

CANADA / JUDGMENT

W.G.T. v. S.L.L.E.

2002 BCSC 1358

COURT

Supreme Court of British Columbia

DECIDED

23 September 2002

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Citation: W.G.T. v. S.L.L.E.

Date: 20020923
2002 BCSC 1358

Docket: E30955
Registry: Vernon
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: W.G.T.
PLAINTIFF

AND: S.L.L.E.
DEFENDANT

REASONS FOR JUDGMENT

OF

MASTER GROVES

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Counsel for the Defendant

G. W. Wagner

Date and Place of Hearing/Trial:

September 17 2002

Vernon, BC

- [1] This application concerns the request of the plaintiff father for interim custody of a child, A.W.G.T. ("A.W.G.T."), born the [], 1996. The origin of the application rest in the fact that the Defendant mother has recently moved to the Burnaby area with the child from the traditional residence of the child in Vernon.
- [2] Cases involving the moving of a child and mobility rights of parents are some of the most difficult cases before the Courts in the family law context.
- [3] The law in this area, in my view, is clear, though the application of the law to the facts often create the difficulties. The leading case in this area, a case often referred to in this type of applications, is the decision of the Supreme Court of Canada in *Gordon v. Goertz* [1996] 2 S.C.R. 27. Additionally, a leading British Columbia Court of Appeal decision in this area is the case of *Nunweiler v. Nunweiler* [2000] B.C.J. No. 3935. Madam Justice McLachlin summarized in *Gordon v. Goertz*, supra, the law as follows:
1. The parent applying for a change in the custody or access order must meet the threshold requirement 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.

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?

FACTUAL BACKGROUND

- [4] In regards to a number of facts before the Court, most notably facts leading up and prior to July of 2002, there is little dispute between the parties.
- [5] The plaintiff is currently 30 years of age and the defendant is approximately 24. The parties never married. The defendant was 17 when she became pregnant with the child, A.W.G.T.. The plaintiff was then 22. The parties lived in a common-law relationship from August of 1995 through to November of 1996, and again from August of 1997 through to August of 1998. There is currently no Court Order between the parties; however, the parties did enter into two different agreements, the first of which was in October of 1998 and the second, I am advised, some six months later. The October 2, 1998 agreement provides that the defendant is to have custody of A.W.G.T., and the plaintiff father, is to have access every weekend. In the agreement, the parties have remained joint guardians of the child. The agreement further provided that the defendant was to give the plaintiff thirty days notice of any change in address.
- [6] The father, W.G.T., has been a responsible father to A.W.G.T.. With the exception of very few weekends, he has exercised his weekend access every weekend since August of 1998. The plaintiff has done this despite the fact that he moved from Vernon to Revelstoke for business reasons in September of 1999, and remained there until July of 2002. The move, of course, necessitated the plaintiff travelling back and forth to Vernon every weekend for his access with his son, but the plaintiff has done so. Additionally, I am advised that the plaintiff is up-to-date on his child support.
- [7] From the time of separation until November of 2001, the defendant mother resided with the child, A.W.G.T., in Vernon. The plaintiff's parents, Mr. and Mrs. T. Sr., have been very involved in the care of A.W.G.T. since his birth. They reside in Vernon. The evidence seems clear that the defendant had, until recently, a good relationship with the plaintiff's parents, particularly the plaintiff's mother, C.T.. In regards this good relationship, I am convinced this is the case because of three factors. The first factor is that it appears apparent that the plaintiff's mother, has on a number of occasions, assisted the defendant financially. Secondly, the defendant relied on the plaintiff's mother to assist her in child care for A.W.G.T. on an intermittent basis, at least until November of 2001.

