Case Name:

Orring v. Orring

Between
Audra Elvira Orring also known as Audrey Elvira Orring,
Appellant (Plaintiff), and
Kai Orring, Respondent (Defendant)

[2006] B.C.J. No. 2996
2006 BCCA 523 Vancouver
Registry No. CA34270

British Columbia Court of Appeal
Vancouver, British Columbia
Finch c.J.B.c., Rowles and Thackray JJ.A.

Heard: November 8, 2006.
Judgment: November 22, 2006. (58 paras.)

Family law - Custody and access - Considerations - Best interest of child - Removal of child from jurisdiction - Variation of-Changed circumstances - Consent order - Appeal by mother from order restraining her from moving with children allowed - Mother had custody, father had generous access - Consent order required mother to provide father with notice of intention to move and provided father with right to apply to court to show move not in best interests of children - Judge erred in granting order restraining move where move would not affect father's access - Judge gave too little weight to mother's view move was in children's best interest and her wish to move on with life and secure her financial future - Divorce Act, ss. 16, 17.

Appeal by mother of two children from an order restraining her from changing the residency of the children from Kelowna to Bowen Island, Vancouver or such other location. The mother and father reached an agreement about custody and access at the time of their divorce. The mother had custody of the children and the father, a citizen and resident of Norway, had generous access. The father lived off a significant income from investments in Norway which did not require his attention, so he did not have to work day-to-day. While his permanent residence was in Norway, he rented a residence in Kelowna close to the former matrimonial home, children's schools and recreation facilities, and their friends. The mother was required to give the father 60 days notice of any intention to move away from the Kelowna area, and the father would have to bring a court application if he objected to such a move, failing which the mother was entitled to relocate. The father made such an application when the mother proposed to move with the children to Bowen Island. The mother had used a lump sum she received in the divorce settlement to purchase a commercial building there, with the intention of setting up investments and businesses. The mother was also engaged to a residential designer who lived on Bowen Island. He owned a large home on six acres there, as well as a residence in Vancouver, and deposed he was prepared to act as a step-parent to the children. The judge found there was no reason to change the custody order and that a move to Bowen Island would not interfere appreciably with the father's ability to exercise access. However, the judge concluded the mother did not show the move would be in the children's best interests, so he granted an order restraining her from leaving the Kelowna area. The home and educational and recreational facilities on Bowen Island were comparable to those in Kelowna. However, the judge thought the move would exact too high an emotional price on the children, particularly the older child who had a learning disability and would be subject to assessments by the new school system.

HELD: Appeal allowed. The order was set aside and substituted with an order permitting the mother to relocate to

Bowen Island with the children. The judge did not engage in an analysis as to whether a material change in circumstance had been met, warranting the order restraining the mother from moving with the children. There was no foundation to disturb the custody order. The evidence did not show the father's access would be materially altered by the proposed move. The mother had no burden of proof concerning the potential success of the proposed relocation. The judge did not accord enough weight to the mother's view that her marriage and the move would have a positive effect on the children. The mother's desire to get on with her life and plan for her future financial security was also entitled to respect. The only change that could have triggered a variation of the previous consent order was the negative effect the proposed move might have on the father's access, which the judge did not find.

Statutes, Regulations and Rules Cited:

Divorce Act, R.S.c. 1985, c. 3(2nd Supp.), s. 16(1), s. 16(6), s. 16(7), s. 16(8), s. 16(9), s. 16(10), s. 17(1)(b), s. 17(5), s. 17(6), s. 17(9)

Counsel:

L.A. Kahn: Counsel for the Appellant

B.M. Y oung,Q.C. and T. Brice-Nicolson: Counsel for the Respondent

The judgment of the Court was delivered by

ROWLES J.A.:-

I. Overview

1 This is an appeal from an order dated 27 June 2006, restraining the mother of two children, aged 12 and 8, "from changing the residency of the Children from Kelowna, B.C. to Bowen Island, B.C., Vancouver, B.C. or such other location." The judge's reasons may be found at [2006] B.C.J. No. 2969, 2006 BCSC 990.

2 The parties reached an agreement about custody and access during a contested matrimonial proceeding and their agreement was included in a consent order made at the time of the divorce. Under the order, the appellant had custody of the children and the respondent, who is a citizen and resident of Norway, had generous access. The consent order required the appellant to give the respondent 60 days' notice of her intention to move away from the Kelowna area and if the respondent objected to the intended move, he had to proceed with a court application, failing which the appellant was entitled to relocate with the children.

