Toronto (North York) Registry No. D 44243/08
DATE: 2009·VI·23
CITATION: *Ryall v. Ryall*, 2009 ONCJ 687

ONTARIO COURT OF JUSTICE

2009 ONCJ 687 (CanLII)

B E T W E E N :

SAMANTHA ELIZABETH RYALL,
Applicant,

— AND —

TODD MATTHEW RYALL,
Respondent.

Before Justice Carole Curtis
Heard on 2-6 March 2009; 7-9 and 14 April 2009; 7 May 2009; and 11 June 2009
Reasons for Judgment released on 23 June 2009

CUSTODY OF CHILD — Mobility rights — Grounds for allowing or denying move — Best interests of child — Fostering ties to non-custodial parent — British-born mother was working abroad when she met Canadian-born father — They married in Canada but union was brief — Mother was in Canada scarcely one year before child was born and 3 months later, parents separated — Mother had marketable skills, not all of which were readily recognized in Canada and she struggled financially and socially in Toronto — Despite father's testimony of having tightly-knit and supportive family, none of its members ever bothered to connect with her or child and proved to be poor support network, all of them (including father) living in scattered parts of Ontario outside Toronto — Mother wanted to return to England with child (now 19 months old) to village where she was born and where her own mother resided — Mother's only support network consisted of maternal grandmother who had travelled to Canada to assist her and who had offered mother and child spacious accommodation in England — Even though separation had embittered parties, they did manage to resolve many issues on their own, including agreeing to joint custody with mother's home as child's primary residence, without prejudice to her request to relocate with child, so that by 3rd day of 11-day trial, only issue in dispute was whether mother and child would be allowed to relocate to England — Legal test for relocation was child's best interests — In this case, mother had always been primary caregiver of child — Father admitted that mother supported maintenance of close relationship between father and child and he trusted that she would ensure contact between father and child if allowed to relocate — Mother had such good support system and good opportunity for employment in England (which she lacked in

Canada) that she was ready to waive any right of spousal and child support against father, thus allowing him to use savings for travel cost for visiting with child — Child was still too young to have formed any ties to community, school or group of friends in Canada — On balance, court found that benefits of move to child outweighed any shortcomings — It was in child's best interests to allow mother to move to England and to take child with her, subject to liberal, frequent and regular access to child, consistent with parties' agreement for joint custody.

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STATUTES AND REGULATIONS CITED

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JUSTICE C. CURTIS:—

1: OVERVIEW

[1] This is the trial of the mother's request to move to England with the child, who is 16 months old.

2: BACKGROUND

[2] The mother, Samantha Elizabeth Ryall, the applicant in this case, was born on 26

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May 1981 in London, England and was 27 years old at the trial. She is employed part time at the Champlain Institute as a teacher of beauty therapy or aesthetics.

[3] The father, Todd Matthew Ryall, the respondent, was born on 28 February 1977 in Toronto and was 32 years old at the trial. He is employed as the executive chef at the Royal Canadian Military Institute.

[4] The parents met in 2004 at the Fairmont Southampton Hotel in Bermuda where they both worked. They were married in Haliburton, Ontario on 2 February 2006.

[5] They lived in Bermuda until they moved to Canada on 14 October 2006. The child Izabella Amber was born on 22 November 2007. Izabella is an ordinary, healthy child, with no special needs and no challenges, who is happy, well adjusted, very active and doing very well.

[6] The parents separated on 22 February 2008. Izabella was then 3 months old.

3: THE PARENTS' CLAIMS AND THEIR POSITIONS AT TRIAL

3.1: The Mother's Claims and Her Position at Trial

[7] The mother started this case on 8 April 2008 and amended her application twice (5 May 2008 and 14 November 2008) claiming the following:

(a) sole custody;
(b) supervised access;
(c) permission to obtain the child's travel documents;
(d) permission to travel to England with the child for a visit;
(e) permission to move permanently with the child to England;
(f) child support;
(g) spousal support; and
(h) a restraining order.

[8] The mother was clear at the outset of the trial that she was not looking to sever or impair the father's relationship with the child and that she had always been supportive of the father's role with the child.

[9] At the start of the trial, the mother was claiming the following:

(a) sole custody;
(b) access;
(c) permission to move permanently with the child to England;
(d) child support;
(e) health and insurance benefits for the mother and the child;
(f) spousal support; and
(g) security for support.

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3.2: The Father's Claims and His Position at Trial

[10] The father filed an answer on 11 December 2008, claiming the following:

(a) joint custody;

(b) in the alternative, access;

(c) an order that the mother deposit her passport with the court and deliver the child's passport to the father; and

(d) a non-removal order.

[11] At the start of the trial, the father was claiming the following (among other claims):

(a) joint custody;

(b) a detailed and specific parenting schedule;

(c) the child's permanent residence not be moved from Toronto or Pickering without the other parent's consent or court order;

(d) that the father hold the child's passport;

(e) that the father pay child support of $510 per month to be based on his income of $55,000 and that he pay his proportionate share of the after-tax cost of day-care expenses for the child; and

(f) no spousal support.

