

CANADA / JUDGMENT

J.G.F. v. C.L.B.

2003 BCSC 132

COURT

Supreme Court of British Columbia

DECIDED

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Citation:	J.G.F. v. C.L.B.
Date:	20030124 2003 BCSC 132
Docket:	E021908 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	J.G.F. PLAINTIFF
AND:	C.L.B. DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LOO

Counsel for the Plaintiff

F. C. Lowther

Counsel for the Defendant

L. A. Kahn

Date and Place of Hearing:

9 January 2003

Vancouver, B.C.

- [1] This is an appeal from the order of a Master concerning the parties' child S. who was born [], 2001. The parties Mr. J.G.F. and Ms. C.L.B. are unmarried, but lived together off and on from April 1999 to June 4, 2002 when Ms. C.L.B. took S. to Edmonton where she now works and lives with her mother. Ms. C.L.B. appeals the Master's order that she return with S. to Greater Vancouver, no later than October 14, 2002. There is no appeal from his order that Ms. C.L.B. have day-to-day care of S., and that Mr. J.G.F. have reasonable and generous access.
- [2] The Master in his oral reasons for judgment on September 10, 2002, stated:
- [12] The mother contends there are two primary reasons for her removing herself from Vancouver and returning to her home in Edmonton, one being her concern for her safety at the hand of Mr. J.G.F., and the other being the economic and emotional support that she has from her family, and I suppose the third reason that she feels she is better able to find employment in the Edmonton area as a result of her previous years in that community.
- [14] So far as the emotional and financial support from her family is concerned, there is no indication that Ms. C.L.B. is in any way in need of any significant emotional support. It is clear that she is a person who is able to speak her own mind and make decisions on her own, and so far as the need for her to have emotional support in the Edmonton area is concerned, although that may be a factor, I do not consider it to be a significant one. She was able to make the decision to leave Edmonton to form a relationship with a person whom she had met on the Internet. She lived here for, I am satisfied, a significant period of time with Mr. J.G.F., and there is nothing in the material that indicated to me that she was in such need of emotional support that it could only be obtained by her returning to the Edmonton area.
- [15] As far as her ability to support herself financially in British Columbia, it is my understanding that in the year 2000, when she was significantly in British Columbia, she earned approximately \$32,500, and, indeed, in the year 2001, when much of her income apparently came from maternity benefits, she earned \$20,650. There would seem to be nothing that stands in the way of Ms. C.L.B. finding employment in the Vancouver area, as she was able to find employment when she was residing here by her choice. She has declared bankruptcy and obtained work on a part-time basis in the office of her bankruptcy trustee in Edmonton; certainly, it is not a job that she has returned to, where she has been a long-term valued employee or anything of that nature; at the time of the hearing her employment was part-time and had only very recently been obtained.
- [17] The relationship that, of course, is most important is that as between the father and S. and the mother and S., and only peripherally am I considering the relationship that J.M.. S. is his sister and except for the periods when the mother removed her to Edmonton, she has resided together with J.M., Mr. J.G.F., and her mother.

- [18] The economic situation of both the mother and the father, make it virtually impossible for any meaningful relationship to be maintained with S. living in Edmonton and the father living in Vancouver. It had been my hope that arrangements could be suitably made such that S. could either visit with her father in Vancouver or the father visit with S. in Edmonton. However, it would seem that it is virtually an economic impossibility.
- [19] I am satisfied, therefore, that S. must be returned to the Province of British Columbia, and, indeed, returned to Vancouver, and unless the parties can agree on a date other than the 1st of October, I am satisfied that that is the date by which she should be returned.
- [3] In September 2002, Ms. C.L.B. appealed the Master's order and also commenced proceedings in Alberta Court of Queen's Bench where she obtained an order staying the Master's order. In this court, on October 11, 2002, Mr. Justice McEwan allowed fresh evidence to be adduced at the hearing of this appeal, but that the appeal be stayed pending a determination whether or not the Alberta Court retained jurisdiction. On December 11, 2002, the Alberta proceedings were stayed.
- [4] The parties agree that this appeal may only succeed if Ms. C.L.B. can demonstrate that the Master was clearly wrong. The parties also agree that the principles in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.) apply.

THE FACTS

- [5] Mr. J.G.F. is 32 years old. He has custody of M., his 9 year old son from a former relationship. Ms. C.L.B. is 36 years old. She was formerly married and lived with her husband in Toronto for some nine years. The parties met on the internet, and in April 1999 Ms. C.L.B. moved from Toronto and they began living together in Surrey, B.C. Ms. C.L.B.'s assets included \$10,000 cash, a 1996 Jetta, \$5,000 in RRSP's, and household furnishings. She had \$15,000 in debts.
- [6] Ms. C.L.B. worked for Intrawest from August 1999 to October 2000 and earned close to \$44,000. Mr. J.G.F. worked sporadically at various jobs earning little if any income, and for most of the time was on social assistance. He contends that he was either too stressed or depressed to be able to work. At times there was little food and not enough money to pay the rent. As the Master noted, the relationship was a volatile one. There were physical altercations, and many of the fights were over money, or more precisely, the lack of money. In an effort to make ends meet, Ms. C.L.B. depleted her savings so that her only asset was her Jetta which, incidentally, Mr. J.G.F. drove.
- [7] The parties first separated in August 2000, but lived together again from November 2000 to the end of June 2001. From June 30, 2001, when S. was nine weeks old, until December 1, 2001, Ms. C.L.B. and S. lived with Ms. C.L.B.'s parents in Edmonton where Ms. C.L.B. was raised and many members of her immediate family reside. The parties reconciled in December 2001 on the condition that Mr. J.G.F. would start work at T.[]. Unfortunately, Mr. J.G.F.'s work did not start until February 2002 and lasted only six weeks before he was laid

off. Needless to say, the debts continued to amount and Ms. C.L.B. had to borrow money from her mother in order to buy shoes for S. who has a unilateral club foot deformity.

