In the Court of Appeal of Alberta

Citation: RJF v. CMF, 2014 ABCA 165

Date: 20140514
Docket: 1301-0288-AC
Registry: Calgary

2014 ABCA 165 (CanLII)

Between:

RJF

Respondent (Plaintiff)

- and -

CMF

Appellant (Defendant)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Costigan

Reasons for Judgment Reserved of The Honourable Madam Justice Conrad

Reasons for Judgment Reserved of The Honourable Mr. Justice Costigan Concurring in the Result

Reasons for Judgment of The Honourable Mr. Justice Berger Dissenting in Part

Appeal from the Judgment by
The Honourable Mr. Justice J.T. McCarthy
Dated the 19th day of September, 2013
Filed the 9th day of October, 2013

(Docket: 4801-131966)

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Reasons for Judgment Reserved of
The Honourable Madam Justice Conrad

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I. Introduction

[1] The issue in this case is whether the day-to-day primary care of an eight-year-old boy, who has lived almost his entire life in the primary care of his mother, should be transferred to his father as a result of the mother's decision to move from Calgary, Alberta to Comox, British Columbia. A trial judge found in favour of this change in primary care.

II. Decision

[2] In my view, the trial judge made significant errors in both substance and procedure that demand appellate intervention. In particular, the trial judge erred in his interpretation and application of the law from this court, and from the Supreme Court of Canada, relating to parental mobility rights. I would allow the appeal and return the child to the mother, with reasonable access to the father.

III. Facts

[3] The parties, RJF (the father) and CMF (the mother), were married on September 1, 2001. There is one child of the marriage, a boy, born October 5, 2005.

[4] The parties separated on November 15, 2006, when the child was one year old. On separation, the parties agreed the mother should be the child's primary caregiver, with the father to have access every other weekend.

[5] Existing arrangements were formalized in a Property, Support and Parenting Agreement dated February 16, 2007. Under that Parenting Agreement, the parties had joint custody with the mother exercising primary care and the father having access on alternate weekends. In most essential respects, these arrangements were later included in a Divorce Judgment and Corollary Relief Order dated May 8, 2008.

[6] The parties also addressed mobility in the Parenting Agreement, stating that neither party would attempt to change the child's permanent residence without the consent of the other, except by court order. That clause was not included in the divorce order.

[7] Prior to November 2011, the father exercised his access every second weekend, except for a period of time when he was working out of town and access could only occur every third weekend. He would pick up the child, occasionally, on days outside of his weekend access, but generally he had difficulty getting time off work so that he could spend time with his son. This

changed in November 2011 when the father started work with his current employer who has assisted in facilitating access on his parenting weekends and parenting days.

[8] In May of 2008, the mother entered into a relationship with a new partner. They have had a child of their own, a boy born on September 28, 2010. Prior to the events giving rise to this dispute, the mother and her new partner lived together with the two children in the mother's townhouse in Calgary.

[9] In September 2011, the mother approached the father about relocating temporarily to Comox, British Columbia so that she and her new partner could fix up a house belonging to him and sell it. The father gave his permission, both orally and in writing, to the temporary relocation. On February 23, 2012, the mother, her new partner, and the two boys moved to Comox.

[10] In June 2012, the mother asked the father whether he would consent to their son's permanent relocation to Comox. The father did not consent and further attempts to mediate the issue were unsuccessful. In April 2013, the father applied to the Court of Queen's Bench for an order returning the child to Calgary. Justice Eidsvik granted the order, pending a domestic special, with primary care given temporarily to the father. The mother was given leave to apply to have day-to-day residential care returned to her if she was prepared to move back to Calgary.

[11] During the year and one-half the child lived in Comox, the father's access actually increased. The mother flew the father to Comox five times, at her own expense, and allowed the father to stay with her and the child. In the end, the father had 71 days of access while the child lived in Comox.

[12] The mother and the child returned to Calgary on April 30, 2013. The mother then applied for full-time residential care with permission to return with the child to Comox. The father applied for shared parenting on an interim basis, as well as shared parenting on a permanent basis provided the mother moved back to Calgary or the surrounding area. Justice Hall heard the applications on May 13, 2013 and granted week on/week off shared parenting, on an interim basis, pending a scheduled three-day hearing.

[13] A four-day hearing took place before Justice McCarthy in September 2013. At the hearing, the mother proposed a parenting plan where the child would reside with her in Comox, along with her new partner and their son, where she would be a stay-at-home parent. For his part, the father proposed a plan where the child would reside with him in Calgary. As he was working full time, this would require pre-school and post-school care. The father's plan also involved the assistance of his parents who lived in Cochrane, about a 20 minute drive away.

IV. Trial Decision

[14] The trial judge turned to *Gordon v Goertz*, [1996] 2 SCR 27, 134 DLR (4th) 321. He decided that any relocation of the child involved a material change in circumstances, a finding that

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is not contested in light of the restrictions on relocation found in the separation agreement. The trial judge then turned to the question of the eight-year-old child's best interests, characterizing the issue before him thusly: "Is it in the best interests of the child to leave Calgary where he has lived all his life until February 2012, and where he has lived since April 30th, 2013." He went on to consider some, but not all, of the other considerations set out in *Gordon v Goertz*.

A. The existing custody and access arrangements and the relationship with each parent

[15] In examining this part of the test, the trial judge characterized the current custodial relationship as being one of joint custody. He concluded, therefore, that the custody and access arrangement, "as per Justice Hall's order, is that the primary care and control is now with the father, with generally shared parenting on a one-week-on, one-week-off, so it's -- I guess it is equal...". He then reviewed the father's history of access, which had been limited to approximately four days a month before he became the primary caregiver, although he noted the father's access had increased to 71 days annually while the child was in Comox. Despite the fact that he was obliged to consider the child's historical relationship with both parents he did not discuss the historical relationship between the child and his mother. Thus, he made no mention of the fact that the mother had been the primary caregiver for most of the child's life, and made no effort to discuss the effect of these periods of primary care and access upon the child. Furthermore, he found the mother's plan to be a stay-at-home parent was of little value to the child because he was now in school.

B. Desirability of maximizing contact between the child and both parents

[16] In discussing this topic, the trial judge observed that both parents indicated they would do all they could to ensure that the other saw the child as much as possible. He noted, however, that because the father was employed in Calgary, as a snow-plow and grader driver, the father could not move, and that this had to be taken into account in maximizing the contact between parents. In assessing this factor, however, he did not take into account the fact that the father's access had actually increased during the time the child was living in Comox with his mother.

C. Reason for moving

[17] The trial judge considered the reason for moving to be an important point, although he had already recognized, in reciting the *Gordon v Goertz* factors, that this should only be considered in "the exceptional case". He found that the purpose behind the initial move, to repair and renovate the house in Comox, was really a deception, designed by the mother to disguise her intention to move to Comox permanently, and was disruptive and not in the child's best interests. He commented further:

> None of this needed to happen. The child's needs would have been best met, in my view, if the parties ha[d] sold the residence in Comox in an unrepaired state and

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> stayed in Calgary or got it repaired in Comox without moving and sold it, and this would have continued to maximize contact with both parents as well as the paternal grandparents, and would better have met the needs of the child.

