
CANADA / JUDGMENT

R.O.P.-D. v. A.D.D.

2018 BCSC 2273

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.O.P.-D. v. A.D.D.,

2018 BCSC 2273

Date: 20181220

Docket: E16765

Registry: Duncan

Between:

R.O.P.-D. also known as R.O.D.

Claimant

And:

A.D.D.

Respondent

Before: The Honourable Madam Justice Young

Reasons for Judgment

Counsel for the claimant:

M.L. Duggan

Counsel for the respondent:

B.M. Pearce

Place and Date of Trial:

Victoria, B.C.

December 3-5, 2018

Place and Date of Judgment:

Duncan, B.C.

December 20, 2018

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Introduction

- [1] The claimant seeks an order for joint custody of the three children and to be permitted to remove and relocate the children's primary residence from the province of British Columbia to Brisbane, Australia. The respondent filed an amended counterclaim on the first day of trial seeking an order to move the three children to Calgary, Alberta.
- [2] There are three children of the marriage to whom I will refer by initials to protect their privacy. W.D. is 14 years of age. A.D. is 12 years of age and M.D. recently turned 12 years of age.

- [3] The claimant is an elementary school teacher but has not worked outside the home since the first child was adopted. The respondent is an orthodontist. The history of the parties is not particularly relevant with the exception of explaining the role the claimant played in the marriage.

The Law Related to Relocation

- [4] It is agreed that I am being asked to make an initial order of custody pursuant to s. 16 of the Divorce Act, R.S.C. 195, c. 3 (2nd Supp.).
- [5] Section 16 of the Divorce Act gives the court jurisdiction to make orders respecting custody of, or access to, the children of the marriage. Section 16(4) authorizes the court to make a custody order to more than one person. Subsection (6) permits the court to make orders for definite or indefinite periods of time until the happening of a specified event and to impose any other terms, conditions or restrictions in connection with an order for custody.
- [6] Although the parties have previously agreed to where the children will primarily reside, they have not ever entered into a custody order. This is therefore an original custody order and not a variation order. The parties consent to continue to share custody as well as guardianship.
- [7] Under the Divorce Act, the leading authority on issues of parental mobility is *Gordon v. Goertz*, [1996] 2 S.C.R. 27. In that case the custodial parent wished to move the child from Canada to Australia materially changing the father's access rights. The court granted the mother's application and set out a two-stage test for the variation of a custody and access order under the Divorce Act. The court was clear that there is no presumption in favour of a custodial parent although the custodial parent's views are to be entitled great respect (para. 49(4)). The best interests of the child is the only consideration and a judge is not to consider the interests or rights of the parents (para. 49 (6)).
- [8] The Court then listed a number of factors to consider in determining whether the proposed relocation would be in the best interests of the children. These factors relate to the "relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them" (para. 49(2)). They include:
- (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.

The Court concluded at para. 50:

- [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 of the circumstances, old as well as new?
- [9] In *T.K. v. R.J.H.A.*, 2015 BCCA 8, the British Columbia Court of Appeal considered a relocation case. At para. 47 the court said that the test in *Gordon v. Goertz* has been adopted in a modified manner to mobility issues that arise in the context of an initial application for custody and principal residency under the Divorce Act. With those adjustments, the child-centred test from *Gordon v. Goertz* continues to govern the analysis.

Analysis

- [10] Applying the *Gordon v. Goertz* factors I will analyse the evidence.

The existing custody and access arrangement and relationship between the child and the custodial parents

- [11] W.D. was adopted in September 2004 at the age of nine months. A.D. was adopted in January 2007 at the age of one year. M.D. was adopted March 2010 at the age of three and one-half years.
- [12] The claimant stayed home with the children during the marriage. After separation the claimant remained the primary caregiver to the children and the respondent saw the children on alternating weekends for three overnight visits.
- [13] It is fair to say that the parties each have a close relationship with the children and have provided well for them.
- [14] The children have been thriving in Canada.
- [15] W.D., the oldest child, is academically advanced and it has been a challenge to keep her intellectually stimulated.
- [16] A.D., the middle child, also does well in school. She sought counselling when her parents separated and has recently requested some more counselling for reasons that have not been disclosed to me.

