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COURT OF APPEAL FOR ONTARIO

WEILER, AUSTIN AND LASKIN JJ.A.

B E T W E E N :	)	
	)	
CHARLOTTE BJORNSON	)	**D. Smith,**
	)	**for the appellant**
Plaintiff	)	
(Appellant)	)	
	)	
- and -	)	
	)	
EARL CAMERON CREIGHTON	)	**Anthony T. Keller,**
	)	**for the respondent**
Defendant	)	
(Respondent)	)	
	)	
	)	
	)	**Heard: August 27, 2002**

On appeal from the judgment of Justice Ronald C. Sills of the Superior Court of Justice dated August 21, 2000.

Austin J.A.:

[1] Charlotte Bjornson appeals and Earl Cameron Creighton cross-appeals from the decision after trial of R. C. Sills J. dated August 21, 2000. Sills J. awarded sole custody of Robert Justin Pride Creighton, born August 23, 1996, to his mother (Bjornson) and granted access to his father (Creighton). The reasons are available at [2000] O.J. No. 5168.

[2] Bjornson appeals from the trial judge's refusal to permit her to return to Alberta with her child. Creighton cross-appeals from an award of child support of $475 per month and payment of 70 per cent of extraordinary expenses. Creighton seeks an award of "joint parenting or joint custody" at a cost to him of 50 per cent of child care costs including extraordinary expenses.

[3] For the reasons which follow, I would allow the appeal, and the cross-appeal in part. I would permit Bjornson to return to the Calgary area with her son, reduce to a minimum the child support payable by Creighton and revise his terms of access.

[4] Bjornson, now 36, was born and raised in Alberta. She completed high school and a year of college there. For twelve years, she had a career as a senior registered nurse, specifically in cardiology and intensive care, at Foothills Hospital in Calgary.

[5] Creighton was born in Walkerton, Ontario in 1960. He completed high school there and then moved out west where he became a ski instructor. He lived in various locations as he pursued various occupations. Creighton and Bjornson met and began dating in Alberta. In the fall of 1994, Creighton moved in with Bjornson. While they were attracted to one another, he was not successful at finding employment in Alberta while she had no desire to leave that province.

[6] Circumstances overcame them. In February 1995, Creighton moved to Ontario to work at the Drayton Festival Theatre. He asked Bjornson to relocate but she refused. She was not willing to move to Ontario since her friends, family and employment were all in Alberta. Creighton returned to Alberta to visit Bjornson several times in 1995, and Bjornson made some visits to Ontario. In 1996, Bjornson learned she was expecting a child with Creighton. She moved to Ontario to be with Creighton, arriving on or about August 14, 1996 – only 9 days before the premature delivery of their son on August 23, 1996. Three weeks later she returned to the Calgary area with her son and spent seven weeks with her family. She then took up residence with Creighton in his father's home in Walkerton. Creighton and Bjornson moved to Waterloo, Ontario in November 1996. She remained on maternity leave from her employment at Foothills Hospital until August 1997.

[7] In October 1998, although still under care for post-partum depression, Bjornson secured employment as a part-time nurse in the Intensive Care Unit of St. Mary's General Hospital in Kitchener, Ontario. She worked twelve to twenty hours per week at $23 per hour, and had no seniority status.

[8] By the summer of 1999, after a common law relationship of approximately three years, the relationship between Creighton and Bjornson was in difficulty. The reasons of the trial judge deal with it from Bjornson's perspective. She was lonely. Her family and friends were all in the west. Because of her lack of seniority, and in order to accommodate Creighton's apparently demanding schedule, she had to work irregular shifts. She was able to do this with the help of Pat Allen, a neighbourhood baby-sitter.

[9] Creighton's repeated failure to file income tax returns became an issue between them. The trial judge found Creighton owed tax arrears of $80,000-$100,000. Creighton would not give Bjornson his social insurance number, which she required in order to

claim a child tax credit on her tax return. When she raised the issue of returning to Alberta, Creighton indicated she could go at any time but that she could not take the child.

[10] By the end of the summer of 1999, Bjornson had seen a counsellor at the Catholic Family Services and had received advice from a lawyer. On September 9, 1999, while Creighton was on a golf trip in the Maritimes, Bjornson left the home she shared with Creighton and took their son with her. They moved into a basement apartment in the home of friends.