[18] Because of this conclusion, the trial judge took no account of the mother's stated reasons for now wanting to relocate permanently – that the cost of living was cheaper in Comox and that by living there she could be a stay-at-home parent to both the child and his two-year-old half-brother.

D. Disruption to the child

[19] The trial judge found that the interim, one week on/week off shared access arrangements were working well, and although the evidence indicated that the child had been doing well in school in Comox (which was not the case in Calgary) a move would disrupt the relationship that the child had with his paternal grandparents. Furthermore, although it was clear that the child participated in extra-curricular activities in both places, a move to Comox would interfere with the child's Christian education because the mother had indicated she did not wish to have the child go to a Christian school in Comox, even though she did not oppose the child's attendance at church.

[20] The trial judge also observed that the child had mild developmental delays in regard to reading and speech. Although there was no specific evidence in front of him in this regard, he concluded that "common sense" dictated that Calgary would be a better location to find resources to meet the child's needs.

E. Trial judge's conclusions

[21] Having taken these factors into account, the trial judge concluded the child was better off living in Calgary. He stated:

> With my comments and analysis of the *Gordon v. Goertz* factors having been made, I am convinced that based on my comments it would be in [the child's] best interest to remain in Calgary and to live in Calgary as opposed to Comox. The divorce judgment is amended accordingly, with the father having primary care and control. This is consistent with what the parties agreed to in 2007 in writing, and in 2011 in writing.

[22] He did not make an order for access, preferring to leave that to the parties to work out between themselves. He invited the parties to return to him, however, if satisfactory arrangements could not be worked out.

V. Grounds of Appeal

[23] The appellant advances the following grounds of appeal:

1. The Learned Trial Justice erred in his analysis and application of the *Gordon v Goertz* factors to the facts of this case, leading him to a ruling that was contrary to the best interests of [the child].

2. The Learned Trial Justice erred in allowing in evidence during cross-examination, in spite of objections raised by [the mother's] counsel, as to whether [the mother] would return to Calgary with [the child] if the Court did not allow [the child] to move to Comox. Allowing this improper evidence tainted the decision of the Learned Trial Justice.

3. The Learned Trial Justice erred in inferring bad faith on the part of [the mother] surrounding her decision to live in Comox permanently and he further erred in analyzing this as a factor relevant to the best interests of [the child].

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VI. Standard of Review

[24] This court described the applicable standard of review in mobility cases in *MacPhail v Karasek*, 2006 ABCA 238 at paras 25-27:

> In *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60, Bastarache J. stated at para.13:
>
> > [A]n appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion.
>
> This parallels the decision in *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235, in which the court held that questions of law are reviewable on a standard of correctness, while conclusions of fact, or mixed fact and law, cannot be disturbed unless there is palpable and overriding error.
>
> When it is alleged the trial judge did not consider relevant factors or evidence, the reviewing court may reconsider the evidence if the omission "gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion": *Van de Perre* at para. 15.

VII. Analysis

A. Issue One – Did the trial judge err in his analysis and application of the *Gordon v Goertz* factors?

[25] The appellant submits the trial judge failed to consider, gave no weight, or gave insufficient weight to the three factors he was obliged to consider in accordance with *Gordon v Goertz*: the relationship between the child and his primary caregiver, the effect of removing the child from the home of his half-brother and the deficiencies in the father's parenting plan.

1. The failure to consider the relationship between the child and his primary caregiver

[26] The appellant relies on this court's decisions in *MacPhail* and *Milton v Letch*, 2013 ABCA 248 (available online), and suggests that the judge erred in principle by failing to give any weight to the effect on the child of removing him from the primary care of his mother. In this regard, the appellant also submits the trial judge erred by basing his analysis concerning the current parenting regime, and the resulting relationships of both parents to the child, on the short-term interim parenting orders, which gave the parties (effectively) equal access, pending trial. In this way, the trial judge effectively ignored the fact the child had been in the primary care of his mother for the previous seven years of his life.

[27] I agree with the appellant. The need to assess the effect of removing the child from his mother's care, and the nature that such an enquiry must take, were matters set out by the Supreme Court of Canada in *Gordon v Goertz*, and by this court in *MacPhail*. In *MacPhail*, the court stated at paras 32-33:

> The essence of the custodial test was described by McLachlin J. (as she then was) at para. 50 of Gordon:
>
> > 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?
>
> Applied to the circumstances in this case, this test requires the court to balance the importance of this child residing in Okotoks with the Mother, her custodial parent since birth, against being with the Father in Medicine Hat. Here the trial judge did not address the first part of this analysis – the effect of removing the child from the Mother's care in Okotoks. The Mother had raised the child from birth and was her primary care-giver for slightly over two years until the parties began sharing parental duties, on an interim basis, in the summer of 2003 (as a result of interim

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> orders pending trial). She was the one consistent care-giver throughout the child's life. **The trial judge should have addressed the extent to which the child had bonded with the Mother, and the effect that separation might have upon the child as a result of the Mother becoming simply an access parent.** [emphasis added]

[28] In coming to the conclusion highlighted above, the court applied this court's earlier decision in *Christmas v Christmas,* 2005 ABCA 213, 367 AR 172, as well as decisions by the Saskatchewan Court of Appeal in *HS v* CS, 2006 SKCA 45, [2006] SJ No 247, and the Ontario Court of Appeal in *Rushinko v Rushinko,* 161 OAC 85, [2002] OJ No 2477. In *HS*, the Saskatchewan Court of Appeal pointed out that the assessment of the effect of separating the child from the bonded parent was not a process which could be done dismissively. The court noted the following deficiencies in the trial judge's reasons at para 24:

> He did not consider the particular role of the primary parent in the lives of the children: the bonding between the children and their mother; the importance of maintaining the relationship with the psychological parent; and the desirability of maintaining the link. He did not consider the importance of maintaining stability in the relationships between the primary parent and the children.

[29] This court recently reiterated this point in *Milton* where a mother with primary care of a two-year-old child moved from Calgary to Virden, Manitoba. The trial judge gave primary care to the father despite acknowledging that the mother had bonded with the child while the father had not (para 12). This court overturned the judge's decision, finding it was an error in principle not to discuss the effect of removing the child from the primary caregiver. The court stated at paras 14-15:

> The chambers judge's decision was based primarily on the desirability of increasing the child's contact with the father without considering the effect of removing the child from the mother's care.
>
> This was not just a failure to weigh a factor, this was an error in principle: *MacPhail v. Karasek*, 2006 ABCA 238, 273 DLR (4th) 151 at para 54. The chambers judge distinguished *MacPhail* on the basis that the mother in that case had been the sole custodial parent since birth whereas here, although the child had been in the primary care of the mother, the father and the maternal grandparents had also been care givers. This is an artificial distinction as in both cases the mother was the only parent who had a continuous care relationship with the child since birth. As this court said in *MacPhail* at para 33: "The trial judge should have addressed the extent to which the child had bonded with the Mother, and the effect that separation might have upon the child as a result of the Mother becoming simply an access parent."

