IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *L.C.E. v. E.S.B.,*
2014 BCSC 1111

Date: 20140618
Docket: E092390
Registry: Vancouver

Between:

L.C.E.

Claimant

And

E.S.B.

Respondent

Before: The Honourable Mr. Justice Leask

Reasons for Judgment

Claimant Self-Represented:	L.C.E.
Counsel for Respondent:	P.A. Fleming
Place and Date of Trial/Hearing:	Vancouver, B.C. March 12 & 21, 2014 April 4 & 23, 2014
Place and Date of Judgment:	Vancouver, B.C. June 18, 2014

INTRODUCTION

[1] The Applicant and Respondent were married in Palermo, Sicily in October 1997. They have 2 daughters, the older born February 25, 2002 and the younger on November 27, 2005. They separated on July 31, 2009. They had a trial before Hyslop, J. in August, 2009. In the Reasons for Judgment, *E.L.C. v. E.S.B*., 2009 BCSC 1543 at para.79, Hyslop, J. stated:

> "Dominating this trial is the fact that the plaintiff wishes to move to Australia with the children."

Hyslop, J. then concluded:

> "The children cannot be moved to Australia."
>
> (at para.158)

[2] On August 6, 2010, Hyslop, J. granted the parties a divorce, *E.L.C. v. E.S.B*., 2010 BCSC 1338 at para. 6. Before the Court is a second application by the mother to relocate the children to Australia. Since the hearings before Hyslop, J. in 2009 and 2010 the father has continued to operate a restaurant business in Vancouver. The mother continued to live in the Greater Vancouver area, finding part-time work in February 2011 and a full time job in March 2012. Her taxable income in 2012 was $76,577. In late 2013, she was offered a job in Australia with an annual salary just under A $90,000. She has accepted that job and commenced her employment in early April of this year. Both the mother and children have dual Australian and Canadian citizenship. The mother has re-partnered with an Australian. During their school summer holidays the children have been spending the Applicant's parenting time visiting Australia.

[3] On March 21, 2014, I made an interim Order that the children would remain in B.C. until the end of the school year in June. On April 23, 2014 I heard an application by the mother to rescind my interim Order and permit the children to go to Australia to await my decision on the Application to Relocate or, in the alternative, to reside with their "step-father" rather their father. I dismissed that application. The

principal question for decision by the Court is: Can the children relocate to Australia to live there with their mother? The subsidiary questions for resolution are:

1. Is this application pursuant to the *Divorce Act,* R.S.C., 1985, c.3 or the *Family Law Act,* S.B.C. 2011, c.25?

2. If the application is under the *Divorce Act*, how do the principles enunciated in *Gordon v. Goertz*, apply to the facts of this case?

3. What changes to parenting time and responsibilities are necessary in the light of the Court's decision on mobility?

ANALYSIS

(1) Is this case under the *Divorce Act* or the *Family Law Act*?

[4] I asked the parties to make submissions on this question. Both parties agreed that my decision should be based on the *Divorce Act*.

[5] The Applicant mother submitted that it was her understanding and intention to apply under the *Divorce Act*, and, in particular, s.17 of that Act. She made reference to *Gordon v. Goertz,* [1996] 2 S.C.R. 27, *S.S.L. v. J.W.W*., 2010 B.C.C.A. 55, and *Hejzlar v. Mitchell-Hejzlar*, 2011 B.C.C.A. 230. She also referred to the recent decision of Humphries, J. in *Hansen v. Mantei-Hansen*, 2013 B.C.S.C. 876.

[6] Ms. Fleming, counsel for the father, agreed that the proper law to apply was the *Divorce Act*. She made reference to the trial judgment of Hyslop, J. in this case (*E.L.C. v. E.S.B*., 2009 B.C.S.C. 1543) at para. 151 to distinguish the procedural situation in this case from the situation in some of the cases referred to by the applicant. She went on to refer the Court to the recent detailed analysis and discussion of this issue by Sewell, J. in *B.D.M. v. A.E.M*., 2014 B.C.S.C. 453.