- [17] M.D., the youngest child, is the most vulnerable. She came to Canada with serious health problems and significant developmental delay. She had a congenital heart defect which should have been repaired earlier. She had poor oxygen saturation for the first three and one-half years of her life. When she was adopted, she was non-verbal. I was quite surprised that the claimant did not mention any of her health concerns while giving her evidence.
- [18] M.D. had open heart surgery shortly after her arrival. Both parents say that she has recovered well and is monitored by her cardiologist. At some point she may need to have a replacement cardiac valve but this is not a concern at the moment.
- [19] Since being in Canada, M.D. has progressed well but still suffers from anxiety and some language delay which causes her challenges at school. Unfortunately I not provided any school records to review or psychoeducational reports.
- [20] I am advised by the parties that M.D.'s pediatrician has recommended that she have a neuropsychological assessment of her brain development. The parties have been waiting for that assessment for one and a half years. An appointment became available during the week of the trial which the parties were unable to accommodate. She is now scheduled for her neuropsychological assessment on January 8 and 9, 2019 and the respondent has confirmed that he is able to take her to this assessment.
- [21] I find it to be in M.D.'s best interest to proceed with the neuropsychological evaluation in January 2019. If there are lasting effects from the significant deprivation she experienced in the first three and one-half years of her life, then presumably early intervention would be in her best interest. It is not in her best interest to be put on another waiting list before a proper evaluation can be done.
- [22] The existing parenting arrangement is contained in the parties' mediated agreement which they signed on August 22, 2017. In that agreement they agreed to continue to remain guardians of the children under s. 39(1) of the Family Law Act, R.S.B.C. 2011, c. 25 ("the FLA"), and to equally share parental responsibilities in accordance with ss. 40(2) and 41 of the FLA. It was agreed that the children would primarily reside with the claimant and that the respondent would have parenting time with the children on alternating weekends for three nights. The parties shared school holidays.
- [23] The children have been in the primary care of the claimant since their adoptions and since the separation of the parties in 2015. Any change in parenting regime restricting the claimant's contact with the children could be distressing for them because they have been in her primary care for so long.
- [24] The children are closely attached to both parents. The respondent was fully engaged in the children's care but spent less time with them because of his obligations to financially support the family.
- [25] Both parents consider the children to be happy, healthy, well-adjusted and intelligent.

Maximizing contact with both parents

- [26] This is the most troublesome factor. If the children move to Australia, their contact with her father would be dramatically reduced. Access will be more difficult if they live in Australia than if they were to move to Calgary. Either way the time differences create challenges for electronic communication.
- [27] If the children resided in Calgary, then the obligation to travel would be placed on the claimant and not the three young children. The claimant has family in Calgary and so would have a place to stay while spending time with the children. The respondent does not have any family in Brisbane, Australia, and would have to provide accommodation for four people if he were to travel there.
- [28] If the children reside in Calgary, the claimant could spend her summer school breaks with the children between December 15 and the end of January each year residing with family in Calgary and spending time with the children at Christmas. She would have three other two-week opportunities to travel to visit the children or vacation with the children.
- [29] If the move to Australia is permitted, the only way to maximize the respondent's contact is to have the children spend the Australian summer school break in Canada from mid-December until the end of January.
- [30] The children seem to think that electronic communication and long vacations will be easy to manage. I agree with the submissions of counsel for the respondent that they may have been misled. They will actually see their father a lot less than they think they will.
- [31] The respondent raises some legitimate concerns about how he can maintain his relationship with the children if they live in Australia. He is not able to travel to Australia for prolonged periods of time because he has to keep up his hours as an associate orthodontist.
- [32] There are three other breaks during the Queensland school year. They are from April 6 to April 22; from June 29 to July 14 and from September 21 to October 7, 2019. These are potential times when the respondent might travel to Australia or the children might travel to Canada or the family might enjoy a holiday in between the two locations.
- [33] The time and date differences between Mountain Standard Time and Brisbane time also pose a problem. Brisbane is a day ahead of Alberta time. There is a 19 hour time difference so if the respondent wished to FaceTime or telephone the children after school, he would have to stay up till midnight or 1:00 a.m. to do so. In the morning when the children are going to school, it would be 3:00 p.m. Mountain Standard Time when presumably the respondent will be working.
- [34] It is likely that telephone or FaceTime could only happen one day on the weekend because of the date differences. It will be difficult to maintain a close bond under these strained circumstances.

