz* was dutifully included in the decision. Also, reference was made to the casually accepted notion that "the court cannot directly restrict a parent's mobility," even if one must sternly note that custodial parents must not view this as *carte blanche* to "limit access by moving from the child's historic area."

The ultimate remedy provided was however quite decent: father was granted each long weekend per month, plus a further weekend per month (with mother to bring the child to the Horseshoe Bay ferry terminal); father was further granted half the summer, half the holidays, and weekly telephone access to the child. All in all, one can at least say that the court here took quite seriously the need carefully to redress all efforts by the mother to distance this child from father, and to create a structured access regime which would ensure the quality – and quantity – of time spent by the child with her father. Indeed, the mother was also directed to advise the school that father was a contact person to whom all educational information should be given about the child, on a timely basis.

5. Conclusion

In closing, this coverage of the relevant caselaw should permit the practitioner to address the issues which would be of concern for the Court to permit a well-reasoned consideration of where children in such situations ought to reside. In my view, it is essential that there be a psychological assess-

ment which deals with the degree of attachment of the children to each parent, as well as the global impact upon the children of a proposed move. For example, children who feel secure that they will still be able to visit with the non-custodial parent regularly despite a move, may still express other significant anxieties about changing schools or losing neighbourhood friends and family members, and these latter elements alone may be sufficient to mitigate against a move (presuming, of course, that the non-custodial parent is willing and able to assume custody).

This is not a matter of caprice, and should not be viewed as putting children's wishes above their parents' decisions. Rather, it is a question of granting full respect to the rights of children, as autonomous human beings, to have a reasonable say in their future, and where their emotional or material well-being requires that they stay and not move (or move and not stay), then this must be the guiding beacon for the trial judge. In this regard, it is often useful to have an attorney appointed to represent the children, or if they are of an age to give their own mandate, that they consult an attorney themselves. Their right to independent representation when their future is at stake is a matter of decided caselaw (*Droit de la Famille 1549 [supra]* and *Droit de la Famille 2224* [1995] R.D.F. 396).

In this light, the remarks of Abella J. in *MacGyver* which imply there are two classes of parents (the all-powerful custodial parent, and the essentially impotent access parent) are indeed regrettable if they are taken out of the context of the narrow facts in that case. The practitioner in this area should be sure to make reference to the analysis of Proulx J. in *Droit de la Famille 1826 (supra)* which is not only more useful for a wider range of situations of fact, but which also answers perhaps more appropriately the fundamental question of judicial policy: in family matters pertaining to custody, is it *mothers* first, or *children* first?

A thoughtful and complete psychological assessment will facilitate for the trial judge the determination of what the best living arrangements would be for the children, within the parameters of what may be reasonably expected of their parents. The well-being of children may then be considered from all angles (psychological, material, emotional, academic, and so on), without regard for the adult marital issues. The conduct of the parents will not be relevant to this appreciation unless it is clearly evidence of good parenting or bad; spousal misconduct is immaterial. The willingness of either or both parents to make accommodations to safeguard their children's well-being in all the developmental spheres is likely a fair predictor of their future success.

It is the clinical psychologist's job to advise the court of what children need to live well, within the dynamics of their family structure. It is the practitioner's job to present such expert recommendations before the Court, and to convince the eventual trial judge that the parents may – and *should* – be compelled to do all things in their power to give full effect to such recommendations, to safeguard the one cardinal right all children have: that all decisions be made in their best interest.

Insofar as the jurisprudence which has followed *Goertz* strives to be seen to apply the structured reasoning set out by the Supreme Court, we may at least say the judiciary is being sensitized to the new political correctness, so to speak. However, the electrifying cross-wiring between *Woodhouse vs. Woodhouse* and *Ligate vs. Richardson* serves to remind us quite dramatically that man is far from being a rational animal, and is rather the paragon of rationalizers. No matter how much the highest court is trying to steer a clearer course for the determination of the future stability of the children of this nation, we will always be stuck between the judges who espouse each of the two schools of thought: those who genuinely believe in "children first" (majority in *Woodhouse*, minority in *Ligate)*, and those who are

entrenched in the "mothers first" reasoning (majority in *Ligate*, minority in *Woodhouse)*.

It is time that this matter be referred to the legislator for correction. McLachlin, J. has already spoken as clearly as she can: "Custodial responsibilities curb the personal freedom of parents in many ways, The Act is clear." The *Divorce Act* already provides, at section 16(6), as follows:

> **Order for custody**
>
> **16. (1)** A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
>
> …
>
> **Terms and conditions**
>
> **(6)** *The court* may make an order under this section for a definite or indefinite period or until the happening of a specified event and *may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.*
>
> **Order respecting change of residence**
>
> **(7)** *Without limiting the generality of subsection (6),* the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.
>
> **Factors**
>
> **(8)** *In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.* [italics added]

A court of competent jurisdiction may grant custody to a party (whether parent or third party), and impose any terms, conditions or restrictions as are fit and just, having regard only to the best interests of the child. The legislator has not seen fit to indicate that parents have "mobility rights" which transcend the right of the child. The legislator has seen fit to note that section 16(7) of the *Divorce Act* provides a mechanism of notice to the non-custodial parent in the event of a planned move by the custodial parent, but that this subsection does not limit the power of the court of competent jurisdiction to fix terms and conditions.

Yet, the courts persist in thinking that the *Charter of Rights and Freedoms* somehow grants "mobility" rights to individuals who are also parents, as if parents somehow needed to have freedoms they may assert *as against their children* (as opposed to freedoms one may assert as against the State, or against one's neighbours). The s. 6 *Charter* right of every Canadian citizen to "enter, remain in, and leave Canada" and "to move and take up residence in any province" has nothing to do with the profound responsibilities undertaken by two individuals who bring a child into the world.

It is incumbent upon the legislator to amend section 16 of the *Divorce Act* to make explicit

the instruction of the Supreme Court that parents do not have rights they may assert against their children, but rather it is the children whose rights hold sway over those of the parents. A society which forgets the language of obligation in its duty to its children is one doomed to failure. In the event of parental discord, when the parents are no longer acting in a united fashion to assert and agree upon the best course for their children, it is, for better or worse, upon the shoulders of the judiciary that the burden will fall to make that determination and to assert that best course. Without the explicit empowerment by the legislator, the courts are being reduced to nothing more than rubber stamps of the custodial parent's decision blithely to move hither and yon. So, we should either declare universal judicial impotence, or remedy it without delay.

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