3 On the respondent's application, which followed the appellant's notice of her intention to move to Bowen Island, the judge found that there was no reason to change the custody order and that the move would not interfere appreciably with the respondent's ability to exercise access. The judge held, however, that the appellant had not shown that the proposed move was in the children's best interests and granted an order restraining her from leaving the Kelowna area.

4 The appeal is advanced on the ground that the order restraining the appellant from moving with the children from the Kelowna area is the result of a misapplication of the principles of law derived from *Gordon v. Goertz, [1996J* 2 *S.C.R.* 27 *to the undisputed facts. The appellant argues that when the judge had concluded that the respondent's access would not be impaired by the proposed move, he erred in law:* (1) *by placing an onus on the appellant to demonstrate with certainty that the relocation would be successful;* (2) *by failing to give any weight to the appellant's view of the potential positive benefits of her proposed move and impending marriage on the children's best interests; and* (3) *by failing to recognize and respect the appellant's right to make decisions about where to live and work when there was no suggestion of an improper motive that would adversely affect the*

children.

5 The respondent's position is that the judge correctly applied the principles of law in *Gordon v. Goertz when he concluded that the proposed move to Bowen Island was not in the children's best interests. The respondent submits that the detailed analysis of all the relevant principles in the judge's reasons contradicts the appellant's assertion that the judge placed the onus on the appellant to demonstrate with certainty that the move would be a success, rather, the judge weighed the factors on either side and concluded it was in the children's best interests to remain in Kelowna. The respondent argues that the judge was correct in focusing on the children's needs, as opposed to the appellant's needs, particularly when there was no evidence to support the conclusion that moving to Bowen Island would improve either parent's ability to satisfy the children's needs. It is the respondent's submission that in preferring the status quo,* the judge did not err in law and that the standard of review bars appellate interference with the order.

6 At the conclusion of oral argument we allowed the appeal, set aside the judge's order restraining the appellant from relocating and awarded costs to the appellant both on the appeal and in the court below, with reasons to follow. These are the reasons.

II. Facts

7 The parties were married in October 1983. Their children were born in July 1994 and May 1998. The family lived in Norway from 1983 to 1999. In 1999 they moved to Kelowna, British Columbia, where they bought a home. The parties separated in 2000. The appellant remained in the family residence in Kelowna with the two children. The respondent, who is a Norwegian citizen, returned to live in Norway.

8 When the parties were divorced in October 2004, they consented to an order providing for custody of and access to the children. Provisions for child support as well as a settlement of matrimonial property and spousal support were included in the consent order.

9 The order set out a detailed schedule of access which was designed to take into account the fact that the respondent's access was exercised over a long distance. The order provided that when in Kelowna, the respondent would have weekend and some mid-week access to the children. In addition, the order provided for extended access during school holidays and the summer vacation.

10 The respondent, who was 52 years old at the time of the hearing in the court below, has a number of business investments in Norway which do not require him to attend to their management. The respondent's income is considerable. As the judge described it, "Mr. Orring's life is, therefore, free from the pressure of day-to-day work. "

11 The respondent's permanent residence is in Norway but he has rented a residence in Kelowna close to the former matrimonial home where he stays when visiting the children. The two residences are close to the children's school, recreation facilities, and the homes of their friends. The respondent visits four to five times per year and often stays for up to a month at a time.

12 The appellant, who is a Canadian citizen, was 49 years old when the application was heard. She was not employed outside the home and her income was limited to the $3,500 per month she was receiving from the respondent as child support.

13 The appellant may be able to earn income from her share of the assets from the financial settlement reached with the respondent. Under the consent order, the appellant was to receive title to the former matrimonial home and the sum of $587,500, the latter being, in addition to $25,000 previously received, in "full and final settlement of the Plaintiffs claim for spousal support and property division." The appellant has purchased a commercial building on Bowen Island with the intention of setting up investments and businesses there.

14 In the fall of 2005, the appellant gave notice to the respondent of her intention to move from Kelowna to Bowen Island with the two children. The appellant's wish to move to Bowen Island was prompted by her engagement to Douglas Berry, a residential designer who has lived and worked on Bowen Island for many years. According to the material before the judge, the appellant and Mr. Berry hoped to marry in the summer of 2006 and, after the marriage, to live on Bowen Island with the children. During oral argument we were informed by counsel that the appellant and Mr. Berry are now married.