- [35] The respondent is also worried about the children travelling on airlines as unaccompanied minors crossing international borders.

Views of the children

- [36] In preparation for a September trial date, the parties had children interviewed by a member of the Hear the Child Roster, Joan Cotie, who is a registered social worker, mediator and consultant.
- [37] The children clearly expressed that they wish to travel to Australia to live primarily with their mother. They all wish to be able to travel back to spend long vacations with their father to have him visit them in Australia. A suggestion of having ongoing electronic communication with their father while in Australia was also raised.
- [38] All three children expressed affection for both parents. In W.D.'s mind, the move to Australia is happening and she is frustrated having to wait. She is sad about the fact that she would not see her father for a long time but thought that they could communicate regularly through electronics. She's excited about a new life experience.
- [39] M.D. was tearful during the interview. As she spoke about how things were going since her parents separated, she had tears running down her face and difficulty speaking as she was softly crying. She was sad after their separation that there was no father in the house. She is worried if she moves to Australia that her father will get lonely. She would like to go to Australia with her mother. She enjoys her time with both parents.
- [40] M.D. told Ms. Cotie that her mother asked her to tell her father "we are going, so deal with it." After hearing the claimant on the witness stand, I am fairly certain this is what she said, although she evaded answering that question. She has put a very positive spin on the move and stated opinions about the superiority of the education system and the healthcare system in Australia which I do not believe she is in a position to know. Further evidence of this comes from the mouth of M.D. who said she thinks the move would be a great thing to do because they will get a "better education with no professional development days." That clearly came from her mother who was trying to convince her that this move is a good thing.
- [41] A.D. said she wanted to move to Australia and said she wanted a fresh start which puzzled me. I am not certain why she needed a fresh start. She did say that she would like to spend school breaks with her father in the summer and winter and she said she thought she could move back to live with her father if she does not like Australia. She said that she had seen a counsellor at her school when her parents divorced and that was helpful. She had mentioned to both her parents that she would like to speak to someone now. That was in July. I am not certain if she was provided another opportunity for counselling. Her message to her parents was that she loves them both.

- [42] There is no Hear the Child report with respect to the move to Calgary because the respondent's decision to move to Calgary is quite recent. The children fully expect to be moving to Australia.
- [43] The children have been clearly influenced by the claimant's enthusiasm for the move to Australia. This is not surprising given that they are closely attached to their mother. I suspect the geographical location has little to do with their enthusiasm and the girls are expressing a strong preference to live with their mother. The claimant has done a good job parenting the children. The respondent does not deny that and does not deny that the children do wish to live with their mother in Australia.
- [44] The children have also been advised that they can come back to Canada if they do not like it in Australia. This may not be as easy as they think however I will consider this in making my decision.

The claimant's reason for moving

- [45] *Gordon v. Goertz* makes it clear that this is only a factor in exceptional cases where the claimant's reason for desiring a relocation is related to the best interests of the children. I find in this case it is.
- [46] The claimant obtained her education over 20 years ago and only taught school briefly before the children were adopted. She has a strong compensatory spousal support entitlement.
- [47] Upon separation the parties entered into a consent order that the respondent would pay child and spousal support. The same agreement for child support and spousal support was repeated in the mediated agreement.
- [48] The respondent has not complied with these orders and the claimant has had no financial support for several months.
- [49] The parties divided the family property. It was agreed that the family residence will be transferred to the claimant and that she would be at liberty to sell it. The claimant was to receive an equalization payment of \$120,000 from the respondent in satisfaction of her claim of an interest in his orthodontic practice. The respondent has been unable to make this payment due to an inability to obtain financing. He has decided to sell his orthodontic practice in an effort to honour this agreement.
- [50] The respondent was struggling financially to pay the children's private school tuition and child support and spousal support. Although he agreed to continue to pay child support and spousal support once the children changed schools, he neglected to do so.
- [51] The respondent applied for a loan to pay the equalization payment to the claimant and was turned down by several banks. I accept his evidence that he made his best efforts to get financing. When he could not succeed in obtaining financing, he listed his orthodontic practice for sale and looked for work as an associate orthodontist.

