Date: 20000105
Docket: CA 156722

NOVA SCOTIA COURT OF APPEAL

[Cite as: Burns v. Burns, 2000 NSCA 1]

Glube, C.J.N.S.; Roscoe and Bateman, JJ.A.

BETWEEN:	)	
	)	
HELEN MARIE BURNS	)	Marian F. Mancini
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
HENRY FRANCIS BURNS	)	Alan J. Stanwick
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	November 19, 1999
	)	
	)	
	)	Judgment Delivered:
	)	January 5, 2000

THE COURT: The appeal is allowed without costs as per reasons for judgment of Roscoe, J.A.; Glube, C.J.N.S. and Bateman, J.A., concurring.

ROSCOE, J.A.:

[1] This is an appeal from a decision of Justice F.C. Edwards in which he denied the appellant mother's application for sole custody and permission to move with her two children from New Waterford, Cape Breton to Ottawa.

[2] The parties separated on December 28, 1995. In August, 1996, they consented to a Family Court order which provided that they have joint custody with the mother having day-to-day care of the children, and the father having access for part of every weekend and one weekday in addition to holidays and vacation periods. Mr. Burns assumed responsibility for a $16,000 matrimonial debt with payments of $200.00 per month and agreed to $60.00 monthly as child support. Mrs. Burns issued a petition for divorce in December, 1997, and when the divorce trial was eventually heard in May, 1999, before Justice Edwards, the only outstanding issue was the change in custody and residence as requested by Mrs. Burns.

Background

[3] The parties were both born and raised in New Waterford. Mrs. Burns, after graduating from high school, attended Holland College in Prince Edward Island and obtained a Human Services Diploma. After graduation, she obtained employment in Montreal. Mr. Burns joined her there in 1991 and their first child, Justin, was born in Montreal on April 5, 1992. They were married in July, 1992, and returned to New Waterford

to live with Mrs. Burns' parents in the summer of 1993. Shortly after returning to Cape Breton, Mrs. Burns found part-time employment. Mr. Burns had a couple of short term temporary placements until finding full-time work at Central Supplies, a building supply company, in April, 1994. In July, 1994, their second child, Janelle was born. In January, 1995, they bought the matrimonial home for which they borrowed 100% of the purchase price. After a brief maternity leave, Mrs. Burns went back to work. In addition, she began taking courses at the University College of Cape Breton in September, 1995. Mrs. Burns' mother cared for the children when the parents were working.

[4] In December, 1995, the parties separated. In August, 1996, they entered into a consent order whereby Mr. Burns would pay no child support, but would be responsible for a Credit Union loan in the amount of $16,000 for which Mrs. Burns parents' home had been used as collateral. Mrs. Burns took over responsibility for the other matrimonial debts. A few weeks later Mr. Burns declared bankruptcy. After a further Family Court application, Mr. Burns agreed to continue payments on the Credit Union loan in order to prevent foreclosure against her parents' house, and to pay $60.00 a month child support.

[5] When they first separated, Mrs. Burns left the home with the children and went to live with her parents while Mr. Burns stayed in the matrimonial home. Then in February, 1996, their son was diagnosed with a brain tumor which required surgery and extensive treatment at the children's hospital in Halifax. Justin is well at present but requires annual checkups and close observation to monitor his health. While Justin was in the hospital, the parties agreed that Mrs. Burns should move back into the matrimonial home and Mr. Burns

would move out. Mr. Burns now lives with his parents in their home. Mrs. Burns occupies the matrimonial home and is responsible for the mortgage payments. Although working as many as three part-time jobs at a time, Mrs. Burns has also required social assistance from 1996 until a few months prior to the trial.

[6] Since the separation, Mr. Burns has exercised regular access. At present, he takes the children, (now ages seven and five), with him to his parents' house every weekend from 5:30 p.m. Saturday until 8:00 a.m. Monday. In addition, he exercises access one day through the week on his day off from 5:30 the evening before the day off until 5:00 p.m. of the day off.

[7] Mrs. Burns graduated with a Bachelor of Arts in Community Studies from UCCB in April, 1998. At the time of trial she was working part-time with the Cape Breton Children's Aid Society, but her hours were irregular. As well, she was taking further courses by correspondence through Dalhousie University towards a Bachelor of Social Work degree. Mrs. Burns testified that her career goal is to obtain a Masters Degree in Social Work and work as a counsellor to families with seriously ill children. She has been accepted into a MSW program at Carleton University and hopes to be able to move to Ottawa to complete her education. Carleton has accepted her without the necessity of completing a BSW Degree which means she could complete the Masters Degree two years after starting the course. If she had been permitted to start in September, 1999, she could have finished in May, 2001. If she begins in September, 2000, she could finish the degree in May, 2002.