15 Mr. Berry owns a four bedroom house on a six acre property on Bowen Island. He has a design business as well as investment and revenue properties on Bowen Island. He also owns a residence in Vancouver.

16 Mr. Berry has two adult children from a prior relationship. He deposed that he is prepared to act as a supportive step-parent to the two boys, that he does not intend to replace the respondent as the children's father, and that he will take what steps are necessary to facilitate an ongoing and productive relationship between the children and their natural father. Mr. Berry also deposed that after his marriage to the appellant, he planned to decrease his work to approximately half-time in order to make more time available to devote to family life.

17 The judge found that Mr. Berry's house on Bowen Island offered approximately the same level of amenities as the boys' residence in Kelowna and that the recreational and extracurricular activities available on Bowen Island were approximately equivalent to those available in Kelowna. The judge also found that the school system on Bowen Island was equivalent to the one in Kelowna. He observed that "one difference may be that there is no middle or high school on Bowen Island itself, and so if the boys live on the Island when they move into grade 8 they will have to take a school bus to attend a school in West Vancouver" and that "may entail a commute of one or two hours per day."

18 The appellant's mother, who lives in Kelowna and is close to her two grandchildren, supported the appellant's move to Bowen Island. No other family member of either party lives in Kelowna. The respondent's mother lives in Norway.

19 As to the views of the children regarding the proposed move to Bowen Island, the judge stated:

> [18] In November 2005 the children attended a "views of the child" interview. I have read the interviewer's report letter. I am satisfied that the interview took place under neutral circumstances and was, to the extent such things can be, non-threatening to the children. Both [children] expressed reservations about moving to Bowen Island. They expressed equal reservations about going to live with their father in Norway. Both boys were not keen to endorse Mrs. Orring's relationship with Mr. Berry. By the same token, neither boy was particularly enamoured with Mr. Orring's relationship with his new paramour in Norway. Both [children] made it clear that what they really did not like was the fact that their parents were divorced and that their parents fought all the time.

20 Following the separation, the parties' relationship has been characterized by conflict and acrimony, much of it rooted in monetary matters. By way of example, in 2005, the appellant brought contempt proceedings against the respondent for his failure to pay the full amount of the matrimonial settlement as required in the consent order.

III. The judge's reasons

21 The judge concluded there was no reason to interfere with the existing custodial arrangement:

> [33] As I have noted above, the existing custody arrangements serves the children well. Mrs. Orring's proposed move to Bowen Island would not alter the custody arrangement: she would continue as the custodial parent and would continue to be the boys' primary caregiver. Since there

> is no prospect on this application of Mr. Orring obtaining an order for custody and primary residence, whether the children move or stay put in Kelowna will have no impact on the custodial arrangement.

22 With respect to the respondent's access, the judge observed that "Mr. Orring has arranged his affairs to very nicely accommodate his living in Norway while still playing an important role in the boys' lives" and that "[t]he existing access arrangement serves the boys wel1." He went on to find that the concerns and complaints the respondent had expressed about rental accommodation on Bowen Island and the Bowen Island ferry schedule as being a restriction or barrier to access were unsupported by the evidence. The judge concluded:

> [39] In sum, Mr. Orring has not shown that the frequency or quality of the children's access with him would likely be impaired if they were to move to Bowen Island and he were to visit with them there.
>
> [40] ... The court would have to seriously question the move if the evidence showed that it would present a genuine barrier to the children's access with their father. But the evidence on this application does not establish that any such barrier exists.

23 The judge had some concerns about the effect of proposed move on the children because of the disruption it would cause to their friendships and activities but he expressed greater concern about its effect on the older child, who has an attention deficient disorder and has had some difficulty with his schooling.

