2010 CarswellAlta 831, 2010 ABQB 285

S. (C.) v. L. (E.)

C.S. (Applicant) and E.L. (Defendant)

Alberta Court of Queen's Bench

W.P. Sullivan J.

Heard: February 11, 2010
Judgment: April 27, 2010
Docket: Calgary FL01-06451

Counsel: Nancy E. **Koul** for Applicant

Nigel S. Montoute for Respondent

Subject: Family

Family law.

Cases considered by *W.P. Sullivan J.*:

D. (E.R.) v. M. (T.A.) (2006), 2006 CarswellAlta 1815, 2006 ABQB 921 (Alta. Q.B.) — considered

Gordon v. Goertz (1996), 1996 CarswellSask 199, [1996] 5 W.W.R. 457, 19 R.F.L. (4th) 177, 196 N.R. 321, 134 D.L.R. (4th) 321, 141 Sask. R. 241, 114 W.A.C. 241, [1996] 2 S.C.R. 27, *(*sub nom. *Goertz c. Gordon)* [1996] R.D.F. 209, 1996 CarswellSask 199F (S.C.C.) — followed

Heikel v. Heikel (2007), 2007 ABQB 378, 2007 CarswellAlta 1472, 44 R.F.L. (6th) 102 (Alta. Q.B.) — considered

L. (R.) v. P. (M.) (2008), 2008 CarswellAlta 220, 2008 ABQB 49 (Alta. Q.B.) — considered

L. (R.) v. P. (M.) (2008), 2008 CarswellAlta 1242, 2008 ABCA 313, 56 R.F.L. (6th) 242, 437 A.R. 330, 433 W.A.C. 330 (Alta. C.A.) — considered

M. (M.N.) v. M. (J.E.) (2009), 2009 ABQB 607, 2009 CarswellAlta 1776 (Alta. Q.B.) — considered

MacPhail v. Karasek (2006), 65 Alta. L.R. (4th) 205, 30 R.F.L. (6th) 324, 409 A.R. 170, 273 D.L.R. (4th) 151, 2006 CarswellAlta 1035, 2006 ABCA 238, 402 W.A.C. 170 (Alta. C.A.) — considered

N. (P.) v. B. (L.) (2010), 2010 CarswellAlta 100, 2010 ABQB 33 (Alta. Q.B.) — considered

R. (C.C.) v. V. (M.A.) (2010), 2010 CarswellAlta 718, 2010 ABQB 237 (Alta. Q.B.) — considered

S. (D.B.) v. G. (S.R.) (2006), 61 Alta. L.R. (4th) 1, 31 R.F.L. (6th) 1, 391 A.R. 297, 377 W.A.C. 297, 2006 SCC 37, 2006 CarswellAlta 976, 2006 CarswellAlta 977, 351 N.R. 201, [2006] 10 W.W.R. 379, 270 D.L.R. (4th) 297, [2006] 2 S.C.R. 231 (S.C.C.) — followed

T. (P.O.) v. M. (B.E.) (2010), 2010 ABCA 22, 2010 CarswellAlta 107 (Alta. C.A.) — considered

Statutes considered:

Family Law Act, S.A. 2003, c. F-4.5

Generally — referred to

s. 1(m) "person standing in the place of a parent" — considered

s. 47 "parent" — considered

s. 48 — considered

s. 48(2) — considered

s. 49(1) — considered

Regulations considered:

Family Law Act, S.A. 2003, c. F-4.5

Alberta Child Support Guidelines, Alta. Reg. 147/2005

Generally — referred to

***W.P. Sullivan J.*:**

Introduction

1 The parties to this dispute, C.S. ("Ms.") and E.L.("Mr.") were living together in Saskatoon, when T.S. was born on December, 28th 1996. Mr. was not the biological father of T.S.; however, the parties continued their relationship for about a year and a half following T.S.'s birth. Following separation Ms. moved to Calgary. Mr. then visited Ms. and T.S. and on this visit the parties conceived J.S. born the 22nd day of September, 1999. Despite sharing a child the parties never resumed their relationship.

2 In 2001 Mr. relocated to the Calgary area. Since this time he has been involved in both children's lives. He has always paid child support for J.S., although not always at the amount prescribed by the *Alberta Child Support Guidelines*, and he has been paying child support for T.S. since January 2008.