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[30] In this case, the child had lived for seven years – from his parents' separation at the age of one until four months prior to the trial – in the primary care of his mother, with the father having access every second weekend. During much of the child's life, however, the father exercised access irregularly, because he was often working out of town, and the child frequently spent the Saturday of the father's access with the father's parents. This changed in November 2011, when the father changed employers, so that he could exercise his access more regularly. But even in the year and one-half before the trial, when the father's access improved considerably, he exercised access on only 71 days out of 365.

[31] It is clear, therefore, that the child had spent the bulk of his young life having his day-to-day needs met by his mother. She was his primary caregiver in fact as well as law. There is no suggestion that she did not provide the child with a caring and beneficial environment, something the father acknowledges through his application for shared parenting should the mother choose to move back to Calgary. The trial judge did not find otherwise. Given these facts, it was incumbent on the trial judge to address the extent to which the child had bonded with his mother, and the effect separation might have upon the child if he awarded primary care to the father in Calgary. The judge did not address this topic. All he said in relation to the effect of the child's separation from his mother was this:

> **If [the child] lives in Calgary with [the father] the relationship will change with his mother and half-brother. He will not see them as often as living with them in Comox.** However, this must be balanced – of course, he won't see his father as much if he lives in Comox as opposed to Calgary, however, this should be balanced between ie: the choices between Calgary and Comox when looking at what each of these two locations offers to [the child]. [Emphasis added]

[32] This brief and rather obvious conclusion – that if the child does not live with his mother in Comox he will not see her as often – does not address the requirement set out in the extensive case law cited above. It speaks only to the conditions of the child's life going forward, and says nothing about the value of the child's past relationship with his mother. There is nothing in this comment, for example, to indicate the trial judge considered or assessed, to paraphrase the criteria set out in *HS*, whether the child had bonded with his mother, whether it was important and desirable to maintain the relationship with the psychological parent, or whether it was important to maintain the stability in the relationship between the primary parent and the child. And it is no answer to this failure, in my view, to say that because the trial judge was told by appellant's counsel to consider the issue of the child's bond with his primary caregiver, that he must have considered it, when there is nothing in the judgment to indicate that he took the matter into account or gave the issue any weight. As McLachlin J observed in *Gordon v Goertz*, in a similar situation where there was no indication the trial judge had considered relevant matters:

> No reference was made to the circumstances prevailing after the trial, the current needs and desires of the child, or the respective abilities of each parent to meet them. One may speculate that the trial judge, having heard full argument, had such

> factors in his mind when he made his decision in favour of the mother. But one may equally infer that the necessary fresh inquiry was not fully undertaken. In either event, it seems clear that the trial judge failed to give sufficient weight to all relevant considerations (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 77), and it is therefore appropriate for this Court to review the decision and, should it find the conclusion unsupported on the evidence, vary the order accordingly. (para 52)

[33] I find, therefore, that the trial judge erred by failing to consider, or give any weight to, the child's previous relationship with his mother in his overall assessment of the *Gordon v Goertz* factors, and that his decision is open to appellate review.

[34] The trial judge made two other legal errors that compounded his failure to consider the child's previous relationship with his mother. First, throughout his analysis he asked himself the wrong question. Having found a material change in circumstance he was obliged to consider, anew, the best interests of the child. In that context, he was required to apply the test set out in *Gordon v Goertz* at para 50:

> **In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community.** The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new? [Emphasis added]

[35] The trial judge, however, focussed on location, and asked himself whether it was in the best interests of the child to live in either Calgary or Comox. This is apparent in the quotation from his reasons, cited above, as well as in the way he framed the issue before him at the beginning of his reasons. He summarized:

> With regard to part 2 [of the *Gordon v Goertz* test], it requires an analysis and summary of the best interests of the child. Is it in the best interests of the child to leave Calgary where he has lived all his life until February 2012, and where he has lived since April 30th, 2013.

[36] It is also consistent with his ultimate conclusion where he found "that based on my comments it would be in [the child's] best interest to remain in Calgary and to live in Calgary as opposed to Comox."

[37] Thus, the trial judge erred in framing the issue. Moreover, this was not just an issue of semantics. He was obliged to balance "the importance of the child remaining with the **parent** to whose custody it has become accustomed in the new location" against giving custody to the former access **parent** in the old location. By focussing on location, rather than on which parent the child should live with in either of the two locations, the trial judge turned the child's existing

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relationships, with both his mother and father, into minor factors, no more important, in the final analysis, than the child's schooling or religion.

[38] The second way the trial judge compounded his error is that he misapprehended, and thus failed to properly take into account, the existing custody and access arrangements at the time the conflict over mobility arose. In *Gordon v Goertz*, McLachlin J held that it was necessary in mobility cases to examine the existing custody and access arrangements, in conjunction with the child's relationship with each parent in his or her particular role (para 49). She was talking about the parenting arrangements that existed prior to the proposed move, found in the existing order, and the relationships that had been built up while they were in place. In this case, that meant the custody and access arrangements set out in the original corollary relief order, which the parties had followed for over seven years, giving primary care to the mother with access every second weekend to the father. Here the trial judge characterized the custody and access arrangements as being "equal", relying on the interim, shared parenting, arrangements put in place pending trial. This was an error: *Roebuck v Roebuck* (1983), 45 AR 180 at para 20, 148 DLR (3d) 131, and caused him to disregard the fact that the mother had been the child's primary caregiver from the point of separation to the four months prior to the trial.

[39] In addition, and just as importantly, this error also caused the trial judge to mischaracterize the nature and extent of the respondent's access. He viewed this as a shared parenting situation, although he was supposed to be weighing "the importance of the child remaining with the parent to whose custody it has become accustomed in the new location ... against the continuance of full contact with the child's access parent, its extended family and its community." Had the judge considered the access regime in place, when the mother had primary care, he would have noted that the respondent's actual access for most of the child's life was limited, a factor that weighed in favour of leaving the child in the primary care of his mother.

[40] Furthermore, if he had taken proper account of the existing access arrangements, he would have noted that the father's actual access had increased while the child was in Comox, largely due to the mother's assistance. The trial judge acknowledged that both parents were sincere in their desire to facilitate the child's access to the other parent, meaning there was no reason to suspect that access would not be accommodated in Comox if the move were permanent. It follows that an order could have been drafted to ensure that the father exercised the same, or even improved, access with the child while he lived in the new location. This might have meant that the father's access would be structured differently, but as Paperny JA held in *Spencer v Spencer*, 2005 ABCA 262, 371 AR 78, about a similar proposition: "There is nothing to suggest that [the father's] relationship with the children will be seriously jeopardized if the access arrangements change to something less regular, but of longer duration" (para 20).

[41] In my view, therefore, the trial judge's failure to characterize the existing custody and access arrangements properly was also one of the ways he fell into error, and helps to explain why he failed to consider the effect on the child of the dramatic decrease in contact with his mother that would occur if the child was removed from her primary care.