- [52] The claimant has been endeavouring to reinstate her teaching credentials so that she can be employed outside the home. She was required to upgrade her science and math courses before she could enter into a two-year post-degree teaching program in British Columbia. She had completed those courses and was prepared to enter into the two-year program in Victoria in the coming year.
- [53] The claimant's new partner is an Australian citizen who was working in British Columbia and was prepared to remain here while the claimant upgraded her credentials. While on a vacation in Australia with the children, the claimant decided to apply for a teaching certificate in Australia, not expecting to have her credentials accepted.
- [54] In April 2018, to her surprise, the Queensland College of Teachers issued her a provisional teaching certificate which is in effect for two years. In order to apply for full registration, she is required to complete a minimum of 200 days of teaching experience in a Queensland, another recognized school in Australia or New Zealand. If she does not meet those requirements, then she is required to reapply at the expiry of the two-year period.
- [55] The claimant considers this an urgent situation. I do not interpret the situation that way but I do accept the claimant's evidence that this was not the plan all along. She fully expected to have to complete a two-year upgrading program at the University of Victoria.
- [56] The claimant cannot work in Australia until she has a work permit, receive her permanent residency status and a working visa.
- [57] Once the claimant has her bridging visa, then she can apply for work and register her dependents to start school and obtain medical coverage.
- [58] The claimant says that teachers are in high demand in Australia. She also stated that Australian schools are as good as B.C. private schools. They offer a gifted enrichment program which will meet W.D.'s needs.
- [59] Much of her evidence was hearsay about what she has been told by other people in Australia and is not reliable evidence. There is no documentary evidence about the demand for teachers in Australia or the quality of the education system.
- [60] The claimant notified the respondent in an email immediately of her wish to relocate the children. She explained that her new partner P.F. would sponsor her but he had to submit her permanent residency application from Australia. The plaintiff anticipates that she will receive a bridging visa to allow her to start searching for work within eight to ten weeks of her arriving in Australia.
- [61] Prior to any consultation with the respondent, the claimant spoke to the children. It sounds to me like she won them over. In her text to the respondent at the end of April 2018, she said that she believes the children are old enough to decide where they are to live. I disagree with her.

- [62] The respondent replied on May 1, 2018, in writing, that he wished to keep the custody arrangement as agreed upon on August 22, 2017. He did not permit the three children to travel outside Canada. Because a bridging visa takes eight to ten weeks to be processed and has to be applied for within Australia, the claimant left the children in Canada with the respondent and travelled to Australia to commence her bridging visa application.
- [63] I accept that this was not the claimant's first choice. She had already booked flights for the children assuming that they would be able to travel with her.
- [64] Since returning to Australia, the claimant married P.F. She was surprisingly reluctant to admit this on the witness stand and apparently had not told the respondent. I can only speculate that her reluctance was because this marriage makes the move to Australia sound far more permanent than she was implying in her opening statement. In her opening statement she suggested that she is seeking an interim order that the children move to Australia for a year to see if they like it. Since returning to Australia, P.F. has recently purchased a home for them and the children. P.F.'s 12-year-old daughter is residing in Australia with him for the year. It sounds like the claimant has no intention of returning to Canada.
- [65] I do however accept the claimant's statement that she would allow the children to return to Canada if they were unhappy in Australia. Whether or not she returns with them remains to be seen and is not a factor in my decision.
- [66] I find that the reason for the claimant's proposed relocation is directly related to the respondent's failure to support the family. The claimant was willing to stay in Canada and obtain her training. She was in the process of acquiring the prerequisites to do so. Had the respondent paid child and spousal support as he had agreed to do, then it is quite possible that a relocation would not be considered in the best interests of the children.

The respondent's reason for moving

- [67] The respondent's decision to move to Calgary is directly related to the same financial circumstances. The respondent has recently been hired as an associate orthodontist in Calgary and has started working in Calgary part-time while trying to maintain his orthodontic practice on Vancouver Island so as to maintain its value. This is the reason for the late amendment to the counterclaim. The respondent chose Calgary because he was raised there, as was the claimant. They have extended family who still reside in Calgary. He believed this would be a good environment for himself and the girls.
- [68] The respondent has acquired rental accommodation in Calgary in the Northwest area of Calgary near the University. He will be working downtown with reduced hours now that he will no longer be responsible for managing the practice. He anticipates finishing work every day around 4:00 o'clock and having a brief commute on the rapid transit system.