[8] An alternative program of study may be available through Dalhousie University in Halifax. However, in order to be accepted into the MSW program at Dalhousie University, Mrs. Burns would have to first complete the BSW Degree, through the distance education program. This would require either two years of full-time study or four years of part-time study. She would then need to work full-time as a social worker for another two years before commencing the Masters Degree. Finally, there would be a further two years for the courses towards the MSW in Halifax. Assuming all the courses were offered by correspondence as required, she could complete the degree in 2006 or 2008, five to seven years longer than the Carleton alternative. There is no assurance that the preparatory courses will continue to be available through distance education and the cost of each course is substantial.

[9] Mrs. Burns indicated that if she were permitted to move to Ottawa with the children, her mother would go with them and provide after school and evening child care when Mrs. Burns was attending classes or working. Her mother confirmed this agreement in her testimony. As well, her new partner, Gilbert Varrance, who, at the time of trial was receiving a training allowance while taking a computer programming diploma, would move to Ottawa with her and continue to make a financial contribution to the household. Based on her high academic standing to date, Mrs. Burns was optimistic that she would receive either a scholarship or a teaching assistant's position or both from Carleton. As well she would contribute to the support of herself and the children with a student loan and bursary.

[10] Mrs. Burns testified that she would not go to Ottawa without the children. If the court

did not permit her to leave she would stay in New Waterford. She did not want to keep taking courses part time and working part time because it was very expensive and was taking so long. If the court denied her application to re-locate to Ottawa she indicated she would look into the possibility of moving to Halifax to work towards her courses at Dalhousie.

[11] With respect to Mr. Burns' access to the children if the move were permitted, Mrs. Burns testified that she wanted:

> . . . to keep my children's relationship with their father as close as possible and what I am thinking, our ties are still here in Cape Breton, we still have very close ties here, so we would be coming home as much as possible but in order to make sure that definite plans are made I was thinking that Francis could see the kids for at least one month of the summer and I was thinking we may come home for Christmas if finances allow it, but hopefully for the second week at Christmas that we would be home, or Francis could come up, either one. Um, and for March break we were looking at either Francis coming up to Ottawa or me coming back with the children to Cape Breton. Those things for sure, but I would also encourage them to have telephone conversations, I indicated biweekly but of course Francis would be welcomed to call whenever and he would have unlimited access in terms of letters, e-mail and anything else that is possible.

[12] Mrs. Burns was of the opinion that although it would be difficult for the children not to see their father every week, the children are young and they would adjust quickly to the new arrangement. She indicated that the main benefit of the proposed move would be enhanced financial security in the future for herself and for the children.

[13] In his evidence, Mr. Burns indicated that he was opposed to the move because it would be disruptive to the children and himself. He said he would not be able to afford to go to Ottawa to exercise access. His preference was for Mrs. Burns to stay in New

Waterford.

The Reasons for Judgment

[14] In his oral decision given immediately after the conclusion of the hearing, the trial judge concluded that "... it would not be in the best interests of the children to permit Ms. Burns to remove them to Ottawa in order to pursue a Masters Degree at Carleton University." He indicated that Mrs. Burns was to be commended for trying to improve her education, and he was satisfied that she was acting reasonably, however, his primary concern had to be what was best for the children. After reference to the list of factors required to be considered in determining the best interests of the children, as set out by the Supreme Court of Canada, in **Gordon v. Goertz**, [1996] 2 S.C.R. 27, (at para. 49), the trial judge described the children and their relationship with Mr. Burns as follows:

> . . . Undoubtedly these children have a warm and loving relationship with both their parents. They have a father who is very devoted to them. The evidence is uncontradicted and quite appropriately and fairly acknowledged by Ms. Burns that there is no criticism of his parenting. There were a couple of references to minor manners [sic - matters] but overall I take it, it is a given that Mr. Burns exercises his access in an exemplary fashion. That is corroborated by other members of his family. I recognize that they can be expected to favour their brother's position but even when I consider that I find that their evidence rings true, that he is an excellent father to these children. He is involved in their recreational pursuits. In fact, he is Justin's hockey coach. He has the support of a very close-knit family. His parents, with whom he resides, and his sisters, three of whom reside in the immediate vicinity in New Waterford. The children look forward to their access visits with the father at their grandparents'. In short, he is very much a part of the children's weekly routine. The children by all accounts are very well adjusted and children of whom both parents can be rightfully proud.