[11] The statement of claim in this action was issued the next day. In it Bjornson asked for custody of her son. It also states at paragraph 7, that:

> The plaintiff would ultimately like to return to Alberta where she has a full time position at Foothills Hospital and where she has family support.

[12] In his counter-claim Creighton asked for a declaration that mother and father were "equally entitled to custody" and for an order that both "share in parenting." At trial, after the mother's case was completed, the father amended his pleadings to claim joint custody. Creighton alleged on several occasions, and in different contexts, that while he was away, Bjornson had intended to leave for Alberta with their child. The trial judge's finding to the contrary is amply supported by the evidence. Notwithstanding this, Creighton asked for an order restricting Bjornson from changing the ordinary residence of the child without court order or Creighton's written consent.

[13] Interim orders were made on consent on September 16 and 30, 1999, declaring the parents equally entitled to custody, the child's ordinary residence to be a specified address in Waterloo, Ontario and the parents to "share in the parenting of the child". Both parents were restricted from changing that residence without court order or the consent of the other.

[14] The central issues in the action were custody and mobility. For convenience, the trial judge's reasons dealing with those are attached as an appendix to these reasons.

[15] There cannot have been serious doubt about the resolution of the question of custody. The mother asked for sole custody; the father did not. The trial judge was persuaded that this was not an appropriate case for joint custody. He was so persuaded on the basis of the following: the evidence regarding the termination of the relationship between mother and father; the father's rather different style of parenting -- sometimes described as "rambunctious" or "aggressive"; and the father's tendency to control and distrust the mother.

[16] Creighton appeals from the decision awarding sole custody to Bjornson and again asks for "shared parenting" or "joint custody." He does not ask for sole custody. In my view, it is sufficient to dispose of this aspect of the matter by saying that the reasoning of the trial judge was entirely correct. I would not alter the award of sole custody to the mother.

Mobility

[17] I take an entirely different view, however, on the matter of mobility. The decision in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 ("*Gordon*") is the guiding authority. A couple in Saskatoon separated. The mother was awarded custody of the young daughter who was seven years old at the time the Supreme Court of Canada issued its reasons. The father was awarded generous access and, in fact, spent more time with the daughter than awarded. The mother then proposed to move to Adelaide, Australia to study orthodontics. To that end, she applied to vary the original custody order. Despite the father's objections, the variation was allowed. This decision was sustained by both the Saskatchewan Court of Appeal and the Supreme Court of Canada. At the Supreme Court of Canada, the reasons of six of the nine judges were given by McLachlin J. (as she then was).

[18] The *Gordon* proceeding dealt with mobility within the context of an application to vary an order. In the instant case, the issue of mobility was dealt with at the original hearing following the two interlocutory orders made on consent. Despite these differences, the guiding principles set out in *Gordon*, which remain applicable in the case before us, are:

> 1. The judge must embark on a fresh inquiry into what is in the best interest 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.
>
> 2. 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 and the most serious consideration.
>
> 3. 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.
>
> 4. The focus is on the best interests of the child, not the interest and rights of the parents.

> 5. 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 reasons for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
>
> (f) the disruption to the child of a change in custody; and
>
> (g) the disruption to the child consequent on removal from family, schools and the community he has come to know.

[19] In applying the guidelines provided by *Gordon* to the instant case two matters require consideration. The first is that at the outset of the trial, the parents were "equally entitled to custody". As a result, for analysis purposes, the parents could not be divided into "custodial parent" and "access parent". The second is that the organization of his reasons is such that the trial judge appears to have decided the question of mobility first and the question of custody second. With respect, that strikes me as putting the cart before the horse.

Best Interests of the Child Include Being With a Well-Functioning Parent

[20] At paragraph 58 of his reasons, the trial judge concluded his analysis on the issue of mobility, stating that "[t]he availability of full time employment in Calgary does not overcome the need for the child to have ready access to his father at the present time." The learned trial judge did not appreciate that employment, though important, was only one factor in Bjornson's wanting to return to Alberta.

