The Importance of Legal Presumptions and Legislated Guidelines in Canadian Relocation Cases

By Ken Nathens[1]

GORDON V. GOERTZ-THE STARTING POINT[2]

There are few issues more emotionally charged for family law litigants and more difficult for judges to decide than a child relocation case (also referred to as a "mobility" case). For the purpose of this paper, a relocation case involves one parent applying to a court for permission to relocate with his or her child or children away from the location of residence of the other parent when the parents live separate and apart.

The child's relationship and contact with the stay behind parent may be permanently altered if the parent is permitted to relocate with the child by the court. If the parent applying for relocation is not permitted to take the child, that parent may have to give up custody or primary care of the child to the other parent or in the alternative choose not to relocate, thus passing up possible opportunities for a new relationship, better financial circumstances, educational opportunities, etc. Often there is no middle ground with a mobility case. The parent is either permitted to relocate with the child or not. Thus these cases are difficult to settle and more likely to be litigated through the courts, both at the trial and appeal levels.[3]

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[2] *Gordon v. Goertz*, [1996] 2 SCR 27.

4. Nicholas Bala and Andrea Wheeler "Canadian Relocation Cases: Heading Towards Guidelines" (2012) 30 CFLQ 271 at page 1 (Bala and Wheeler "Canadian Relocation Cases").

Until March 2013 when British Columbia proclaimed its new *Family Law Act*[4] in force no jurisdiction in Canada had enacted legislation that dealt specifically with child relocation issues. Courts throughout the country continue to rely on the application of the general "best interest of the child" test set out under the various provincial family law statutes and the *Divorce Act (Canada)*[5] and the criteria for establishing best interests in mobility situations set out in the 1996 Supreme Court of Canada case of *Gordon v. Goertz*.[6]

In *Gordon v. Goertz*, the mother sought to vary an existing court order for custody to permit her to move from Saskatchewan to Australia with her young son. The father sought to vary the order to restrict the move or in the alternative to grant him custody of the child.

The Supreme Court determined that the proposed move constituted a material change in circumstances and thus the Court was required to embark on a fresh inquiry into what was in the best interest of the child having regard to all the circumstances of the child. The Court then established the following criteria to assist in the determination of the child's best interest regarding mobility issues that has been followed in all levels of courts in Canada since 1996: [7]

1. The inquiry does not begin with a legal presumption in favour of the custodial parent,

[4] *Family Law Act*, [SBC 2011] c. 25, ("BC FLA").
[5] *Divorce Act* (Canada), R.S.C. 1985 c. 3 (2nd Supp) as am. ss. 16, 17. ("Divorce Act").
[6] *Gordon v. Goertz*, *supra,* at note 3.
[7] *Ibid*, paragraphs 16, 49.

although the custodial parent's views are entitled to great respect.

2. 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.

3. The focus is on the best interests of the child, not the interests and rights of the parents.

4. 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.

5. 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?[8]

Although *Gordon v. Goertz* is a variation of custody case, the same criteria set out in *Gordon v. Goertz* are applied to original application cases where there is no prior parenting agreement or final custody order in place. [9]

There has been much dissatisfaction expressed by the Canadian family law community regarding *Gordon v. Goertz*. Typical criticism include that the case does not provide guidance as to when there is a mobility issue that must be decided, for instance in what circumstances does a proposed move constitute a "mobility issue' worthy of special consideration and the application of the criteria set out in *Gordon v. Goertz*? It has also been argued that the Supreme Court's failure to create a legal presumption either for or against a proposed move makes the outcome of mobility cases notoriously difficult to

[8] *Ibid*, paragraph 50.
[9] see for instance *Bjornson v. Creighton*, 2002 CanLII 45125 (ON CA) at para. 18.

predict. The *Gordon v. Goertz* criteria are also very subjective in application. A trial judge may apply one or more of the criteria as he or she feels fit and give more or less weight to one of the criterion over another without any specific guidance from the Supreme Court as to how the criteria are to be applied and weighed. [10] Further, appeal courts in Canada have routinely overturned trial court judgments in mobility cases and have substituted their own view of best interests of a child as a result of the lack of objectivity in the application of the criteria set out in *Gordon v. Goertz.* [11]

In short, many argue that *Gordon v. Goertz* fails to provide objective and predictable criteria that may be applied by trial courts across Canada in the determination of mobility cases. This has had a profound affect both on Canadian parents who require more certainty regarding his or her rights to relocate with a child and on Canadian children who are caught in the middle of expensive and lengthy court proceedings regarding their mobility.

This paper discusses criteria that Courts ought or ought not to consider when deciding mobility cases along with the criteria set out *in Gordon v. Goertz.* The same criteria suggested in this paper may be incorporated into any future mobility legislation should legislative guidelines to be applied in mobility cases be considered in other jurisdictions aside from British Columbia. The goal is to create more objective, principled, decision making regarding mobility issues and to reduce the number of mobility cases required to go to Court for resolution.

[10] Bala and Wheeler, Canadian Relocation Cases, supra at note 4, page 1.
[11] D.A. Rollie Thompson, "Heading for the Light: International Relocations From Canada" 30 CFLQ 2011 at page 7.

PROPOSED MOBILITY PRESUMPTIONS AND GUIDELINES

A. Three Factors that Ought to be Part of Legislated Mobility Guidelines

(i) What is mobility?