[7] After considering the careful submissions made to me and the cases referred to I am satisfied that I should analyze this case by applying the *Divorce Act* and in particular the decision in *Gordon v. Goertz* and the subsequent case law interpreting ss. 16 and 17 of the Act. Although Hyslop, J. declined to grant a divorce in her 2009

judgment, the present Applicant was seeking a divorce which she obtained in 2010. The order for joint custody granted in 2009 could only be granted under the authority of the *Divorce Act* and the subsequent order made in her 2010 judgment specifying conditions for seeking to vary her order concerning the children's location is best understood as flowing from s. 17 of the *Divorce Act*.

(2) How do the principles enunciated in *Gordon v. Goertz* apply to the facts of this case?

[8] In *Gordon v. Goertz*, the law was summarized at paras. 49 & 50:

> **49** The law can be summarized as follows:
>
> - 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
> - 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
> - 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
> - 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
> - 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
> - 6. The focus is on the best interests of the child, not the interests and rights of the parents.
> - 7. More particularly the judge should consider, inter alia:
>   - (a) the existing custody arrangement and relationship between the child and the custodial parent;
>   - (b) the existing access arrangement and the relationship between the child and the access parent;
>   - (c) the desirability of maximizing contact between the child and both parents;
>   - (d) the views of the child;
>   - (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>   - (f) disruption to the child of a change in custody;

- (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

> **50** In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[9] Of great assistance to trial courts in wrestling with these difficult cases in the thoughtful decision of Huddart, J.A. in *S.S.L. v. J.W.W.*, 2010 B.C.C.A. 55. In that case, she stated:

> **24** In my view, the court's task in these joint parenting cases is to analyze the evidence in four possible scenarios, in this case, (i) primary residence with mother (London, Ontario); (ii) primary residence with father (Victoria, B.C.); (iii) shared parenting in Victoria; and (iv) shared parenting in London, but to do so knowing the court's first task will be to determine which parent is to have primary residence. When the question of primary residence is evenly balanced and the court finds the best interests of the children require both parents to be in the same locale, then the court will need to choose between the shared parenting options offered by the parents, without presuming the current care-giving and residential arrangement is to be the preferred one.
>
> **25** Proximity of parental homes will usually be in the best interests of children with two good parents. But proximity may be achieved in either proposed location. The choice of the existing location cannot be the default position. …
>
> …
>
> **31** In evenly balanced shared parenting situations, careful and transparent analysis of the evidence and reasoning is especially important, if courts are to encourage joint parenting following separation and discourage jockeying for position by the parent in a favoured position (very often mothers because of their historic role in a family) who wants to avoid being frozen in a current location by the co-operative approach generally thought ideal for young children, particularly those not yet well bonded to their father. It acknowledges that the lives of families must accommodate change.
>
> (paras. 24, 25 & 31)

[10] The Reasons for Judgment of Saunders, J.A. in *Hejzlar v Mitchell-Hejzlar*, 2011 B.C.C.A. 230, particularly paras. 23-26, are also helpful in this case:

> **23** The issue of a proposed relocation of a child against the wishes of the non-moving parent, is difficult. In the tangle of competing benefits and detriments to the child it is not easy to determine best interests. This is particularly so where family members beyond the parents are an important part of the child's home life.

> **24** From the cases, however, certain principles arise. The cases confirm the principle expressed in s. 16(10) of the *Divorce Act* that the court must consider maximizing contact between the child and parent. Yet, that same section makes it clear that maximizing contact is not an absolute principle, and is only to be pursued within the limits of that which is "consistent with the best interests of the child."
>
> **25** Second, *Gordon v. Goertz* tells us that, barring an improper motive for the proposed move, there must be an attitude of respect for a custodial parent. This means, in part, that the party seeking to move need not prove the move is necessary, although any degree of necessity, such as for income-earning reasons, may bear upon the best interests of the child.
>
> **26** Third, the authorities generally do not favour the *status quo* as a 'default position'. In *Nunweiler* this court observed that such an approach "reinserts into custody discussions a presumption which is contrary to the instructions in *Gordon v. Goertz* to assess each case individually" and is "contrary to the observations of this court in *Robinson v. Filyk* (1996), 84 B.C.A.C. 290 that presumptions are inappropriate in custody cases and detract from the individual justice to which every child is entitled ...".
>
> [emphasis added]