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[42] In summary, the trial judge erred in failing to take account, or give weight, to the child's long-term relationship, and bond, with his primary caregiver – his mother. It is impossible, in my view, to consider the best interests of the child without considering the effect of removing the child from the parent who, up until this point, has had primary care. This was compounded by his errors in framing the question before him, and by considering the short-term, interim, shared parenting order rather than the corollary relief order in effect at the time of the proposed move. I would allow the appeal on this ground alone.

2. The failure to consider the child's relationship with his half-brother

[43] The appellant submits the trial judge erred by failing to consider, or to give sufficient weight to, the child's relationship with his half-brother and the effect of separation on that relationship. The need to consider this factor was set out in *MacPhail* at para 33. The court, having already found the trial judge had not addressed the extent to which the child had bonded with his mother, stated:

> [The trial judge] also failed to address the effect of separating Venture from her older sister, Saylor. While Venture also had step-siblings in Medicine Hat, she had lived with Saylor from birth. The trial judge, therefore, should have weighed the effect of separating the two girls in assessing Venture's best interests.

[44] In this case, the child had a younger brother with whom he had lived since the younger child's birth, being almost three years by the time of trial. The trial judge ought to have considered the effect of separating the two boys on the child in assessing his best interests. He did not do so. His comment regarding the child's relationship with his half-brother was included in his comment with respect to the mother, to the effect that if the child lived in Calgary he would not see his half-brother as often. Once again, this is merely a statement of the obvious, and does not indicate any consideration for the nature of the relationship between the child and his sibling, nor of the effect of separating the child from his half-brother and his family unit. This too was an error that invites appellate review.

3. The improper consideration of the deficiencies in the father's parenting plan

[45] The appellant submits the trial judge erred by awarding primary care of the child to the father when the father only applied for shared parenting, and by failing to take into account that the father's parenting plan involved substantial assistance from his parents, whereas the mother's plan was to be a stay-at-home parent. I am satisfied there is no merit to the first aspect of this submission. The father's request for shared parenting may indicate his recognition of the importance of the mother in the child's life, and perhaps it was framed this way in anticipation that the mother would return if the child was not allowed to go to Comox. Nonetheless, by the time of trial it was implicit in the father's applications that if the mother chose not to return to Calgary, he was seeking primary care, and I cannot find error here.

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[46] As for the other half of the mother's submission on this point – that the trial judge made a palpable and overriding error in weighing the two parenting plans – a review of the trial judgment reveals that the trial judge did consider the two plans. However, he attached no value to the mother's plan to be a stay-at-home parent because the child was already in school, had already been in daycare, and third party assistance was available through the father's parents. In my view, this was an unreasonable conclusion. The father's plan would involve considerable pre-school and post-school care, and while the child was experienced in daycare, being in the care of someone other than a parent is not equivalent to being with a parent, something the mother's stay-at-home plan would provide. Furthermore, this child had already been identified as having developmental difficulties, and while the trial judge seemed to think these problems could be best met by unnamed and unspecified resources in Calgary, whatever external help the child would need to deal with his disability would be best supported by a parent whose sole occupation was to care for the child. This must be considered in the context of the child's acknowledged success at the school in Comox, and the difficulties he was facing at school in Calgary. In my view, therefore, the trial judge misapprehended the importance of the mother's parenting plan in light of the child's disability.

4. Conclusion

[47] With respect to the first ground of appeal, I am satisfied that the trial judge erred in law by not considering, or by failing to give adequate weight to, the relationship that existed between the child and his mother and the effect of removing the child from her primary care. He erred, as well, in failing to consider the effect of removing the child from the home of his half-brother, and in discounting entirely the mother's plan to be a stay-at-home parent.

B. Issue Two – Did the trial judge err in allowing the mother to be cross-examined about whether she would move back to Calgary if the court did not grant her application for primary custody?

[48] The appellant was asked during cross-examination whether she would move back to Calgary if the court did not allow her to relocate with the child to Comox. Appellant's counsel objected to this line of questioning, arguing that it was prejudicial and effectively prohibited by this court's decisions in *Spencer* and *MacPhail*. Respondent's counsel replied to the objection by submitting that the question was relevant because the mother had already indicated, by her actions, that she would return to Calgary if faced with this option. He told the judge:

> So I think it's a valid question. It seems to me that she's done it once already. And why are we going through all of this, if – if that's a viable option for her, and if that's within her intentions. Why are we going through this? If she's not successful, that she would just get on a plane in the next week and come back. I think it's a valid question.

[49] The trial judge overruled the objection and allowed the question. The mother answered "no". Further questioning of this kind followed and once again the mother's counsel objected. In

response, the father's counsel reiterated it was necessary to discover if there was a third option. This time the trial judge attempted to clarify the situation, but when cross-examination resumed the respondent's counsel continued with the same line of attack – probing the mother's sincerity about the proposed move – without interruption from the trial judge. This exchange between counsel and the mother followed:

> Q So, just to – to go back, you've indicated that in the event that you're not successful in obtaining the Court's blessing to move with [the child] to Comox permanently, you would not come back to Calgary to reside. Now, obviously that would, I think, mean, in – in light of the options before the Court, that [the child] would be here in Calgary with his dad in that circumstance, on a primary basis, correct?
>
> A Correct.
>
> Q So in that scenario, you would be prepared to make the decision to have a distance relationship with [the child], as well as between he and [his half-brother] and – and [her new partner], correct?
>
> A. Correct. As I feel it is important for my kids to have a stay-at-home mom, and if the Court makes me choose between my children, I have to think about [the half-brother] as well.
>
> Q Okay.
>
> A And I would have to think about [the half-brother] as well.
>
> Q So it's a very difficult decision you would be faced with, and what you're saying is you have to look at, very carefully, and prioritise your values –
>
> A M-hm.
>
> Q --and in that difficult situation, you would choose to stay in Comox?
>
> A. I would choose to stay at home to support my kids.
>
> Q I see.
>
> A And --
>
> Q So --
>
> A -- I have to think about [the half-brother] as well. And I don't want [him] in third party care. I don't want [the child] in third party care.

[50] At the end of the trial, the trial judge referred to this evidence in his reasons. He noted:

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> The mother states that no matter what the decision of this Court is, she will live in Comox. This leaves no middle ground for the Court. Either the child lives in Calgary or Comox. Case law requires me to ignore any consideration of whether or not one or the other parents will change residences pending an order of this Court.

[51] The appellant submits the trial judge erred by allowing this line of questioning, and that notwithstanding his self-imposed caution not to consider the answers he erred by actually considering them. In most essential respects, I agree with the appellant.

[52] The trial judge erred by allowing the cross-examination on this point. Evidence of this kind, in most cases, is irrelevant because the question before the court is whether a parenting change should be made on the basis of a material change in circumstances – a proposed move by the custodial parent. The issue before the court, therefore, as the Supreme Court pointed out in *Gordon v Goertz,* is whether the best interests of the child require a change in custody based upon the proposed move. It is not whether the relocating party might change his or her mind. As this court stated in *Sangha v Sandhar,* 2013 ABCA 259, [2013] AJ No 745: "All parties recognize that the court does not have the power to order a parent to remain or leave a particular locale. Nor should it. The court must determine what is in the best interests of the child **assuming the mother leaves**. That is the question before the court" (para 2) [Emphasis added].