[12] The father's position on spousal support was that the mother was eligible for spousal support, but that the mother had no need and he had no ability to pay it.

4: LITIGATION HISTORY

[13] There were many court appearances in the early days of the separation. There were several contested motions regarding access and there were some consent orders. The parents were mistrustful of each other and there was no doubt hurt and anger.

[14] On 11 April 2008, Justice Harvey P. Brownstone granted a consent temporary "without prejudice" order for primary residence of the child to the mother, with supervised access to the father every Tuesday and Sunday, for a period of 1½ hours, and a non-removal order.

[15] On 17 July 2008, Justice Geraldine F. Waldman ordered temporary child support of $470 per month and spousal support of $600 per month, starting on 1 June 2008.

[16] On 20 November 2008, on consent, Justice Waldman changed the earlier order re access to provide specific access unsupervised.

[17] Both parents made some questionable decisions. The mother was quite angry with the father and demanded concessions before she would allow access. The father called the mother repeatedly and threatened her, including threatening to call the children's aid society to take the child. The mother brought a motion for contempt when the father took the child

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to Peterborough. The father repeatedly tried to prevent the mother from even visiting the United Kingdom ("the U.K.") with the child. These conflicts made the situation between the parents worse.

[18] The litigation history is less significant in this case than in other custody-and-access cases, as the parents have come a long way in one year and have resolved all of the issues except the relocation issue.

[19] As the parents gave evidence that they now trust and respect each other as parents and that both now believe the other will do what is appropriate to ensure a continued relationship with the other parent, no matter what the trial outcome, there is no need to review the history of the conflict in the early days of the litigation, particularly the historical conflict surrounding access.

[20] At trial, the father's access was every Tuesday from 4 p.m. to Wednesday at 9.30 a.m., and every Sunday from 8.00 a.m. to Monday at 1.00 p.m.

5: THE ISSUES

[21] At the start of the trial, these were the issues in dispute between the parents:

(a) custody and access;

(b) relocation of the child (the mother wants to move to England);

(c) child support (table amount and special expenses under the *Child Support Guidelines*, O. Reg. 391/97, as amended);

(d) spousal support (eligibility and quantum);

(e) security for support;

(f) health and life insurances benefits; and

(g) the mother wants to be able to travel with the child without the father's permission.

[22] On the second day of the trial, the parents' lawyers asked for time to meet and discuss resolution regarding some of the issues. These meetings took 1½ days and resulted in a settlement of many of the outstanding issues. The settlement was reduced to writing in an untitled document (mistakenly dated 4 March 2008) and filed on 4 March 2009, which functioned as a joint statement of agreed facts and minutes of settlement (referred to as "minutes of settlement").

[23] In the minutes of settlement, the parents agreed to joint custody, primary residence with the mother, a decision-making regime, sharing of information and other issues (including access if the child is in Toronto and child support if the child is in England or Toronto).

[24] The remaining issues for the court to determine are these:

(a) Should the mother be permitted to move to England with the child?

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(b) If the mother is permitted to move with the child, what are the access arrangements that are in Izabella's best interests?

6: THE EVIDENCE

[25] The mother is the primary caregiver of the child. She was at home full-time with the child. She breast-fed the child for 8 months. The father only lived with the child for 3 months after the child's birth.

[26] The parents are sophisticated, intelligent young people.

[27] The mother told the father almost immediately after the separation that she wanted to move back to England with the chid.

6.1: The Mother's Plan for Living in England

[28] The mother plans to return to live in the village where she grew up in Suffolk, a village described by the maternal grandmother as "a very small place where everyone knows everyone else". The mother lived there from the age of 3 until she left to work on a cruise ship at the age of 21. The mother and the child would be living with the maternal grandmother in a large 6-bedroom Victorian home on 6 acres of land, a home in which the maternal grandmother has lived for many years in a large one-bedroom flat. The maternal grandmother is a tenant and a care-giver and helper to the elderly woman owner who lives there. The father has been to this home to visit and described it as a mansion on several acres of land.

[29] The maternal grandmother lives in a self-contained apartment in the home but the entire house is accessible to her. The mother and Izabella would have their own bedrooms and access to the large yards and a garden. The mother and Izabella spent 6 weeks there in June and July 2008. The mother could live there as long as she wanted and she would not have to pay rent there. The mother would only have to pay for food and the child's needs. This would allow her to save for a house. She said she would not be in a hurry to leave her mom's home, and that there is no pressure on her to leave. Eventually, she plans to buy a 2-bedroom house and the maternal grandmother will help her with a down-payment, but she has not yet begun to look for a house. The houses in Suffolk are in the range of £100,000-£200,000 sterling.

[30] The maternal grandmother is available to provide day care for Izabella. The maternal grandmother is 67 years old and in good health. She works part-time at a local pub (where she has worked for many years) for 3 days a week, with flexible hours. The pub owners have known the mother since she was 3 years old. The maternal grandmother says she does not need the money and that she works because she likes to keep active. Izabella would be with the maternal grandmother 3 days a week and in day care 2 days a week. The maternal grandmother will continue to help the mother with child-care even after the mother moves out of the maternal grandmother's home.

