CANADA / JUDGMENT

Hunt v. Hunt

2002 BCSC 1189

COURT
Supreme Court of British Columbia

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2002BCSC1189

Citation:	Hunt v. Hunt
Date:	20020809 2002 BCSC 1189
Docket:	F990145 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	BARBARA ANNE HUNT PLAINTIFF
AND:	ROBERT JOHN HUNT DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HOOD

(IN CHAMBERS)

Counsel for the Plaintiff

J.R. Singleton, Q.C.

Counsel for the Defendant

J.C. Fiddes

Family Advocate for the Children

H.I. Wolfson

Date and Place of Hearing:

July 30 and August 2, 2002

Vancouver, BC

[1] The plaintiff mother seeks an order that the children of the marriage, Taylor Hunt, born August 31, 1998, and Hayley Hunt, born November 6, 1995, be permitted to relocate their residence to North York, Ontario. The sole issue for me to decide is whether such a move would be in the best interests of the children. It will be seen that in my view the move would not be in their best interests in the present circumstances. Rather, it is more likely than not that it would effectively destroy any chance these children have to enjoy any kind of a meaningful relationship with their father.

[2] The parties were married on June 14, 1985, separated on December 10, 1998 and divorced on May 31, 2001.

[3] The parties went through a trial before the Honourable Mr. Justice Henderson. His oral Reasons for Judgment dated April 25, 2001 should be read. His Lordship found that while the parties were good parents, they were incapable of co-operating in even minimal ways. He awarded custody to the plaintiff as well as spousal and child support.

[4] The threshold issue before His Lordship was the plaintiff's allegation that the defendant sexually abused their daughter. The allegation was withdrawn on the first day of trial and the plaintiff made no effort to establish sexual abuse; although a great deal of evidence was apparently led on the subject.

[5] His Lordship found that the defendant had not committed sexual abuse or sexual impropriety of the daughter; that there was no confirmation or support for the child's story. And he awarded costs, which were certified at $28,157.00, against the plaintiff. His Lordship also found that the evidence did not support the defendant's position that the plaintiff manipulated the daughter into making the allegations, notwithstanding the suspicions of Dr. Posthuma in his Section 15 Report. It was found that the daughter made the false allegations of her own volition.

[6] Apparently the defendant exercised access without difficulty until January of 2000 when he was arrested. He was then released on his undertaking which provided that he would have no contact with the children or with the plaintiff. No charges were ever laid. Thus, as His Lordship found, access was not exercised in any effective way after January of 2000, although this could not be attributed to Mr. Hunt.

[7] With regard to access, His Lordship had the following to say, both with regard to Taylor and Hayley:

31 Mr. Hunt is entitled to unfettered access to Taylor, if Taylor wishes to accept that opportunity. I hope that Taylor does so. Mr. Hunt may have access to Taylor every second Friday from 7 p.m. until the immediately following Sunday at 7 p.m., commencing May 4, 2001.

32 Mr. Hunt is also entitled to additional access to Taylor during the summer months, such access to be agreed upon between the parties, but the access is to be not less than two weeks of continuous time. Mr. Hunt is also entitled to access to Taylor at Christmas time, such access to be agreed upon between the parties, but to be not less than 48 hours in duration.

33 Mr. Hunt is also entitled to access to his daughter, but, in light of the allegations she has made, that access would not be in the best interests of Hayley until after some significant counselling of all concerned has taken place. With respect to Hayley, my order is that Mr. Hunt may have the same access to her as I have described regarding Taylor, but only upon the following conditions: the parties and their children are to attend counselling by a licensed psychiatrist or psychologist on a regular basis for a period of six months, the cost of such counselling to be divided equally between them. Access may, during this six-month period, be exercised only at such times and in such manner as the psychologist or psychiatrist directs. After six months have elapsed, the access is to be unfettered and is to be the same entitlement as I have ordered with respect to Hayley.

[8] Reconciliation Therapy for Hayley was commenced earlier this year with Dr. Carla Fry, Registered Psychologist, pursuant to His Lordship's order, and the parties are co-operating with Dr. Fry in the therapy, and following her directions. The therapy was put on hold until November because of the fact that Dr. Fry is now on maternity leave. It is not clear whether any interim arrangements have been made pending her return. I will refer to Dr. Fry's letters on the subject matters, and Mr. Wolfson's letter and memo in a moment.

