
CANADA / JUDGMENT

S.S.L. v. J.W.W.

2009 BCSC 924

COURT

Supreme Court of British Columbia

DECIDED

19 June 2009

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2009 BCSC 924 S.S.L. v. J.W.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.S.L. v. J.W.W.,

2009 BCSC 924

Date: 20090619

Docket: 08-5378

Registry: Victoria

Between:

S.S.L.

Plaintiff

And:

J.W.W.

Defendant

Corrected Judgment: Reasons for Judgment

were edited for publication purposes

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

June 19, 2009

Counsel for the Plaintiff:

W. Murphy-Dyson

Counsel for the Defendant:

D. Tracy

Place and Date of Trial:

Victoria, B.C.

June 1-5, 2009

June 8-12, 2009

Place and Date of Judgment:

Victoria, B.C.

June 19, 2009

INTRODUCTION

- [1] In this action the plaintiff seeks the permission of the court to move to London, Ontario, with the two children of the marriage: W, born June 23, 1997, and K, born November 4, 1999. The plaintiff, who is 44 years old, is a former Olympic rower. She has developed a career as a professional speaker and writer in the fields of personal development and the importance of play in child development. Before and since the birth of the children, her work has required her to travel extensively.
- [2] The defendant is 47 years old. He too is a former Olympic rower. Since January 2009 he has been employed by GoBid Online Charity Auctions, an enterprise that helps charities and non-profit organizations to raise funds through Internet-based auctions. However, he has earned no income from this enterprise. The defendant testified that since the commencement of this action in December 2008, he has lived on savings and a loan from his family and has put his career on hold pending the outcome of this case. For about three and a half years prior to December 2008, the defendant was employed as a medical equipment sales representative, earning up to \$75,000 per annum.
- [3] The plaintiff and the defendant are both devoted parents who have dedicated much of their time and energy to the care and nurturing of their two children. The plaintiff and the defendant met as members of the national rowing team in the 1980s, were married on September 24, 1993, and separated in late March 2002. The parties were divorced by order of this court pronounced on March 1, 2005. Since their separation the parties by agreement have had joint custody and guardianship of the two children.

- [4] The plaintiff has recently become engaged to Mr. P-E, a successful businessman who resides in London, Ontario, and has two daughters, age 13 and 10, by a previous marriage. Mr. P-E owns and operates GoodLife Fitness Incorporated, a chain of some 170 fitness clubs located throughout Canada but concentrated in southern Ontario. As a result of her new relationship with Mr. P-E, the plaintiff wishes to move to London with W and K.
- [5] The defendant is strongly opposed to the move. He says that Victoria has always been the children's home and that the disruption to the relationship with their father and their removal from their community and friends would outweigh any benefits, whether material or otherwise, that might accrue from the proposed move. The defendant counterclaims for an order for joint custody and guardianship and says that if the plaintiff proceeds with her intended move, the children should remain with him in Victoria, with generous access to the plaintiff. Although the defendant's counterclaim included a claim for child support, at trial he elected not to pursue that claim.
- [6] The court's task is to determine whether the proposed move is in the best interests of W, who is about to turn 12, and K, who is 9 years old. That determination calls for the application of the principles stated by the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 134 D.L.R. (4th) 321 to which I return later in these reasons.
- [7] Section 16 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), confers jurisdiction on the court to make an order respecting the custody of and access to the children of the marriage. Section 16(8) provides that the court shall take into account only the best interests of the children as determined by reference to the condition, means, needs, and other circumstances of the children. Section 16(10) requires the court to 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.

BACKGROUND

- [8] I turn now to some of the relevant background.
- [9] Following their separation, the plaintiff and defendant collaborated in working out the terms of their own separation agreement, dated for reference December 2002. They agreed that they would be joint guardians and have joint custody of the children. The separation agreement included a parenting agreement which contained the following parenting vow, drafted by the plaintiff and readily accepted by the defendant:

We vow to make K and W the first priority in our lives. Their physical, emotional, and spiritual well being will be paramount in the decisions we make for our lives. We will speak about each other to our children with kindness and respect. We will communicate on parenting and discipline decisions, we will work together as a team to raise our children.