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[31] Both the mother and the maternal grandmother described their relationship as a very close one. The mother is an only child, whose father died when she was 19 years old. The father says that their relationship is not as good as they suggested at trial and not as stable as presented.

[32] Both the mother and the maternal grandmother are committed to making the living arrangements and care-giving arrangements work for the benefit of Izabella. The mother and the grandmother have already had experience living and working together as a team to care for Izabella. The maternal grandmother visited the mother 4 times in Bermuda. The maternal grandmother visited the mother 3 times in Canada and came to Canada to be with the parents and Izabella shortly after Izabella was born and to help to in any way she could. As well, the grandmother had been in Toronto staying with the mother from 10 December 2008 up to and during the trial in March 2009 and through to April 2009.

[33] Izabella would attend the same school to which the mother went as a child. There is a toddler's group nearby and a playgroup for mothers and babies. There is a community centre, with a swimming pool, tennis courts, and there are many activities walking distance from the maternal grandmother's home.

[34] The mother has friends in the village with whom she remains in contact, all of whom have children.

[35] The mother is qualified as a beauty therapist or aesthetician. Her area of speciality is skin care and skin treatments and she has 9 years of experience in this area. She is qualified to perform manicures, pedicures, waxing, eye treatments and other body treatments. She had previously worked in spas on a cruise ship and as a spa manager in London, before she got a job in Bermuda.

[36] She is also qualified as a massage therapist but, in Canada, many spas prefer the Canadian designation of registered massage therapist (because of the requirements of insurance companies which reimburse for this treatment). As a result, this work is much less available to her in Canada than in the U.K. (where she is fully qualified), and she would earn less money for this work in Canada than a registered massage therapist would earn (as much as $15 per hour less). She would have to return to school in Canada to qualify as a registered massage therapist. She says she does not want to work full-time as a massage therapist and that she wants to work in skin care and body treatments. The father admitted that they knew of these limits on her massage therapist qualifications when they decided to move to Canada and that her main qualification was in beauty therapy and teaching.

[37] The mother is certainly employable and is likely to be desirable as an employee in both the U.K. and Canada. She was described by a former Toronto employer as "a spectacular young lady" (although she had only worked for this employer for 3-4 months). The employer said the mother has an excellent résumé, that she has very strong qualifications in aesthetics and in hospitality, that she has a great personality and that she has managerial potential. The mother has won "retailer of the year" awards with several different companies (whose products she sold as part of her treatment of her customers).

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This employer said she would always have a place in her spas for the mother. She basically offered the mother a job from the witness stand, but confirmed that she had not been so clear to the mother with a job offer before that. She did not, however, currently have a spa open in Toronto or in the Toronto area.

[38] The mother believes that she can earn much more money in the U.K. She has a good job offer already in the U.K. at a reputable spa, at a more favourable pay rate than she has been able to earn in Toronto and with bonuses and benefits she could not earn in a Toronto spa. The U.K. spa is a very busy spa with an established clientele where she worked previously and is in a nearby town, a 15-20 minute drive.

[39] The pay structure is different for aestheticians in the U.K. and in Canada. In the U.K., in addition to the base pay, there are commissions paid for treatments and for retail sales, and as well, bonuses if the therapist reaches certain sales targets. In the U.K. spas, 10% commission is the lowest and commission can go up to 12-13%, depending on the therapist's expertise and years of service. If she achieved all the retail targets, she believes she could earn £31,000-£32,000s per year in the U.K. (a Canadian equivalent of $57,444 to $59,297 at an exchange rate for the pound of $1.85 Canadian). The base pay is less in Canada than in the U.K. and, although there are commissions paid in Canada on the retail sales, there are no commissions paid on treatments in Canada. The mother was unsure of exactly what earnings would be available for her in Toronto (as she had not yet worked full-time in her field at a spa in Toronto), but she believes that she would be able to earn about $32,000 to $45,000, with a possibility for as much as $48,000.

[40] The mother believes that she would be better able to provide for the child in the U.K. and that she would be better able to save for the future in the U.K.

[41] If the mother moves to England, she is committed to the father's and Izabella's maintaining a good relationship and she is confident that they can. The mother will come to Canada with the child for the father to see the child twice a year, at the father's convenience. She will pay for these trips herself, including the hotel stay (although she anticipates that she could stay with friends in Toronto). The father can visit the child in the U.K. as often as he wishes, whenever he wishes, and may stay as long as he wishes. The mother and the maternal grandmother both say that he may stay at their home for these visits. The mother wants to make it easier financially for the father. The mother would agree to no child support, which at $510 per month for the table amount of support alone would give the father an additional $6120 per year to use for travel expenses. The father would actually have more money than this available to contribute to travel costs, as he would also not be paying the current amount ordered for spousal support ($600 per month), nor would he be paying his proportionate share of special expenses, which would presently be day-care costs. Eventually, Izabella can travel as an unaccompanied minor.