[53] But apart from possibly being irrelevant, this kind of evidence, if elicited, can be highly prejudicial. First, it is completely hypothetical and puts the witness in the position of having to try and answer a question he or she may not have a thoughtful answer for until after a decision is made. Furthermore, as Paperny JA explained at para 18 of *Spencer*, it puts the relocating parent in a difficult position:

> [I]t is problematic to rely on representations by the custodial parent that he or she will not move without the children should the application to relocate be denied. The effect of such an inquiry places the parent seeking to relocate in a classic double bind. If the answer is that the parent is not willing to remain behind with the children, he or she raises the prospect of being regarded as self-interested and discounting the children's best interests in favour of his or her own. On the other hand, advising the court that the parent is prepared to forgo the requested move if unsuccessful, undermines the submissions in favour of relocation by suggesting that such a move is not critical to the parent's well-being or to that of the children. If a judge mistakenly relies on a parent's willingness to stay behind "for the sake of the children," the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents.

[54] It follows that unless a party can establish that this kind of evidence is relevant to some issue in the case before the court, and that relevance is not outweighed by its prejudicial effect, cross-examination of this kind should not be allowed. In this case, counsel for the respondent argued that it was important to know if the appellant was sincere about the move, because if she was ultimately prepared to return to Calgary there was no need for the application. This is exactly

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the kind of reasoning Paperny JA rejected in *Spencer*. The cross-examination was intended to "undermine the submissions in favour of relocation." Thus, the respondent's justification for the questions did not adequately explain their relevance, and the cross-examination should not have been allowed.

[55] The respondent submits that if the trial judge erred by allowing the cross-examination, the error was harmless because he made note of the law suggesting he should not consider it. In this case, however, the trial judge referred specifically, and critically, to the mother's answers to the improper cross-examination. He found that the mother's stated determination to remain in Comox, "no matter what the decision of the Court is," put him in a difficult position because it left him no "middle ground". It is clear from this that the trial judge wanted there to be a middle ground – a possible return to Calgary – and he looked unfavourably at the mother's position because it precluded him from considering it. Thus, he judged the mother's evidence, and applied it against her, even though he noted that case law required him to ignore it.

[56] There is even more, however, to indicate the trial judge took the improper cross-examination into account. He went on to say, later in his judgment, that none of this needed to happen had the mother simply decided to stay in Calgary [see paras 17 and 58 of these reasons]. This too was a clear criticism of the mother's judgment, expressed in the impugned cross-examination, for not choosing to remain in Calgary. After this, the trial judge went on to find either bad faith, or poor judgment, in the way in which the initial move took place [para 58 of these reasons]. In my view, it would be hard for an objective observer to conclude, in light of these statements and conclusions, that the trial judge disabused himself of the mother's answers to the impugned cross-examination. The fact that a mother says she is prepared to move, even if the court transfers primary care of her child to the access parent, is compelling testimony, and can be used easily in the manner described in *Spencer*, even if it is technically irrelevant. That is what happened here.

[57] I am satisfied, therefore, that the trial judge erred in admitting this evidence, and then considering it, with the result that there is merit to this ground of appeal.

C. Issue Three – Did the trial judge err by inferring bad faith regarding the mother's decision to move to Comox permanently?

[58] Issue Three is closely related to Issue Two. The trial judge purported to examine the appellant's reason for moving and the effect that such a move would have upon her ability to meet the child's needs. It appears he concluded she did not have a good reason to move, and that the best interests of the child favoured a custody and access regime where both parties lived in Calgary. He went further, however, and concluded that the circumstances of the initial move, premised on the suggestion that the move would be temporary, indicated either poor judgment on the mother's part, given the possible temporary disruption to the child, or bad faith because it was always her intention to make the move permanent. These various conclusions are set out in the following paragraphs from the trial judge's reasons, some of which I have already described or set out above:

> None of this needed to happen. The child's needs would have been best met, in my view, if the parties ha[d] sold the residence in Comox in an unrepaired state and stayed in Calgary or got it repaired in Comox without moving and sold it, and this would have continued to maximize contact with both parents as well as the paternal grandparents, and would better have met the needs of the child.
>
> It's difficult not to find an element of bad faith in the actions of the mother with regard to the sale of the home – or with the repair of the home in Comox and the move to Comox in that these circumstances would indicate to me that it never was her intention to move – return to Calgary once she moved to Comox, regardless of any agreement to the contrary, and if I am wrong in that, in any event it shows an element of poor judgment in maximizing the best interests of the child.

[59] In my view, there are several problems with these conclusions. First, as noted in *Gordon v Goertz*, a custodial parent's reason for moving should only be considered in "the exceptional case – where it is relevant to that parent's ability to meet the needs of the child." In this case, neither the respondent, nor the trial judge, questioned the mother's parenting abilities, and the respondent did not argue that the mother could not meet the child's needs in Comox – whatever her reasons for moving were. The father's application was based on the premise that the child's needs could be better met if both parties lived in Calgary under a regime of shared parenting. Indeed, even the trial judge agreed with this, as his suggestion that the mother should have remained in Calgary indicates. While the trial judge found that the child's developmental delays could be best dealt with in the larger community, he came to this conclusion on the basis of "common sense", rather than evidence, and despite his finding that the child had previously been doing well in school in Comox. Furthermore, there is no evidence to support a finding that the move was designed to thwart access. In short, this was not an exceptional case where the mother's reasons for moving had to be considered at all.

[60] The second problem with the trial judge's reasoning is that even if he was entitled to consider the mother's reasons for wanting to move permanently to Comox he never actually considered them. The mother told the court that she and her new partner had decided to remain in Comox permanently because the cost of living was lower in Comox, with the result that they could afford to have her stay at home to look after the two children. The court appears to have dismissed or ignored this evidence and considered, instead, whether the temporary move was really intended to be a deception. But the trial judge never did articulate what the mother might have been attempting to gain by this alleged deception, perhaps, as I will discuss further below, because she did not actually have anything to gain. Thus, he never explained what he found the mother's "real" reason for relocating to be, nor how that contributed to the conclusion that it interfered with her ability to meet the best interests of the child in Comox. Furthermore, he ignored what the Supreme Court said in *Gordon v Goertz*, which was that while a material change in circumstances erased the presumption in favour of the custodial parent, the custodial parent's views are still entitled to great respect. The court stated at para 48:

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> While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

[61] The third difficulty with the trial judge's conclusions is that he compared the mother's reasons for relocating, whatever he felt they were, to an unavailable "third option" – that the mother remains in Calgary. Thus, in the trial judge's view, whatever the mother's reasons for moving were, they had to be ill-conceived. "None of this needed to happen," he explained after discussing the mother's initial move to Comox, if the mother and her partner "ha[d] sold the residence in Comox in an unrepaired state and stayed in Calgary or got it repaired in Comox without moving and sold it, and this would have continued to maximize contact with both parents as well as the paternal grandparents, and would better have met the needs of the child." In the trial judge's view, the child's best interests would be best served if both parents lived in Calgary.