[9] Mr. Singleton took me through the leading decision of Chief Justice McLachlin in Gordon v. Goertz [1996] 2 S.C.R. 27. He submitted that the threshold requirement of demonstrating a material change in the circumstances affecting the children has been met. I must embark on a fresh inquiry into what is in the best interests of the children, having regard to all the relevant circumstances pertaining to their needs and to the ability of the respective parents to satisfy them. The inquiry is based on the findings of Mr. Justice Henderson who made the previous order, and the evidence of the new circumstances. The plaintiff has made out her case that she should be entitled to take the children and relocate them in Toronto, that is, in North York.

[10] In support of the motion, Mr. Singleton read portions of the plaintiff's primary affidavit, which seemingly is more concerned with her asserted faults on the part of the defendant, than with the children and what is in their best interests. In this regard, Dr. Posthuma says in his Section 15 Report that basically the plaintiff describes someone with serious pathology, and that it is unlikely that it is true. At page 10 of his report, he has this to say about the plaintiff:

The clinical scales of the test would indicate someone who is likely to see themselves as very conventional and moralistic, with an optimistic view of the world. However, others are likely to see them as individuals who do not have much psychological insight, who have strong needs for attention and affection, and who are easily slighted if these needs are not met. In psychological terms, such individuals are often seen as narcissic and egocentric. It is difficult to know from this assessment, whether these test findings can be supported by other evidence. Accepting that there is no foundation for the sexual abuse allegation, the test results would not be surprising, given that such individuals usually lack psychological insight and tend to look for external explanations for their difficulties in life. The test results would also account for the overwhelming list of faults that Mrs. Hunt has found in regards to her husband, in which there is little differentiation of the trivial with the grave. This would not support, however, Mr. Hunt's concern that she has concocted the allegations. Rather, it would be the type of unfortunate, in this case, scenario that is likely to evolve when Mrs. Hunt is under stress. This would not be a conscious intention on her part, but rather an example of the phenomena of her looking for external explanations for discomfort within her. In addition, her anger or hostility to her husband is likely to be expressed in the same indirect, rather than intentional, manner, such as a sexual abuse allegation, rather than the more direct constructive form. This again, would not be intentionally invented by her, but rather part of the unconscious way that Mrs. Hunt would deal with stress. Similarly, it would be probable that her difficulties in dealing with shared custody and access arrangements, and whether the arrangements for supervised access would be motivated, not so much by her concern for the welfare of the children, but rather her difficulty in dealing with the stresses associated with such arrangements. If a court can find other support for these findings, then the move to Toronto would also be seen in a different light. (my emphasis)

[11] In his conclusion, Dr. Posthuma states:

Most psychological literature on the development of children in these circumstances, would suggest that both parents should continue to have significant involvements in their children's life. If the court establishes that Mr. Hunt did have significant involvement in the children's life prior to the allegations, and while he was still in the family home, then it would be important to maintain this contact. This, thus would mitigate with regard to Mrs. Hunt's desire to move to Toronto. Finally, the investigations that were conducted on the sexual abuse allegations, are not seen to be sufficiently reliable to establish that this occurred. If the court reaches a similar conclusion, then the custodial and access arrangements should reflect an understanding that the mother will alter her stance on this position, and support shared involvement by both parents. (my emphasis)

[12] Notwithstanding the plaintiff's evidence to the contrary, I am satisfied that the defendant did have significant involvement in the children's lives prior to the abuse allegations and while he was still in the family home. While it was a relationship perhaps dominated to some degree by his work, nevertheless he had a relationship with the children, which they were entitled to and which probably would develop further in time as often is the case.

[13] Before leaving the doctor's evidence, it should be noted that Mr. Justice Henderson had this to say about his evidence in the following passages:

2 Mr. Hunt, for his part, has pleaded that Hayley did not make these disclosures of her own volition, but was manipulated into making them by Mrs. Hunt. The evidence does not support that. I found Mrs. Hunt to be for the most part, a credible witness.

3 Dr. Posthuma, who wrote a detailed Section 15 Report and was called as a witness by the court, was very sceptical of Mrs. Hunt on this point. His report and his evidence do not provide any credible support, beyond Dr. Posthuma's own opinion, of Mrs. Hunt's assertions.

He then goes on to find on the balance of probabilities that Hayley made the false allegations of her own volition, and that Mrs. Hunt did not manipulate Hayley into making false allegations against her father.