[42] The mother will be financially self-sufficient if she is living in the U.K. She will forgo child support and will not seek spousal support. If she requires financial help, she will turn to her mother.

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[43] As well, the child could come to Canada and stay with the father for 2-3 weeks in the summer, including in the summer of 2009. The mother says that she is very open to flexibility to accommodate the father's work.

[44] The mother also suggested that it was possible that they could share the transporting of the child, that one parent could deliver the child and the other parent could return the child.

[45] The mother is "tech savvy" and has a computer and a web-camera. She would set up telephone contact and web contact on a regular basis for the child and the father. The child already knows and recognizes the father's voice. The mother is confident there will be daily contact for Izabella and the father by web-camera. She has already done this with her own mother and Izabella. She understands that this level of contact is not the same as personal contact. The mother respects the father and is very committed to contact on a daily basis.

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6.2: The Mother's Plan for Living in Canada

[46] The mother came to Canada to begin a new life with her husband. She had been to Toronto only once before moving here in October 2006. She had lived in Toronto 16 months at the time of separation.

[47] The mother is now a single mom. She did not plan to be a single mother living alone in Toronto. She does not feel at home in Toronto. The mother says that she is struggling here. The father admitted that life for the mother in Toronto is a bit of a struggle. The mother says that her life will be more difficult financially and otherwise in Canada. She has no car and no Canadian driver's licence. She has few friends here and is isolated. The father admitted that the mother is isolated in Toronto.

[48] In the time since they moved to Toronto (2 years and 4 months), the parents had lived in 5 different homes (the Royal York Hotel and 4 apartments). Some of the moves were for financial reasons. At trial, one year after separation, the mother was finding it financially a struggle to live in Toronto. The mother did not anticipate earning so much less in Canada when she came here. The mother received a small amount of employment insurance until November 2008. She has been unable to work full-time as she needs someone to care for the child and has not yet found suitable convenient and affordable day care. At trial, the mother was working about 12 hours per week teaching aesthetics for $18 per hour. She had been working at this job for about 8 weeks. Her projected gross income for 2009 at this job at 12 hours per week would be about $24,000. Although she had made 2 trips to the U.K. since separation, she did not pay for the flight for either trip.

[49] The mother lacks support in Toronto. Before the separation, the mother had a good relationship with the father's family, especially with the paternal grandfather, whom she saw the most and with whom she was close. He was, she said, kind, loving and generous to her.

[50] The father has three brothers all of whom are married or in relationships and all of

whom have children. The father's family is close-knit, a clan and really tight. The father said that he is really tight with his family.

[51] Only one member of the father's family gave evidence at the trial, his sister-in-law. The paternal grandfather did not give evidence.

[52] The father's family has been entirely absent from the mother's life since the separation. Different explanations were offered for that: the father's sister-in-law says her husband (the father's brother) told her not to contact the mother; the mother says that her lawyer told her not to contact the father's family. The father says that he did not tell his family not to contact the mother. He also said that he never called his family to tell them to be supportive of the mother. There were not any phone calls from the father's family members to see how the mother was coping or to enquire how the child was doing. No one from the father's family sent cards or presents on the child's birthday. No one from the father's family made a telephone call on the child's birthday. The mother was hurt and upset by this treatment from the father's family and felt betrayed.

[53] The father says that no one from his family sent the mother money. They gave money to the father. The father said that the paternal grandfather gave him thousands of dollars after the separation, some of which he used to pay child support, but that he did not give this money to the mother. The paternal grandfather came to see the mother within a few days of separation and gave her $500.

[54] At the time when the mother was the most needy, the father's family did not help her at all and had no contact with her, including right up to the trial and during the trial. The maternal grandmother provided the child care needed to enable the mother to come to court for the trial. The absence of the father's family from the mother's life since separation is a significant statement of the willingness of the father's family to be a support to the mother and the child.

[55] The mother says that she is able to forgive the father for the things that have happened.

6.3: The Father's Concerns about the Planned Move to England

[56] The father has a very good relationship with Izabella.

[57] The father lives in Pickering with his current girlfriend.

[58] The father described the mother as a fantastic mother and compared her to his own mother. He said that he could tell this by the way that the child reacts and by the love that the child shows. He said that there is no mother better for Izabella than the mother.

[59] The father accepts that the job offer from the spa in the U.K. is a legitimate job offer, but he believes that the terms of the written proposal are exaggerated. The father even called the spa in the U.K. to enquire about benefits packages for its employees.

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[60] The father believes that the mother has almost no friends in Suffolk and certainly has more friends and more support in Toronto than she would have in Suffolk. In Toronto, he considers himself and his family members to be part of her support network. None of the father's family live in Toronto (they live in Peterborough, Havelock, and Ottawa) and the father lives in Pickering.