[21] I recognize that as an appellate court we have only a narrow scope of judicial review (*Van de Perre v. Edwards,* [2001] 2 S.C.R. 1014 at 1021-1026). In my view, however, the trial judge erred in reducing the issue of the child's best interests to one that deals only with employment. In doing so, the trial judge overlooked or disregarded the social, psychological and emotional aspects of the mother's desire to return to Alberta with the child. Bjornson wishes to return to Alberta to regain the general stability, control and independence that she enjoyed in her emotional, professional, psychological and social life there.

[22] Serious regard must be paid to the views of Bjornson. Most important among them are those concerning her family, her friends and her job. Her family includes her parents who live in Red Deer, about 85 miles away from Calgary. She usually visited them twice a month, and some times more. Bjornson's sister, Brenda, Brenda's husband and their two young children live just outside of Calgary. Brenda is an older sister on whom Bjornson leans for advice. Brenda's two children enjoy playing with Bjornson's child. Bjornson's brother, a paediatric neurologist, lives in Richmond, British Columbia. The Bjornsons are a close-knit family who visit and communicate with one another on a regular and supportive basis. Bjornson's roots and connections remain in the west. She still has her own doctor and dentist there.

[23] Bjornson is both fond and proud of her profession as a nurse specializing in cardiac and intensive care work. Despite a move to Ontario, she has done everything she can to maintain her credentials, her position and her seniority at Foothills Hospital in Calgary. In Ontario, her lack of seniority prevented her from earning as much as she did, and could, earn in Calgary. It also prevented her from controlling her hours of work, which was something she was able to do in Calgary. The differentials between her work in Alberta and in Ontario are not marginal. They are quite substantial.

[24] Bjornson came to Ontario in August 1996, expecting to raise the child in a traditional family setting. When she first arrived in Ontario, she was dependent on Creighton for money. She was unable to earn anything until October 1998. Because of the level of her earnings in Ontario she has remained financially dependent upon Creighton, to a greater or lesser degree. Money was, and is, an issue between them. Moving to Calgary and regaining employment at the hospital there would change this. According to Bjornson's evidence, a return to her work in Calgary would enable her not only to support herself and her son, but also to contribute something towards enabling Creighton to exercise his right of access.

[25] Freeing Bjornson of her dependence on Creighton would create the possibility of a new and positive relationship between herself and Creighton. It would also almost certainly create a new and more positive relationship between Bjornson and her son.

Freeing Bjornson from financial dependence on Creighton would give her an independence she has never had during her son's life.

[26] Bjornson's life in Waterloo is controlled by Creighton in ways other than financial. In cross-examination, when asked why she took their child and left the home without discussion with Creighton, she said:

> . . . I felt like I had to do it legally and with legal counsel because I did not trust Bill and he's always been somewhat controlling and manipulative with me so I felt like that's what I had to do.

[27] Her sister also expressed the view that, throughout the relationship, Creighton exercised both financial and emotional control over Bjornson. This continues notwithstanding their separation. Creighton still retains a degree of control over Bjornson's life. One illustration of this control is Creighton's manner of exercising access. Although the present agreement is for Creighton to have the child living with him from Thursday evening until Sunday evening, Creighton usually keeps the child over Sunday night and delivers him to school on Monday morning. He regards this as a matter of his choice despite the agreement.

[28] Moving to Alberta, where she plans to resume a well-adjusted and independent life – a life that she worked hard for and had achieved there previously -- will, in all the circumstances of this case, enhance the best interests of the child. This is particularly true when contrasted with the potential negative effects of prohibiting Bjornson from relocating. The evidence indicates that Bjornson has neither the 12 years seniority status that she accumulated in Alberta nor the full time hours, self-scheduling and full benefits, including pension, which came with her lengthy period of employment there. She also does not have the support of her friends and family which is beneficial, if not crucial, to raising a child as a single parent. In this case, the child's best interests are better served and better achieved by a well-functioning and happy custodial parent, operating at her full potential.

[29] In *Gordon*, the Supreme Court of Canada reiterated that the best interests of the child test governs relocation disputes. Ultimately, the only issue is what is in the best interests of the child. In determining this, careful attention should be paid to the potential negative effects on the child should the custodial parent be restricted from relocating. Likewise, careful attention should be paid to the potential positive effects on the child should the parent be permitted to relocate (*Woodhouse v. Woodhouse* (1996), 136 D.L.R. (4th) 577 per Weiler J.A. at 597.)