- [10] The parties agreed that the children's primary residence was with their mother. They also agreed upon a liberal and somewhat flexible schedule for the defendant's access to the children, then aged four and a half and two and a half. The separation agreement also resolved all matters relating to the division of assets between the plaintiff and the defendant. The defendant also agreed to pay child support, including costs of childcare and B.C. medical premiums for the children, in the total amount of \$1,600 per month. However, the defendant fell behind in his monthly child support payments after he left his executive position with Foundation 2000 Plus, an organization promoting rowing and paddling sports, during the spring of 2003. In 2003 the defendant also purchased a house which enabled him to accommodate the children in their own bedroom when they spent nights with him. The defendant had also purchased a café and no longer enjoyed the income he had earned when employed with Foundation 2000 Plus.
- [11] On or about December 15, 2004, the plaintiff and the defendant entered into an agreement to amend their separation agreement which provided that until the defendant began to earn an income he would pay \$600 in basic child support, plus an additional \$150 per month which the plaintiff would invest in a registered education savings plan for the children. At the defendant's request, the parties agreed to amend the defendant's schedule with the children so that the children would now spend an average of eight nights per month with the defendant. The amending agreement also recognized that the defendant was maintaining a home for the children at his own expense. After the parties made the amending agreement, the plaintiff proceeded with her uncontested application for divorce, which was granted on March 1, 2005.
- [12] The defendant fell behind again in child support payments after December 15, 2004. He took the position that he should not have to pay child support when he was maintaining a home for the children at his own cost. In addition, the defendant wanted equal time with the children. The plaintiff suggested going to mediation. She testified that she strongly believed that the best environment for the children was to have one primary residence with generous access for the defendant. She said at the time, that is in the spring of 2005, both W and K were doing well and had a solid relationship with both parents.
- [13] With the assistance of a mediator, Dr. Alison Rees, the parties agreed that the defendant would have both the children 11 nights per month and that he would have one child on a 12th night, making for a total of 12 scheduled evenings per month. The mediator recorded the results of the mediation in an unsigned memorandum dated May 20, 2005, which also included these provisions:
6. Financial requirements for the children will be reviewed and agreed upon by both J and S with each one carrying responsibility for costs from clothing to classes.
 8. If at any time either S or J decide to start a serious relationship with another in which marriage or common law [is] a consideration both agree to rewrite this agreement particularly with regard to structured time with the children.

- [14] The parties agree that under the mediated agreement of May 20, 2005, the defendant no longer paid basic child support. However, both parties keep track of expenditures they make for the children and equalize those expenditures from time to time. The plaintiff testified that the parties have generally abided by this agreement since May 20, 2005, and that the defendant has had the children for an average of 12 nights per month.
- [15] The defendant contended that from at least March 2004 until December 2008 he had the children about 50 percent of the time and that it was only after the plaintiff brought this action in December 2008 that she began to schedule his time with the children for no more than 12 nights per month. The parties devoted considerable time during the trial to testing the accuracy of both the calendars maintained by the defendant for the period of March through December 2004 and the various monthly schedules prepared by the plaintiff to schedule the defendant's time with the children for each month during 2008. The defendant also produced a set of calendars for 2008 purporting to correct the plaintiff's schedules.
- [16] I am satisfied that neither the defendant's calendars nor the plaintiff's schedules are entirely accurate. Both parties, and particularly the plaintiff, travelled on business, often on short notice. This required adjustments to the times each parent had the care of their children. Even during the periods that the plaintiff employed a live-in nanny, the defendant would frequently take the children while the plaintiff was out of town on business. The defendant and the plaintiff were each able to identify errors in the other's records. The evidence does establish that there were some months when the defendant had one or both children for 15 nights or more and other months when he had them for 10 nights or less. Doing my best to assess the evidence, I conclude that the defendant has probably had both children in his overnight care for about 40 to 45 percent of the time since December 2004.
- [17] I turn now to the children. After K started grade one at Selkirk Montessori School, the plaintiff became concerned that her daughter might be dyslexic. The plaintiff, the defendant, and K met with Dr. Gillian Roberts, a child psychologist, who assessed K and identified problems with her working memory. Dr. Roberts recommended that the plaintiff and the defendant keep an eye on K's school performance and consider more testing later. After K transferred from Selkirk Montessori School to Cordova Bay Elementary, a psycho-educational report was prepared for her. This report revealed that K is an intelligent child, but has difficulties with rapid naming memory and some problems with reading. After she was designated as a child with learning disabilities, the school district prepared an independent education plan for her. The plaintiff testified that the positive result of the testing for K was that she has received extra assistance with reading outside the classroom. Her teachers have come to appreciate that she requires additional time to complete work. However, according to the plaintiff, there has been no substantial improvement in K's reading skills while she has attended Cordova Bay School.

