

CANADA / JUDGMENT

Grant v. Grant

2001 BCSC 1289

COURT

Supreme Court of British Columbia

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Citation:

Grant v. Grant
Date: 20010912
2001 BCSC 1289

Docket:

2264
Registry: Revelstoke
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JODY MAXWELL GRANT
PLAINTIFF

AND:

ANITA MARIE GRANT
DEFENDANT

REASONS FOR JUDGMENT

OF

MASTER GROVES

Counsel for the Plaintiff

R. Lundberg

Counsel for the Defendant

R. Buddenhagen

Date and Place of Hearing:

August 22, 2001

Revelstoke, BC

[1] This application is an application for interim child support and interim custody of two children under the provisions of the Divorce Act, R.S.C. 1985, c.3. The most contentious issue is that of interim custody.

[2] The relevant sections of the Divorce Act on the custody issue are as follows:

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.

Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

...

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.

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

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

1. Background Facts:

[3] The plaintiff father, Jody Maxwell Grant (the "plaintiff"), is 33 years of age. The defendant mother, Anita Marie Grant (the "defendant"), is 32 years of age.

[4] The plaintiff and defendant commenced a "common-law" relationship in August 1990 and were married in Kelowna, British Columbia on the 21st of November 1992. Both the plaintiff and defendant were raised in the Revelstoke area and both have extended families in that city and the surrounding areas.

[5] The parties' marriage was a somewhat difficult one. Though the parties were initially quite happy in the relationship, there was an earlier separation in 1996 for about four months.

- [6] Throughout the marriage, it appears that the plaintiff worked for the most part for the Canadian Pacific Railway. The defendant was a homemaker who did not regularly work outside the home. She was the primary caregiver for the children.
- [7] While residing in Revelstoke the parties had two children, Lucas Mackenzie Grant, born the 19th of May 1993, and Lindsay Meagan Grant, born the 11th of September 1995. I will refer in these reasons to the children as Lucas and Lindsay.
- [8] As part of the plaintiff's employment, the parties after the birth of the children moved to Field, British Columbia for a short period of time. Field is a relatively small community in the mountain passes between Golden and Banff. The defendant did not like living in Field and found the opportunities for her and the isolation somewhat limiting, as one might suspect in a very small community. A separation occurred in 1996 and the defendant during this separation moved with the children to Revelstoke. The plaintiff appears to have seen the children regularly during this time and he paid child support to the defendant.
- [9] Shortly after this first separation, the plaintiff was able to obtain employment again out of Revelstoke with the Canadian Pacific Railway and he returned to Revelstoke. The parties reconciled upon his return.
- [10] In the summer of 2000 the defendant was able to obtain temporary work in the Cranbrook area. It was agreed by both the plaintiff and the defendant that she should pursue this opportunity and the defendant left Revelstoke in the summer of 2000 and worked in Cranbrook for some time between four and six weeks. The children resided with the plaintiff in Revelstoke at that time. It is during this time in Cranbrook that the defendant phoned the plaintiff and advised him that their marriage was over.
- [11] In early September 2000 the defendant returned to Revelstoke, her work being complete, and located a place to live. There is some dispute as to the discussions between the plaintiff and the defendant at this time about the children's primary residence. The defendant rented accommodation in Revelstoke. I am prepared to accept that the plaintiff reluctantly agreed that the children could leave the matrimonial home and reside with the defendant, knowing that the children would remain in Revelstoke and that he would spend considerable time with them.
- [12] There is some dispute between the parties as to how the plaintiff's time with the children was arranged and how it proceeded. The plaintiff indicates that he and the defendant had a verbal agreement as to joint custody and there was extensive daily access and every weekend access with the children which amounted to more than half of the time. After a few weeks however he says the defendant unilaterally began to cut back the time the plaintiff spent with the children. The defendant denies these assertions and suggests that it was agreed that she would care for the children and they had an informal arrangement as to access which met both their needs. There are some problems with the defendant's evidence on this point. The plaintiff continued to work for Canadian Pacific Railways and the defendant obtained employment for approximately 4 1/2 to 5 hours per day at the rate of \$12

an hour with a Revelstoke lawyer, Gail S. Bernacki. The children were cared for by extended members of the family and daycare providers while the children were not in school and the defendant was working.