- [8] The third factor that convinces me of this good relationship arises from the circumstances in November of 2001. In September of 2001, the defendant undertook a course of study which required her to travel from Vernon to Kelowna on a daily basis. The defendant deposes that she found this travel difficult, and with the on setting of winter, chose to move to Kelowna from Vernon to complete her studies. In doing so, she decided to leave A.W.G.T. in the day to day care of the plaintiff's mother, C.T., who agreed to take on the responsibility for her grandson. Of course, during this time, the plaintiff father was returning to Vernon every weekend to spend time with his son, and I accept that the defendant had regular visits with A.W.G.T. which often involved her travelling to Vernon from Kelowna and staying overnight with the plaintiff's mother and A.W.G.T., in the grandmother's home in Vernon.
- [9] In April or May of 2002, the plaintiff moved to Burnaby. It seems clear from the materials that she did so, at least in part, because of a relationship she had developed with a gentleman by the name of P.. Additionally, the defendant says in her materials that she moved to Burnaby for "many reasons - better job opportunities, to further my education and to start fresh in a new environment."
- [10] A.W.G.T. remained with his paternal grandmother who provided primary care in Vernon through the months of May and June.
- [11] Sometime in early July, A.W.G.T. came into the care again of the defendant. It is here where each parties' version of events differ dramatically. The plaintiff father states that A.W.G.T. initially went with his mother for a "visit" over the summer, which was extended on a couple of occasions by agreements because of special activities that the defendant stated she wanted to participate with A.W.G.T. in, in the lower mainland area. The plaintiff further states that it was always the intention of the parties that A.W.G.T. would start school in Vernon in September. To that effect, the plaintiff arranged, through the spring of 2002, to adjust his work commitments and move back from Revelstoke to Vernon. He states that he has purchased a home in the Vernon area, where he lives with his new common-law partner, with the intention of having A.W.G.T. in his care and custody. He says that it was understood that A.W.G.T. would be with him, with the assistance of his mother, in the Vernon area.
- [12] The defendant states that the move of A.W.G.T. to Burnaby was a natural reuniting of A.W.G.T. with his traditional custodial parent. She says that there was no intention expressed ever of A.W.G.T. returning to Vernon for school in September, and that when she again had A.W.G.T. on a full time basis in July of 2002 that it was understood between the parties that that would be the arrangement.
- [13] An additional aspect of dispute between the parties relates to the defendant's boyfriend, P.. Little is known or disclosed in the materials about P. and his relationship with A.W.G.T.. However, attached to an Affidavit No. 1 of the plaintiff is a note, which appears to have been written by the defendant to her boyfriend, P., dated June of 2002. It says in part:

"It seems that any time we have plans to see A.W.G.T. we get into a fight. You know that I've been looking forward to A.W.G.T. coming down and staying with us. Now look what's happened. I get the feeling that the whole incident has something to do with A.W.G.T.. How fair is this? I hope you are satisfied with the outcome. Thanks a lot."

The circumstances around the writing of this note are not explained in the materials by the defendant. The defendant does state that P. and A.W.G.T. get along fine.

DISCUSSION

- [14] As indicated earlier, much of the facts concerning the custodial situation of A.W.G.T. up to the summer of 2002 are not seriously in dispute. Though the parties have some minor disagreements about relatively minor issues over the years, it seems that for the most part, they have been able to work out arrangements in regards to A.W.G.T.. While residing in Vernon, A.W.G.T. had regular access with his father and his father's extended family. They provided at least some of the support mechanisms for the defendant and for A.W.G.T..
- [15] On balance, the evidence convinces me that, at least on some level, the parties had discussed A.W.G.T. remaining in Vernon in the fall of 2002. One basis for this conclusion is that it is really the only explanation for the plaintiff father's move from Revelstoke to Vernon. He clearly has done so with the intention of being more involved in A.W.G.T.'s life, and providing at least partial care for A.W.G.T.. Additionally, the plaintiff father's explanation of events generally is much more convincing than is that of the defendant mother.
- [16] In cases involving the move of a child and the mobility rights of a parent, one would expect the parent moving to provide general evidence in support of the move. There is, in my view, an onus on him/her to do so. This evidence would consist of a discussion of the child's new home environment. In this case, not even a civic address is disclosed. Secondly, there would be evidence about the schooling available for the child, and its appropriateness. The evidence discloses that the child has been enrolled in some Grade 1 French immersion program, but there is no further disclosure. Additionally, there would be evidence about the child's new social environment in the new community. There is no evidence proffered in regards to this concern. Finally, the reasons for the move of the custodial parent should be explained in some detail. Other than the general comment noted above about better job opportunities, furthering of education, and a fresh start in a new environment, no details are provided about the move. No evidence is given that the defendant is in fact enrolling in additional educational opportunities. No evidence is given about a new job or job prospects, and again, as noted in regard to A.W.G.T., no evidence is given in regards to this new or fresh environment. Additionally, the concern about P.'s difficulty with A.W.G.T. is not explained, nor is there any information about P. himself.
- [17] In applying the *Gordon v. Goertz* test, I am satisfied that there has been a change in circumstances as a result of the move of A.W.G.T. to Burnaby. It is then the responsibility of the Court to embark upon a fresh inquiry as to what is in A.W.G.T.'s best interest.