[14] The plaintiff says that her reasons for wishing to relocate to Ontario do not include restricting the access of the defendant to the children. She says she has tried to encourage Taylor to continue his relationship with the defendant and that she would continue to do so in Ontario. She has no desire to defeat the access provisions ordered by the court. She says that her reasons for wanting to relocate in Ontario are based solely on her commitment to providing the children with the best life she possibly can for them. She says that the children will have a more happy and fulfilled childhood if they have the ongoing love and support of their extended family in Ontario, and if they are provided with an improved short term and long term economic situation. She proposes to return to university for three years and on graduation to become a teacher. She also feels that she may be able to obtain part-time work as a model to help support herself, although she has not worked for many years. For the past year or two she has been successful in taking a number of upgrading courses at Capilano College.

[15] I do not propose to go through the various paragraphs in her affidavit which were emphasized by her counsel and which contain allegations of misconduct on the part of the defendant. Not surprisingly, Mr. Fiddes took me through corresponding paragraphs in the defendant's affidavit in which he gives plausible explanations of his conduct and tells his version of what happened.

[16] The plaintiff also makes it clear in her affidavit that the children do not want to see their father. She says that she has tried to convince and to even force Taylor to see his father without success; and that this has caused great tension in the household. Access with Hayley, of course, has been put on hold pending the reconciliation therapy with Dr. Fry. She also asserts that the defendant has not taken any steps to attempt to reconcile his relationships with his children. I observe that this is simply not true. And Dr. Fry confirms his attempts through her and in accordance with her instructions.

[17] Mr. Fiddes says that the plaintiff is not to be believed. He says that her conduct, including her being "forced" into bankruptcy, and deliberating not disclosing a debt to her uncle in any of her sworn financial statements or at trial, in taking the position that she cannot make a go of it in the face of Mr. Justice Henderson's finding on issues of spousal and child support and so on, is all designed to prepare for her application for permission to relocate the children in Toronto. She had contemplated moving to Toronto long before the trial and, in fact, was prevented from doing so by the order of Master Donaldson, dated September 22, 2000. She has, in effect, deliberately deceived and used the court to her own end.

[18] He referred to what he called the "13 point indictment of Mr. Hunt by Taylor" contained in Mr. Wolfson's letter dated August 27, 2001, the reasons Taylor gave to Mr. Wolfson for not wanting to see his father, and Mr. Hunt's response to the itemized complaint. He submitted that the court should simply ask itself if these are issues raised by an 11-year-old boy, or a 37-year-old neurotic woman, referring to the plaintiff. He submitted that either the plaintiff wasn't capable of convincing Taylor and Hayley that their rejection of their father wasn't right "or more likely she hasn't bothered to try."

[19] Mr. Fiddes next referred to Mr. Hunt's latest affidavit in which he says:

2 I have read the affidavit of Dr. Carla Fry sworn herein 27 July 2002 and in response thereto say as follows:

On 2 May 2002 Dr. Fry told me that Hayley had agreed to accept a letter from me and that Hayley "seemed to be quite excited about it".

In meetings I had with Dr. Fry after 2 May 2002, Dr. Fry told me that Hayley had kept asking for the letter and wanted to see it.

[20] Mr. Fiddes points out that Dr. Fry's evidence is that much later on in June, Hayley tore the letter up without reading it. Mr. Fiddes poses the question, "What happened between May 4 and June 25?" He submits that the inference is that the plaintiff continues to manipulate the children against their father in some manner. He submits that if the children are allowed to move to Ontario, they will have no relationship with their father; that distance and circumstances will put an end to any possible relationship.

[21] With regard to Taylor, he notes that only the plaintiff and Taylor know what has transpired between them. The only person who gives evidence in this regard is the plaintiff, and she is not reliable. The court has not heard from Taylor and there is no suggestion why he could not testify.

[22] Mr. Fiddes submitted that if Taylor is allowed to move to Ontario, it is highly unlikely that he will seek out his father in the future. And the notion that effective counselling will continue with another psychologist in Toronto, with the father attending and participating in the process, is simply not realistic. It won't happen. The children will be deprived of the right to have a meaningful relationship with their father.