[62] This reflects the view that a parent with sole custody, or one who is a primary parent, cannot move, although the access parent can. This court discussed the error in such logic in *MacPhail* at paras 43-45:

> The trial judge seemed to be operating under a misconception that every time a parent moves for her own personal reasons it could not be in the best interests of the child. Thus, he concluded: I find this move from Medicine Hat to Okotoks was to satisfy the personal needs of Marcy Marie Karasek and her compliant husband, Shawn Karasek. There is no credible evidence that this move was in the best interests of the children, Saylor and Venture. I find it was not in the children's best interests to move to Okotoks.
>
> According to this logic, parents cannot move unless the move is calculated to further the best interests of their children. Custodial parents cannot be limited in this way. Canadians are mobile and the courts are not the arbiters of the reasonableness of every decision a custodial parent makes. **Custodial parents cannot be held hostage to the place the access parent lives. Certainly access parents are not. Moreover, it is not an option to conclude that a child's best interests are best served by both parties living in the same place any more than it is an option to consider that it is in a child's best interest that their parents remain together.**
>
> **Canadians have the right to choose to separate and divorce, and they have the right to relocate, and it is not for the courts to determine whether they like or agree with the reason for separating or moving. Custodial parents should not be faced with a potential loss of custody simply because they choose to move.**

> **Nor should a decision to move be seen automatically as a negative factor in the ability to parent**. [Emphasis added]

[63] A child of divorced parents should have as much contact with each parent as possible, consistent with the custody and access regime in place, and to the extent that parents can accomplish this by living in the same place, this is good for the child. But that does not mean that custodial parents cannot move, nor, if they choose to do so, that a negative inference should be drawn against them with respect to primary care, as the trial judge appears to have done here.

[64] A fourth error flows from these aforementioned mistakes – the error of imputing bad faith. As already discussed, part of the trial judge's reasons for finding bad faith flowed from his improper finding that the mother was not acting in the child's best interests by relocating. But he also concluded that the mother had lied by telling the father, initially, that the move would only be temporary, and in securing his consent to the move on this basis. It was an error to draw such an inference from the mother's actions. Both parties knew that relocation could only take place by consent or court order. Thus, the mother had nothing to gain by lying to the father, because any attempt to make the move permanent would always be subject to the respondent's consent, or the court's direction. Nor could it be inferred the mother was trying to escape the jurisdiction of the Alberta courts, by relocating, as it is clear she has complied with every court order to date, and has never contested the jurisdiction of the Alberta courts. Most importantly, it could not be inferred that her purpose in this alleged deception was to thwart access because the respondent's actual contact, in total days, increased while the child was in Comox, largely through the efforts of the mother who paid for the father's airfare on five occasions and allowed him to stay at her house while he was exercising access. Lastly, the trial judge's finding of bad faith contradicts all of the other findings that he made about the co-operative way that both parties had behaved previously in regard to the parenting of this young child. In summary, there was no good reason to impute bad faith on the mother's part, and yet it is clear from a reading of the trial judge's reasons as a whole this finding had a significant affect upon his other conclusions.

[65] Finally, even if the mother suspected the move might be permanent, when she obtained the father's consent to the interim move, it is not the court's job to punish parents who are not completely forthright about their intentions, nor is it the court's job to punish a child for the mistakes a custodial parent makes. The test in mobility cases is still whether it is in the best interests of the child to leave him or her in the custody of the primary caregiver in a new location, or put the child in the primary care of someone who, up to now, has been an access parent. In this case, the deception, if there was one, was minor and did not lead to a change in the *status quo*. The mother already had primary care, and the father was exercising access in Calgary on every second weekend. Access improved when the mother moved to Comox. In my view, any alleged bad faith in regard to the initial move was insignificant in the context of deciding whether the mother could meet the child's on-going needs in Comox – particularly when that issue is compared to the possible effect of separating the child from his lifetime primary caregiver, a matter which the trial judge did not discuss.

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[66] I conclude, therefore, that there is merit to this ground of appeal.

VIII. Conclusion

[67] In summary, while the trial judge canvassed a number of the matters set out in *Gordon v Goertz,* he made several material errors. First, he erred in principle by failing to consider the effect on the child of removing him from the day-to-day care of the mother, his primary caregiver over a seven-year period. Second, he applied the wrong best interests test, looking just at location, rather than balancing the importance of the child remaining with the parent in whose custody he had become accustomed in the new location, against the continuance of full contact with the child's access parent and his community. Third, in examining the existing relationships between the child and his parents at the time of the move, he failed to consider the original court order that gave the mother primary care with access to the father every second weekend. Instead, he relied on the interim order which gave the parties shared custody pending trial. Fourth, he failed to take into account the effect on the child of removing him from the home of his half-brother. Fifth, he failed to give proper weight to the mother's parenting plan by failing to see any benefit to the child of being with a stay-at-home parent. Sixth, he admitted irrelevant and prejudicial evidence as to whether the mother would return to Calgary if she should lose care, and then drew a negative inference against the mother because of that evidence. Seventh, he erred in the way he set about considering the mother's reasons for relocation, and in finding she acted in bad faith or with poor judgment. Finally, he allowed his findings of bad faith and/or poor judgment to overwhelm any other considerations regarding the best interests of the child when there was no effective change in the father's access.

[68] In my view, the court cannot defer to these errors. To do so would effectively alter the law of mobility, as previously defined by this court in cases such as *MacPhail*, *Spencer* and *Milton*, and by the Supreme Court of Canada in *Gordon v Goertz*. This change would occur without reference to the usual rules regarding reconsideration of past decisions. More importantly, it would do so without due consideration for the consequences that fall on custodial parents who, until now, have been able to rely on this court's pronouncements with respect to mobility.

[69] I turn to disposition. The parties have indicated they do not want to go through the ordeal of another trial in the event we find error on the trial judge's part. I am satisfied that a proper application of the best interests test, as articulated in *Gordon v Goertz* , favours leaving the child in his mother's primary care in Comox. I start by observing that while the trial judge found a material change in circumstances, this was due to the provision in parties' separation agreement requiring the consent of the other party, or the court, before a move. Thus, there was nothing in the proposed move that actually reflected a substantive change in the existing custody and access regime. In this case, the parties agreed at the point of separation that the mother should have primary care of the child, with the father having access every second weekend. This was enshrined in both an agreement between the parties and a court order. This regime remained in place, without complaint, for many years, including the period of the mother's initial move to Comox. Indeed,

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after the move, due to the father's new employer and the mother's financial help, the father's access actually increased. The father had not complained about the existing custody and access arrangements, prior to the present application, and there is no reason to suspect he would have sought a change in primary parenting if the mother had simply returned to Calgary. Indeed, in trying to justify the improper cross-examination, counsel suggested that if the mother were simply to return to Calgary there would be no need for the applications.