- [18] The plaintiff believes that K would benefit from the smaller class size and more specialized teaching available at Matthews Hall, the private school in London, Ontario, where she wishes to place both of her children if she is permitted to move to Ontario with them. Class sizes at Matthews Hall range between 12 and 18 students, as compared with the 25 to 30 students in each class at Cordova Bay Elementary and Royal Oak Middle School.
- [19] The plaintiff also arranged for K to meet with a speech pathologist, Sandy Collins, who recommended a hearing test for K, as well as a complete auditory assessment. Ms. Collins also recommended that K might benefit from a computer program designed to help children with learning disabilities, called First For Word. The plaintiff told the defendant about this program and decided to start K on it in March of this year. The plaintiff testified that the defendant has been very good in ensuring that K puts in the time necessary to benefit from this program.
- [20] The plaintiff testified that she has taken the lead in investigating the children's learning problems and that the defendant, at least initially, was resistant to some testing and believed that it might scar the children by singling them out from their classmates as children with learning disabilities.
- [21] Dr. Gillian Roberts also performed a psycho-educational assessment for W in August 2003. At that time W was in grade three at Selkirk Montessori School. He was clearly intelligent, but was not doing well in school. Dr. Roberts determined that W had particular difficulties with the motor skills associated with writing and recommended that he be designated as a student with a learning disability so that an independent education plan might be developed to address his particular needs. The plaintiff testified that W has benefited from Dr. Roberts' assessment, in that his teachers have allowed him to take more time to complete his writing assignments. An independent educational plan was prepared for W. He has attended grades four and five at Cordova Bay Elementary and is currently completing grade six at Royal Oak Middle School.
- [22] Mr. Guiguet, W's grade five teacher at Cordova Bay Elementary, testified that when W came to his class he identified that W had difficulties in reading, writing, and math and some problems with his self-esteem. Mr. Guiguet worked with the school's integration support teacher, adapted the curriculum, met frequently with the plaintiff and the defendant, and created an environment in the classroom where W's friends supported him in his academic work. According to Mr. Guiguet, W's self-esteem grew through grade five. By the end of the year he had made progress in all subjects, was meeting the Ministry of Education's expectations, and had exceeded the expectations set in his independent education program.
- [23] At Royal Oak Middle School W's academic performance improved substantially from the first to the second term. His grade six teacher testified that W continues to face challenges respecting his self-esteem and that during his third term he has been late in handing in some assignments. The teacher, Mr. Diekmeier, testified that by the end of the final term he hoped to see a slight improvement in some areas, but anticipated that W's marks might be

slightly lower in some subjects. Over the course of the year Mr. Diekmeier noted that both parents were eager to help W. Mr. Diekmeier lobbied for and obtained additional learning assistance for W, some of which was provided in the classroom and some outside the class through the integration support teacher.

- [24] If the court permits the plaintiff to move to Ontario with her two children, the plaintiff intends to have W attend Matthews Hall, where she believes he will benefit from small class sizes, the school's curriculum which includes an extensive sports program, and specialized teaching, including classroom focused learning assistance.
- [25] In August 2008 the plaintiff took K to see a pediatrician, Dr. Coleman, who diagnosed K as having attention deficit disorder. Dr. Coleman prescribed medication and recommended that the plaintiff and the defendant should work hard on providing a routine and structure to help K meet her potential. Both the plaintiff and the defendant accepted Dr. Coleman's recommendations for K. The plaintiff testified that when K returned to school in September 2008 her medication seemed to be helping. Ms. Holmes, K's grade four teacher at Cordova Bay Elementary, testified that she is a happy, gregarious, outgoing, and enthusiastic little girl who has had difficulty with writing, reading, math, and focusing on her work. However, Ms. Holmes said that K's concentration and output have improved tremendously over this school year.
- [26] I will deal briefly with the plaintiff's relationship with Mr. P-E. The plaintiff first met Mr. P-E in Toronto in the fall of 2007 through her work as a professional speaker. By April 2008 the plaintiff had decided that he was the man with whom she wished to spend the rest of her life. The plaintiff testified that W and K get on well with Mr. P-E's two children. The plaintiff and Mr. P-E were recently engaged and plan to be married in the summer of 2010, although they have not yet set a date.
- [27] The plaintiff testified that it would not be possible for Mr. P-E to relocate to British Columbia. He provided testimony to the same effect. Mr. P-E operates a company with some 8,000 employees and a head office located in London, Ontario. In addition, he is actively involved with a foundation established at the University of Western Ontario to perform research on autism. Mr. P-E has also devoted a great deal of time and energy to finding the right school and home support for his elder daughter, who is autistic.
- [28] Mr. P-E is a man of considerable wealth. He owns a large home, farm acreage, and recreational property. He has the financial means to enable K and W to participate in any recreational activity they choose to pursue and to pay for whatever educational and vocational needs they may have.
- [29] During the fall of 2008 the plaintiff met with the head of Matthews Hall and toured the school. She met with Ms. Frame, a teacher who has substantial experience in working with children with reading disorders and attention deficit disorder. The plaintiff determined that there would be specialized reading assistance available to K in the classroom. Matthews Hall also offers dance, drama, music, and voice lessons, has a large library, a modern computer