[11] Lastly, a passage in the court's Reasons for Judgment in *Nunweiler v. Nunweiler*, 2000 B.C.C.A. 300 at para. 28, seems particularly apposite in this case

> **28** The significance of the reasoning in *Gordon v. Goertz* in an initial determination of custody is, I consider, three-fold. First, the decision directs the court to consider the motive for a parent's relocation only in the context of assessing the parent's ability to meet the needs of the child. This, in my view, is as relevant a direction on an initial custody hearing as on a variation hearing. Second, the decision confirms the significance of the instruction, found in s. 16(10), to consider the willingness of a parent to facilitate contact, but notes that this consideration is subordinate to over-all consideration of the best interests of the child. Third, and more broadly, it approaches the issue of a relocation of residence from a perspective of respect for a parent's decision to live and work where he or she chooses, barring an improper motive.
>
> [Emphasis added]

The Gordon v. Goertz factors

[12] (1) A material change in circumstances affecting the child.

[13] I am satisfied that the mother's move to Australia represents a material change in circumstances affecting the two children.

[14] (2) & (6) Because of the material change in circumstances of the mother's move to Australia, I understand that it is my duty to embark on a fresh inquiry into what is in the best interest of the children, being careful to focus on their interests and not the interests or rights of either parent.

[15] (3)(a) The relevant portion of the trial judge's findings are:

> **79** Dominating this trial is the fact that the plaintiff wishes to move to Australia with the children. Both the plaintiff and defendant agree that they should share joint guardianship and joint custody of the children.
>
> …
>
> **91** I can conclude that this was not a marriage in which the parents fought or exposed their children to inappropriate conduct. There were no allegations by either the plaintiff or the defendant that during the marriage either one treated the other disrespectfully. None of the witnesses gave evidence that either the plaintiff or the defendant were disrespectful to each other. In fact it is just the opposite. When the defendant learned of the plaintiff's relationship with J.R., he did not berate the plaintiff or become angry with her. Both the plaintiff and defendant maintained good behaviour when the defendant's sister and brother-in-law were visiting in the summer of 2009. This speaks well of both the plaintiff and defendant as parents and mature adults.
>
> **92** Both the plaintiff and the defendant love their children and both the plaintiff and the defendant are capable parents.
>
> ….
>
> **102** The push to move to Australia became significantly important to the plaintiff in 2008. …
>
> **103** Towards the end of the plaintiff's stay in Australia she met J.R., and as a result, through the use of email, the telephone and other Internet facilities, an emotional relationship developed between the plaintiff and J.R., which together with the terminal illness of her mother fuelled her desire to return to Australia. At this time, the plaintiff no longer wished to remain married to the defendant.
>
> …
>
> **105** I have concluded that the plaintiff, at some point, decided to end the marriage in 2008, before she arrived home from Australia. I have come to this conclusion based on the fact that she was experiencing unhappiness in the marriage, she met a man that she decided she was in love with and he was in love with her. She then attempted to create a situation such that she and the children could leave. …
>
> …
>
> **107** … Whatever plan the plaintiff had in place, it did not work. …

> **108** In Australia, the plaintiff obtained an offer of employment for a period of a year. This was not intended when the plaintiff left for Australia in January of 2009. This was another attempt by the plaintiff to remain in Australia with the children and end her marriage with the defendant. …
>
> …

[16] In what the trial judge described as "a last ditch effort towards moving to Australia" the claimant wrote a "blackmail" letter to her husband threatening to expose his failure to report certain business income to the C.R.A. unless he agreed that she could take the children to Australia.