[23] I turn now briefly to Dr. Fry's letters, and to Mr. Wolfson's letter, memo and submissions. Dr. Fry commences her first letter dated May 6, 2002 by noting that she is working with Mr. Hunt and Hayley in efforts toward reconciliation between the two; that Mr. Hunt has shown every effort to be co-operative in the process. She notes at that point, that there is no interaction between him and Hayley, and that Taylor refuses to see Mr. Hunt. At that time, it was her recommendation that Mr. Hunt cease all direct contact with Hayley and he agreed.

[24] In her second letter dated June 28, 2002, Dr. Fry notes that at the time they were at Step One of the process. She says:

At this time, we are at Step One of the process, wherein Mr. Hunt wrote a letter to Hayley, which was presented to her by me in the privacy of my office (on June 25, 2002). Hayley chose not to read the letter, but instead destroyed it. She was distressed by the presence of the letter, and did not want to see what it said, and is upset still at the thought of seeing her father, or having any contact with him. She has said that she is unwilling to yet even view a videotape of Mr. Hunt speaking to her, but that she would still accept letters from him through myself if she continued to have the choice to read them or not, as she felt ready or safe to do so.

[25] She then responds to a request by the plaintiff to comment on the application she had made to move to Ontario as it relates to the reconciliation therapy process. She says:

Of course there are many issues that Ms. Hunt and Mr. Hunt, as well as the courts, will need to consider in looking at this application, and I can only comment on a very restricted piece of the overall picture, in particular, the reconciliation work that I am doing with this family. At this point, as there is no indication that Hayley is ready to move forward with the process at any time in the near future. She is continuing to engage in the work we do, however, it could be a very long time, if at all, when she will be ready to see or speak to her father. Of course, there is the possibility that this status could change, however I have seen no evidence that Hayley is emotionally ready, nor that she has any active interest in having contact with her father at this point. Considering this, a move from Vancouver at this time would not be an interference in the reconciliation process, assuming it could continue in some format with a professional in Ontario, and assuming that if and when Hayley is ready to see her father, that access and availability to him would still exist. (my emphasis)

[26] Dr. Fry commences her third letter dated July 26, 2002 by stating that the letter is to summarize her work with the Hunt family prior to her three-month maternity leave. She has recommended that the reconciliation process be put on hold until November if Hayley remains in Vancouver; that if Hayley goes to Toronto that a new therapist be introduced to continue the work there. She also notes that she recommends that Hayley continue with her in November if she remains in Vancouver because it would take her a while to get comfortable with and to establish trust with a new therapist. Also, it would take the new therapist some time to get a handle on the work, which was being done, "as this kind of work is done by relatively few people."

[27] Dr. Fry emphasizes that her comments on Hayley moving to Ontario were not an opinion about parental access, but rather the impacts of what such a move may make on the reconciliation process itself. She says:

Again, the process may successfully continue in Toronto once an appropriate therapist is found and he or she understands the terms in the reconciliation contract. This of course may take some time, and the therapist would need to be in frequent phone and/or email contact with Mr. Hunt in Vancouver, as his input is key to the process, but in theory, should be possible to co-ordinate. The other element I mention in my previous letter is that if Hayley decides to have face-to-face contact with her father at some point in the future, she needs to be able to have access and availability to do so. I trust that the courts will be able to assess this last issue, as it is not within the scope of the work that I do with this family to ascertain the viability of this availability.

(my emphasis)

I do not find comfort in these opinions that there would not be substantial risks involved if the move is permitted.

[28] I observe here that both Mr. Fiddes and Mr. Wolfson question whether or not Dr. Fry is qualified to comment on the impact of a move to Toronto on the reconciliation process. In any event, I am not persuaded that a move to Toronto involving a change in the therapist and Mr. Hunt's involvement on a long distance basis would be in the best interests of the child. It seemingly is a very delicate situation and in my opinion, these changes would be disruptive and perhaps even injurious, to the five-step process, as outlined in the reconciliation contract, but even more importantly, to the child and to her potential relationship with her father.

[29] I turn now to Mr. Wolfson's letter dated August 27, 2001 to counsel and to his submissions. He was brought in to address the access problem with Taylor. Mr. Wolfson, of course, is an officer of the court, and his only interest is what is best for Taylor.

[30] In his letter, he sets out what he did to prepare to try and resolve Taylor's reluctance to meet with his father. For example, he reviewed Mr. Justice Henderson's judgment, Dr. Posthuma's Section 15 Report, the court file and attended at the plaintiff's residence in Horseshoe Bay, meeting with both her and Taylor separately and so on.