Disruption to the children of a change in custody

[69] Disruption caused by a change of custody is a particularly strong factor for consideration in this case because, despite the fact that they are thriving, I must keep in mind that these children experienced early childhood abandonment and, in M.D.'s case, deprivation. Their attachment to their primary care parent is likely the most important factor in their sense of security.

[70] I find it would be very disruptive to the children to be separated from their mother. Reduced contact with their father will also be distressing. I accept the claimant's commitment to foster their relationship with their father and to support their contact with him.

Disruption consequent on removal from family, schools, and the community he or she has come to know.

[71] Ordinarily a change in geographic location would be a significant factor in my decision. However, it cannot be a factor in this case because either way the children are moving from their current location. They are either moving to Calgary or to Australia.

[72] The children are more familiar with Calgary because their extended family live there and they have visited there before. They have no extended family in Australia. That has to be weighed against the fact that their mother, who is likely the closest attachment figure, would not be in Calgary with them.

[73] The respondent expresses concern about the disruption in the children's schooling if a move is permitted. The semesters or school years do not align between Canada and Australia. The children are now only halfway through their current grade and will either be placed back at the beginning of that grade or moved forward.

[74] From what I have heard about their academic achievements, I have little concern that W.D. and A.D. will be moved back a grade when they move. It is possible that M.D. may be moved back because she has some academic struggles. If the children are to move back to Canada at that stage, there will be some interruption in their education again.

[75] The claimant has been a strong academic advocate for the children. She is a teacher herself and her mother was a principal. The respondent agrees that she has always been a strong advocate for the children and there is no reason to doubt that she will continue to do so. I therefore have faith that she will ensure that the children's education is well supported.

[76] The interruption of contact with the extended family or community is of little concern. The children will likely see the respondent's family as much as they do now if they are permitted to move. The claimant's family will presumably visit her in Australia. The children are not strongly attached to one community at this age but will have to make adjustment of making new friends. They have gone through that adjustment before as a change of schools. I am not minimizing the impact of being the new kid at school, but I am confident that their mother will support them through any turmoil.

Conclusion

- [77] When I weigh the importance of the children remaining with the parent whose custody they have been accustomed to against the continuance of full contact with their access parent, I conclude that it is in their best interest to remain in the claimant's primary care.
- [78] By consent, the parties will share joint custody and guardianship.
- [79] I grant leave to the claimant to relocate the children to Brisbane, Australia, on conditions which I will set out below.
- [80] The move will not occur until after January 20, 2019. That will enable the respondent to have more time with the children before the move and will enable the respondent to accompany M.D. to her neuropsychological assessment.
- [81] The claimant is ordered to produce proof to the respondent that she has obtained her bridging visa and medical and dental coverage for the children in Australia and that the children are registered to commence school by the beginning of February 2019.
- [82] The respondent will have access to the children every year that they are in Australia from December 20 to January 20 or such other dates as the parties may agree upon in writing. The claimant will be responsible for paying for the children's flights to Canada and back. The children will either be accompanied by the claimant or a member of her family or the claimant will pay for the children to be accompanied by a flight attendant for the entire trip, including layovers. It is my view that the children are too young to be travelling that distance unaccompanied by an adult.
- [83] The respondent is at liberty to have further parenting time with the children during their three further school breaks during the year by either travelling to Australia to visit them or arranging a holiday somewhere in between.
- [84] The claimant is to facilitate electronic communication on a weekly basis at a minimum. I suspect this will have to be on a weekend because of the time difference. The children of course are at liberty to text and email as well.
- [85] The claimant has told the children that they can return to Canada if they are not happy in Australia. In my view, once they have arrived, they should give Australia a fair chance of one year.
- [86] The children are to be re-interviewed by a member of the Hear the Child Roster during their December 2019 visit to Canada. If any of them express a desire to return to Canada and the parties cannot agree, then the respondent is at liberty to apply to vary this order.
- [87] The claimant has been the successful party in this trial and is entitled to her costs of this proceeding.

"B.M. Young, J."

The Honourable Madam Justice Young

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