> **111** The defendant did not back down and made his voluntary disclosure and is prepared to take whatever punishment is meted out to him.
>
> …
>
> **118** Throughout the defendant's testimony, the defendant was never critical of the plaintiff as a mother or the care that she provided for the children.
>
> **119** I cannot say the same of the plaintiff. She claimed that the defendant never had the children alone and cannot care for the children on his own, …
>
> …
>
> **148** If the plaintiff and defendant remain in the Lower Mainland, the children would see both parents weekly and possibly communicate with each parent daily. It is quite likely that third party caregivers would only be required for after-school care if both parents were working.
>
> **149** The plaintiff's proposal has a number of pitfalls. Firstly, the joint guardianship, or for that matter, the joint custody, would have little meaning. The defendant would have little chance of making a decision concerning the children as it would be difficult to obtain the necessary facts to make decisions relating to the children. He would have to accept the facts as communicated to him by the plaintiff.
>
> …
>
> **152** The plaintiff has also stated that J.R. still loves her. In the plaintiff's evidence she stated that she could not state that she would not persue her relationship with J.R. J.R. owns a business in Sydney and resides there.
>
> **153** If the plaintiff moves with the children there is an emotional loss which will be suffered by them. They are only ages 7 and 4. They will grow up with limited physical and emotional affection from their father. Skype is not enough. They will not be able to participate in activities or events with their father. The ten weeks that the plaintiff is proposing is unlikely to occur. The plaintiff's proposal does not take into consideration as the children will grow older, they will have events that they wish to participate in Australia. The plaintiff's plan is likely to fail; this will be at the expense of the children.
>
> …

> **157** I understand the plaintiff's need at this time to be with her parents, and in particular her mother. That is not a good reason to permit the children to move to Australia and to be deprived the care and influence of their father in their lives. Both C. and S. are young. A move to Australia is likely to terminate any meaningful relationship they have with their father.
>
> **158** I have no doubt that there are suitable schools, friends, medical treatment, and recreational facilities available to the children in Australia. However, permitting the children to move to Australia would cost them their father. The plaintiff stated that if she is not permitted to take the children to Australia she will not move. I do not take this statement as evidence to buttress her case. Rather, I take it to mean that she believes she is a good mother, she is an important influence on the children and that they need her emotional and physical care. The plaintiff's proposal relies on other people to do things and to provide things. The plan is costly and may not be affordable. The plan does not meet s. 16(10) of the *Divorce Act*. The children cannot be moved to Australia.
>
> **159** As a result, I order that the plaintiff and defendant are the joint guardians and custodians of C. and S. I see no need at this time to order primary care of these children, nor any need to define guardianship. I believe that the plaintiff and defendant have the ability to communicate with each other and make decisions on behalf of the children. In making this statement, I am aware that there is no post-separation conduct on which I can rely, and if I am not correct, these matters can be re-visited.

[17] 3(b) The new circumstances include the extremely important fact that the mother has accepted a job in Australia and moved there. They also include the fact that she has re-partnered with the man referred to in Hyslop, J.'s Reasons for Judgment as J.R. Quoting from her 14th Affidavit sworn 13 December 2013:

> "(8) I re-partnered in late 2009 and I am in a loving relationship with a respectful and kind man that is a wonderful step-parent to C. and S. J. is also Australian. The children sincerely enjoy our family life, and love and respect their step-father.
>
> (9) J. is a parent who is actively involved in the day to day lives of both children and has spent more time hands on parenting the girls than their birth father. When at home the girls have a stable family unit with two parents ….
>
> (10) J. and I share in all of the daily duties of parents - helping with and encouraging school work, bedtime and reading, morning routines and breakfast, nutritious school lunches, home-made dinners, laundry and housecleaning as well as after school sports activities, cultural actitivites and family outdoor pursuits including hiking."

[18] This should be contrasted with her 12th Affidavit sworn May 29, 2012 in which she swore:

> "(4) No adults reside with me."