[30] With the greatest respect to the learned trial judge, he did not contemplate what improvement, if any, would result to the interests of the child if the custodial parent were permitted to move to Alberta. I agree with the statement of counsel for the mother, as expressed in her factum, that the trial judge failed to "give due regard to the relationship between the quality of the custodial parent's emotional, psychological, social and economic well-being and the quality of the child's primary care-giving environment." The learned trial judge failed to appreciate the multi-faceted nature of the mother's desire to return to Alberta with the child and the concomitant positive effects on the child's best interests in being cared for by a well-functioning and happy custodial parent.

Disproportionate Weight Assigned to Ready Access and to Evidence of Baby-Sitter

[31] Sections 16(10) and 17(9) of the *Divorce Act*, R.S.C., 1985, c.3(2nd Supp.) require that:

> . . . the court shall give effect to the principle that a child of the marriage should have as much contact with each (former) spouse as is consistent with the best interests of the child . . . .

[32] Although this case is not taken under the *Divorce Act*, the principle set out in sections 16(10) and 17(9) applies nonetheless because, at the time of separation, the child had a relationship with each of his parents.

[33] Instead of considering contact with each of the child's parents, the trial judge focussed his attention on the child's contact with his father and the fact that the father's ready access would be compromised by the relocation. He did not consider that if the mother moved to Alberta, her contact with the child would be maximized because she would be able to work straight days while the child was in school, as opposed to the shift work, including evenings, she had been working in Ontario.

[34] While the "maximum contact" principle does apply and is an important one, it is not absolute and it remains one factor in the whole of the analysis. It ought not to be treated as the governing factor. In *Gordon*, at paragraph 24, McLachlin J. noted that:

> The "maximum contact" principle, as it has been called, is mandatory, but not absolute. The Act only obliges the judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact: *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 117-18.

[35] The trial judge's focus on ready access, almost to the exclusion of consideration of the child's contact with the mother and, as I have indicated, almost to the exclusion of the mother's views, resulted in a less than complete consideration of the impact of the move on the child's best interests.

[36] Related to this, the learned trial judge appears to have assigned more weight than is appropriate to the non-expert baby-sitter's opinion. At paragraph 44 of his reasons, after reviewing the evidence of the baby-sitter he writes, "In her view, the child Justin needed stability in his relationship with both his parents." At paragraph 54(c) the trial judge relied on the baby-sitter's opinion and wrote,

> Immediately following the separation of the plaintiff and the defendant, the child reacted adversely to the separation as observed by Ms. Allen, who expressed the view that the child Justin needs two loving parents ["children were better off having two loving parents"]. She indicated by her evidence that this child requires stability in his relationship with each of the mother and father and needs to know that both his parents love and care for him, and are available to him even though they no longer live as a family unit.

This comment ignores the fact that the child will still know both his parents love and care for him whether they are both in Ontario or not.

Stereotypes Entered into the Analysis

[37] The learned trial judge appears to have placed more importance on the father's career than he did on the mother's career. The effects of prohibiting Bjornson from relocating, professionally and otherwise, have already been discussed. At paragraph 49 of his reasons, the trial judge considered the respondent father's career and wrote,

> All of the evidence in this case about the employment of the defendant with the Drayton Festival Organization indicates that the defendant had obtained a good job, that he was good at the job and he was being reasonably well paid. He now earns $53,000 per annum managing a budget of some $3 million for this theatrical company and an additional $3,000 from other contract sources. There is no evidence that comparable employment was available to him in Alberta and even if it were found that the expressed intention of the defendant was to return to Alberta after one or two years in this job, *it is foolish and unreasonable in the extreme for the*

> *plaintiff to have expected the defendant to give up this continuing opportunity in Ontario to return to Alberta without any assurance of gainful employment* [emphasis added].