[61] The father admits that the mother's relationship with the maternal grandmother is close, but he raises concerns about the likelihood of success of their plan to live in the same house. He describes the relationship as volatile and says that they argue and that their arguments are more severe than the mother lets on. He said that he had never seen fights like that before. The father's concern is that the instability in this relationship adversely affects the stability of the plan that the mother is presenting to the court for her move to England.

[62] However, the father described his own relationship with the maternal grandmother as a good one. From the day that he met her, she loved him as a mother. She spoiled him, helped them financially on several occasions (including a contribution to the cost of the wedding) and she coached him on how to deal with the mother.

[63] The father believes that the maternal grandmother is an excellent and suitable caregiver for the child and that she is very generous of spirit to him, to the mother and to Izabella. He said that the maternal grandmother has been supportive of the mother emotionally and financially.

[64] Regarding the mother's claim for spousal support, the father says that he wants the child to live here in Canada and that he wants everyone to be financially stable enough to take care of themselves. If that means that he needs to continue to pay spousal support to make that happen, then he accepts that. If the mother is in need of spousal support, he is prepared to pay child and spousal support. He says that he has no preconceived notions of a termination date for spousal support.

[65] The father believes that it would be impossible for him to continue to grow the relationship that he now has with the child if she is permitted to move to England. He is concerned that he would miss out on her day-to-day life and activities.

[66] The father particularly points to the child's age and the distance of the planned move as negative factors regarding the move. The move is to a place very far away. And the child is at a significant developmental stage. In addition, she cannot yet talk, have telephone conversations or use a computer.

[67] The father is concerned that daily contact with the child through the use of a web-camera is no substitute for physical contact.

[68] The father is also concerned about the cost of travel to England. The father earns $55,000 per year. It is expensive to fly over-seas. And the father has a fixed and limited amount of vacation time at his job and can only take vacation time at certain times of the year (*e.g.*, he currently gets 3 weeks a year vacation, and has to take 2 weeks off in August

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and 1 week in December when the club is closed). However, the father was present for the 11 days of the trial (in March, April, May and June).

[69] The father believes that the consequences of the move for the child outweigh any possible benefits to the child. He believes that the mother can earn just as much money here as in the U.K. and that she has support here in Canada.

[70] The father admitted that he believes that the mother will do everything she can and will follow up on her promise regarding contact between the father and the child if they move to England. The father believes that she will do whatever she can to make sure that the child is in constant contact with him. The father's sister-in-law also believed that the mother would do everything that she could to keep the father in the child's life.

[71] The father said that he trusts the mother. The father said that he knows that, as the child grows up, the mother will only speak positively about him.

7: THE LEGAL FRAMEWORK

[72] The leading case on relocation is the Supreme Court of Canada decision in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 196 N.R. 321, 141 Sask. R. 241, [1996] 5 W.W.R. 457, 114 W.A.C. 241, 134 D.L.R. (4th) 321, 19 R.F.L. (4th) 177, [1996] R.D.F. 209, 1996 CanLII 191, [1996] S.C.J. No. 52, 1996 CarswellSask 199. That case set out principals for courts to consider in deciding relocation cases. *Gordon v. Goertz*, however, has some significant differences to the Ryall case. *Gordon v. Goertz* was a request to change a previous custody order, and the Ryall case is a custody case of first instance. *Gordon v. Goertz* was decided under the federal *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, as amended, and Ryall is decided under provincial legislation, the *Children's Law Reform Act*, R.S.O. 1990, c. C-12, as amended. Although subtle, there are differences in the tests to be applied.

[73] The decision of the majority, by Justice Beverley McLachlin sets out a threshold analysis in examining relocation issues (paragraph [48], emphasis added):

> **[48]** 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.

[74] In the Ryall case, there was no suggestion that the mother had an improper motive of any kind in her desire to move back to England with the child and the father neither proposed this nor argued it.

[75] *Gordon v. Goertz*, *supra*, sets out the principals of the law in paragraph [49]:

> **[49]** The law can be summarized as follows:
>
> 1. The parent applying for a change in the custody or access order must meet

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the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

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

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

    (a) the existing custody arrangement and relationship between the child and the custodial parent;

    (b) the existing access arrangement and the relationship between the child and the access parent;

    (c) the desirability of maximizing contact between the child and both parents;

    (d) the view 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.

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[76] As the Ryall case is not a request for a change in an earlier custody order, only some of the factors enumerated in *Gordon v. Goertz*, *supra*, apply. In the Ryall case, the relevant factors to consider are in subparagraphs [49](5) and (6) and clauses [49](7)(a), (b), (c), (e), and (g).

[77] The most important principal that should be distilled and applied from the test in *Gordon v. Goertz*, *supra*, is the following from subparagraph [49](5) (emphasis added):

> 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.***

and from paragraph [50] (emphasis added):

> **[50]** In the end, the importance of the child's 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?