> [53] [Both children] are well integrated into their school and neighbourhood. They have friends in Kelowna. They go to Beavers and play various sports. In the winter they go skiing on the local hil1. They are, on the evidence, normal kids. Normal kids are capable of overcoming the upheaval naturally entailed in moving from one community to another. Nonetheless they will inevitably pay an emotional price if they have to move to a new community.
>
> [54] [The older child's] progress in school is a concern. By all accounts he is doing better this current year than he has in the past. But [his] ability to accommodate changes in his education routine is likely compromised by his learning disability. While there is no evidence that the Bowen Island school system would be any less accommodating to him than Kelowna's has been, the fact is that if he does move whatever school he goes to will have to engage in an assessment process to determine his particular needs. The need for such assessments is established in the evidence adduced by both parents. They say that [the older child] has had to attend many counselling sessions and much effort has been expended by his school to find out what his particular needs are and how to meet them. It is difficult to see how [he] would benefit from having to go through that whole process again at a new school on Bowen Island.

24 Under the heading "Overall Assessment" the judge found that the appellant had not established that the move would benefit the children:

> [55] The *Gordon* case decrees that, in the end:
>
> > 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?

[56] Because Mr. Berry has not actually lived with Mrs. Orring and the boys I cannot reasonably conclude that the boys will actually benefit from having him in their household. They might or they might not. It is a risk. This case is not like *Barnetson* v. *Cook,* [2005] B.C.J. No. 1361 , 2005 BCSC 913 where the court endorsed a move by a mother and step-dad who had already established a positive track record of jointly caring for the children.

[57] Mrs. Orring does not assert that she lacks some parenting ability that Mr. Berry will fulfill. There is therefore no evidence that the boys will necessarily suffer if Mrs. Orring does not move to Bowen Island.

[58] If she does not move it is certain that Mr. Orring will continue to make frequent visits to Kelowna. The evidence indicates that Mr. Orring has not made a genuine effort to find out whether he can obtain good accommodation for access visits on Bowen Island. He seems unwilling to exert himself to set up accommodation on Bowen Island. A father who, in a fit of pique, declines to continue access visits to the kids' new community does not reflect much credit on himself, but the court must not lose sight of the risk that loss presents to the children. Put another way, the court should not allow an access father to hold his ex-spouse and children hostage to his temper and pride, but the access father's feelings, insofar as they bear upon a previously positive access regime, do merit some limited consideration.

[59] On the evidence [the younger child] would likely have little difficulty adapting to new surroundings and a new school. [The older child] makes friends easily too, but his education has been problematic, and requiring him to enter a new school would exact a price from him.

25 The judge's conclusions leading to the order under appeal, and in which the errors in principle are said to be manifest, were stated as follows:

[60] After carefully considering the facts as a whole, I have come to the conclusion that the proposed move to Bowen Island offers the possibility benefiting the children by putting them in a two-parent household. The downside is the upheaval and emotional turmoil that the boys will suffer as a natural consequence of moving to a new community and school. [The older child] is likely to pay a higher cost than [the younger one.] Another, but far less important, negative concern is Mr. Orring's questionable willingness to continue to make access visits if the boys do live on the Island.

[61] If the evidence showed that Mrs. Orring and Mr. Berry were, in fact. able to offer a stable and supportive household and that their two-parent household did, in fact. offer a benefit to the children, then I would be inclined to approve the proposed move. But as the evidence stands now that benefit is only a prospect. and not a certain one at that. I do not think that it would be in the children's best interests to uproot them from Kelowna where things are going well for them when the evidence shows that the only significant benefit to them of making a move is the bare possibility that Mr. Berry will work out as their step-father.

[62] Thus, although I greatly respect Mrs. Orring's wish to, as she says, "get on with her life", I find that I cannot endorse moving the children from Kelowna to Bowen Island in order to for her to marry her new romantic partner.

[Underlining added.]

IV. Relevant statutory provisions

26 The relevant sections of the ***Divorce*** *Act, R.S.* C. 1985, c. 3 *(2nd Supp.) provide:*

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.

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

(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.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

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

(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.

(6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

(9) In making a variation order varying a custody order, 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 and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

V. Did the judge err in law by misapplying the principles set out in *Gordon v. Goertz?*

27 The judge used the summary of the law which appears in the reasons of McLachlin J. in *Gordon v. Goertz as a template for determining the respondent's application. He began his analysis by reference to the summary:*

> [24] The principles that govern an application concerning the relocation of children were laid down by McLachlin J. in *Gordon.* The salient portion of the judgment is this:
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> > 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.
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> > 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.
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> > 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?

28 While the foregoing summary of the law is a helpful guide, it must be read in conjunction with McLachlin J.'s analysis of the statutory provisions that apply when a motion to vary an existing order is made in the context of a custodial parent wishing to relocate. That is so not only of the principles set out in the first six paragraphs but also of the factors set out in the seventh paragraph of the summary.