laboratory, and a science lab. She believes Matthews Hall would provide superior educational opportunities and assistance for both her children. The plaintiff has applied for admission of both K and W to Matthews Hall, and they have been accepted for registration in the 2009/2010 school year.

- [30] In August 2008 the plaintiff told the defendant that she was in a serious relationship and wanted to move with the children to London, Ontario. He was and is opposed to the move. The defendant makes his home in Victoria and believes that the disruption to the children's lives and friendships involved in a move to Ontario would outweigh any potential benefits.
- [31] The defendant also has a five-year-old daughter, O, born to Ms. L, a former nanny. In the fall of 2008 the defendant sought to restore his complex and intermittent relationship with Ms. L; however, he was unsuccessful in doing so. O now lives with her mother in Calgary.
- [32] The plaintiff acknowledged that K and W have a bond with O which she likens to that between cousins. She said W probably has a stronger bond with O than K does, but that W was not upset by O's recent move to Calgary. The plaintiff said that she and Mr. P-E were prepared to assist the defendant in travelling to and from Victoria so that he could spend time in the west with O and also have regular access to W and K. Mr. P-E was at one point prepared to offer the defendant employment with GoodLife Fitness. The defendant has declined these overtures.
- [33] The plaintiff testified that the market for corporate speaking is centred in Toronto. Speakers' bureaus there are a source of work for her. She has recently entered into an independent services agreement for a three-year term with GoodLife Fitness which will provide her with an annual salary of \$100,000. She believes that it would be difficult to perform this contract if she continued to live in Victoria, since much of the speaking, promotional, and fundraising activity contemplated by the contract would be performed in southern Ontario. The plaintiff testified that her corporate speaking engagements have declined in the last year, in part as a result of her shifting her focus to the active children's movement. She does not see the 2010 Vancouver Olympics as a major source of work. She believes that younger former Olympians and particularly those with a background in winter sports are likely to be in greater demand for speaking engagements. The plaintiff testified that her earnings from corporate speaking engagements have declined in the last year. She estimates her income for 2008, without taking into account the contract with GoodLife fitness, of course, at about \$56,000. She said that if she were unable to perform her contract with GoodLife Fitness Centres Incorporated, it would be difficult for her to replace the income stream that contract offers.
- [34] The plaintiff explained that she wants to move with her children to London, Ontario, because she has found her life partner in Mr. P-E. The children would have the opportunity for the first time in their lives to see their mother in a loving relationship. She would also have the opportunity to flourish in her business. Her new relationship offers financial security for herself and her children. In addition, her children would have the opportunity to spend time with grandparents and members of their extended family, many of whom live

in southern Ontario. The children would also have the opportunity to attend private school and to receive whatever additional help and support they might require. She also believes she would have the opportunity to be at home more because, as she put it, Mr. P-E will be paying the mortgage. Also, rather than having to travel across the continent, much of her travel would be in the Toronto area and could easily be completed during the course of a working day. She said that she and Mr. P-E are working on a prenuptial agreement and that they have an understanding that he would pay for the children's education to the end of grade eight and perhaps grade twelve, regardless of whether the relationship worked out.