[15] The trial judge considered the financial considerations in the following passages:

> Mr. Burns is employed full time in this area at Central Supplies. His annual salary is approximately $19,000 . . . It is not a high salary to be sure and given the employment situation in this part of the country, it is not likely that Mr. Burns will be able to substantially improve upon that. Financial security is just one factor, albeit an important one, which has to be considered.
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> . . .
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> The possible long-term benefits of their mother's enhanced education and employability are achievable here without fracturing the father/child relationship. Mr. Burns does not have the financial means to exercise access in Ontario . . .
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> . . . Their standard of living may be marginal in a financial sense but they are more fortunate than many children in more affluent surroundings . . .

[16] In respect to the reasons for the proposed move, the trial judge commented:

> It may be debatable whether the faster route via Carleton would dramatically advance her employment prospects. Employers typically look at work related experience as well as paper qualification. The UCCB and Dalhousie program offers a balance of each. In either event, although undeniably the UCCB/Dalhousie program will take longer, the bottom line is that Ottawa is not her only option and the UCCB/Dalhousie option is comparable in many respects.
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> . . .
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> . . . In two to three years, Ms. Burns will have to attend Dalhousie in Halifax to complete her Masters. The distance involved will be significantly less than that involved with the proposed move to Ottawa. The children will also be older and better able to cope with the change that that might entail. Their mother will only be a five hour drive away during the university year which is normally September to April. She will have the option to visit them on weekends or perhaps have them visit her for reasonable periods of time. However, we are looking at least two years down the road and I will not close the door on Ms. Burns to revisiting the removal issue at that time, although I suspect that she will have the burden of persuasion. I may not be the judge then and in fact, it is probably better if I am not.

[17] And finally the following excerpts include the trial judge's conclusions drawn from the evidence and the application of the law:

> In analyzing the evidence, whether I ask the question; has Mr. Burns proven that the move will not benefit the children or, if I ask, has Ms. Burns proven the move will benefit the

> children, I come up with the same answer. The move would be an extremely traumatic experience for both these children. They would be deprived of the contact and loving attention of their father with whom they have had regular and significant contact. It would also involve separation from the extended paternal family and their friends. It has been suggested, and I accept, that these children are well adjusted and would, like other children, be able to adapt. However, I am very concerned about the impact that such a sudden separation would have upon them.
>
> . . . The children would only see [Mr. Burn's] for a few weeks in the summer and possibly at Christmas. The risk of negative consequences for the children are high and probably incalculable, that is, the risk involved with the move. It is a risk which in my opinion need not be taken.
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> (emphasis added)

Grounds of Appeal

(1) By failing to consider the evidence of the economic circumstances of the petitioner, the primary caregiver, the learned trial judge failed to properly assess the best interests of the children;

(2) The court failed to give sufficient weight to the views of the mother as primary care giver.

(3) The court took into account an irrelevant factor when he determined that the planned move for the children would be traumatic.

(4) The learned trial judge erred in overemphasizing the reduction in access, and in determining the father financially unable to travel to Ottawa.

Standard of Review

[18] Appellate review of a decision involving the best interests of children does not

consist of a retrial. This Court has stated on many occasions that the question of custody is a matter which lies within the realm of the discretion of the trial judge who has the opportunity of seeing and hearing the parties, and his or her decision should not be disturbed unless he or she has clearly acted on some wrong principle or disregarded the evidence. See for example **Routledge v. Routledge** (1987), 75 N.S.R. (2d) 103 and **Gorham v. Gorham** (1994), 131 N.S.R. (2d) 7. The following statements of Justice Moldaver of the Ontario Court of Appeal in **Ligate v. Richardson**, [1997] O.J. No. 2519; 34 O.R. (3d) 423, are also instructive in considering the role of this Court in this type of case:

> Decisions relating to custody and access call for the exercise of discretion by the trial judge but the discretion is not an unfettered one. It must be exercised in accordance with recognized legal principles designed to ensure, as much as possible, that the result achieved accords with the best interests of the child.
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> Appellate courts may interfere with a trial judge's discretion if the court is satisfied, inter alia, that the trial judge committed an "error in principle" in arriving at the decision. In **R. v. Rezaie** (1996), 31 O.R. (3d) 713, 112 C.C.C. (3d) 97 (C.A.), Laskin J.A. considered the term "error in principle" and he outlined the various factors encompassed by it. At p. 719, he wrote:
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> > Error in principle is a familiar basis for reviewing the exercise of judicial discretion. It connotes, at least, failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, overemphasizing relevant factors and, more generally, it includes an error of law: see **Fox v. Ontario Legal Aid Plan** (1977), 14 O.R. (2d) 668 (H.C.J.); **Friends of the Oldman River Society v. Canada (Minister of Transport)**, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1; **Reza v. Canada,** [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61.
>
> Once error in principle has been shown to exist, the trial judge's decision is no longer entitled to deference. An appellate court is free to take a fresh look at the matter and is entitled to exercise an original discretion of its own, applying correct legal principles: see **Metropolitan Stores (MTS) Ltd. v. Manitoba (Attorney General)**, [1987] 1 S.C.R. 110 at pp. 154-55, 38 D.L.R. (4th) 321; and **Friends of Oldman River Society v. Canada (Minister of Transport**), [1992] 1 S.C.R. 3 at pp. 76-77, 88 D.L.R. (4th) 1.

Legal Principles

[19] There have been several recent cases where courts have grappled with the difficult issues presented when one parent seeks to move away and change the location of the children's principal residence. The Supreme Court of Canada dealt with this issue for the first time in **Gordon v. Goertz**, **supra**, where the court upheld a decision allowing a mother to move from Saskatoon to Australia with the parties' seven year old daughter. The majority of the court rejected the use of any presumption in favour of the custodial parent. McLachlin J., for the majority, provides the following synopsis of the law in relocation cases beginning at para. 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.
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> 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.
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> 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.
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> 7. More particularly the judge should consider, inter alia:

> (a) the existing custody arrangement and relationship between the child and the custodial parent;
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> (b) the existing access arrangement and the relationship between the child and the access parent;
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> (c) the desirability of maximizing contact between the child and both parents;
>
> (d) the views of the child;
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> (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;
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> (f) disruption to the child of a change in custody;
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> (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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> 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?

[20] Of appellate court decisions since **Gordon v. Goertz,** two are particularly helpful: **Woodhouse v. Woodhouse** (1996), 29 O.R. (3d) 417 and **Ligate v. Richardson**, **supra**, both decisions of the Ontario Court of Appeal.

[21] In **Ligate v. Richardson,** the mother, who was the primary caregiver of the seven year old daughter, wished to move her residence with her new partner from Toronto to Cambridge, 100 kilometers away from the father's residence. The separation agreement provided that the child's residence would not be moved outside of Toronto without the consent of the father. The child visited with her father every second weekend and once overnight each midweek. The trial judge, writing prior to the Supreme Court of Canada's **Gordon** decision, denied permission to relocate while focusing on the child's close

relationship with her father and the fact that the mother demonstrated no compelling reason for the move. The majority allowed the mother's appeal and concluded:

> The trial judge committed three serious errors in principle in concluding that it would be contrary to Ashley's best interests to change the existing terms of access and permit the proposed move by Ligate to Cambridge. To summarize, the trial judge improperly took into account and placed great weight on the lack of a compelling reason for the move; placed undue emphasis on the residence clause in the separation agreement and misapprehended its purpose and effect; and failed to give adequate weight to the views of Ligate. These errors were significant and they resulted in the trial judge adopting an approach to her assessment of Ashley's best interests that was fundamentally flawed.

[22] Although the majority did not completely accept the logic of the expert opinion offered at trial on behalf of the father, for the purposes of this case, it is worth noting that the expert testified that if there are financial or family reasons for the move, then the move is more likely in the best interests of the child, but a move merely for the sake of a move is not. Evidence of this nature must be carefully considered, given the admonishment in **Gordon** that the reason for the move is not relevant except to the extent that it is relevant to the parent's ability to meet the needs of the child.

[23] Of most relevance to this case is Justice Moldaver's assessment of the trial judge's approach to the views of the mother, as the custodial parent, which according to **Gordon v. Goertz**, "... are entitled to great respect and the most serious consideration...", at p. 14:

> Having carefully reviewed the reasons for judgment, I am unable to find any specific reference to this important principle. That of course would not be fatal if I were otherwise satisfied that the trial judge gave effect to it. With respect, when the reasons for judgment are considered as a whole, it is apparent that the trial judge gave very little, if any weight to the views of Ligate. Rather, she focused almost exclusively on the views of Richardson in assessing whether the proposed move would be in Ashley's best interests.