3 The original claim in this matter was filed on August 19th, 2008 under the *Family Law Act*, by Ms. The

only claim made at that time was with respect to child support for both T.S. and J.S. Mr. filed a Response to this claim on June 22nd, 2009. He disagreed with the Order, asked for by the Applicant with respect to retro-active child support and, in addition, asked the Court to grant Orders in respect to guardianship of the children, parenting of the children, and mobility of the children.

4 On July 2nd, 2009 an Interim Consent Order was filed by the parties. Madam Justice Rawlins ordered, pursuant to Mr.'s application, after being advised that there was one child of the relationship between the parties that being J.S. and that Mr. stands in place of parent to the older child of Ms., T.S., that both children remain in Calgary until further order of the Court and that counsel be appointed for the children.

Background

5 Briefly the history of the parties is this. Mr. and Ms. never married. They resided together for approximately seven years, mostly in Saskatoon, and during this time T.S. was born. However, T.S. was not Mr.'s biological child. Despite this fact the parties continued to reside together for a year and a half after T.S.'s birth.

6 During the year and a half period following T.S.'s birth Mr. had little do with T.S. In fact he did not provide any financial support for T.S. and was marginally involved in her care.

7 In December 1998, T.S. and Ms. moved to Calgary, Alberta. Later that month Mr. attended T.S.'s birthday party in Calgary, and during this visit the parties conceived J.S.

8 T.S. and J.S. have been in the primary care of their mother, Ms. since their respective births. She has always made the custodial decisions regarding the children, although Mr. asserts that he has been kept informed of such decisions.

9 Mr.'s role in the children's lives has evolved over the years. He has spent time with both children which can be summarized as follows:

1. As has already been mentioned, for the year and a half following the birth of T.S. Mr. resided with her and her mother. However, Mr. was not an active parent during this time.

2. From December 1998 to the summer of 2001 there is no evidence before this Court in regard to Mr.'s role the children's lives. I conclude from this that Mr. played a minor role at this time, and did not see either child very often.

3. Then in the summer of 2001 Mr. and his wife, moved from Saskatoon to the Calgary area. Mr. began seeing the children on most Saturdays from 6:30 p.m. until Sunday at 6:30 p.m..

4. Since April 2009 Mr. began seeing the children every second weekend, from Friday evening until Sunday evening.

10 Mr. has provided child support over the years, which can be summarized as follows:

5. Following J.S.'s birth the parties agreed that Mr. would provide $150.00 per month for J.S.

6. In July 2001 the parties agreed to increase the support to $200.00 per month for J.S.

7. In January 2004 the parties agreed to increase J.S.'s child support to $350.00 per month.

8. In January 2008 Mr. began paying $1,050.00 per month for the support of both J.S. and T.S. This agreement was reached after Ms. had obtained legal advice. This marked the first time that Mr. had ever provided financial support to T.S.

9. Finally, since September 25, 2008 (but retroactive to June 1, 2008) Mr. has been paying $1.400.00 per month for the support of both J.S. and T.S. This agreement was reached following a Dispute Resolution Order (DRO) session.

11 It now appears that Ms. has developed a relationship with a man in Saskatoon and wishes to move to Saskatoon and establish her life there with him.

12 In the past, the parties have attended mediation sessions with Family Justice Services attempting to resolve their outstanding issues, namely, parenting, guardianship, decision making, parenting styles, child support, mobility, adoption and the role of Mr.'s wife in parenting the children. The outstanding issues before this Court are guardianship, parenting time, child support, and mobility of the children.

Legislation

13 Since the parties were never married the governing law is provided by the *Family Law Act*. The following sections are relevant to this case as regards to Mr's relationship with T.S.:

1(m) 'person standing in the place of a parent' means a person described in section 48;

47 In this Division, "parent" includes a person standing in the place of a parent.

48(1) A person is standing in the place of a parent if the person

10. is the spouse of the mother or father of the child or is or was in a relationship of interdependence of some permanence with the mother or father of the child, and

11. has demonstrated a settled intention to treat the child as the person's own child.