- [35] The plaintiff suggested that if the defendant were to move to London, Ontario, there would be no change in his contact with the children. She said that the cost of living in London was lower than in Victoria and believed that the defendant would be able to replace his income in Victoria and his home in Victoria in the London area.
- [36] The plaintiff recognized that the major negative of her proposed move to London, Ontario, is the potential separation of W and K from the defendant. She acknowledges that the children have lived all of their lives in Victoria and have friends here. The defendant believes it would be very hard on the children to move and to give up their friendships. However, the plaintiff believes that the children will adjust and make friends at their new school if the move is permitted. The plaintiff testified that she has not discussed the move to Ontario with K and W, beyond telling them in response to their questions that moving to London is a possibility.
- [37] The plaintiff said that if the defendant stays in Victoria, she would support the children continuing to have contact with their father. She and Mr. P-E are prepared to pay for tickets for the defendant to come to London once a month and to assist in paying for accommodation for him. They would also contribute to the cost of flying the children to Victoria to see their father there.
- [38] The plaintiff testified that if the court does not permit the move, she would continue her relationship with Mr. P-E as best she could while they lived in separate cities. She believes this would place a strain on the relationship. She would have to see Mr. P-E less in order to have the time to maintain her business, and she would reconsider her plans to marry. The plaintiff believes that the children would lose the opportunity to attend private school and that their lifestyle would be constrained if they remain in Victoria rather than move to London.
- [39] Since her separation from the defendant and before meeting Mr. P-E, the plaintiff has had two serious romantic relationships, each of which lasted for about one year. She confirmed that she has been in a relationship with Mr. P-E since April 2008 and that since then they have met for work, on some weekends, and for vacations. She believes that her children first met Mr. P-E in or about August 2008 during a trip to Ontario for a family reunion. Since then Mr. P-E has travelled to British Columbia and she has travelled east with the children to spend time with him and his family at Thanksgiving, around Christmastime, and for a

spring skiing holiday in Vermont.

- [40] The plaintiff testified that she intends to pursue her contract with GoodLife Fitness and to continue with her professional speaking career as much as time allows. She acknowledges that the new family unit in London, Ontario, would be a blended family. The plaintiff has previously lived in a blended family, as has Mr. P-E .
- [41] The plaintiff said that while she has not yet informed the children about this litigation or that if she is successful that they will be moving with her from Victoria to London, Ontario, without their father, she intends to seek the assistance of a child psychologist for advice about how the move might best be presented to the children as clearly and with the least stress possible, should it be approved. The plaintiff said that the children have detected tension between herself and the defendant and sense that change may be afoot.
- [42] The plaintiff regards as unacceptable any arrangement which would leave the children in Victoria while she moved to London. Mr. Tracy suggested to her in cross-examination that she might try a two-city relationship with Mr. P-E for the next year. She would keep her home in Victoria and the children would stay with the defendant when she is not here. The plaintiff testified that her present level of travel is unsustainable and that she and Mr. P-E could only sustain the balance of extensive travel, their professional commitments, and the children's needs for so long. She reiterated her belief that it would be difficult to maintain a long-distance relationship with Mr. P-E.
- [43] The plaintiff called Ms. L, who was employed by the plaintiff from 1998 to 2000 as a nanny for W. Ms. L is the mother of the defendant's daughter O. Ms. L said that she would always do her best to support the relationship between O and the defendant and between O, K, and W. If K and W moved to Ontario, Ms. L would support O, K, and W getting together intermittently, finances permitting. Ms. L said that she has recently acquired Skype, which will permit O to communicate with her stepbrother and sister by Internet video link.
- [44] The defendant fairly described his relationship with Ms. L as complicated. Ms. L showed considerable animosity toward the defendant in her testimony. I have disregarded her assertions regarding the defendant's integrity or character in reaching my decision in this case.
- [45] Mr. P-E gave some evidence about his first meeting W and K in May or June 2008, although he does not recall the exact circumstances. In late July 2008 all four children spent time together with Mr. P-E at the summer cottage in Ontario. Mr. P-E testified that all of the children get on together well. He estimates that he has spent between 55 and 65 days over the past year with W and K and said that he has established a positive relationship with them, although he recognizes that the defendant will always be their father. Mr. P-E said that he and the plaintiff intend to take parenting coaching for assistance in managing a blended family if the plaintiff, K, and W are permitted to relocate to London, Ontario. He sees himself as serving as a role model for K and W, but does not intend to supplant the defendant in his role as the children's father.

- [46] Mr. P-E testified that the plaintiff's contract with GoodLife Fitness Centres offers her financial security and guarantees that she will be able to look after the children and herself for three years even if her relationship with him does not work out. Although the contract was to take effect in January 2009, the parties agreed that it would come into force in June. Mr. P-E confirmed that he and the plaintiff are preparing a prenuptial agreement and that he has made a commitment that if the plaintiff and her children move to Ontario, W and K will receive the same education as his younger daughter, even if the relationship between the plaintiff and Mr. P-E breaks down.