29 In my respectful view the judge's reasoning in this case fails to apply correctly the fundamental precepts of the statutory provisions discussed in ***Gordon v. Goertz,*** *including the stated rationalization or underpinning for the factor referred to in the summary under para. 7(e).*

30 In ***Gordon v. Goertz,*** *the mother had custody under an order made under the* ***Divorce Act*** *and the father had reasonable access to their child. Both parents had been living in Saskatoon but when the mother decided she wished to move to Adelaide, Australia to study orthodontics, the father applied for custody or, in the alternative, an order restraining the mother from removing the child from Saskatoon. The mother cross-applied to vary the access provisions. The judge concluded that the mother should be allowed to move with the child to Australia and that the father ought to have generous access, to be exercised in Australia. The decision was upheld on appeal to the Saskatchewan Court of Appeal. On his further appeal to the Supreme Court of Canada, the father sought custody of the child or, alternatively, an order permitting his access to be exercised outside Australia. The Supreme Court upheld the lower court orders permitting the mother to take the child with her to Australia but varied the access provisions so that access could take place outside Australia.*

31 The issue in ***Gordon v. Goertz*** *was whether the trial and appeal court had erred in permitting the child to move to Australia with her mother. In considering the effect of a custodial parent's move on custody and access, McLachlin J. began by referring to the statutory threshold condition required for a variation of an existing order, that is, the party seeking variation must show a material change in the circumstances of the child:*

> 10 Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the child since the last custody order was made. Section 17(5) provides that the court shall not vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child". Accordingly, if the applicant is unable to show the existence of a material change, the inquiry can go no farther: *Wilson v. Grassick* (1994),2 R.F.L. (4th) 291 (Sask. c.A.).
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> 11 The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued: ...
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> 12 What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way : .. [Underlining added.]
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> 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) 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) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
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> 14 These are the principles which determine whether a move by the custodial parent is a material change in the "condition, means, needs or other circumstances of the child". Relocation will always be a "change". Often, but not always, it will amount to a change which materially affects the circumstances of the child and the ability of the parent to meet them ...
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> 15 The third branch of the threshold requirement of material change requires that the relocation of the custodial parent not have been within the reasonable contemplation of the judge who issued the previous order: ...

> 16 Conversely, an order which specifies precise terms of access may lead to an inference that a move which would "effectively destroy that right of access" constitutes a material change in circumstances justifying a variation application ...

32 In this case, the judge did not engage in an analysis as to whether the statutory threshold requirement of a material change in circumstance of the children had been met. Immediately after setting out the summary of principles in *Gordon v. Goertz, the judge simply said:*

> [25] Applying those principles to this case, I find that Mrs. Orring's plan to relocate the children constitutes a change in circumstances sufficient to trigger a fresh inquiry into the children's best interests having regard to all the relevant circumstances. There is only a previous consent order, so I will be finding facts relating to the circumstances anew.

33 The fact that the judge proceeded on the footing that there had been a material change in circumstances of the children by reason of the custodial parent's proposed move may well reflect the fact that the mother's counsel, who is not counsel on the appeal, conceded that there had been such a change. Whether such a concession ought to have been made in this case is questionable because what emerges from the material and the judge's reasons is that there was no foundation to disturb the custody order and the evidence did not show that the respondent's access to the children would be materially altered by the proposed move.

34 The first ground of appeal in this case was that the judge " ... erred by concluding that the Appellant's relocation with the children from Kelowna to Bowen Island would be a material change in the circumstances sufficient to trigger a consideration of the merits of the Respondent's application to prevent the relocation". That ground was abandoned after it came to light that the concession just mentioned had been made.

35 The fact that the first ground of appeal was abandoned does not, of course, alter the principles McLachlin J. derived from the applicable statutory provisions nor change how those principles are to be applied in relocation cases.