> In coming to this conclusion, I do not for a moment suggest that the trial judge was unaware of Ligate's views. As Blair J. points out, the trial judge recited Ligate's evidence at length. Unlike my colleague, however, I am not prepared to assume that because the trial judge recited Ligate's evidence, it follows that she necessarily treated Ligate's views with the great respect and most serious consideration they deserved. To the contrary, in my opinion, once the trial judge determined that there was no compelling reason for the move, Ligate's views were essentially ignored.
>
> Ligate's request to move to Cambridge did not follow immediately upon the heels of her separation from Richardson. Rather, it came after the couple had separated for several years. In the interim, Ligate formed a new and promising relationship with Hume and they decided to purchase a home in Cambridge, a distance of approximately 100 kilometres from Toronto. Unquestionably, Hume and Ligate considered the move to Cambridge to be advantageous in terms of their own personal and professional needs. Likewise, Ligate believed that the move would be advantageous to Ashley and would provide her with a host of benefits and amenities that Toronto could not provide.
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> Ligate's views were entitled to great respect and the most serious consideration. The trial judge erred in failing to give them the weight they deserved.

[24] In **Woodhouse**, **supra**, the trial judge denied an application by the mother of boys aged five and seven to move with them from Hamilton to Scotland with her new husband. Although the mother retained custody, their residence was restricted to southern Ontario. The trial decision was upheld on appeal, where Justice Weiler for the majority (3-1), combined the seven factors to be considered in determining the best interests of the children, as established in **Gordon**, into two groups:

> 1. The existing custody arrangement, the existence of a new family unit, the position of the custodial parent, and the ability of the custodial parent to meet the needs of the child.
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> . . .
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> 2. The proposed relocation and the effect of this disruption on the children, the relationship between the children and each of their parents, the views of the children, and the desirability of maximizing contact between the child and both parents.

[25] In effect, the court weighed those factors which favored the move against the drawbacks of the move. According to Weiler, J.A., one of the matters to be weighed within

the first set of factors is the economic effect of the decision on the children. The court carefully compared the financial situation of the mother and children if they remained in Ontario, with what it would be if they went to Scotland. The appellant mother was submitting that they would benefit by moving where her husband would be able to work as a carpenter. However, the Court concluded that given that the mother had extensive experience as a dance studio owner and teacher and had recently been offered employment in Ontario, combined with a probable reduction in child support from the father if he was required to exercise access in Scotland, the two financial scenarios were equivalent.

[26] Within the second set of factors, the court considered the fact that the mother had disregarded orders requiring her to return the children to Ontario from Scotland, after she had remained there two weeks longer than permitted by the terms of an earlier agreement. This “foolish act” led the court to seriously question whether the mother would comply with any Ontario court order respecting access, if she were permitted to move.

Analysis

[27] Before addressing each of the specific grounds of appeal there is a preliminary matter that should be addressed.

[28] The appellant mother refers to herself as the “primary care giver”, and therefore says that she should be considered to be the custodial parent whose views are entitled to “great

respect" as formulated in the fourth point in the summary of the law as set out in **Gordon v. Goertz**, **supra**. The respondent father vehemently opposes any such designation, arguing that the parents shared custody and therefore his views are entitled to equal consideration. In fact, that is apparently the entirety of the respondent's position.

[29] It is clear that the children sleep three nights a week at their father's and four at their mother's. However, the actual period of time spent with the children is not the only determinant. More importantly, in my opinion, is which parent has taken primary responsibility for all the important decisions concerning the health, safety, education, and overall welfare of the children, since the parties separated four years ago. Mrs. Burns has been the one responsible for the medical follow-up required for Justin and she makes the annual trip to Halifax with him for that purpose, where numerous medical and educational specialists are seen over several days. She has acquired the information about what symptoms to lookout for in the future, about what to tell his teachers concerning the effect of his illness on his learning abilities, and has made arrangements for several required appointments with an eye specialist. Although Mr. Burns is provided with all of this information by Mrs. Burns, he has not been primarily responsible for it.

[30] In addition to the major matters, the primary caregiver is the parent who deals with the countless less significant, but nonetheless obligatory, daily arrangements for the children's clothing, haircuts, hygiene, extracurricular activities and everyday mundane affairs. Who would buy a present for them to take to a school friend's birthday party? Who

makes the appointments and takes them to the dentist? Which parent is keeping the record of their vaccinations, and fills their prescriptions? Who goes to the parent-teacher interviews? Who chose the pre-school? Both parents testified that they attend the parent-teacher interviews and apparently they each attend the children's extracurricular activities. As well, Mr. Burns was Justin's hockey coach.