[19] In the father's 13th Affidavit sworn 3 December 2013, he stated:

> "(26) I am a devoted father … I am significant in my children's lives …
>
> (27) My residence is one of the children's homes. At my house the children have their own garden with trees and plants that they have nurtured from seedlings. The children grow fruits and vegetables as well as herbs. The children share a passion with me for cooking and we regularly cook family meals together. On some occasions, the children and their friends will have play dates at my restaurant, where we will all cook delicious meals together.
>
> (28) As well the children have pets in my residence that they have had for over four years. The children take pride in their garden and pets and take great care of them.
>
> (29) … We are a family unit that is very special to the children and me.
>
> (30) The children and I regularly go out on adventures. We go fishing and camping many times a year. Sometimes, the children's friends join us. We also go swimming, hiking and go swimming in lakes, rivers and the ocean as well as family trips to friend's pools …
>
> (46) The children have now adapted to the separation of their parents and have two families. I know I am an important and significant source of stability for my children. I have never wavered in my devotion to them or in my goals in taking care of them … [their mother] now wants to give up the family home, a secure career with M [Co] whom she worked for before the children were born, the friends she and the children have made and most importantly, the children's secure relationship with their father.
>
> (61) There is no substitute for the close relationship that I have with my daughters, a relationship that thrives on the substantial time and quality interaction between us. We have close bonds and this is not going to be able to be maintained if the Respondent is permitted to move to Australia."

[20] As to the fourth *Gordon v. Goertz* factor, it is important to observe that in this case both parents are custodial parents and Hyslop, J. declined to order a primary residence. I find as a fact that the mother overemphasizes her importance in the lives of the children and seeks to minimize the father's role. The father's evidence is more balanced and, in my view, more accurate.

[21] As to (7) the existing arrangement in this case is joint custody and joint guardianship as sought by both parents and ordered by the trial judge. As previously mentioned, the trial judge declined to make a "primary care" order. There is a good relationship between both children and both of their parents.

[22] As to the views of the children, the younger child seems content with whatever happens but certainly has a mild preference for going to Australia. The older child has expressed a strong desire to go to Australia. In the Hear the Child Report she is quoted as saying:

> "that it felt 'kind of a little weird', because she knows that her dad doesn't want her going. She felt however that going 'would be the best thing that ever could happen to her; When I asked to explain what she meant by that statement, she said 'because of her horses and dog that live there - they really miss her.'

The Report also included this statement:

> "She told me that her mother had said that there would be better financial support in Australia for them, so that they could come back to Canada and travel to Italy more often.'

[23] Analyzing the four scenarios as recommended by S.S.L. I find that the interests of the children would be best served by

> (1) remaining in Vancouver with both parents here and continuing to spend significant holiday time in Australia with the children's maternal relatives. That would enable them to maintain and strengthen their relationships with both parents, as well as their Canadian friends and schooling. From what the elder child says about her desire to be in Australia, I find it to be an immensely enjoyable summer holiday home for her where her pets and family connections make her feel happy.
>
> (2) I believe the second best option would be for the whole family to relocate to Australia. Both children love both parents and both parents love their children. Consequently both solutions where both parents are in the same location as the children are preferable to the solutions where the parents are separated by ½ the distance around the globe. The father has established a Gastown restaurant with the expenditure of much time and energy relocation to Australia is neither desirable nor practical for him. Moving to Australia would probably substantially reduce and might even eliminate the children's connections to Canada.

> (3) In my opinion the third best option would see the children remaining in Canada with their father and visiting their mother during summer holidays and Christmas - hopefully with 1 or 2 visits from their mother to Canada each year. I share the trial judge's view that moving away from their father "is likely to terminate any meaningful relationship they have with their father". I don't believe there is an equal chance of them losing their relationship with their mother.
>
> (4) In my view the worst option would involve permitting the children to move with their mother to Australia. This option is best for the mother but not for the children. In Canada she has been seeking to enhance the children's relationship with their "step-father". Despite her protestations I am confident she would continue and expand that process in Australia.