[38] One might reverse this scenario to state that it is "*foolish and unreasonable in the extreme*" to expect Bjornson -- a qualified nurse with an established position and the ability to earn approximately $53,000 per year -- to sacrifice the opportunities and advantages she earned as a nurse in Alberta, in order to remain in Ontario. This is particularly so when there is actual evidence, not speculation, that she is at a disadvantage professionally in Ontario as compared to Alberta. While it is true that the defendant has no assurance of gainful employment in Alberta it is also true, and supported by actual evidence, that Bjornson's professional life, earning potential and self-fulfillment will continue to be significantly compromised if she remains in Ontario.

Views of a Custodial Parent

[39] I noted in paragraph 19 that in delivering judgment the trial judge dealt with mobility before dealing with custody and that appeared to me to be the wrong sequence. Had he decided the question of custody first, he could then have properly factored that finding into his decision of the mobility question.

[40] Had he followed that course, he would then have been required to deal with the position and views of Bjornson as the custodial parent as directed in *Gordon.* While the majority of the Supreme Court of Canada in *Gordon* rejected the idea of a legal presumption in favour of the custodial parent's views, it nonetheless stated that the views of the custodial parent are "entitled to great respect and the most serious consideration." At paragraph 48 McLachlin J. said,

> 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 [emphasis added].

At paragraph 36, she wrote,

> The judge will normally place *great weight on the views of the custodial parent*, who may be expected to have the most intimate and perceptive knowledge of what is in the child's interest. The judge's ultimate task, however, is to determine where, in light of the material change [not the instant situation], the best interests of the child lie [emphasis added].

[41] At paragraph 46, she said:

> The child's best interest must be found within the practical context of the reality of the parents' lives and circumstances, one aspect of which may involve relocation.

[42] At paragraph 32, McLachlin J. wrote that the common element in *Carter v. Brooks* (1990), 30 R.F.L. (3d) 53*, MacGyver v. Richards* (1995), 22 O.R. (3d) 481, 123 D.L.R. (4th) 562 and *Gordon* is the view that significant weight is to be accorded to the custodial parent's view. She wrote,

> Although some have read MacGyver as a departure from Carter v. Brooks … the difference between the cases may not be as great as sometimes supposed. Both cases urge careful consideration of the views of the custodial parent: the court is directed to accord them a "reasonable measure of respect" in Carter, and an "overwhelming respect" or "presumptive deference" in MacGyver. Despite the stronger language of the majority in MacGyver, neither decision proposes a legal presumption in favor of the custodial parent.

[43] At paragraph 37, McLachlin J. said:

> Nor does the great burden borne by custodial parents justify a presumption in their favour. Custodial responsibilities curb the personal freedom of parents in many ways.

Having said that, the existence of the "great burden borne by custodial parents" must be recognized.

[44] In concluding that part of her reasons which summarized the law on this subject (see paragraph 18 above) McLachlin J. said, at paragraph 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 interest of the child in all the circumstances, old as well as new?

[45] The views of the custodial parent, despite the Supreme Court's rejection of a legal presumption in their favour, remain a very important consideration in any analysis of the best interests of the child. Moreover, the views of the custodial parent are a factor which the Supreme Court of Canada considered significant enough to single out as being worthy of "great respect" and "the most serious consideration." With the greatest of respect to the learned trial judge, it does not appear to me that he made the depth of enquiry required in the circumstances or that in doing so he gave the evidence of the mother the "great respect" or "most serious consideration" to which it was entitled.

Disposition

[46] In the best of all worlds the appropriate disposition of this appeal would be to send it back to be retried and to retry, in particular, the question of the child's best interest. But that is impractical. Neither parent has unlimited resources and the child's biological clock moves inexorably on. His childhood should not be spent in court or in a state of doubt. In any event, neither counsel invited us to send the matter back for rehearing. In *Gordon,* the Supreme Court of Canada chose to proceed notwithstanding an incomplete record below. Our obligation is to do the best that we can.

[47] In paragraphs 53 and 57 of his reasons the trial judge refers to "the probability that each of [the parents] will develop a new attachment, which will hopefully provide happiness for each of them. Much care will have to be taken to incorporate the well-being of this child into each of these new family units." It is now well over two years since these words were written and even longer since the evidence on which they were based was uttered. The trial judge's optimistic expectation that each parent would develop a new relationship and that bonds would develop between such relationships and the child has not been fulfilled.