- [13] I am satisfied that during this time the plaintiff had generous time with the children on terms the parties informally agreed to. The balance of evidence suggests he saw the children almost daily, after school, and he had them for at least part, if not all, of every weekend. I will deal with my reasons for this conclusion later.
- [14] This situation, a shared custody with primary residence with the defendant, continued until the 26th of January 2001. On that date the plaintiff attended at the school to pick up the children for a scheduled visit. He was told when he arrived at the school that the children had not attended that day and that the defendant had called the school and advised that the children would not be attending. The plaintiff states that while at school he ran into the children's caregiver, Phyllis Makarewicz, who had been called by the defendant that morning, January 26, 2001. The plaintiff was told by Ms. Makarewicz that the defendant and the children were out of town. The plaintiff then contacted the defendant's landlord who was unaware where the defendant was.
- [15] On that same date, January 26, 2001, at 4:30 the plaintiff was served with a letter which states as follows:

Dear Jody: This is to let you know that the kids and I are moving to Cranbrook this weekend. We are moving for employment opportunities for myself and because I have enrolled in school. I plan to be back in Revelstoke for a visit on the weekend of February 17, 2001 and would like to plan for you to see the kids then. Our new telephone number is (250)417-3422 and you are more than welcome to call and talk to the kids anytime. I am sorry that this is not much notice to you. It is not my intention to hurt you in any way but this is a wonderful opportunity for the kids and I. I would really like it if we could come to some formal agreement regarding access soon. [16] The plaintiff was later informed by the children that a friend of the defendant's arrived on Thursday, January 25, 2001, and as it turned out helped with the move. The children also advised that they did not know in advance of the move to Cranbrook.

- [17] The evidence also suggests at the time of the move the defendant had a schooling program confirmed and some prospect for employment, though not as of then a firm prospect.

2. Litigation History:

- [18] This matter initially came on before me on February 22, 2001, at which time an application was brought by the plaintiff for an order that the children not be removed from the Revelstoke area pending a determination of interim custody. Essentially, the plaintiff was requesting that until the matter of interim custody was resolved that the children be returned to Revelstoke. The matter was argued before me on that date and I ordered that the principal residence of the children be in Revelstoke.

- [19] My order was appealed and prior to hearing the appeal a stay was granted by the Honourable Justice Hunter. The appeal came on before the Associate Chief Justice on the 17th of April 2001. At that time, the Associate Chief Justice allowed the appeal and set aside my order.
- [20] Justice Dohm, in his reasons, noted specifically that the plaintiff, despite his income, had not paid interim support to the defendant for her support or that of the children. Justice Dohm also found that the defendant's motives for moving to Cranbrook were, "at this stage pure". Justice Dohm states:

Her motive was perhaps attacked indirectly by assertions that her affidavit material is inconsistent, and I will accept that that is so, but, given the circumstances here, I think it is not terribly relevant. I think what is relevant is that for the most part the move was not made to frustrate the father's ability to be part of the children's lives. Both parents possess the skill to be good parents. That is accepted by the parties. In the time since the removal of the children and herself from Revelstoke, the mother has made a real effort to provide access to the father. The father has accepted that. [21] The Associate Chief Justice further concluded in his reasons:

The parents, having decided that the marriage is over, at least one of them has, it is not for this court to substitute the wisdom of a parent in moving elsewhere to keep the family in a realistic way. That is, the family will continue to exist, although separated. I dare say that it might not, given other circumstances and given the order which Master Groves made, in effect compelling the parents to do that which is unreasonable. There is nothing unreasonable about one parent trying to better themselves by taking training consistent with their degree of intelligence and availability of that training. So with all due respect to Master Groves, I think the order made was wrong. It certainly ought not to have been made at the stage that it was. This appeal is allowed.