[31] Although most of the other specific points were not addressed in the evidence, there were a few issues canvassed which, in my view, are relevant to this determination. They are the few concerns expressed by Mrs. Burns pointing to episodes of carelessness or lack of understanding by Mr. Burns, and which the trial judge called "minor matters". These include: not taking them to church when he had previously agreed to do so, not consistently following instructions for treatment of their skin conditions, not taking the children to the hospital or a doctor, or immediately advising Mrs. Burns, after having been in a car accident, in which Janelle suffered a bump on her head and cut near her eye as a result of hitting her head on the dashboard, and not taking Janelle to pre-school because she did not want to go.

[32] It is clear from Mrs. Burns' evidence that she has a keen perception of the emotional needs of the children. Her description of their personalities and distinct needs is particularly revealing: "[Janelle] is very sensitive for her age. She is very..eh, she is very bright, she sees a lot of things that four year olds don't see. She sees very abstract things for a four year old and she just needs lots of love and attention like most four year olds." As well, it was her recognition that Justin's personality had dramatically changed that led to the

discovery of his brain tumor, after earlier tests failed to reveal the problem.

[33] My assessment of the evidence is that Mrs. Burns has been the primary caregiver and she is therefore the custodial parent whose views are entitled to great respect. She has been an exemplary parent and has assumed substantial responsibility for the care and general welfare of the children, and I believe has significant insight into their emotional, physical and psychological needs.

Ground One - Economic circumstances

[34] The appellant submits that the trial judge failed to properly consider the economic impact on the children if the move was not permitted and thus committed an error in principle. In particular, it is submitted that the trial judge failed to give any weight to the following relevant factors: the fact that the appellant has been not only the primary caregiver but also primary financial provider for the children; that, given the children's ages, five and seven, there are many years of financial responsibility ahead for the appellant; that there is no realistic prospect that the financial burden will ever be shared by the respondent; the stress on the appellant of trying to achieve financial security in Cape Breton and the economic necessity of her plan; and her uncertain financial future without further education.

[35] As noted in **Woodhouse**, **supra**, economic factors are certainly relevant in this type

of case. The impact of the move on the mother's ability to meet the basic needs of the children is undeniable. Here, a comparison of the two scenarios leads inescapably to the conclusion that for the mother to complete her education at Carleton where it could be accomplished in two years, is economically more advantageous than doing it in seven to nine years, or possibly longer if the courses were not available due to insufficient registrants, through Dalhousie. An additional relevant point, as explained by Mrs. Burns, is that student loans, bursaries and scholarships are not available to part-time students. Without such assistance, her ability to obtain the degree, even in eight or nine years, is tenuous. It can be reasonably inferred that employment as a MSW will be more easily attained, and that it more likely will be full-time and higher paying than what is presently available to Mrs. Burns. The effect on the children of an additional five to seven years of poverty or bare subsistence seems to have been either ignored or minimized by the trial judge. The trial judge seemed to assume that the mother's present income level would continue indefinitely, but her uncontradicted evidence was that her current employment was only temporary and that she really had no guarantee that it would continue. Having only just a few months previous to the trial achieved a sufficient level of income to be no longer entitled to welfare, we can expect that she and the children will be back on social assistance as soon as the hours of her present employment are significantly reduced.

[36] There is no real issue here that Mrs. Burns has been the primary breadwinner, given that Mr. Burn's contribution to the children is only $60.00 per month, plus whatever he spends on their behalf when he exercises access. Her determination to improve her situation, and consequently that of her children, is not only commendable, as noted by the

trial judge, it is in my view, reflective of her understanding of the needs of the children. By diminishing the importance of her attempt to achieve a level of income security, the trial judge disregarded the opinion of the economic realities in Cape Breton which he expressed in **Wall v. Wall** (1997), 163 N.S.R. (2d) 81, commencing at para. 28:

> [28] The alternative is for Ms. Wall to remain here living with her parents. Here she has very dismal prospects of employment. The official unemployment rate in this area is approximately 30 percent. Ms. Wall has been getting part-time work in the militia since 1990. Without the support of her parents, she would have to resort to Social Assistance. Her parents are of modest means so, despite their best interest, the support they can provide is limited. Remaining here would be a depressing prospect for Ms. Wall. The move will enable her to improve her life and prospects from both the material and psychological standpoints.
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> [29] The above reasoning accords with that in the June 1996 unreported decision of the Manitoba Court of Appeal in **Woods v. Woods** (1996), 110 Man.R.(2d) 290; 118 W.A.C. 290 (C.A.). There the court was dealing with the wish of a custodial father to move for employment reasons to the Province of British Columbia. After reviewing the law in **Gordon v. Goertz** (supra), the court allowed the father to move. At paragraph 15 of the decision, the court stated as follows:
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> > "So long as some form of access for the boys to see their mother regularly can be worked out, I see the choice as Hobson's. <u>The balance comes down so strongly in favour of allowing the father to make the move that will enable him to improve his sons' circumstances that there really is no choice: the status quo is a palpably wrong alternative</u>."
> >
> > (Emphasis added by Edwards, J.)
>
> [30] The best interests of the child are intertwined with the best interests of his mother. Just as his mother's economic and emotional prospects are enhanced by the proposed move, so will those of the child. The positive effect on the child of being with a happy custodial parent cannot be overemphasized.

[37] By contrast, in this case, the trial judge found that the mother's enhanced education and employability was achievable in Cape Breton. That conclusion, in my respectful opinion, clearly disregarded the economic significance of the additional five to seven years

required if the mother stayed in New Waterford, and the uncertainty of the availability of the courses required, which was an extremely relevant factor.

Ground Two - The views of the mother

[38] As the second ground of appeal, it is submitted that the trial judge erred by failing to accord the views of the mother "great respect and the most serious consideration" as stipulated by **Gordon v. Goertz**. Furthermore, the trial judge neglected to heed the Supreme Court's direction that the custodial parent's decision to live and work where she chooses is likewise entitled to respect (see para. 48).

[39] There is no specific reference by the trial judge to the respect deserved by the mother's views. Although, on the one hand, he indicated that she was acting "reasonably" and not attempting merely to frustrate the father's access, on the other hand, he "debates" whether attending Carleton is any better than the Dalhousie alternative, and then presumes to predetermine the issue if she should later decide to move to Halifax. That does not give the appearance of having any appreciation for or respect of her opinion. In this case, the mother's reason for moving is directly related to the best interests of the children. There is no attempt to frustrate access. Her educational pursuits are key to her ability to meet the needs of the children, as already discussed above. The following passage from **Ligate v. Richardson**, **supra**, in which Moldaver, J. considers the necessity for respect for the custodial parent's views is, in the circumstances, equally applicable to this case:

> Having carefully reviewed the reasons for judgment, I am unable to find any specific reference to this important principle. That of course would not be fatal if I were otherwise satisfied that the trial judge gave effect to it. With respect, when the reasons for judgment are considered as a whole, it is apparent that the trial judge gave very little, if any weight to the views of Ligate. Rather, she focused almost exclusively on the views of Richardson in assessing whether the proposed move would be in Ashley's best interests.
>
> In coming to this conclusion, I do not for a moment suggest that the trial judge was unaware of Ligate's views. As Blair J. points out, the trial judge recited Ligate's evidence at length. Unlike my colleague, however, I am not prepared to assume that because the trial judge recited Ligate's evidence, it follows that she necessarily treated Ligate's views with the great respect and most serious consideration they deserved. **To the contrary, in my opinion, once the trial judge determined that there was no compelling reason for the move, Ligate's views were essentially ignored.**
>
> (emphasis added)

Ground Three - Traumatic effect of the move

[40] The appellant contends that the trial judge engaged in speculation and made findings in the absence of evidence in concluding that the move would be “extremely traumatic”, that the “risk of negative consequences are high”, and that there would be an adverse impact as a result of a “sudden separation” from their father.

[41] I agree with the appellant that these conclusions are significant overstatements that lack any support in the evidence. There was absolutely no evidence, expert or otherwise, that the move would be extremely traumatic or that the risks of negative consequences were high. Every move of children away from one parent involves some disruption and change, however, moves are clearly endorsed by the courts in many cases: for example to Australia in the **Gordon v. Goertz** case. There is nothing unusual about these children or their relationship with their father and their extended family that would indicate that they

would suffer any specific trauma by moving away with their mother. As for the characterization of the move as “sudden”, the move was planned for four months after the hearing. Mrs. Burns testified that she understood that it would be a difficult adjustment for the children, but she would do everything possible to prepare them and that since they were very young, they would easily adjust. The fact that their maternal grandmother, who was also their babysitter, would be moving with them to Ottawa would certainly help alleviate any upset. The evidence certainly supported a finding that the children had adjusted well as a result of the changes brought about by their parents’ separation and Justin’s illness. As noted by Justice McLachlin, in **Gordon v. Goertz**, the “reduction in beneficial contact between a child and the access parent does not always dictate ... an order which restricts moving the child”.