[48] As a consequence of the passage of time since the trial and the filing of fresh evidence on the appeal, it can be seen that to a large extent the parents are not pursuing new lives but rather are still fighting the old ones. The interlocutory proceedings leading

up to the argument of the appeal suggest that much of the time and energy of the parents is spent in litigation about their respective rights and obligations. The trial judge might have foreseen this as a distinct possibility arising from their proximity.

[49] The trial judge found as a fact that it was not the mother's intention to "remove Mr. Creighton as the loving, involved father figure" from her son's life. If allowed to return to Calgary, Bjornson suggested generous access to the father, including significant time periods in the summer, during the Christmas period and spring break and for family occasions such as weddings, birthdays and the like. She indicated a willingness to accompany their son to Ontario for access purposes and to pay her own way while Creighton would pay for their son's way. Bjornson would also welcome Creighton out west when convenient for him. I propose a month in the summer, a week at Christmas time and a week at the spring break, all to be spent in the east with the father, who will pay the child's transportation. In addition, the father should be entitled to two weeks access in the west at his expense, provided such access does not require the child to be absent from school. If the parties are unable to work out the details of the exercise of access, it is anticipated that direction will be sought where the child resides, namely in Alberta.

[50] Bjornson testified that she would provide her son with a telephone card and would arrange for what she described as an "interactive video" so that father and son could see each other and talk. I expect her to do this.

[51] I accept that a move to Calgary will reduce the amount of time father and son would spend together. As I have indicated, it does not necessarily follow, however, that the move would not be in the best interests of the child. To the contrary, when the factors enunciated by McLachlin J. in *Gordon v. Goertz* are properly considered, I am of the opinion that it would be in the child's best interest for Bjornson to return to Calgary. Having regard to my comments above respecting Creighton's control and the probable improvement in the circumstances of the mother consequent upon returning to residence and employment in Calgary, the best interests of the child would almost certainly be served by the separation of the parents in the manner proposed by the custodial mother.

[52] I would therefore set aside the order below except for: a) paragraph one, which grants sole custody of the child to Bjornson; b) paragraph eight, which deals with the annual certification of incomes, and c) paragraph nine, which deals with the medical and dental coverage. I see no reason to restrict the whereabouts of the parties other than to require each parent to notify the other a month in advance of any proposal to take the child out of the country, other than for holiday purposes.

[53] It was Bjornson's position on the appeal that once re-employed in Calgary, she would be able to maintain herself and her son without support from Creighton. This may be an accurate prediction but to protect the position of her son I would maintain a

minimum support link to the father. Accordingly, I would order that any arrears of child support or child expenses be paid forthwith and that regular child support payments be maintained and continued until two months after mother and son have returned to the Calgary area. Paragraphs six, seven and eleven of the judgment shall remain in effect for that purpose and to that extent. Thereafter, support and expense payments shall be reduced to $1.00 per year. It may be anticipated that Bjornson's return to Calgary will not take place immediately; school terms and accommodation will have to be dealt with by Bjornson.

[54] A good deal of material was tendered as fresh evidence on the hearing of the appeal. We invited counsel to deal with it while reserving our decision as to whether to admit it. The material deals in some detail with the usual minutiae of custody litigation. In view of the resolution of the merits of the appeal, I see no need to deal with that material.

[55] Both counsel provided material as to the fees and disbursements incurred from the date of judgment to a day or two before the hearing of the appeal. By coincidence, the fees in each total approximately $25,000 on a substantial indemnity basis and the disbursements total about $1,900 in one case and $2,000 in the other. In the circumstances, I would award costs in favour of Bjornson on a partial indemnity basis at a total of $23,000 inclusive of all disbursements and GST.

RELEASED: November 19, 2001

"Austin J.A."
"I agree K. M. Weiler J.A."
"I agree John I. Laskin J.A."

APPENDIX

Indexed as:
Bjornson v. Creighton

Between
Charlotte Bjornson, plaintiff, and
Earl Cameron Creighton, defendant

[2000] O.J. No. 5168
Court File No. 1068/99

Ontario Superior Court of Justice
Sills J.