[22] This matter was then before me again in Revelstoke on the 30th of May 2001 and by telephone conference before me in Cranbrook on the 31st of May 2001. As a result of those hearings, a Section 15 home study report was ordered. The parties agreed on the terms of the home study report and agreed it should be prepared by Lin Taylor of Golden, British Columbia. It should be noted that on the 30th and 31st of May, for the first time, the issue of interim custody of the children and child support was before the court. I ordered the home study report and adjourned the issue of child support pending the determination of the interim custody matter.

- [23] The home study report was completed as a result of interviews in late June and early July.

3. Home Study Report

- [24] The home study report prepared by Lin Taylor was filed in this court on the 11th of July 2001. The report is extensive. There were three days of interviews conducted, two in Revelstoke and one in Cranbrook. The children were interviewed and the parents were interviewed. Additionally, the maternal grandmother, grandfather, aunt and uncle of the children were interviewed, and the paternal grandmother, step-grandfather, uncle and aunt were interviewed. All these parties reside in Revelstoke. The then proposed child caregiver in Cranbrook was interviewed, as were the proposed and long time caregivers in Revelstoke.

Finally a close friend of the defendant's was interviewed in Cranbrook as was the children's counselor there.

[25] No doubt as a result of these lengthy interviews and the considerable effort put into this report, the report is somewhat lengthy and I will not repeat the factual observations or the background noted by the writer. The findings in regards to the children, however, are important and require some examination.

[26] In regards to Lucas, Ms. Taylor found him initially to be a quiet, reserved child but someone who warmed up to her gradually. She found him to be "bright, articulate and engaging". She found him to be very sensitive, and often referred to hurt feelings including being bullied in school while in Cranbrook. She noted, and I quote:

...a pervasive sense of sadness about Lucas on all three of the occasions on which I met him, as if he were preoccupied, and defensive in talking about his family. She further wrote:

... family and friends noted that Lucas has changed since the separation and the move. He is more reserved, unhappy, and guarded. [27] The considerable task assigned to Lin Taylor in conducting her home study report by the court was a request that she render an opinion as to whether the children had reached a sufficient age to articulate a rational opinion as to which parent they wished to reside with, and if so what was that opinion. On this point Lin Taylor notes as follows:

Regarding Lucas' ability to "articulate a rational preference", I suggest he is developmentally at a concrete stage, and I would not expect him to cognitively be able to rationalize the best community or parent to live with presently, or in the future. Emotionally, Lucas is drawn to Revelstoke. I suspect that Revelstoke represents familiarity, security, closeness to family and friends, memories of happier times and fun activities, and more time with Dad, whom he misses, as well as less travel, and the possibility of the family being together again. He is also confident that his Mom will always love him, and wants him to be happy, and he will see her lots. Lucas clearly articulated his desire to live in Revelstoke, and understands that his Mom will stay in Cranbrook. [28] In regards to the child Lindsay, Lin Taylor notes that Lindsay, like Lucas, was initially reserved. She also warmed up to the interviewer and was then described as, "cheerful, chatty, and very bright". In regards to the ultimate question, the ability to articulate a preference, the deponent notes as follows:

As is age appropriate, Lindsay is very concrete and directly affected by the most immediate influence on her. It would not be appropriate to expect her to make a rational decision, for the present, or future, as to the best placement for her. On an emotional level, she seems less torn and guarded than Lucas, and is clear about her desire to live in Revelstoke with her Dad. She is clearly attached to Lucas and feels safe, loved and supported by both parents. [29] In regards to both children under the Diagnostic Formulation section of the report, the expert notes as follows:

Lindsay and Lucas clearly share a mutual bond of affection with both parents, and they are safe and valued in both homes. They have been deeply affected by the conflict, and need to feel equally attached to both parents so they do not have to worry about the other, and can heal from the separation and be content and happy with both parents. The children's relationship with both parents and the extended family must be supported without the children having to choose or feel caught in the middle. ...