[78] The legal test in relation to relocation is the best interests of the child, as determined by a contextually full enquiry into the needs, means, condition and other circumstances of the child. See paragraph [16] in *Nadeali v. Zaree*, 2006 CanLII 12316, 147 A.C.W.S. (3d) 826, [2006] W.D.F.L. 3052, [2006] O.J. No. 1543, 2006 CarswellOnt 2489 (Ont. S.C.).

[79] The court must consider and balance all the benefits and detriments of the proposed relocation. What is required is a full and sensitive enquiry into the best interests of the child. See *Gordon v. Goertz*, *supra*, at paragraph [52]; *Young v. Young* (2003), 63 O.R. (3d) 112, 168 O.A.C. 186, 223 D.L.R. (4th) 113, 34 R.F.L. (5th) 214, 2003 CanLII 3320, [2003] O.J. No. 67, 2003 CarswellOnt 63 (Ont. C.A.), at paragraph [17].

[80] While setting out general principles as guidance for courts in *Gordon v. Goertz*, *supra*, Justice McLachlin also stressed that it is the best interests of a ***particular*** child that must be determined. The facts of each case provide the context within which the general principles are to be applied. See *Woodhouse v. Woodhouse* (1996), 29 O.R. (3d) 417, 91 O.A.C. 91, 136 D.L.R. (4th) 577, 20 R.F.L. (4th) 337, 1996 CanLII 902, [1996] O.J. No. 1975, 1996 CarswellOnt 1906 (Ont. C.A.), at paragraph [7].

[81] Since the case of *Gordon v. Goertz*, *supra*, was decided in 1996, there has been a great deal of jurisprudence and academic writing about relocation. The parents' lawyers presented about 20 cases to the court for consideration in their legal arguments. Both lawyers were able to refer to many cases (trial and appeal decisions, in many provinces) that allowed a move or prevented a move. A quick search of a legal research database disclosed over 100 relocation cases decided in Ontario alone in 2008 and 2009 to date. The issue has evolved in many ways.

[82] Courts deal with relocation on a case-by-case basis, applying the principles set out in *Gordon v. Goertz*, *supra*. Professor Rollie Thompson pointed out that "one of the most unfortunate effects of *Gordon v. Goertz* has been its emphasis that there are no presumptions, no subordinate guidelines, nothing but individualized decision-making in mobility cases". See D.A. Rollie Thompson: "Annotation" to *Young v. Young* at (2003), 34 R.F.L. (5th) 214, 2003 CarswellOnt 63.

8: THE ANALYSIS AND THE DECISION

[83] The mother is the child's primary care-giver and has been since birth. The parents had a two-year marriage. The marriage ended because of the father's affair. They separated when the child was 3 months old.

[84] This is not a custody case; it is a case about the father's access, notwithstanding the decision of the parents on day three of the trial to agree to joint custody.

[85] Professor James G. McLeod (in his "Annotation" to *Rushinko v. Rushinko* (2002),

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27 R.F.L. (5th) 173, 2002 CarswellOnt 1997) and Professor Thompson (in his "Annotation" to *Young v. Young*, *supra*) have both noted that courts have been applying the same rules to decide whether to approve a move where the parents shared joint custody as where a sole custodial parent wants to move. Professor McLeod wrote (in the "Annotation" to *Rushinko v. Rushinko*, *supra*):

> **. . .** Although McLachlin J's comments in *Gordon v. Goertz* were given in the context of a proposed move by a mother who had custody by court order and reflect an access parent's limited right to over-ride a custodial parent's child-care decisions, courts have extended the reasoning to cases where a parent has custody by agreement, joint custody parents and to first instance cases.

[86] The parents settled the custody issue in the midst of the trial on the basis of joint custody with primary residence with the mother, irrespective of which jurisdiction in which she lives.

[87] The father argues that he is something more than an access parent, that he is a joint custodial parent and that, as a result, his views are entitled to great weight and are even entitled to equal consideration to those of the mother — as in *Saunders v. Saunders (Bilquist)*, 2005 NSSF 10, 230 N.S.R. (2d) 115, 729 A.P.R. 115, [2005] N.S.J. No. 53, 2005 CarswellNS 58 (N.S.S.C., Fam. Div.), at paragraph [31]. The father says that *Saunders v. Saunders (Bilquist)*, *supra*, means that the more the other parent is involved in the child's life, the more weight his views should be given. The court in *Saunders v. Saunders (Bilquist)*, *supra*, found that the parents were "as nearly as possible equally involved in all aspects of parenting" the 11-year-old child in that case, "including the time they spent with him, decisions regarding his up-bringing, his day-to-day care, his education, his appointments, his recreation and his entertainment". That structure may be the goal of the minutes of settlement signed by the parents in Ryall, but it does not describe the *status quo* regarding Izabella that existed at the start of the trial.

[88] The minutes of settlement specify that the joint custody settlement is "without prejudice to the mother's request to relocate the child's permanent residence to Suffolk, England, an issue which is still before the courts". The father cannot now argue that he is something more than an access parent, that he is a joint custodial parent and that therefore his views are entitled to equal consideration in these circumstances. The father started the trial as an access parent (pursuant to a consent order). The mother would likely not have agreed to a joint custody settlement, in the midst of the trial, if she thought that the father would be able to use the settlement to his advantage in the framework of the relocation arguments. In any event, the settlement for joint custody is clearly marked "without prejudice" on the issue of relocation.