Application of the Children's Law Reform Act

¶ 51 Against the foregoing factual background, this court is asked to deal with the issues of custody and access and whether the plaintiff mother should be permitted to return to Calgary with the child. All of the cases to which I've been referred with respect to the mobility issue deal with the mobility of a custodial parent seeking a variation in a custody and access order to accommodate the move of the custodial parent. Also, the decided cases to which I've been referred all deal with the mobility issue as between two previously married parents. In the case before me, the parents of the child were never married, but I am conscious of the provisions of section 1(1) which provides that "a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage".

¶ 52 I find as a fact, on the evidence, that it was not the intention of the plaintiff/mother as alleged by the defendant/father, to "remove Mr. Creighton as the loving, involved father figure" in the child's life. Both parties are acknowledged to be loving and caring and involved parents of the child. To remove the child to Calgary from Waterloo would inevitably reduce the involvement of the defendant in parenting the child. If this child remains in Waterloo the defendant will continue to be involved in the parenting of the child and be able to expose the child to a beneficial association with other members of the defendant's family. If the child remains in Waterloo it necessarily follows from the evidence of the plaintiff mother that she will remain in Waterloo and continue to be very much involved in parenting the child. However, it also follows that the child will probably not have an equally beneficial exposure to other members of the mother's family, unless arrangements can be made to accommodate this extended relationship in Alberta.

¶ 53 Plaintiff and the defendant had discussed having a large family, the defendant speaking somewhat more aggressively in this regard. That goal for the defendant may continue to be achievable although it is less likely for the plaintiff. In any event, that whole discussion may be somewhat speculative at this time. However, it is very likely that these two people will each develop a new relationship which, hopefully, will be a happy one for each of them. It will be in the best interest of this child that, in forming new attachments, these parties foster with any new family units, commitments between those new family units and this child. It will require a real effort on the part of everyone involved to maintain a strong parental bond with this child and the plaintiff and defendant might just as well corn e to grips with this prospect sooner than later. Their individual happiness continues to be important but during the minority of this child, his best interest will continue to govern any determination of the parental relationships of these parties and this child.

¶ 54 Custody of and access to children are addressed in Part 3 of the Children's Law Reform Act and the purposes of this Part are stated to ensure that determinations under this Part are made "on the basis of the best interest of the children". The best interests of a child are determined pursuant to section 24 of the Children Law Reform Act. Subsection (2) thereof mandates a court to "consider all the needs and circumstances of the child", including specific considerations found in (a) - (g):

"(a) The love, affection and emotional ties between the child and,

(i) each person entitled to or claiming custody of or access to the child

(ii) other members of the child's family who reside with the child and

(iii) persons involved in the care and upbringing of the child;"

In this regard, the evidence clearly confirms that these circumstances are satisfied by both parents. There are no other members of the child's family residing with the child but Patricia Allen, who provides daycare on a frequent basis has established a significant bond with the child.

"(b) The views and preference of the child" - in this case such views and preferences cannot reasonably be ascertained.

"(c) The length of time the child has lived in a stable home environment". Since September of 1999 the child has been the subject of a shared parenting regime as laid out in the consent orders of Taliano, J. and Whitten, J. Immediately following the separation of the plaintiff and the defendant, the child reacted adversely to the separation as observed by Ms. Allen, who expressed the view that the child Justin needs two loving parents. She indicated by her evidence that this child requires stability in his relationship with each of the mother and father and needs to know that both his parents love and care for him, and are available to him even though

they no longer live as a family unit.

"(d) The ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;" - in this regard, both parents have the ability and willingness to satisfy this consideration.

"(e) Any plans proposed for the care and upbringing of the child." The plaintiff/mother presented two alternative plans. The first of these plans was to return to the Calgary area, resume her employment at Foothills Hospital, and to reside with her sister and family until she could obtain a place of her own. The plan for the day to day care and upbringing of the child was expressed by the plaintiff in her evidence at some length and demonstrated an adequate plan. Alternatively, if she was not permitted to move with the child to the Calgary area, she intended to remain in Waterloo, continue her employment, for the moment, on a part time basis at St. Mary's Hospital and to make use of the quite adequate recreational and educational facilities for the child. The defendant father seeks to continue his close involvement in the care and upbringing of the child and made reference to his intention to seek admission of the child to a Montessori school at an early date.