In terms of the children, it is obvious that they are well loved, well-adjusted children, who are hurting from the separation, move and intense conflict. They are very aware that each parent wants them to live with them, and I would suggest are equally attached to each parent. Obviously, Anita has provided good, consistent day to day care, and Jody has been actively involved in after school routines and activities. It is my opinion that either parent would provide a good home for the children. I did not complete an in depth parenting capacity assessment, and do not have an opinion about who is the "best" parent if in fact there is one. Considering the children's preference, Lucas clearly stated that he wants to live in Revelstoke with his Dad. Lindsay also expressed a preference for living in Revelstoke, but is less definite about it. Both children wish their Mom would live in Revelstoke so they could live with her, too, but seem clear that she will not move back. I think the children prefer Revelstoke because they clearly miss Jody, and have strong bonds to their extended family. Their best friends live in Revelstoke, it is familiar, and it represents happier times. I think that they believe living in Revelstoke will mean less travel, as well. It is unusual for children to have a definite opinion about wanting to live away from the primary caregiver. I hypothesized that they felt they needed to go back to Revelstoke to "take care" of Jody because he was so distressed, but I could not find any evidence of that, nor did I get the sense that he was bribing, manipulating, or trying to convince them. I believe that when the children said they wanted to stay, Jody suggested that they talk to Anita about it. In spite of the intense conflict that preceded this home assessment, it is apparent that both parents want what is best for their children. Both parents agree that the conflict must stop and they are ready to support the decision made. They further agree that the children should not be separated, and that they would both support the children's relationship with the other parent and extended family by being flexible in allowing as much visitation as possible. [30] Lin Taylor was not asked to provide a recommendation per say. Her task was to interview the children and extended family and provide the court with information and additionally answer the question as to whether or not the children have reached a sufficient age to articulate a rational opinion and if so what that opinion was. In her recommendations, Lin Taylor has provided a number of quality suggestions to assist the plaintiff and defendant in regards to establishing a long- time co-parenting plan, to involve a mediator or therapist to help build bridges between alienated members of the children's extended families, and finally her view that all legal issues such as separation, divorce or child support be settled as soon as possible.

[31] Having read through the report on now a number of occasions, I thank Ms. Taylor for her assistance and the information provided as a result of her investigation. It seems clear to me from the report that both Lucas and Lindsay have a strong emotional attachment to Revelstoke, to their large extended family that resides there and friends who reside there.

The children seem, obviously, torn between their two parents. Since being in Cranbrook they have spent considerably more time with their mother than with their father, with the possible exception of the summer months when time appears to be shared equally. Their mother is a good parent and provides a loving home for them, as does their father. They both appear to recognize that a move back to Revelstoke, which they both say they prefer, would involve less time with their mother and they indicate that they are comfortable with that.

4. The Parties' Positions

- [32] The plaintiff, as indicated, works at the Canadian Pacific Railway in Revelstoke. He deposes in the various affidavits that he has filed in support of his application for custody that he has been the primary caregiver for the children at the time of separation in August 2000 when the defendant was in Cranbrook. He deposes that initially the defendant intended to stay in Cranbrook without the children. This is denied by the defendant. The plaintiff deposes that he has been actively involved with the children setting out the almost daily visits that he had with the children during the time the parties were separated and the defendant resided in Revelstoke and worked part-time. He deposes that the only time that he was not actively involved in the daily care of the children was for a four-month period of time when the parties separated in 1996 when he resided in Field and the defendant returned to Revelstoke. He deposes that, as indicated earlier, his time with the children was unilaterally trimmed back by the defendant after the separation in Revelstoke and he deposes that telephone access while in Cranbrook has been restricted by the defendant.
- [33] The plaintiff raises a number of concerns about the children's behaviour since the separation. These behaviours are no doubt to do at least in part to the anxiety the children must feel as a result of the uncertainty of their living arrangements. He does express and advise of the quality relationship he has with his children and the activities they undertake when they are together.
- [34] The plaintiff further deposes to his belief that under his proposed parenting plan he will have more time with the children than would the defendant. His hours of work are from 7:00 a.m. until 3:00 p.m. Monday to Friday. The routine that he sets out on a daily basis is that the children would wake at 6:30 a.m., be taken to a neighbour's, Mrs. Vaillancourt, and that he would pick the children up at 3:00 p.m., just after school. The children and their father would have every afternoon and evening together. He suggests that the defendant would have less time with the children in that with her school and work she is regularly out of the home between 8:00 a.m. and 7:00 or 8:00 p.m. consistently during the week. He believes that if the defendant is successful, the children will spend the majority of their non-school, non-sleeping time with a babysitter.
- [35] On the issue of lack of child support, it is noted that during the previous separation of the parties in 1996 the plaintiff paid child support to the defendant voluntarily. The plaintiff deposes that at the time of separation he and the defendant had an agreement in regards to