[89] However, even if the father were to be treated by the court as a joint custodial parent and were the court to give his views great weight, it still would not result in a decision to prevent the mother from relocating with the child to the U.K. The benefits of the move to the child outweigh the detriments (as described elsewhere in greater detail).

[90] The issue whether the mother sufficiently looked for work in Toronto is not

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determinative on the relocation decision in this case, since the court accepts that the mother is employable in either Toronto or the U.K.

[91] The court accepts that the mother and the child will have a better life in the U.K. The mother will be financially more secure. She will not be isolated in the U.K. She will have help from her mother financially and for child care, for as long as she needs it.

[92] The court accepts that the mother and the maternal grandmother have a loving and strong relationship. The maternal grandmother has repeatedly made the mother and Izabella a priority in her life (which the father and his family have not done) and she will continue to do so, particularly now, as the mother really needs her help. The mother can save money to buy a house in the U.K. She will not be struggling in the U.K. She is struggling in Toronto and will be struggling as a single mother living alone, even with full-time work at a spa in her areas of expertise and even if she is receiving the table amount of child support and the father's proportionate share contribution to day-care costs.

[93] There is no evidence that the father's family is a support for the mother if she remains in Toronto. None of them live in Toronto. Even the father does not live in Toronto. The father's family have not been a supportive presence in the mother's life in the year since separation, or during the several months over which the trial stretched. In fact, quite the opposite: the starkness of their absence from the mother's life and the child's life, particularly in the face of their closeness as a family, is quite telling.

[94] One of the factors a court should carefully assess before limiting a custodial parent's decision to move with the child is the economic effect of its decision on the child; see *Woodhouse v. Woodhouse*, *supra*, at paragraph [38]. But the fact that the mother's financial life will be better in the U.K. and her life as a single parent will be easier there are not the only reasons that the mother wants to return to the U.K.

[95] There is also a psychological, social and emotional component to her desire to move, in order for her to regain the general stability and control in her life that has been absent since the marriage ended in February 2008. There is a connection between the quality of a parent's emotional, psychological and social and economic well-being and the quality of the child's primary care-giving environment. See *Bjornson v. Creighton* (2002), 62 O.R. (3d) 236, 166 O.A.C. 44, 221 D.L.R. (4th) 489, 31 R.F.L. (5th) 242, 2002 CanLII 45125, [2002] O.J. No. 4364, 2002 CarswellOnt 3866 (Ont. C.A.), at paragraph [30]; *Sheikh v. Sheikh*, 2005 CanLII 14151, 17 R.F.L. (6th) 303, [2005] O.J. No. 1712, [2005] O.T.C. 332, 2005 CarswellOnt 1690 (Ont. S.C.), at paragraph [75]. An improvement in her physical, emotional and financial circumstances can only benefit the child and therefore be in the child's best interests. See *Stromsten v. Stromsten*, 2002 BCSC 1247, 116 A.C.W.S. (3d) 553, [2002] B.C.J. No. 1934, 2002 CarswellBC 1967 (B.C.S.C.); *Greenfield v. Garside*, 2003 CanLII 53668, 39 R.F.L. (5th) 281, [2003] O.J. No. 1344, [2003] O.T.C. 273, 2003 CarswellOnt 1189 (Ont. S.C.), at paragraph [14]; *Nyari v. Velasco*, 2008 ONCJ 272, 170 A.C.W.S. (3d) 242, [2008] O.J. No. 2383, 2008 CarswellOnt 3540 (Ont. C.J.), at paragraph [24].

[96] The father raises the age of the child and the distance of the proposed move as

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impediments to maintaining his relationship with Izabella. However, courts have recognized, in permitting a parent to move away with children, that modern-day technology has made it significantly easier to overcome the distance problem with respect to access and maximizing contact with the other parent. See *Jensen v. Jensen*, 2006 CanLII 28559, 150 A.C.W.S. (3d) 861, [2006] O.J. No. 3357, 2006 CarswellOnt 5093 (Ont. Fam. Ct.), at paragraph [32]; *Brouse v. Lillini*, 2008 CanLII 28217, [2008] O.J. No. 2322, 2008 CarswellOnt 3438 (Ont. Fam. Ct.), at paragraph [58].

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[97] Decisions in relocation cases are a delicate balancing act. The court must consider all the facts and factors involved. The court must weigh the benefits of the move to the mother and the child and compare those benefits to the losses that would result from the move. Careful attention must be paid to the potential negative effects on the child should the custodial parent be restricted from relocating. See *Bjornson v. Creighton*, *supra*, at paragraph [29]; *Bartlett v. Bartlett*, 2004 ONCJ 276, 135 A.C.W.S. (3d) 113, [2004] O.J. No. 4659, 2004 CarswellOnt 4709 (Ont. C.J.), at paragraph [12].