"(f) The permanence and stability of the family unit with which it is proposed that the child will live;" - in this regard there will continue to be, at least for the present, the divided family unit of mother and child on the one hand and father and child on the other and both parties are reasonably well able to recognize the importance of each other with respect to the upbringing of this child and to provide as much stability as is possible in a divided household.

"(g) The relationship by blood" - in this regard each of the parties to this litigation are equally related by blood to the child and are equally entitled to custody of the child, which entitlement is subject to alteration by the order of this court.

¶ 55 I have some concern that the child rearing philosophy of the father may be overly aggressive. As I said earlier in these reasons, his approach to parenting, although I think genuine, may be somewhat overly demanding of the child in the father's search for excellence in the child.

¶ 56 The defendant father appears to be on his way to recovery from a financial problem having its genesis in his failure to remit income tax and goods and services tax. The problem is of sufficient magnitude that the defendant may be hampered in the achievement of his goals for the education and betterment of the child by, virtue of his financial obligations. He expressed in his evidence a desire to see the child enrolled in a Montessori school within the next year or two and it would seem that this child might

well be a candidate for such training or something similar. A potential difficulty which I foresee is that the defendant might well insist on initiating such training at a cost which he may not be able to afford and for which he might expect a contribution from the mother, which she may not be able to afford. Whatever plans are developed for this child and however deserving the child may be, a good deal of cooperation and understanding between the plaintiff and the defendant will be required in dealing with such issues.

¶ 57 I have earlier alluded to my views regarding the permanence and stability of the family units within which this child will live. Each of the parties hereto currently have only their own extended families to rely upon. Both extended families are strong and stable, albeit that the plaintiffs family unit is located entirely in the Province of Alberta. The father's extended family is generally within the ambit of Southern Ontario. I repeat the probability that each of these parties will develop a new attachment which will hopefully provide happiness for each of them. Much care will have to be taken to incorporate the wellbeing of this child into each of these new family units. It is speculative at this time to contemplate what might be and therefore I propose to deal with the situation as it exists now, leaving it to future agreement between the parties or other court orders to determine the best interests of the child as circumstances then dictate.

The Mobility Issue

¶ 58 I find that it is now in the best interests of this child that he continue to have the benefit of a close and loving relationship with each of his parents and that this can best be achieved at this time by maintaining the residence of the child somewhere in or near the Regional Municipality of Waterloo. As the circumstances of the child and the parents change it will be open to the parents, particularly the mother, to seek a change in residence that might well be in the best interests of the child. At this time the plaintiff mother is employed by St. Mary's General Hospital as a regular part time nurse in the hospital intensive care unit working 12 to 20 hours per week and generating income of approximately $24,000 per annum. Although future full time employment is not certain at St. Mary's or elsewhere in the Kitchener-Waterloo area, there are prospects which may develop. The availability of full time employment in Calgary does not overcome the need for the child to continue to have ready access to his father at the present time.

The Custody Issue

¶ 59 In this case the plaintiff/mother has sought sole custody of the child given that she seeks a court order permitting her to move with the child back to Alberta. Alternatively, if the plaintiff is not permitted to move to Alberta with the child she seeks sole custody, maintaining that joint custody is not appropriate in the circumstances.

¶ 60 The defendant seeks an order that would restrict the residence of the child to the Kitchener-Waterloo area and permit a continued involvement in the parenting of the child.

¶ 61 I have reviewed all of the cases that have been referred to me by both counsel. On the facts of this case I have come to the conclusion that an order for joint custody is not appropriate. The plaintiff appears willing to accommodate the wishes of the defendant to participate actively in the parenting of the child and to actively encourage the

involvement of the child with the defendant's extended family. The defendant, in my view, seems to recognize the importance of the child's relationship with the plaintiff and her family in Alberta but demonstrates a more controlling manner and distrust of the plaintiffs motives. At the same time, the defendant has a genuine love and affection for this child, which love and affection is returned. Nevertheless, in the circumstances that exist in this case, one of the parents needs to be in charge in the best interests of the child and in my opinion, this can only be accomplished by granting to the mother sole custody. This order for custody will, of necessity, carry with it a restriction on the residence of the child within a geographical area of one hundred kilometres from the municipal limits of the cities of Kitchener or Waterloo.