his non-payment of support. The agreement was that he would be responsible for the family debts, a charge card debt of somewhere between \$7,000 and \$7,500, as well as responsible for the debt on the matrimonial home. It can be noted that the mortgage on the matrimonial home is approximately \$8,000 in excess of the current market value.

- [36] Since the litigation has begun, the plaintiff deposes that he has additional costs for lawyers as well as for exercising access to the children. He further deposes that on one occasion he provided \$200 to the defendant.
- [37] In addition to the affidavits of the plaintiff, affidavits were filed in support of his application by various family members who have been involved in the care of Lindsay and Lucas in the Revelstoke area. All these affidavits attest to the warm and close, loving relationship that the plaintiff has with his children. Though admittedly the plaintiff's mother, the affidavit of Lois Marcella Cunningham-Brooks I find particularly noteworthy. In this affidavit, Ms. Cunningham-Brooks talks about her time with the children in Revelstoke since the separation. She talks about how during the visits in Revelstoke the children have claimed that all their friends are in Revelstoke and they have no close friends in Cranbrook. They make comments that their mother is working long hours, the sorts of hours that she condemned the plaintiff for working when he worked over-time. She comments that Lucas is especially upset about returning after a visit, that he cries and demands to be allowed to stay and live with his father. She deposes how on Easter vacation Lindsay commented that all her best friends were in Revelstoke and she went on to name all of them and then named all her family, cousins on both sides of the family, and stated how she missed everyone. The reason I find this affidavit noteworthy is that the comments the children make to the deponent and the behavior she observes is consistent with what is later found by Lin Taylor in her investigation.
- [38] The defendant also filed a number of affidavits. She deposes in her initial affidavit that despite what is said by the plaintiff, that from the time of separation in early September until she moved to Cranbrook, the plaintiff had the children on alternate weekends plus he had daily telephone contact with them. In her first affidavit, she acknowledges that when she moved to Cranbrook she did not have employment but she felt Cranbrook created, because of its size, a greater opportunity for potential. She also deposes that she moved to Cranbrook so she could go to school at the Academy of Learning to improve her work skills as well as seek employment. She deposes that she put a lot of thought into her move to Cranbrook and came to the decision that the move to Cranbrook was not only best for employment potential and education, but also was best for the children because of the opportunities Cranbrook offers the children. She attaches to her first affidavit references to a recreational centre, movie theatres, water park, skating rink, shopping malls, closeness to the U.S. and Alberta borders, bowling alleys, churches, skiing and a number of activities. She notes however that many of these activities are also available in Revelstoke. She deposes in subsequent affidavits of the number of activities that the children are involved in in Cranbrook including skating, swimming and the like.

[39] There are some inconsistencies in the affidavits of the defendant which cause concern. In her first affidavit filed February 2, 2001, in paragraph 12 she denies the assertion that she and the plaintiff had agreed to joint custody. She says in part in that paragraph:

... Nor did the Defendant have daily access to the children. Right from the beginning of the separation, the routine was for the Plaintiff to have access to the children on alternate weekends plus more-or-less daily telephone conversations. The context in which this paragraph appears is her detailing of her role as primary caregiver, and by direct and indirect suggestion, the limited role the plaintiff played in the children's lives.