- [18] On the evidence before me, it is not really possible to embark into a full inquiry as to what is in the best interest of A.W.G.T.. As noted above, the evidence in support of the mother's move and the details of her move, the social environment, the educational environment, the reasons for her move, are unfortunately missing from the materials. Equally fair, is the comment made by counsel for the defendant, that the details of the father's home environment are also somewhat sketchy. I know that he has moved back to the Vernon area, and I know he lives with his girlfriend, but the details of his plans for A.W.G.T. are uncertain. In fact, his counsel in submissions on his behalf, appeared to be arguing that A.W.G.T. should be returned to the primary care of the grandmother, though the application is, of course, phrased as an application by the plaintiff father.
- [19] Noting as I do, and as directed in the case of *Gordon v. Goertz*, my inquiry as to what is in A.W.G.T.'s best interest does not begin with a legal presumption in favour of a custodial parent. Noting that I must focus on what is the best interest of A.W.G.T., considering existing arrangements and relationships between this child and custodial and access parents, the desirability of maximizing contact with both parents, disruption to this child of a change in custody, and disruption to this child's consequence on removal from family and the community in which he has come to know, I am troubled that I cannot draw a complete conclusion about the proposed new environment and home for the child, in order to compare it to what the father is proposing. Additionally, what the father is in fact proposing, is somewhat uncertain.
- [20] There is a significant absence of evidence particularly about the new environment. I can, however, conclude that A.W.G.T.'s "home" in Vernon is a situation that has been in the past good for A.W.G.T.. It is where he has had the benefit of the care of both his parents, and extended family. It is where he has grown up, and it is where he is, no doubt, comfortable.
- [21] As I have noted above, I am unable to embark on a total *Gordon v. Goertz* analysis because of the failure of both parties to provide evidence. The defendant mother has not provided an explanation for her move, nor has she provided information as to A.W.G.T.'s environment.
- [22] Having no information on the new home environment, and no explanation of P.'s apparent difficulty with A.W.G.T., I cannot conclude a move at this time to Burnaby is in his best interest.
- [23] As a result, I am going to direct that the parties are to have interim joint custody and care of A.W.G.T.. The principal residence of A.W.G.T. is to be in the Vernon area effective the 30th September 2002.

"Master J. Groves"

September 30, 2002 - Corrigendum to the Reasons for Judgment were released from the Vernon Registry on October 2, 2002 and are date stamped accordingly.

The Corrigendum to the Reasons for Judgment were issued by Master J. Groves advising that on page 5, paragraph 6, lines 5 and 7 should read:

"The move, of course, necessitated the plaintiff travelling back and forth to Vernon every weekend for his access with his son, but the plaintiff has done so."

On page 13, paragraph 23, should read:

"The principal residence of A.W.G.T. is to be in the Vernon area effective the 30th September 2002."

There are no other amendments to these Reasons for Judgment.

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