36 Once the statutory threshold condition of a material change in circumstance has been met, "the court should consider the matter afresh without defaulting to the existing arrangement": *Gordon v. Goertz at para. 17. "Section* 17(5) *of the Divorce Act directs that the judge must consider the child's best interests 'by reference' to the material change in circumstances. However, the inquiry cannot be confined to that change alone, isolated from the other factors bearing on the child's best interests": Gordon v. Goertz at para.* 18. *The last clause of* s. 17(5) *of the Divorce Act provides that ... 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". The amendments to the Divorce Act in 1986 elevated the best interests of the child from a "paramount" consideration, to the" only " relevant issue: Gordon v. Goertz at para. 19.*

37 With reference to the best interests of the child test, McLachlin J. recognized that by the nature of the subject matter and the multitude of factors at play, "a measure of indeterminacy" was inevitable at: at para. 20. She further observed that two statutory provisions, one relating to the conduct of the parents and the other fostering maximal beneficial contact between the child and both parents, provided guidance in relation to the best interests test.

38 As to the less than certain nature of the test McLachlin J. said:

> 20 The best interests of the child test has been characterized as "indeterminate" and "more useful as legal aspiration than as legal analysis": per Abella J.A. in *MacGyver v. Richards (1995),* 11 R.F.L. (4th) 432 (ant. c.A.), at p. 443. Nevertheless, it stands as an eloquent expression of

Parliament's view that the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake. The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty. Moreover, Parliament has offered assistance by providing two specific directions - one relating to the conduct of the parents, the other to the ideal of maximizing beneficial contact between the child and both parents.

39 On the statutory provision limiting the relevance of conduct, McLachlin J. said:

21 In s. 16(9), Parliament has stipulated that the judge "shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child". This instruction is effectively incorporated into a variation proceeding by virtue of s. 17(6). Parental conduct, however meritorious or however reprehensible, does not enter the analysis unless it relates to the ability of the parent to meet the needs of the child . [Underlining added.]

22 This stipulation is important in applications for variation of custody based on relocation of the custodial parent. All too often, such applications have descended into inquiries into the custodial parent's reason or motive for moving (see *Carter v. Brooks* (1990), 30 R.F.L. (3d) 53 (ant. c.A.); *Colley v. Colley* (1991), 31 RF.L. (3d) 281 (ant. U.F.e.), and 1. G. McLeod, Annotation to *Williams v. Williams* (1992), 38 RF.L. (3d) 100 , at p. 103). If the move is considered "necessary", the decision is considered justified, entitling the parent to retain custody in the new location. If, on the other hand, it is made for a less noble reason, the custodial parent may be required to choose between losing custody or moving. The focus thus shifts from the best interests of the child to the conduct of the custodial parent.

23 Under the *Divorce Act,* the custodial parent's conduct can be considered only if relevant to his or her ability to act as parent of the child. Usually, the reasons or motives for moving will not be relevant to the custodial parent's parenting ability. Occasionally, however, the motive may reflect adversely on the parent's perception of the needs of the child or the parent's judgment about how they may best be fulfilled. For example, the decision of a custodial parent to move solely to thwart salutary contact between the child and access parent might be argued to show a lack of appreciation for the child's best interests: see *McGowan v. McGowan* (1979), 11 RF.L. (2d) 281 (ant. H.C.); *Wells v. Wells* (1984), 38 RF.L. (2d) 405 (Sask. Q.B.), affd (1984), 42 R.F.L. (2d) 166 (Sask. c.A.). However, absent a connection to parenting ability, the custodial parent's reason for moving should not enter into the inquiry.

40 Sections 16(10) and 17(9) of the *Divorce Act establish a principle of maximum contact with each parent. With respect to that principle, McLachlin J. said:*

[24] The second factor which Parliament specifically chose to mention in assessing the best interests of the child is maximum contact between the child and both parents. Both ss. 16(10) and 17(9) of the *Act* 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". The sections go on to say that for this purpose, the court "shall take into consideration the willingness of [the applicant] to facilitate" the child's contact with the non-custodial parent. 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, per McLachlin J.

41 An underlying assumption in *Gordon v. Goertz is that the "maximum contact" principle militates against relocation because the proposed move will usually adversely affect the access parent's ability to see the child, which is contrary to Parliament's stated intention of promoting maximum contact between the child and both parents. A court is therefore faced with having to balance the benefits of the proposed relocation against the child's interests in maintaining maximum contact with the access parent and may decide against permitting the move: see Karpodinis v. Kantas (2006),* 55 *B.e.L.R. (4th) 90,2006 BCCA* 272; *leave to appeal to s.e.e. refused, [2006}* S. e. *e.A. No.* 318 (16 *November 2006). The maximum contact principle is not an absolute one but it is a mandatory consideration when determining whether a proposed relocation is in the best interests of the child. There are cases where the other principles will outweigh the negative effects of decreased contact with one parent and thus the custodial parent is permitted to move. This Court's decision in Lowcay v. Lowcay (2000),* 8 *R.F.L. (5th)* 313, *2000 BCCA* 447 *is an example.*