DISCUSSION

- [47] With this background in mind, I turn now to the governing legal principles and their application to the particular facts of this case. In addition to the leading case of *Gordon v. Goertz*, counsel have referred me to various other authorities, including *Mosher v. Mosher* (June 5, 2007), Victoria 06-0594 (S.C.), *Hamilton v. Hamilton*, 2001 BCSC 896, *McDowell v. McDowell*, [1999] O.J. No. 1852 (S.C.J.), and *One v. One*, 2000 BCSC 1584, 81 B.C.L.R. (3d) 315.
- [48] In *Gordon v. Goertz* the Supreme Court of Canada held that the parent applying for a change in custody or access order must first meet the threshold requirement of demonstrating a material change in circumstances affecting the child. Here the application is to change joint custody arrangements under a separation agreement rather than to vary an order of the court. The analysis, as Madam Justice Dorgan observed in *Mosher v. Mosher* at paragraph 47, proceeds directly to the best interests of the children, rather than the needs or wants of the parents. In *Goertz* the court held that while there is no legal presumption in favour of the custodial parent, the views of that parent are entitled to great respect.
- [49] In the case at bar, there are two custodial parents. Although the parties agreed at the time of their separation that the plaintiff would provide the primary residence for the children, the fact is that W and K have for the last several years spent about 40 percent of the time in the custody of their father and the balance with their mother. The plaintiff has taken the lead in investigating schooling and the identification and diagnosis of the children's learning challenges. However, the defendant has also played an active role and taken a keen interest in his children's education, care, and medical treatment. In the circumstances of this case, the views of both custodial parents are entitled to respect, although the focus of the inquiry is to determine the best interests of the children in the very unique circumstances of this case.
- [50] I turn now to the factors identified in paragraphs 49(7)(a) through (g) of *Goertz*. Dealing first with paragraphs (a) and (b), here it is necessary to consider the existing custody arrangements and the relationship between the children and each parent. The plaintiff and the defendant each testified with complete candour about the very strong parental relationship the other had with both children. It is abundantly clear, from the evidence of the plaintiff and the defendant and from the teachers and parents from the Cordova Bay neighbourhood who testified, that the children have benefited from their relationship with

both parents and the time spent in the care of each parent.

- [51] The next factor is the desirability of maximizing contact between the children and both parents. Under the present regime the children divide their time between the two homes provided by their parents situated in the same neighbourhood. For the last seven years since the separation the defendant has been an integral part of the children's lives. Since 2003, when he purchased his home on Lochside, the children have moved back and forth between the two homes and have spent significant amounts of time with their father, as well as their mother, throughout each year.
- [52] If the children move to Ontario with the plaintiff, their contact with their father will be reduced. The plaintiff has offered to assist the defendant with the cost of monthly air travel to London, Ontario. However, I find that it is probable that the defendant, when re-employed, would not be able to travel to Ontario to spend a week each month there with his children. Rather than participating in the day-to-day activities of the children and having them in his home as he does now, his contact with the children would likely be largely confined to the summer holidays, Christmas, and spring breaks.
- [53] The next factor is the views of the children. In *Mosher v. Mosher*, where the children were 9 and 6, the court concluded that whether the children should move with the custodial parent was a matter to be determined by adults. The parties here agreed that neither of them would solicit the views of their children about the plaintiff's intended move to Ontario.
- [54] The defendant did apply to the court prior to the trial of this action for an order for a child custody and access report pursuant to s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128. His application was denied by Master Scarth, as was his appeal from the master's decision. Master Scarth held that the defendant had failed to satisfy her that a s. 15 report was necessary or in the children's best interests. She concluded that the trial judge would be able to assess the *Gordon v. Goertz* factors by considering the evidence of the parties and their witnesses, without the assistance of a psychologist.
- [55] Both children are aware that Mr. P-E has given their mother a ring. Both parents have said the children are showing signs of stress and are aware something is afoot. The plaintiff anticipates that the children will initially react against the move, but expects that they will adjust, particularly if she and the defendant seek the assistance of a family counsellor in explaining the move to W and K. The defendant said that he expects both children will be devastated and will feel that both of their parents have deceived them.
- [56] The next consideration is the reason for the move. This is not a case where one parent wishes to move the children with a view to diminishing the other parent's contact or for any other ulterior purpose. The plaintiff wants to move with the children to Ontario because she has formed a new relationship with Mr. P-E and because she believes that the move will benefit her children. By moving to Ontario and taking up the contract with GoodLife Fitness, she expects to spend less time travelling for work and thereby increase her time with the children and her and their financial security. She also believes that their best interests will

be served by attendance at Matthews Hall.