[70] Thus, the only problem arising from the mother's proposed move to Comox is the father's convenience in exercising access, a problem that is not insoluble, as the parties have already proven, through their previous co-operation. Balanced against this is the possible harm that could result from a change in primary parenting. The mother has been the child's primary caregiver for almost all of his life, and making a change in custody would upset the parental bond that had developed between mother and child. Added to this, a change in primary care would separate the child from the company of his half-brother. The evidence also indicates the child had been doing well, generally, in Comox before his return to Calgary, and that upon his return to Calgary he began to experience difficulties with school. Finally, the evidence indicates that the father needs daily third-party help to assist in parenting while the mother, by moving to Comox could become a stay-at-home parent. This consideration is particularly relevant given the need to assist in dealing with the child's mild developmental disabilities.

[71] It follows that the best interests of the child favour keeping him in his mother's primary care in Comox. Parents are the best people to decide issues of custody and access. In a spirit of co-operation, and with consideration for the best interests of their child, these parents made that decision many years ago, and there is nothing in the proposed move to challenge the wisdom of that decision.

[72] I would allow the appeal and restore primary care of the child to the mother with reasonable access to the father. If the parties cannot agree to the conditions of access, they may return to court to have the terms settled.

Appeal heard on January 15, 2014

Reasons filed at Calgary, Alberta
this 14th day of May, 2014

Conrad J.A.

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Reasons for Judgment Reserved of
The Honourable Mr. Justice Costigan
Concurring in the Result

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[73] The facts, grounds of appeal and standard of review are set out in my colleagues' Reasons for Judgment. I need not repeat them.

[74] I am persuaded that the trial judge erred in principle on the first ground of appeal. The trial judge was required to assess the extent of the child's bond with the mother and the effect that separation from the mother might have upon the child: *MacPhail v Karasek*, 2006 ABCA 238 at paras 32-33, 409 AR 170, leave to appeal refused, (2007) 364 NR 399 (SCC). The trial judge's reasons do not demonstrate that he conducted that assessment. As this error is dispositive, it is unnecessary to consider the remaining grounds of appeal.

[75] In the result, I concur with the disposition set out in paragraph 72 of the Reasons for Judgment of Conrad J.A.

Appeal heard on January 15, 2014

Reasons filed at Calgary, Alberta
this 14th day of May, 2014

Costigan J.A.

Reasons for Judgment of
The Honourable Mr. Justice Berger
Dissenting in Part

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[76] No new question of law arises in this appeal.

[77] It is a credit to the parenting abilities of both mother and father and a testament of their love for their child that the disposition of this appeal is no easy task.

[78] The role of an appellate judge is to adjudicate dispassionately and objectively on the record before her. The child's best interests must predominate; they are not amenable to either expediency or compromise.

[79] The trial judge's thorough account of the factual matrix, transparently revealing his thinking, is to be commended for facilitating appellate review. The record reveals that this judge was alive to the comprehensive arguments of competent counsel. His reasons are not to be parsed and criticized for brevity. As L'Heureux-Dubé J. emphasized in ***Gordon v. Goertz***, [1996] 2 S.C.R. 27 at para. 145, in family law matters the findings and reasons of a trial judge are entitled to considerable deference:

> "... First, this Court has always made clear that caution should be exercised by appellate courts before interfering with the exercise of discretion by a trial judge in custody matters, the applicable standard being that decisions should not be interfered with unless there is a gross distortion of the evidence or misapprehension of the relevant legal principles (*Young*, *supra*, at p. 101 (per L'Heureux-Dubé J.)). Furthermore, in light of the considerable expertise trial judges develop in the area of family law and the restricted time allotted to write long and detailed reasons in all cases, brief reasons will often be sufficient, particularly in cases which do not present any exceptional feature (*Willick*, *supra*, at p. 746 (per L'Heureux-Dubé J.))."

[80] The mother does not contend that the trial judge misstated the law. The record reveals that he recited the ***Gordon v. Goertz*** factors and understood that he was bound by them. He appreciated full well that "relocation cases such as these are difficult and highly discretionary." He recognized that "both parents are good parents." He gave credit to both parties for their mutual desire to ensure maximum contact with the child. Both parenting plans were commendable. He understood that "[i]t is critically important for a young boy of 8 years old – almost 8 years old to have maximum contact with his father as well as with his mother." (ARD F9/18-20) He took account of the evidence "filtered through the parents" that the child "deeply loves both his parents and would like

to see both his parents as much as possible and would like them to live near one another." (ARD F10/8-11)

[81] The trial judge was well aware that for most of his life and, in particular, following the divorce judgment of July 7, 2008 until April 2013, the child was in the primary care of his mother.

[82] The prospect of primary care vesting with the father was at the very heart of the mother's submissions in the Court below. The argument pressed at trial emphasized the bond between mother and child and of the consequential disruption in the child's life should the mother be relegated to an access parent. As counsel for the mother emphasized in her submissions to the panel, "that was my case."

[83] There is no question that the mother is entitled to live and work where she chooses. Her views as custodial parent must be given considerable respect. That said, the best interests of the child do not begin with a presumption in favour of the custodial parent. As McLachlin J. (as she then was) explained at para. 50 of ***Gordon v. Goertz***:

> "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?"

[84] All of the foregoing principles were front and centre and thoroughly canvassed in the course of a 3.5 day *viva voce* trial.

[85] That said, the relevant inquiry is whether the judge erred in law or misapprehended the evidence thereby obliging this Court to intervene: ***R.L. v. M.P***., 2008 ABCA 313, 437 A.R. 330 at para. 15. In that regard, I have found the supplementary arguments of counsel which I called for to be of considerable assistance. I have the following concern.

[86] The parties had separated in 2006 when their child was one year of age. The separation agreement included the parties' acknowledgment that their parenting arrangement "will work best" if both continued to live in the same geographic area. Clause 28 expressly stated: "Neither party shall change the permanent residence of [C] from Calgary without the prior consent of the other party or Court order."

[87] All went well until the fall of 2011. The mother expressed her desire to move (and did move) to Comox on a temporary basis on the understanding that her intention was "to repair and sell [her partner's house] and upon selling, return to the same geographic area." (Written agreement of the parties dated December 18, 2011).