[31] He says he met with Taylor and discussed with him the three of them, that is, Taylor, Mr. Hunt and Mr. Wolfson, spending some time together as the first step in their reconciliation; that although Taylor wanted some time to think about it, his reaction was really positive. He then met with the plaintiff and told her about his discussion with Taylor and what he was proposing. He said that the plaintiff then became concerned and quite upset. On the following day, Taylor telephoned him saying that he didn't want anything to do with his father, and that there was absolutely nothing that would change his mind.

[32] He then met with Taylor on the following day. When told, in effect, that the court had ordered that he see his father for an access visit, he responded by saying that the court did not have the power to order someone to do something that he didn't want to do, and that his mother could not force him either. He became so worked up that he needed a few minutes to calm himself down before he could again speak.

[33] In this regard, Mr. Wolfson suspects that the plaintiff may have attempted to persuade him to access his father. However, he is also of the view that the plaintiff's negative disposition towards the father, and her concerns for her children, that her negative attitudes have been conveyed to the children; that her involvement in their attitudes need not be intentional. It has been his experience in these cases, that children often act more in response to the primary caregiver's expectation, than on their own feelings; that often there is no direct evidence of interference by the custodial parent. It is circumstantial or inferential. His observations are common sense bolstered with experience. And I ask the question as well, what happened between Mr. Wolfson's two meetings with Taylor, other than the plaintiff's negative response to his proposal in the interim?

[34] I also have before me a copy of Mr. Wolfson's memo dated July 29, 2002 containing particulars of a 20-minute conversation he had with Dr. Fry on July 29 and some of his observations. There he sets out the Four Step reconciliation process outlined by Dr. Fry, the first step being Mr. Hunt's provision of a letter to Hayley, through Dr. Fry, that Hayley and Dr. Fry would read together. Mr. Wolfson says:

According to Dr. Fry, Hayley did not even make it through the first step. Specifically, Hayley was initially excited about the thought of receiving a letter from her father, and she was told that it would be her choice whether she would read it or not. For a number of sessions she would ask Dr. Fry if she had received the letter yet. Finally it arrived, but rather than reading it, Hayley became very upset and chose to rip it up and destroy it. According to Dr. Fry this act was therapeutic for Hayley.

To this point Hayley has only expressed interest in receiving further letters, but again with the choice of reading them or not. She has shown no signs of being ready to take any further steps at any time soon.

[35] Dr. Fry, who is a clinical psychologist, has explained to Mr. Wolfson the difference between a clinical psychologist and a forensic psychologist. She simply treats the patients presenting symptoms without any investigation of their cause. A forensic psychologist would actually investigate the cause of the symptoms. I observe that a forensic assessment would be of assistance to the court if, in fact, the children co-operated and were able to freely relate their own views and opinions to the forensic psychologist.

[36] Mr. Wolfson states in his memo:

I suggested that Ms. Hunt's move to Ontario with the children would likely lessen the possibility of a reconciliation between Mr. Hunt and Hayley, and that is when Dr. Fry referred to her third letter wherein she sets out a number of factors relating to future access between Mr. Hunt and Hayley. It would be important, for example, for Mr. Hunt to be in contact with the Ontario therapist, and it would also be important for Mr. Hunt to be accessible to Hayley in Ontario.

I asked Dr. Fry whether she was surprised at Hayley's lack of progress and she said, "Not necessarily, as reconciliation is a drawn out process." I asked if she would agreed that the mother could be a factor in the lack of progress and she said that was possible, although she has seen no evidence that Ms. Hunt is being in any way uncooperative or attempting sabotage the process.

Dr. Fry did say that her opinion as to the move to Ontario would have been different if Hayley had made some progress. For example, if Hayley had shown that she was ready to progress to a further step or shown that she was emotionally prepared to do so, then Dr. Fry's opinion would have been different. So I suggested to Dr. Fry that assuming that Ms. Hunt had wanted to move for a long time, it was in her interest that Hayley not progress and the reconciliation process with her father, and I asked Dr. Fry if she had any experience in dealing with parental alienation. Dr. Fry was not clear what I was referring to in this regard.