- [57] The next consideration is the disruption to the children of a change in custody. There will be a disruption to the children if the move is permitted. The present custodial arrangement will be fundamentally altered if the plaintiff and the two children move to London, Ontario. The defendant, who has been a constant presence in his children's lives, would only have them in his custody on a much reduced basis.
- [58] I heard considerable evidence about the potential disruption of the children consequent on removal from their friends, schools, and their community. W has a circle of friends with whom he plays sports, attends school, and "hangs out", centred on the Cordova Bay neighbourhood where both he and K have always lived. Some of his close friends are in his class at the middle school. They have supported and encouraged him in the classroom and on the sports field. There is also an informal but very strong network of neighbourhood families who have formed a close community bond, and who meet for social and recreational activities in which both children and adults participate. K is also developing a group of friends at Cordova Bay Elementary School. If the move is approved, the children would experience the dislocation of removal from the community where they have lived the whole of their lives, and from the schools with which they are now familiar.
- [59] It is also likely that W and K would have somewhat less contact with their stepsister O if they moved to Ontario than if they remain in Victoria. Although O now resides in Calgary and her mother has said she is willing to support O's continuing contact with W and K, as a practical matter it will require less time and expense for O to visit her father and W and K if they remain in Victoria, rather than move to London, Ontario.
- [60] On the other side of the ledger, K and W's grandparents and other members of their extended families reside in southern Ontario. A move to London would likely facilitate contact with grandparents, uncles, aunts, and a cousin.
- [61] In *One v. One* Mr. Justice Burnyeat identified from the case law applying *Goertz* twelve factors which British Columbia courts have reviewed in deciding what is in the best interests of the children.
- [62] The first of these are the parenting capabilities of, and the children's relationship with, parents and new partners. Both parents have equally strong parenting capabilities. Mr. P-E has spent, by his estimate, over 55 days with K and W since last August and has, by his account and the plaintiff's evidence, a good relationship with the children. However, he recognizes that he will not replace or displace the defendant as the children's father and has no desire to do so.

- [63] The next factor is the employment security and prospects of each spouse. The plaintiff's public speaking career has provided her with a very comfortable living. Her contract with GoodLife Fitness now offers her the potential for a stable base income of \$100,000 per annum for three years. If she moves to Ontario with the children and her relationship with Mr. P-E develops and endures as she anticipates, her financial security and that of the children will be enhanced.
- [64] The defendant has earned no income since December 2008, when he lost his position with the medical equipment company. He has drawn upon his savings and a loan from his parents in order to support himself and his children. His current lack of remunerative employment creates some uncertainty about his ability to continue to provide the same standard of living for himself and his children. The defendant recognizes that he will have to find new employment and pay down his accumulating debts, but is confident that he will be able to do so, as he intends, once this litigation is resolved. As the defendant points out, he has always provided for his children. He was able to find well paying employment after his unsuccessful café venture.
- [65] I have already dealt with access to and support of the extended family, in which I include both W's and K's stepsister O in Calgary, and their grandparents, uncles, and aunts in southern Ontario.
- [66] The difficulty in exercising the proposed access and quality of the proposed access if the move allowed is the next factor. The plaintiff's proposal that the defendant relocate to London, Ontario, with some assistance from herself and Mr. P-E, while well intended, is impractical, given the defendant's firm desire to continue to make his home in Victoria and to have his children there. The plaintiff has also offered to facilitate the defendant's access to the children if the move is permitted, by assisting to pay for his accommodation and airfare for trips to London. In addition, the plaintiff has offered to assist with the cost of flying the children to and from Victoria and to pay for web camera equipment to facilitate communications between the defendant while he is in Victoria and when the children are in London, Ontario. As I have already found, the exigencies of earning a living would likely prevent the defendant from making regular monthly visits to London, Ontario, as proposed by the plaintiff. Under the proposed arrangements, as I have noted, the children would not have anything like the same access to their father as they do under the current joint custody arrangement.
- [67] The next factor is the effect on the children's academic situation. Matthews Hall would offer smaller class sizes, specialized teaching, including learning assistance and a rich program of dance, theatre, and music for K as well as a wide range of sports activities and instruction for W. However, it is by no means certain that these children, following their relocation from Victoria, the disruption of their close relationship with their father, and the loss of daily contact with their friends, would necessarily flourish at Matthews Hall, notwithstanding the facilities and attributes it offers.