[98] Relocation decisions are not scientific, there is no formula, and there is no precise analysis. These decisions are the exercise of a court's discretion, taking into account the legal framework and all of the circumstances, to determine whether such a move is in the child's best interests.

[99] In some relocation cases, the move proposed is relatively neutral from the child's perspective, aside from reducing contact with the stay-behind parent. See "Annotation" to *Bjornson v. Creighton*, at (2002), 31 R.F.L. (5th) 242, 2002 CarswellOnt 3866, by Professor James G. McLeod. That is not so in this case. This is not a neutral move for this child. On balance, and taking into account all the issues for consideration, including the reduction in contact with her father and her father's family, this move is still a positive event for this child.

[100] This child is 16 months old at trial. She was 3 months old when her parents separated. She is not yet connected to a community, to a school or to a group of friends. See *Gordon v. Goertz*, *supra*, at clause [49](7)(g). It is much easier for this child to make such a move than for an older child, who may be connected to a community, to a group of friends, to a day care, to a school, to an extended family.

[101] No doubt she is developing relationships with her father's family (although there was little evidence about this), but they are new relationships and limited by her age and the infrequency of her contact with them, bearing in mind that none of her father's family lives in Toronto, or in Pickering, where he lives. As well, this child socializes well and transitions well from care-givers.

[102] There is no question that a move to England by the child will dramatically change the kind of contact that the father has with the child. Nothing can replace physical contact. The father's relationship with the child may also change and it will evolve over time. There will be many opportunities for extended time together, particularly as the child gets older and can come for lengthy vacation stays. Technology is constantly evolving and will no doubt

present opportunities for forms of contact not thought of by either parent or the court. There is no doubt that both parents are committed to ensuring the father and the child have as much contact as possible and in as many formats as they can devise.

[103] The mother is committed to the father's and Izabella's maintenance of a good relationship. The mother has always been supportive of the father's role with the child. The mother respects the father and is committed to contact on a daily basis. The mother says that she is able to forgive the father for the things that have happened.

[104] The father believes that the mother will do everything that she can to make sure that the child is in constant contact with him. The father trusts her. The father knows that, as the child grows up, the mother will only speak positively about him.

[105] This level of trust, respect and commitment to the other parent simply does not exist between most separating parents, particularly not during an 11-day trial.

[106] It is in the best interests of Izabella that her mother be permitted to move to England and to take Izabella with her. The mother may move to England with the child immediately.

[107] As the parents have agreed in the minutes of settlement, there will be no child support payable in these circumstances. If the child had stayed in Toronto, the current child support for one child under the *Child Support Guidelines* would be $510 per month ($6,120 per year) based on the father's current income of $55,000 per year. As well, if the child had stayed in Toronto, the father may have been paying spousal support and would be paying his proportionate share of the special expenses related to the need for the child to be in day care. The father shall have this money (the table amount plus the special expenses amount of child support and the amount of spousal support) available for him to use for travel expenses to see Izabella.

[108] The father shall have liberal, frequent, and regular access to the child, consistent with the agreement for joint custody, the age of the child, the means of the parents and the distances between them. The parents can, with the assistance of their experienced family law lawyers, likely work out the details of these arrangements, as they both gave detailed evidence about what this access might look like if the mother was permitted to move to the U.K.

[109] If the parents cannot come to an agreement regarding the details of access, they may ask the scheduling office to set a court date to deal with access on the basis of further submissions to the court.

9: THE ORDERS

[110] The mother may relocate with the child to England immediately.

[111] On consent, there will be no child support payable, starting on the 1st of the month

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following the mother's move to England. Until then, the current child support order continues.

[112] On consent, there is no spousal support payable starting on 1 March 2009.

[113] The father shall have liberal, frequent, and regular access to the child, in England and in Canada, as the parents can agree, consistent with the agreement for joint custody, the age of the child, the means of the parents and the distances between them.

[114] If the parents cannot come to an agreement regarding the details of access, they may ask the scheduling office to set a court date to deal with access on the basis of further submissions to the court.

[115] There will be a consent order in the terms of the minutes of settlement filed on 4 March 2009, paragraphs 1-17, 22, 23, and 24.

10: ACKNOWLEDGEMENTS

[116] This was a long trial under circumstances that were difficult, somewhat unusual, and sometimes challenging. The trial was marked by the high level of professionalism displayed by the lawyers, Mr. Gottlieb and Ms. Sager. Although the case was adversarial and was fought aggressively by both sides, the lawyers were well-prepared, appropriate, sensitive and responsive to their clients' evolving positions and professional throughout. This is the way a trial should be conducted.

11: COSTS

[117] It is unusual for a one-issue trial (relocation) to last 11 days. It is even more unusual in these circumstances, where the parents settled every outstanding issue on day 3 of the trial except the relocation issue.

[118] The mother was successful in her request to relocate with the child to England and she may want to seek costs of the trial. If she does, the scheduling office shall set a date for the parents to argue costs.

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