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[88] Shortly after the temporary move, the mother announced her decision to remain in Comox permanently. There can be no question that in reliance upon the foregoing, the trial judge inferred bad faith on her part. His reasons cast doubt on the mother's true intentions when she undertook orally and in writing to return the child to Calgary after the temporary move to Comox. The trial judge reasoned as follows:

> "With regard to the reason for moving and how it affects the ability to meet the child's needs, the reason for Ms. [F] moving was to repair, not renovate, Mr. [P's] home, former matrimonial home in Comox, and then to sell the home and move back to Calgary. It is difficult to grasp how moving a child in the middle of the school year to a home that was described as initially unsafe, and later by Mr. [P] as a 'disgusting mess', is in the best interests of the child or would meet – best meet the needs of the child, and then to disrupt him again some months later by moving him back to Calgary. It is difficult for the Court to grasp if it really was their intention to return to Calgary after the house was repaired, since the existing condominium that they owned – that Ms. [F] owned in Calgary was sold, the home in Comox was never listed for sale, and Mr. [P] and Ms. [F] never showed a particular interest in the Calgary real estate market except to say that it was unaffordable, even though Ms. [F] chose to sell the existing residence.
>
> <u>None of this needed to happen</u>. The child's needs would have been best met, in my view, if the parties had sold the residence in Comox in an unrepaired state and stayed in Calgary or got it repaired in Comox without moving and sold it, and this would have continued to maximize contact with both parents as well as the paternal grandparents, and would better have met the needs of the child." [emphasis added] (ARD F10/30 - F11/6)

[89] The supplementary argument has persuaded me that the foregoing reflects an error in principle and a misapprehension of the significance in fact and in law of the mother's change of plans. It may well be that the <u>temporary</u> move to Comox, which the mother insisted upon and to which the father finally acquiesced, was ill-conceived and may not have been in the best interests of their child in the first place. In fact, my initial impression was that the foregoing comments by the trial judge were, as the Respondent argued, directed solely to the <u>temporary</u> move. The supplementary argument of the Appellant persuades me that the recited excerpt following the words, "None of this needed to happen", reveals that the trial judge viewed the decision of the mother to remain permanently in Comox as improvident, fatal to her claim for primary care, and dispositive of the central issue, the best interests of the child. This, in my opinion, is a misapprehension and misapplication of the ***Gordon v. Goertz*** test and an error of law that erroneously drove the outcome in the Court below.

[90] I conclude, accordingly, that appellate intervention is warranted. There are two options: a new trial or a disposition on the record. As I emphasized at the outset of this judgment, the child's best interests must predominate; they are not amenable to either expediency or compromise. The

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supplementary arguments of counsel make clear that neither party has any appetite for another 3.5 day trial. Both parties agree that all of the evidence bearing upon what is in the child's best interests can be determined from the trial transcript. Both point out that the parties are of limited financial means and sending them back to a new trial would be prohibitively costly. Moreover, a new trial would delay permanency for this child who has already had over a year of disruption in his life and, no doubt, has suffered significant distress over the course of the roller coaster of interim orders, the trial and the appeal.

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[91] Section 8 of the ***Judicature Act***, RSA 2000, c. J-2 grants the Court general jurisdiction to grant remedies subject to reasonable terms and conditions. The Court also has a residual *parens patriae* jurisdiction to make orders in the best interests of a child should that be necessary and appropriate: ***E.S.C. v. D.A.P***., [1997] A.J. No. 843, 206 A.R. 276. Section 8 reads as follows:

> "The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided."

[92] In ***Gramaglia v. Alberta (Government Services Minister)***, 2007 ABCA 93, [2007] 6 W.W.R. 573 at para. 39, this Court held:

> "… Section 8 of the ***Judicature Act*** directs that the court has a general jurisdiction to grant any remedy so as to avoid, if at all possible, multiple proceedings and to ensure that all matters between the parties are completely determined. …"

[93] Although s. 21(5)(b)(ii) of the ***Divorce Act***, R.S.C. 1985, c. 3 (2nd Supp.) allows a court to "order a new hearing where it deems necessary to do so to correct a substantial wrong or miscarriage of justice", s. 21(5)(b)(i) confers upon the Court the jurisdiction to "render the judgment or make the order that ought to have been rendered or made, including such order or such further or other order as it deems just …"

[94] I agree with the parties that a new trial is in no-one's best interests, least of all the child's. I also agree that the findings of fact of the trial judge and the transcript of proceedings in the Court below provide a sound basis for appellate adjudication on the merits. See ***Nova, an Alberta Corp. v. Guelph Engineering Co. (Alta. C.A.)***, 1989 ABCA 253, 100 A.R. 241. In ***Nova***, this Court unanimously held (per Kerans J.A.) that upon a finding of palpable and overriding error in the Court below, this Court could exercise the following powers as set out by the Supreme Court of Canada in ***Lensen v. Lensen***, [1987] 2 S.C.R. 672:

> "On appeal . . . it shall not be obligatory on the court . . . to adopt the view of the evidence taken by the trial judge, that the court shall act upon its own view of what the evidence in its judgment proves, and the court may draw inferences of fact and pronounce the verdict, decision or order that, in its judgment the judge who tried the case ought to have pronounced."

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[95] The evidence proffered in the Court below and the findings of fact of the trial judge warrant the relief prayed for by the mother. On this record, and in reliance upon the competing supplementary submissions, I have come to the conclusion that a change in the pre-existing parenting/custody arrangements has already caused the child emotional distress and would continue to do so. A change in primary care was not and is not warranted. During the period of time that the child resided in Comox, he flourished and fared well in school: AB Vol. 1: 46/8-11; 49/13-14; 48/35-37. The child had expressed a desire to live in Comox: AB Vol. 1, 65/23-25). This was confirmed by the father: AB Vol. 2, 377/20-21. There was evidence before the trial judge that notwithstanding his mother's comforting reassurance when the child was ordered into the primary care of his father (pursuant to the interim order of Eisdvik J. of April 16, 2013), the child's anxiety was not abated and he encountered difficulties at school in Calgary: AB Vol. 1: 60/23-28; 63/16-26; 64/13-15; 65/18-21; AB Vol. 2: 377/35-36.

[96] In the result, I would allow the appeal. Ongoing primary care shall be with the mother in Comox commencing forthwith upon conclusion of the present school term. The father shall thereafter have liberal and generous access subject to the following terms (which the father suggested in his supplementary argument would apply to the mother if she were the access parent):

(a) Continuing daily (or twice daily by agreement) phone and/or Skype access;

(b) School Spring Break: commencing after school end for 8 consecutive overnights in Calgary (majority of the break);

(c) School Summer Holidays: commencing mid-July for 6 consecutive weeks in Calgary, with the child returning to prepare for school in the remaining week (with the exception of summer 2014 access which shall be for 2 consecutive weeks commencing August 3, 2014);

(d) Christmas/New Year: alternating. In even numbered years, commencing on Boxing Day, travelling to Calgary and return to Comox 2 days before school recommences. In odd numbered years, commencing after school end to December 31st in Calgary then returning to Comox on that day for the remainder of the school break;

(e) *Ad hoc* access in Comox on at least 3 weeks prior notice, and for up to 7 days duration, occurring up to once each calendar month where no other face to face access is otherwise scheduled that month;

(f) The mother shall contribute to the costs of the father's access by purchasing a return flight for the child for each of the summer holiday transitions and the Christmas holiday transitions; and

(g) Such occasional flexibility in the above as both the mother and the father may agree to from time to time in advance in writing.

Appeal heard on January 15, 2014

Reasons filed at Calgary, Alberta
this 14th day of May, 2014

Berger J.A.

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Appearances:

C. Thompson
for the Appellant

P.G. Leamy
for the Respondent

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