42 If the appellant's proposed move to Bowen Island would have had the effect of materially altering the respondent's ability to exercise access as provided in the consent order, the judge would have had consider how to give effect to the principle found in ss. 16(10) and 17(9) of the *Divorce Act that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child. On the judge's findings, however, the respondent's access would not have been materially altered by the proposed relocation.*

43 That brings me to the appellant's submissions that when the judge found there was no reason to alter the custody and access provisions of the previous consent order, he erred in principle: (1) by placing an onus on the appellant to demonstrate with certainty that the relocation would be successful; (2) by failing to give any weight to the appellant's view of the potential positive benefits of her proposed move and her impending marriage on the best interests of the children; and (3) by failing to recognize and respect the appellant's right to make decisions about where to live and work when there was no suggestion of improper motive that would adversely affect the children.

44 The errors alleged by the appellant appear to be mainly rooted in the judge's analysis of paras. 4 and 7(e) of the summary in *Gordon v. Goertz. In my respectful view, the judge misconstrued the principles of law that underpin those paragraphs. For ease of reference, I will repeat paras.* 4 *and 7(e):*

> 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.
>
> 7 More particularly the judge should consider, *inter alia:*
>
> (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;

45 In his reasons, the judge referred to the summary of the law contained in para. 4 only to say: "I will discuss this element in detail in the context of item 7(e) below."

46 The errors in principle emerge in the following paragraphs of the judge's reasons which come under the heading: *"7(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* ":

> [44] I read this factor to mean that the court should limit itself to assessing only those of the custodial parent's motivations that are relevant to her ability to meet the children's needs. The corollary must be: a motivation not relevant to parenting ability is not relevant to the question of mobility.
>
> [45] This limitation is difficult to reconcile with the direction in *Gordon* point r4l; vis: the custodial parent's wishes are to be given great respect. That is because a wish is nothing more than a goal the wisher is motivated to attain. If the wish is born of a motive not relevant to parenting ability, does *Gordon* dictate that the court may not assess the merit of that motive, but must instead uncritically give the parent's wish great respect? Fortunately, that conundrum need not be resolved in this case. Here there is evidence concerning motives relevant to Mrs. Orring's parenting ability .
>
> [46] Mrs. Orring says that she wants to move to Bowen Island because she has invested in commercial property there. She says that she knows she will not always be receiving child support and that she hopes eventually her investment will improve her economic self-sufficiency. Her counsel argues that improved economic circumstances for Mrs. Orring must necessarily also benefit the children. The problem with her argument is Mrs. Orring's evidence on the point. She says that income production from her investment is geared to the time when she is not receiving child support. She does not say that this investment can be expected to generate income while the children are still under her care. Further, Mrs. Orring does not assert how it is that she needs to live on Bowen Island in order to reap the benefit of this investment.
>
> [47] I cannot conclude from Mrs. Orring's evidence that moving to Bowen Island will improve her economic circumstances such that the children will benefit, and I cannot conclude that she should live on the Island in order to reap the full economic reward of her investment there.
>
> [48] Mrs. Orring does not assert that as a single parent she is lacking in some emotional or financial resource which Mr. Berry will augment when he joins the household. Therefore, it cannot be said on the evidence that Mrs. Orring is motivated to move to Bowen Island in order to improve her own parenting ability. In this respect her evidence does not tip the balance of the 7(e) discussion in her favour.
>
> [49] But Mrs. Orring argues that the scope of our discussion on this point should be widened to encompass the possibility that the children will benefit from the addition of Mr. Berry to the household. She points to Mr. Berry's affidavit in which he deposes that he looks forward to living with the kids on Bowen Island. She says that the court should take judicial notice of the proposition that a two parent household is better for the children than a one parent household.
>
> [50] It seems to me that to take judicial notice of that proposition would be to commit the same sort of error as to decide the case on the 'tender years' doctrine (where the mother should always have primary care of infants), or on the 'status quo' doctrine (where long established circumstances should not be disturbed). The case law firmly forbids the court to make