Ground Four - Overemphasizing reduction in access

[42] The appellant submits that the trial judge erred in principle by concentrating almost exclusively on the fact that the proposed move would result in reduced access by Mr. Burns and by failing to consider the mother’s plan for access. Also, it is argued that the trial judge erred in concluding that Mr. Burns did not have the financial means to exercise access in Ontario.

[43] While maximization of contact with both parents is one of the guiding principles in determining what is the best interests of the children, it obviously has to be balanced with

the other factors. Here, the mother presented a plan for access that would have the children with the father in Cape Breton for a month in the summer, a week at Christmas, and a week at March break. In addition, she indicated that regular telephone contact would be encouraged and that whenever Mr. Burns was able to visit Ottawa, additional access would be available. Given that in the past Mrs. Burns has supported and co-operated with frequent access to the father, it can reasonably be expected that she would continue to do so.

[44] Although the trial judge found that Mr. Burns could not afford to go to Ottawa, his financial statement and evidence respecting his actual expenses were apparently not carefully evaluated. While the statement showed a monthly deficit of $800.00, it listed amounts of $600.00 for rent and food that Mr. Burns testified he did not actually pay to his parents. As well, a total of $250.00 per month was shown for entertainment, tobacco, alcohol, holidays, Christmas, events and gifts. Even if only $60.00 a month could be saved by Mr. Burns, that would likely give him enough to make at least one yearly trip to Ottawa in his relatively new automobile. Additionally, Mr. Burns, given his limited prospects, might choose to move to Ontario to be near the children.

[45] Although Osborne, J.A. was in dissent in **Woodhouse**, **supra**, I think his comments concerning the balancing required in these cases to be particularly applicable to the trial decision in this case:

> Just as according a presumptive deference to the custodial parent's decision to move may

> be said to tilt the inquiry too much in favour of the custodial parent, similarly asking the singular question whether it is in the children's best interests that access be decreased tilts the inquiry too much in favour of the non-custodial parent. Framing the inquiry in that way tends to limit the required balancing of relevant factors. The better approach is to determine whether there is a valid reason to decrease access when all of the relevant factors (including the custodial parent's decision to move, which is entitled to "great respect") are taken into account. That is to say that both the benefits and detriments of the proposed move must be considered and balanced. **That consideration and balancing was not undertaken in this case. The trial judge unduly emphasized one detriment of the proposed move -- reduced access -- and did not give sufficient consideration to the benefits of the proposed move.**
>
> (emphasis added)

Conclusion

[46] The trial judge committed errors in principle by failing to consider the economic impact on the children of the proposed move, by failing to give adequate weight and respect to the views of Mrs. Burns, by making findings in the absence of evidence in respect to the probable traumatic effect of a move, and by placing undue emphasis on the reduction in access.

[47] As noted above, once error in principle is established, this Court is entitled to “take a fresh look” and exercise an original discretion applying proper legal principles. In my view, keeping in mind that the overriding issue is what is in the best interests of the children, and that the Court must balance all the relevant factors, including the wishes of the custodial parent and the benefits of maximum contact with the access parent, the move by the mother to Ottawa with the children should be permitted.

[48] Mrs. Burns’ plan to further her education by attending Carleton will likely be a benefit

to the children. It is best for the children to continue to be with her, their primary caregiver. The disruptive effects of moving and the reduction in frequency of access will be offset by the long-range benefits of increased stability and security.

[49] I would allow the appeal, set aside the order restricting the residence of the children, and grant the application of Mrs. Burns for sole custody of the children, with a direction that she be permitted to move with them to Ottawa in August, 2000. I would hope that the parties will be able to agree on the specific terms of the access order, which would include, at a minimum, access to be exercised in Cape Breton for one month in the summer, one week during the school break at Christmas and one week at March break. The access pending the move will continue as previously agreed. If the parties cannot agree to the specifics of the order, either party may apply to the Supreme Court (Family Division) to resolve the matter before Mrs. Burns moves to Ottawa.

[50] The appellant indicated that if successful she was not seeking an order for costs. Accordingly, the appeal is allowed without costs.

Roscoe, J.A.

Concurred in:

Glube, C.J.N.S.

Bateman, J.A.