[40] In her affidavit filed March 6, 2001 she complains about bouncing back and forth of the children while the children resided in Revelstoke. She states in paragraph 10:

THAT the children were much more settled and relaxed after we came to Cranbrook. Formerly, they were bounced back and forth every single day of the work week. They got up with me. We had breakfast, then I dropped them off at school. At noon Lindsay was picked up by a babysitter, Mrs. Phyllis Makarewicz. At 3:00 p.m. Jody got off work and then he would receive the children and when I got off at 4:00 I would pick them up and take them home and give them supper. In short, every day the children were in the care of three different persons. Here she gives a different version of the children's time with the plaintiff in Revelstoke. In this context she is comparing the stability of Cranbrook for the children with the numerous caregivers - herself, the plaintiff, and the babysitter in Revelstoke. These paragraphs are clearly inconsistent.

[41] The defendant denies that she will have to attend school in the evenings anymore. She deposes in her affidavit filed May 31, 2001, that she has regular work hours 8:30 to 4:30 and that she will be able to maintain her standing at the Academy of Learning by studying on the weekends that the plaintiff would have the children.

5. Legal Argument on "Mobility Rights"

[42] As mentioned at the beginning of my reasons, the applicable section to be considered in my decision on the issue of interim custody is s. 16 of the Divorce Act. In addition to consideration of that section, argument was raised in regards to a number of cases which center around mobility rights of parents. The two cases cited in support of the defendant's position in this area are the decisions of *Gordon v. Goertz*, 19 R.F.L. (4th) 177 and *Nunweiler v. Nunweiler*, 5 R.F.L. (5th) 442.

[43] In the *Gordon v. Goertz* case, the facts briefly are that the mother had permanent custody by a court order in 1993 and the father was granted liberal access. Following the February 1993 order the father exercised extensive access as noted and he learned in the fall of 1994 of the mother's intended move to Adelaide, Australia, which was to take place in January 1995. The purpose for the mother's move was to study orthodontics. As a result of this revelation the husband applied for a change in the permanent custody order. At the hearing of the variation application, the trial judge ordered that the mother be allowed to take the child with her in her move to Australia. The Saskatchewan Court of Appeal upheld this finding

and the matter came on before the Supreme Court of Canada. The Supreme Court of Canada ruled in favour of the mother.

- [44] Paragraph 49 and 50 of that decision provides an effective summary of the law as it applies to mobility cases. That summary is as follows:
- [49] The law can be summarized as follows: 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child. 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them. 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances. 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect. 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case. 6. The focus is on the best interests of the child, not the interests and rights of the parents. 7. More particularly the judge should consider, *inter alia*:
- (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. [50] In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. 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?
- [45] The Nunweiler case follows *Gordon v. Goertz* and is a decision of the B.C.C.A. The facts in Nunweiler are that approximately six months after separation the parties had established a shared parenting regime where the child spent alternate weeks with each parent. In 1997 the mother intended to move with the mother's new partner to McBride, British Columbia. A judge, knowing of the move, granted the mother interim custody. The child was enrolled in school in McBride and lived there for about a year before the trial. The mother's roots were in Fort St. John as were the father's.

[46] During the time that the mother resided in McBride the father's access had become more difficult, more expensive and less frequent as a result of the move. The trial judge's decision in this matter was essentially that the child was to reside in the Fort St. John area. If the mother chose to return to Fort St. John she would have primary care of the child and if not, the father would have primary care. The Court of Appeal summarizes *Gordon v. Goertz* into a three-fold test. This is found at para. 28 of the *Nunweiler* decision:

... First, the decision directs the court to consider the motive for a parent's relocation only in the context of assessing the parent's ability to meet the needs of the child. This, in my view, is as relevant a direction on an initial custody hearing as on a variation hearing. Second, the decision confirms the significance of the instruction, found in s. 16(10), to consider the willingness of a parent to facilitate contact, but notes that this consideration is subordinate to over-all consideration of the best interests of the child. Third, and more broadly, it approaches the issue of a relocation of residence from a perspective of respect for a parent's decision to live and work where he or she chooses, barring an improper motive. [47] It is argued capably by Mr. Buddenhagen on behalf of the plaintiff that the *Nunweiler* case sets before the court a test to consider a parent's relocation only in the context of its effect of meeting the needs of the children and it further states that this is as relevant a direction on an initial custody hearing as on a variation hearing.