In order to create mobility guidelines, it is first necessary to recognize when there is a mobility issue that merits the application of specific legislative presumptions and guidelines.

Proposed mobility guidelines should recognize the difference between intended moves in or out of Canada's largest urban areas and those in less populous areas. Legislated mobility guidelines should not be a factor to consider unless the move is greater than 20 kilometers away from the location of the other parent's residence in one of the six largest metropolitan areas of Canada (Toronto, Montreal, Vancouver, Ottawa, Calgary and Edmonton) and more than 30 kilometers elsewhere. Once the minimum distance requirement is met for a proposed move to create potential mobility issues, the actual distance of the move will become a factor to be weighed by the court.

(ii) Rebuttable presumption Against Mobility

It is imperative to have a legislated rebuttable presumption in place against permitting a parent to re-locate with a child away from the location of residence of the other parent. One view presented in social science literature it is both positive and necessary for a child to reside near both parents in order to encourage frequent and meaningful access, absent situations of familial violence or abuse. Although Skype and modern technology makes physical distances less important today, technology is no substitute for in person bonding and the day to day personal interaction and casual contact that are very important to all human relationships.

(iii) Notice Requirements

The BC *FLA* includes notice provisions in the event that a parent proposes to relocate with a child. [12]. The parent intending to move must provide the intended date of the move and the name of the proposed location. If the other parent wishes to object to the move he or she must give notice of the objection 30 days after receipt of the notice of the move. [13] Absent the objection of the non-relocating parent, the move may occur. [14] The requirement of notice in writing of any proposed move is essential to ensure a level playing field for the parents and the child, to ensure that the child's best interests are not unilaterally decided by the move away parent,

[12] *BC FLA*, section 66
[13] *ibid*, s. 68,
[14] *ibid*

and to discourage unilateral moves that may result in either a Hague Convention [15] application of expensive inter-provincial custody proceedings and enforcement issues.

B. Four Factors That Should Not Be Considered When Determining Mobility Issues and That Should Not Be Included in Proposed Mobility Guidelines

(i) If Move is Made in Good Faith: It is too difficult and time consuming for a court and litigation parties to go into real or implied motives for a proposed move. What is important in any event is not the motive for the move, but the negative or positive impact of the move on the child. Good faith on the part of the parent proposing to move for allegedly legitimate reasons (financial, to be with a new partner, to return to family etc.) may be assumed unless there is clear evidence to the contrary.

(ii) Parental Labeling: A number of American jurisdictions provide for different legal presumptions in deciding relocation cases depending on whether there is shared parenting arrangement or a sole custody/access parenting arrangement. *Gordon v. Goertz*, *supra,* specifically rules out a

[15] Convention on the Civil Aspects of International Child Abduction, 25 October 1980, 1343 U.N.T.S. 89

legal presumption in favour of the custodial parent's desire to move, but states the custodial parent's views are entitled to "great respect."[16]

Presumptions based on parenting labels or parenting time spent with a child are inconsistent with concepts of custody and access law in Canada that emphasize the quality of the parenting time, not the quantity. Presumptions for or against a proposed move based on parenting labels or a child's time spent with a parent takes the focus away from the child and his or her best interests. Jurisdictions that apply presumptions based on parenting labels may discover that there are more initial custody and parenting disputes in court and less out of court settlements given the importance of parenting labels.

(iii) The "loaded question": This is the question of whether the parent proposing to move would abandon the plan to move if the child is not permitted to relocate. There is no right answer to this question when asked. For a parent to testify that he or she would move without the child would appear selfish and non-child focused. For a parent to answer that he or she would not move without the child may lead to the assumption by the court that the proposed move is not urgent or in the child's best interests.

[16] *Gordon v. Goertz*, supra, FN 3, para. 49.

The triable issue should simply be whether or not the child will be moving with the move away parent or staying back with the stay behind parent. Whether or not the stay behind parent is a capable custodial parent is a factor that the court ought also to consider and balance when determining the mobility issue.

(iv) The best interest of the move away parent: The exclusion of this criterion in mobility guidelines should seem obvious but is not.

Courts in Canada are charged with determining custody issues based solely on a child's best interests. This does not mean that courts cannot weigh how a child may benefit from a proposed move, only that the move must be considered from the child's perspective, and not the parent's. The difficulty is not in creating legislation that focuses only a child's best interest but in having courts apply the legislation in a child-focused manner.

CONCLUSION

Gordon v. Goertz despite its flaws and the criticism the case has generated, is a positive first step in the creation of mobility guidelines for Canadian Courts to apply. The criteria set out in *Gordon v. Goertz* are all child focused and neutral as there are no presumptions for or against the relocation of a child based on parenting labels such as "shared parent" or "primary caregiver". *Gordon v. Goertz* falls short by relying too much on the

individual discretion of the trial judge in both the application and the balancing of the various criteria. The outcome of mobility trials are notoriously difficult to predict and are subject to be overturned at the appeal level. This uncertainty causes much expense for litigants and stress for Canadian children and families who have already gone through the difficulties associated with a family separation. More objective and principled guidelines are required for judges to consider when determining mobility cases.

It is argued that absent situations of spousal or child abuse, it will be in a child's best interest to live in close physical proximity to both parents. Therefore, a rebuttable presumption against child relocation should be included as an important feature of any proposed mobility legislation.