- [68] The resources of Cordova Bay Elementary and Royal Oak Middle School to support children with learning challenges are finite. However, to date, the plaintiff and the defendant, through their active involvement in and commitment to their children's education, have managed for the most part to have W and K placed in classes with dedicated teachers. They have lobbied for and obtained assistance for the children and have seen them make progress in meeting their educational needs and challenges in the public school system.
- [69] With respect to the psychological and emotional well-being of the children, the removal of these children from a familiar neighbourhood and school to a new school and a new city, and their introduction into a new blended family of four children, will impose some stress. The court is not in a position to assess with precision the extent of that stress or the extent to which, with time, W and K may adapt to new surroundings. However, both the defendant and the plaintiff recognize, albeit in differing degrees, that the separation of K and W from their father and the disruption of their routines and relationship with him will likely have an immediate and adverse impact on their psychological and emotional well-being.
- [70] I have already addressed the disruption of the children's existing social and community support and routines.
- [71] The next factor is the desirability of the proposed new family unit for the children. This, in my view, is at best a neutral factor in this case. There is evidence that during the times that they have spent together on vacation, W and K have got on well with Mr. P-E's children. In time they may form close bonds. However, the formation of a new blended family of four children offers no obvious advantage to K and W over the current unit. The two parents, although separated, have cooperated to raise their two children as siblings who share loving relationships with each other and with their mother and father.
- [72] It is unnecessary to say anything more about the relative parenting capabilities of either parent and their abilities to discharge their responsibilities. Those factors are simply not in issue in this case.
- [73] With respect to the separation of siblings, I have already touched upon the opportunities for W and K to see O in either Victoria or London.
- [74] The last of the factors from *One v. One*, the retraining and educational opportunities for the moving parent, is not engaged in this case.
- [75] Weighing all of these factors in order to determine what is in the best interests of the children in all of the circumstances, both old and new, is particularly difficult in this case. There is no easy answer. The defendant is adamant that he will not move to London. When asked by counsel for the defendant what she would do if the court does not permit her to move with the children to London, Ontario, the plaintiff's considered response was that she would not leave her children. She said that she would continue to travel between Victoria and London while maintaining a home here. She would endeavour to continue her relationship with Mr. P-E, but recognized that if she did not move her relationship with Mr.

P-E ultimately might not endure.

- [76] I recognize that any order I make has the potential to affect, either positively or negatively, the plaintiff's relationship with Mr. P-E. However, the focus for the court is the best interests of the children, rather than the interests of either parent.
- [77] The move to Ontario proposed by the plaintiff offers the children continued contact with their mother there, all of the material benefits that may flow from the plaintiff's new relationship with Mr. P-E, and the opportunity to attend a private school which may provide the children with educational opportunities superior to those available at Cordova Bay Elementary and Royal Oak Middle School. What the children will lose if they move to Ontario is constant contact with a dedicated father who until now has had joint custody with the plaintiff and with whom they have spent about 40 percent of their time.

CONCLUSION

- [78] In my view, the disruption of that relationship for these children, at ages 12 and 9, together with the disruption of their strong social connections to their friends and their community, outweigh the potential advantages to them of the proposed move. At this stage, it is not in the best interests of the children for them to move with their mother to London, Ontario.
- [79] In reaching that conclusion, I take into account the defendant's present financial circumstances and lack of paid employment. I accept his assurance that he intends to find new employment and anticipate that with his background, promotional sales and entrepreneurial experience, and obvious determination, he will do so.
- [80] I also anticipate that the plaintiff, as she has done in the past, will continue to communicate with the defendant regarding the children's education and that both parents will continue to do their very best to ensure that W and K receive the learning assistance and support they need, both at school and in each of their parents' homes.
- [81] The orders I make today maintain the status quo regarding the joint custody of W and K. The plaintiff's claim for an order that she be permitted to move with the children of the marriage to live in London, Ontario, at the end of the 2008/2009 school year is dismissed.
- [82] The plaintiff's claim for a declaration of child support owing by the defendant to the plaintiff is dismissed as abandoned.
- [83] I grant the defendant's counterclaim for an order that he and the plaintiff have joint custody and guardianship of the children of the marriage, W, born June 23, 1997, and K, born November 4, 1999.

[84] In light of the plaintiff's stated intention to continue to maintain a home in Victoria, I do not propose to make any order today regarding what arrangements, if any, for access would apply in the event that the plaintiff decided to move to London, Ontario, without the children. If, after the parties have taken time to consider these reasons, they wish to apply for any further order or directions relating to the joint custody and guardianship for W and K, they are at liberty to do so. I will remain seized of this proceeding for that purpose.

COSTS

[85] The parties requested that the court defer any ruling on costs until after the delivery of judgment. If counsel are not able to resolve the matter of costs by agreement, they may make submissions on costs in writing.

"Pearlman J."

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