[48] These mobility cases are helpful for the court in setting a test, and in determining and assessing the effect of a move on an overall decision on interim custody. Of particular note is the factors set out in paragraph 49(7) of *Gordon v. Goertz*. However, this is not a mobility case per se. This is not a case where a parent has either by final order (*Gordon v. Goertz*) or by interim order (*Nunweiler v. Nunweiler*) where custody is already established. At the trial in *Nunweiler*, the decision which was appealed from, the mother had resided in McBride with the child for close to one year and the father had exercised access.

[49] That being said, these cases give the court some direction. In my view, the court should not consider the mother's motives for the move as negative. There are two reasons for this. To begin with, the Associate Chief Justice has found these reasons to be pure and I am bound by his decision. Secondly, the guidance from *Gordon v. Goertz* and *Nunweiler* suggests that if the mother's motives in moving are not based on an attempt to frustrate the father's access, but are based only in the context of assessing the parent's ability to meet the needs of the child, and here it is argued on behalf of the mother that her ability to meet the financial needs of the children is better met in Cranbrook than in Revelstoke, then in those circumstances the court should not consider negatively a decision of a parent to relocate with the children, be it at the stage of an interim order or final order, or after.

[50] As indicated, the test set out in paragraph 49 of the *Gordon v. Goertz* decision is also beneficial to some degree in these facts. I am particularly drawn to the factors to be considered as set out in subparagraph 7 of paragraph 49. Like in mobility cases, in a case such as this a very significant factor is the fact that the two residences presented to the court are now in different cities, and as a result shared custody and shared time is impossible due to geographic distance.

6. Analysis

[51] Both the plaintiff and defendant, it is conceded, are quality parents who have been actively involved in their children's lives. The children have a warm and loving relationship with both parents and feel equally comfortable with both parents.

[52] Both parents have provided a number of affidavits to the court in support of their positions. There are some factual disputes between the parties, although thankfully not that many. As I noted earlier in these reasons, the defendant mother has sworn inconsistent affidavits. Initially, when talking about herself as the primary caregiver, she minimized the role of the plaintiff and indicated that he only saw the children every second weekend. In a later context, when suggesting that the children's lifestyle in Cranbrook was more settled and was disruptive in Revelstoke, she deposed that the children saw their father every day for a short period of time. As a result of these inconsistencies, I favour the evidence provided by the plaintiff over that of the defendant when there are inconsistencies between the two. Thankfully, however, these are limited.

[53] A comparison of the two parenting plans presents very similar circumstances. The father would not be available for the children prior to drop-off at school for approximately one hour, but would be available for the children around 3:00 p.m. each day. The mother would be able to drop the children off at school but would not be available to them until 4:00 or 4:30 p.m. each day. Both parents work a Monday to Friday shift. As a result, there seems to be very little difference between the amount of time under each parent's plan that the children would have to stay with babysitters or in daycare.

[54] Both parents appear to have arranged for quality daycare, the mother in a new daycare which she has recently arranged for, and the father with the daycare provider the children had prior to their move to Cranbrook, and/or with extended members of his family. In summary, both parents are available to meet the needs of their children and have a plan to meet those needs effectively.

[55] The status quo of children is often a strong factor on an interim custody application. Here, counsel for both the plaintiff and defendant agreed when questioned that primary care is an incident of status quo, but does not equate to status quo itself. Again, we have a relatively equal playing field in the parties' competing applications when one looks at the status quo question. The mother has been the primary caregiver for the children, particularly since the move to Cranbrook. On the broader issue of the status quo, that favors a residence of the children in Revelstoke with the father. It is the community where they have, for all but a few

months of their lives, exclusively resided. It is the community in which the school and the social environment is most familiar to them. It is the community in which extended family, both maternal and paternal, reside and consider their home. Finally, it appears from the report of Lin Taylor that it is the community with which the children have the strongest emotional bond.