- [8] Following a violent physical altercation on June 3, 2002, with the help of her mother and brother who flew out from Edmonton, the following day Ms. C.L.B. took S. and moved to Edmonton to live with her parents and look for employment.
- [9] Mr. Lowther on behalf of Mr. J.G.F. relies on *Campbell v. Campbell* (30 May 1996), Salmon Arm No. 3589 (S.C.B.C.) and *Dhaliwal v. Dhaliwal* (15 January 1998), New Westminster No. E003738 (S.C.B.C.) in support of his argument that "orders are being made every day" preventing one parent from moving away with a child, and this court should not allow Ms. C.L.B. to remain in Edmonton with S.. However, both cases applied the principles set out in *Gordon v. Goertz*, and the decision that is reached depends on the particular circumstances of each case.
- [10] Mr. Lowther's argument which may be summarized as follows: Ms. C.L.B. unilaterally decided to move to Edmonton; she had no relationship with her mother during the 10 years that she lived in Toronto; she initially argued that she left the relationship because Mr. J.G.F. was abusive, when they were both equally abusive; her decision to move because of economics has only been raised with the fresh evidence; and Ms. C.L.B. is capable of finding employment and a place to live in the Lower Mainland.
- [11] The oft-cited passages from *Gordon v. Goertz*, are found at paras. 48-50:
- 48 While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

C) Summary

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?

- [12] It does not appear that the Master considered the principles in *Gordon v. Goertz*, nor is it argued on behalf of Mr. J.G.F. that he did. Moreover, the Master did not have the benefit of the fresh evidence that is before me.
- [13] At the time of their final separation in June 2002, Ms. C.L.B. had not worked for over a year, she had no employment prospects, and a 14 month old daughter who has special needs. It is fair to say that had she remained in British Columbia after separation, she would have required social assistance, at least in the beginning. By moving to her mother's home, Ms. C.L.B.'s expenses were reduced substantially, and her mother, a rehabilitation practitioner, was able to assist in taking care of S.'s needs, both practically and financially.
- [14] Ms. C.L.B.'s mother, stepfather, grandparents, and brother, have all provided financial assistance to her and S., and all of them live in Edmonton. The only close relatives Ms. C.L.B. has in British Columbia is a cousin who lives in Abbotsford, and his daughter, who lives in Whistler.

- [15] On September 30, 2002, Ms. C.L.B. started regular full-time work as an assistant account executive, with S.[] Inc., an information technology company that exclusively markets Xerox products in the Edmonton area. She earns a base salary of \$2,000 a month, plus commissions, and expects to earn approximately \$37,000 in her first year.
- [16] Ms. C.L.B. will have to quit her position with S.[] Inc. in order to move to the Lower Mainland where her employment prospects are less certain. Under the terms of her current employment contract, if she were to terminate her employment at any time within 24 months following December 2002, she is obliged to reimburse S.[] Inc. for a portion of her training costs.
- [17] Ms. C.L.B. was and continues to be unable to rely on emotional or financial support from Mr. J.G.F.. There is no evidence about Mr. J.G.F.'s current financial situation, although it is clearly a matter of dispute. Instead, he simply steadfastly maintains that while they were together "she needed to get work, but was refusing to do that". In answer to my questions, Mr. J.G.F. claims he currently works as a floor installer earning \$15 an hour, or approximately \$20,000 annually. He also contends that the amount of money he earns is not a factor that I should consider, but in my view it is. Ms. C.L.B. has no job in the Lower Mainland and no place to live. The argument that she should be able to find a place to work over the internet, and a place to live through the classified ads, is not realistic or practical. Mr. J.G.F. has paid no child support, but says he understood that the Master did not expect him to pay until S. is returned to this Province, and that Ms. C.L.B. never pressed for child support.
- [18] In Alberta, Ms. C.L.B. has constant support from her parents and other immediate family members. This provides her with the financial and emotional support she needs. In Edmonton, Mrs. C.L.B.'s monthly budget for herself and S., is \$1,650. Without going through great detail, suffice to say, it would be much greater if Ms. C.L.B. moves to the Lower Mainland.
- [19] Ms. C.L.B. has made it clear that she will do all she can to facilitate an ongoing relationship between S. and Mr. J.G.F., including assisting with his travel costs.
- [20] Ms. C.L.B. contends that the Master erred in concluding that the emotional support from her family was not significant, given the parties' circumstances on separation, and Mr. J.G.F.'s failure, or inability to provide financial support. I agree. After weighing the importance of S. remaining with her mother in her new location against regular access to Mr. J.G.F. and his immediate family, I conclude that the Master erred. Accordingly, the appeal from the September 10, 2002 order of the Master requiring Ms. C.L.B. to move to the Lower Mainland is allowed and Ms. C.L.B. is entitled to her costs.

"L.A. Loo, J."

The Honourable Madam Justice L.A. Loo

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