[37] Mr. Wolfson noted that there may be a number of reasons why the children do not want to see their father. One hypothesis is that the mother has a role to play in this. There is no direct evidence before the court. However, in most cases of this nature direct evidence is rarely available. It is a matter of inference. He agrees with Mr. Fiddes that it is absurd for Ms. Hunt to say that Mr. Hunt has done nothing to try and reconciliate with the children. He notes that Dr. Fry says that he has attempted to reconcile with them, and that he has done all that he has been asked to do. It is common sense that if the children moved to Ontario the likelihood of their patching up their relationship with their father is at least lessened. And he observes that children do much better with both parents, and that it is harmful when contact with one of them is cut off.

[38] In his brief reply, Mr. Singleton said it was unfair for counsel to suggest that the plaintiff was putting the children up to not seeing their father. Mr. Justice Henderson had found that the allegations of sexual misconduct were made on her own, and that the plaintiff had nothing to do with it. Dr. Fry said there was no evidence of the plaintiff sabotaging the reconciliation. In this regard, I observe that Dr. Fry herself says that it is not her role to investigate the cause of why the children do not want to see their father. She told Mr. Wolfson that she had no evidence at all about Mr. Hunt, which would be relevant to the issue of whether Mr. Hunt should have contact with Hayley. I suspect her position is the same with regard to Taylor.

[39] Mr. Singleton referred me again to Item 7(b) on page 20 of Goertz, the existing access arrangement and relationship between the children and Mr. Hunt. He said that the key to his submissions was that Dr. Fry saw no prospect at the moment of reconciliation, and that it will be a long drawn out process. Hayley was not ready to complete the first step. Dr. Fry also says in effect that the process can be continued in Ontario.

[40] I am unable to agree with these submissions. It is the right of these misguided children to have a meaningful relationship with their father, which is in issue. In the acrimonious circumstances of this case, it is not sufficient to say that since the children do not have a relationship with their father at this point in time, the mother should be allowed to take them back to Ontario. This is so even if it can be said that the reasons for the attitudes of the children are unknown; although in my view this is not the case. Mr. Hunt is in no way to blame for the attitudes of the children which reflect their mother's attitude. On the other hand, I am satisfied on a balance of probability that Mrs. Hunt has influenced the children's attitude.

[41] In my view, there are reasonable prospects of reconciliation with the children. In this regard, Dr. Posthuma says that there is no reason to believe that the father cannot re-establish his relationship with the children if the mother fully co-operates in the process. And it is clear to me that if the father is to be reconciled with his children, the mother must play a strong and positive role to that end. It is in the best interests of the children that they see their father in the best light, and as much as is reasonably possible, and that they develop a loving and caring relationship with him. The duty of course is owed by both of the parties. Each must encourage and support the other's relationship with their children. In my view, the importance of the children restoring their relationship with their father outweighs whatever benefits they will receive if they move back to Ontario. And I am convinced that if they are allowed to move back to Ontario at this time, any real prospect of reconciliation will be destroyed.

[42] I have given careful consideration to the submissions of counsel with regard to the principles which govern an application for a variation of an order relating to custody and access, which are set out in the Divorce Act, and which are carefully explained by Chief Justice McLachlin in Goertz, supra, as well as some of the factors to be considered, as set out in paragraph 7 on page 20. While most of the principles and factors have some application in the case at bar, the case must turn on its own unique circumstances, the only issue being the best interests of these children in the circumstances of this case. The determinative factors in my view are item 7(c), the desirability of maximizing contact between the children and both parents, taking into consideration the willingness of the plaintiff to facilitate such contact.

[43] Items (a) and (b), the existing custody and access arrangements, and the relationship between the children and both parents are also factors, and come down in favour of not letting the move take place, when balancing the importance of the children living with their mother in Toronto, with her relatives nearby, and the benefits to the children to be derived

therefrom, against the importance of the children remaining in their present environment, where the father is in close proximity to them and where effective reconciliation therapy can take place, hopefully with the full co-operation of the mother in discharge of her duty to really facilitate the father's contact with the children, and the benefits to be derived therefrom, a meaningful and beneficial relationship with their father which is so important today. At a bare minimum the opportunity for the children to have that relationship should not be put at risk, let alone severely curtailed or lost.