- [56] Turning now to the *Gordon v. Goertz* analysis, paragraph 49(7) directs the court to consider existing custody and access arrangements and relationship between the child and custody and access parents. That is difficult to do in this circumstance as there has been no established custodial arrangement. As indicated above, the circumstances suggest that the mother has had primary care of the children but I find that the father has been active in the children's lives both during cohabitation, at the time of initial separation, and even after the children moved to Cranbrook. Secondly, under both parenting plans the children would have quality time with the non-custodial parent under the regime which currently exists. That regime is that each parent drives roughly half-way between Revelstoke and Cranbrook every second weekend, both on Friday and on Sunday, and the children are exchanged for access visits. The parties have effectively been able to split additional special time with the children, as an example summer vacation, in half. Under both parenting plans, contact with the other parent will be real and consistent.
- [57] Again, considering the test in *Gordon v. Goertz*, I do not consider and will not consider the defendant's reasons for moving. This move was not done with the intention of frustrating the plaintiff's time with the children and I accept that the defendant moved for what she perceived to be a long-term benefit for herself and the children.
- [58] On the issue of disruption to the children by a change, in this case of the principal residence with their mother, or conversely removal from family schools and community that the children have come to know, the report of Lin Taylor strongly suggests that the children indicate a preference to reside in Revelstoke, are more closely associated with that community. The children recognize that if that is the end result of this decision, there would be some disruption in the children's relationship with their mother. They would commence seeing her only on an access basis and the children seem to be aware of what that involves. Thus, on balance, disruption to the children is more likely to be a factor if they continue to reside in Cranbrook.
- [59] As this analysis suggests, there are a number of factors, in the two parents' plans for the children, which essentially balance. The time that each parent has available for the children in their two different communities and their two different jobs, works out to be roughly equal. The amount of time that the children spend in daycare as a consequence under both parents' plans is relatively equal. Under both plans, contact with the other parent will be regular and I am satisfied will be encouraged by either as the custodial parent. On the status quo issue, the incident of status quo being primary care favors the mother, whereas the incident of status quo, being familiarity with community, school, friends and family, favors the father.

- [60] At the end of the day, I am satisfied, on the evidence before me, and particularly upon the analysis of the report of Lin Taylor, that Lucas and Lindsay have a strong emotional tie with Revelstoke and the family, friends, schooling and activities that community has provided for them for most of their lives. Lin Taylor, as well as others, have noted in particular Lucas's change since the move to Cranbrook. Of concern particularly is the observation that there is about Lucas "a pervasive sense of sadness" and that family and friends have noted about Lucas since the move that he "is more reserved, unhappy, and guarded".
- [61] I do not accept, nor does Lin Taylor accept, a proposition or belief that Lindsay and Lucas have the ability to weigh factors and rationally choose where they wish to live. However, in my view it is in their best interest that they be given the opportunity to reside in the community in which they have the strongest emotional attachment. Recognizing that Lucas and Lindsay are equally comfortable with both parents, have a strong relationship with both parents, and that both parents love them and provide in an exemplary manner for their care, the closeness that they feel with Revelstoke, their family and friends there, is the determining factor in this case.
- [62] I have concluded that it is in the best interest of Lindsay and Lucas that they reside with their father in Revelstoke.
- [63] There will be an order that the plaintiff and defendant share interim joint custody and interim joint guardianship of the children. The principal residence of the children shall be with the plaintiff. Access will continue in a similar manner to which the parties have arranged, with every second weekend with their mother, and an exchange in Radium. The father gets off work earlier and can thus drive farther.
- [64] The defendant has brought on an application for child support, but the plaintiff has not. Both parties are represented by counsel and are aware of the provisions of the Child Support Guidelines. I will leave it to them to work out the details of appropriate child support, with liberty to apply.
- [65] Each party is to bear their own costs of this application.

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