[24] I want to conclude this section of my Reasons by referring to the issue of improper motive referred to in *Nunweiler* and *Hejzlar*. I am troubled by some of the actions of the mother in this case:

1) I find as a fact that she has failed to comply with Hyslop, J.'s Order respecting joint custody and joint guardianship by failing to inform and consult with the father on a regular basis concerning developments in the lives of their children;

2) The mother's failure to disclose details concerning her new partner, J.R. to either the father or the Court appears to show a significant lack of good faith in dealing with her parenting responsibilities;

3) I am satisfied that it was inappropriate and wrong to take the children to a member of the Hear the Child roster to obtain a report without prior notification or consultation with the father;

4) Her refusal to disclose the views of the Child Report to the father prior to the January 2014 court hearing was a serious aggravation of her previous failure to consult;

5) I am satisfied that the elder child accurately reported that her mother told her their finances would be better in Australia "so that they could come back to Canada and travel to Italy more often". I have two comments. First, the mother's increase in salary will not compensate for the expense of having the family separated by the distance between Canada and Australia. Second, I believe the mother was consciously misleading her daughter to minimize the disruption to her relationship with her father and her Sicilian relatives;

6) I find as a fact that the mother's motive in seeking to take the children with her to Australia is for her own benefit rather than the children's. It is apparent to me that she believes that she and her partner will be happier in Australia;

7) On the evidence, I am satisfied that the mother is seeking to minimize the father's participation in the children's lives and substitute her partner, J.R., in the children's affections;

8) An example of the mother putting her interests ahead of the children's was her behaviour between the last two court hearings - April 4th and April 23rd. On March 21st I made an interim Order that the children would remain in Canada until the end of the school term residing with their father. On April 4th, the mother made an application for me to rescind that Order, I directed that the children should see the Hear the Child reporter for an interim update after spending at least one week with their father. Following their Hear the Child session the mother took the children back into her care until the next hearing. The mother claimed in Court that she misunderstood my rulings. I did not believe her. Clearly the effect of shifting the children back and forth between the parents at their traumatic time of transition was not in their best interests.

CONCLUSION

[25] For essentially the same reasons that the trial judge expressed, my ruling is that it is not in the best interests of the children to accompany their mother to Australia. I do not accept her evidence that she would do her best to maintain their relationship with their father. I agree with Hyslop, J. that the probable consequence

of such a move “is likely to terminate any meaningful relationship they have with their father”.

[26] For that reason, my conclusion also echoes Hyslop, J. The children cannot be moved to Australia.

[27] What changes in parenting time and responsibilities are necessary in the light of the Court’s decision on mobility?

[28] As long as the mother continues to reside in Australia and the children remain resident in Canada, a substantial majority of parenting time will be with the father. Up until now, holiday time has been divided equally between the parents. It will be in the children’s best interests to change that pattern to give them additional holiday time with their mother. This summer, the children will have a nine week summer break. Two-thirds of that should go to the mother, permitting the children to spend six weeks in Australia with her. The Christmas break should be divided equally between the parents. Any plan upon which they could agree would be acceptable to the Court. In the absence of agreement, it will probably be necessary to alternate Christmas day itself between the parents. In that event, the mother should have Christmas day in 2014 and even-numbered years; the father Christmas day 2015 and the odd-numbered years.

[29] It is important to permit the father to take the children to visit their relatives in Sicily. Again, any plan the parents could agree upon would be acceptable to the Court. In the absence of agreement, I would order that the mother get the entire Spring Break in 2015 and 2016 with the father getting the 2017 Spring Break.

[30] If the mother is able to take holiday time in Canada, the children should be able to stay with her when she is here, providing, of course, that there is no interruption of their schooling.

[31] Frequent communication by telephone and Skype should be encouraged by both parents. The father should consult with the mother about all significant decisions in the children's lives.

[32] For the purpose of continuity, I will remain seized of future applications on this file.

"Leask, J."