[44] There really has been little change in the condition, means, needs and circumstances of the children, and in the ability of the parents to meet those needs, which materially affect the children, since the orders of Mr. Justice Henderson and Master Donaldson were pronounced. There has been no material change in the situation of the children shown. Nothing has changed in a negative sense since about January 2000 when the defendant was arrested on the basis of false charges made by Hayley. The plaintiff has openly contemplated moving to the Toronto area for some time, and was prevented from doing so by Master Donaldson's order. Thus, it is not clear whether relocation of the plaintiff was within the reasonable contemplation of Mr. Justice Henderson. He may have suspected that it was still contemplated. He would have known about Master Donaldson's order. And one might speculate that the application was deliberately delayed until after Mr. Justice Henderson rendered his decision granting custody to the plaintiff. On the other side, it may be argued that His Lordship provided for the defendant's access assuming that the children would remain in their present location. In any event, and since Goertz suggests that contemplated relocation itself may be a material change, I will assume for my purposes that the plaintiff has proven the necessary material change under s. 17(5) of the Divorce Act, by reason of the proposed relocation, and get on to the real issue.

[45] My task is to enter into a full and sensitive inquiry into one issue, the best interests of the children, to be determined by reference to the material change and to all of the circumstances of the children and of the parent that bear on the children's lives and their best interests. I must give effect to the statutory principle that a child of a marriage should have as much contact with each spouse as is consistent with the best interests of the child. For that purpose, I must also take into consideration the willingness of the mother, the person who has custody, to facilitate the father's contact.

[46] In Goertz, at paragraph 24, Chief Justice McLachlin reiterated what she said in Young v. Young (1994) 84 B.C.L.R. (2d) 1 at p. 115, with regard to maximum contact, and its importance, as follows:

Third, section 16(10) provides that in making an order, 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". This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something that the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase

"as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted, but only to that extent. Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature, which suggests that children benefit from continued access.

It will be clear that in my view maximum contact with the defendant is in the best interests of the children, and that they should not lose their opportunity to exercise it. There is no merit in the contrary argument that since the children will not see or speak to their father, contact conflicts with their best interests; for I am satisfied that the mother is a substantial factor in bringing this situation about, while the father plays no part in it.

[47] In Goertz, the Chief Justice also dealt with ss. 16 (9) and 17(6) of the Act which provides that in making an order under these sections 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. She points out that parental conduct, however meritorious or however reprehensible, does not enter the analysis unless it relates to the ability of the parent to meet the needs of a child.

[48] At paragraph 23, she deals with the conduct of a custodial parent as follows:

Under the Divorce Act, the custodial parent's conduct can be considered only if relevant to his or her ability to act as parent of the child. Usually, the reasons or motives for moving will not be relevant to the custodial parent's parenting ability. Occasionally, however, the motive may reflect adversely on the parent's perception of the needs of the child or the parent's judgment about how they may best be fulfilled. For example, the decision of a custodial parent to move solely to thwart salutary contact between the child and access parent might be argued to show a lack of appreciation for the child's best interests . . . However, absent a connection to parenting ability, the custodial parent's reason for moving should not enter into the inquiry.

[49] When giving effect to the principle of maximum contact, I must take into consideration the mother's willingness to facilitate the father's contact, and it seems to me that this includes her ability to do so. Looking at the evidence as objectively as I can, the plaintiff's conduct does cause me concern. In my view, she does not demonstrate a real willingness to facilitate the children's contact with the father. It is her responsibility to encourage and facilitate that relationship.

[50] Here we have a mother who is openly very hostile towards the father, and two children who are described by Dr. Posthuma as "fairly well adjusted, bright and health" evidencing the same rigid or absolute hostility against their father, without any apparent independent logical or reasonable reason for doing so. And there is evidence before me of, or from which I infer, wrongful inducement or persuasion by the mother. In my view, the inescapable inference to be drawn is that the mother has greatly influenced the children or manipulated them into their attitude towards their father. And it does not matter whether she has done so deliberately, consciously or unconsciously, for the results are the same.

[51] Her conduct in doing so demonstrates a lack of appreciation or understanding on her part of the children's best interests, and how they may be met, and that in the end, she puts her best interests ahead of those of the children. In my view, her misconduct plays a major role in the attitudes of the children and it brings into play, as well, her motivation for moving to Toronto, which is more likely than not to get her and the children away from the defendant, and from the stress to her which she perceives he causes. If this unfortunate approach on her part continues it is not difficult to predict that irreparable harm may come to the children's relationship with their father and to them.

[52] For these reasons, it is my opinion that the proposed move would not be in the best interests of the children. I therefore dismiss the application. Counsel may speak to costs if they are not able to agree as to their disposition.

"S.W. Hood, J."

The Honourable Mr. Justice S.W. Hood

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