

Custody & Access

Gordon v. Goertz, 1996 2 SCR 27, 1996 CanLII 191 (SCC)

Facts:

The parties separated in Saskatoon in 1990. The mother was awarded custody of their daughter at trial. The father was given significant access. The father frequently exercised access with his daughter and, with the consent of the mother, had care of his daughter even more often than what was allowed by the court order. In 1995, the mother decided to move with their child to Australia to study orthodontics. The father applied to court for an order preventing the move or for custody to be given to him. The mother made her own court application to vary (change) the custody order allowing her to move to Australia with the child.

The trial judge allowed the mother to move to Australia and provided the father with liberal and generous access to the child in Australia on one month's notice. The Saskatchewan Court of Appeal upheld the decision. The father appealed to the Supreme Court of Canada, asking for a change of custody or an order that would allow him access outside of Australia.

Issue:

Did the court make a mistake by allowing the child to move to Australia with her mother who was the custodial parent? What are the principles that should guide judges when deciding a mobility variation case in the future?

The Decision:

The Supreme Court of Canada upheld the decision of the lower courts on custody, including allowing the move to Australia. However, they did vary (change) the access provisions so that the father could exercise access with the child in Canada.

A parent applying to vary a custody or access order must show that there has been a material change in circumstances affecting the child. The following is needed to establish a material change in circumstances:

- 1) there must be a change in the condition, means, needs or circumstances of the child and or the ability of the parents to meet the needs of the child
- 2) this change must materially affect the child;
- 3) the change was not foreseen or could not have been reasonably

Discussion Questions:

- 1) Do you agree with the decision of the Supreme Court of Canada confirming custody and allowing the mother to move to Australia with the child? Why or why not?
- 2) What does the court consider when deciding what is in the best interests of a child in a mobility case?
- 3) Under what sort of circumstances might a court deny a request by a custodial parent to move with a child?

Resources:

You can read the entire case at:

<http://canlii.ca/t/1fr99>

You can find the *Divorce Act* at:

<http://laws-lois.justice.gc.ca/eng/acts/d-3.4/>

Relevant Law:

Divorce Act

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

contemplated by the judge who made the original order.

A move is always a change but it may not always be a material change, such as cases where the move is nearby or the relationship with the other parent is non-existent. In this case, the father had frequent and meaningful contact with the child and such a significant move was not contemplated at the time of the original court order. Once a court has established the material change in circumstances, it can move on to the next stage of the inquiry which is a fresh look into what is in the best interests of the child looking at the child's needs and the parents' abilities. This inquiry considers the previous order and also takes into account evidence of the new circumstances. There is no legal presumption in favour of the custodial parent, although the custodial parent's views are given respect.

The Supreme Court of Canada said that the focus is on the best interests of the child, not the interests and rights of the parents and that judges should consider the following in mobility cases:

- (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 as a result of moving from family, schools, and the community the child has come to know.

The ultimate question is: what is in the best interests of the child in all the circumstances, old as well as new?

(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.