(2) In determining whether a person has demonstrated a settled intention to treat the child as the person's own child, the court may consider any or all of the following factors:

12. the child's age;

13. the duration of the child's relationship with the person;

14. the nature of the child's relationship with the person, including

15. the child's perception of the person as a parental figure,

16. the extent to which the person is involved in the child's care, discipline, education and recreational activities, and

17. any continuing contact or attempts at contact between the person and the child if the person is living separate and apart from the child's father or mother;

(d) whether the person has considered

18. applying for guardianship of the child,

19. adopting the child, or

20. changing the child's surname to that person's surname;

(e) whether the person has provided direct or indirect financial support for the child;

(f) the nature of the child's relationship with any other parent of the child;

(g) any other factor that the court considers relevant.

49(1) Every parent has an obligation to provide support for his or her child.

The Parties Positions

14 In regard to guardianship, Mr.'s position is that he is entitled to guardianship of the children. Ms. disputed this fact until the Chambers hearing and consented to having Mr. added as a guardian at the commencement of this hearing.

15 Mr. is of the opinion that the children should not relocate to Saskatoon should Ms. decide to move. He argues that it is in the best interests of the children to remain in Calgary. Ms. argues that she has always maintained care and control over the children and it is therefore in their best interests to accompany her to Saskatoon.

16 In regard to parenting time, Mr. would like to see it increased, as he believes it is in the best interests of the children to see more of him. He would like to have the children from Saturday evening to Sunday evening twice per month, and from Friday evening to Sunday evening twice per month. Ms. takes no specific position on this issue, but does indicate that she has always encouraged Mr. to see the children as much as possible.

17 Finally, in regard to child support Mr. does not dispute that ongoing child support is payable. However, he is of the view that retroactive child support should not be paid. He argues this based on the following facts:

21. He has been paying proper support since January 2008 for both children.

22. In regard to J.S. he has always paid support at a mutually agreeable sum. Any miscalculation was done in good faith.

23. In regard to T.S., prior to January 2008, Ms. never requested support as both parties believed only a biological father could be required to pay child support.

18 Conversely, Ms. argues that retroactive child support should be payable for three years prior to the date of her formal notice of her application. She basis this on the fact that Mr. did not provide any support for T.S. until January 2008, and did not prior to this time provide proper support for J.S.

Issues

24. The following issues are before this Court:

25. Is it in the best interests of the children to move with Ms. to Saskatoon from Calgary?

26. What amount of parenting time with Mr. is in the best interests of the children?

27. What is the extent of Mr.'s child support obligation. This has two sub issues:

28. What are Mr.'s child support obligations going forward?

29. Should Mr. be required to pay retroactive child support?

Analysis

Mobility of the Children

19 The leading case on mobility, that is whether Ms. ought to be allowed to move her children to Saskatoon, is *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.). In *Gordon* the Supreme Court of Canada held that the determining factor is ultimately what is in the best interests of the children, and to assist in making this determination the Court at para. 49 constructed the following framework:

> 30. 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.
>
> 31. 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.
>
> 32. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
>
> 33. 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.
>
> 34. 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.
>
> 35. The focus is on the best interests of the child, not the interests and rights of the parents.
>
> 36. More particularly the judge should consider, *inter alia*:
>
> 37. the existing custody arrangement and relationship between the child and the custodial parent;
>
> 38. the existing access arrangement and the relationship between the child and the access parent;
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> 39. the desirability of maximizing contact between the child and both parents;
>
> 40. the views of the child;
>
> 41. the custodial parent's reason for moving, only in the exceptional case where it is relevant to that par-

ent's ability to meet the needs of the child;

42. disruption to the child of a change in custody; and

43. disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

20 Therefore, this framework must be applied to the facts of this case.

21 Mr. is clearly able to meet his onus of establishing that the proposed move to Saskatoon would be a material change in the circumstances affecting the children. The children have lived in Calgary for the past eleven years. They have established friends, activities, and Calgary is the only community that either has ever truly known. Further, Mr. lives only a few minutes away from the children and he has enjoyed regular access over the last number of years. Conversely, Saskatoon is a largely unknown community to the children, where they do not have friends, activities, or established community roots. Also, and most importantly, the children would inevitably see less of Mr. who will remain in the Calgary region. I am satisfied that Mr. has established that the circumstances surrounding the proposed move constitute a material change.

22 Since Mr. has established a material change in circumstance I must turn my attention to steps two through six of the *Gordon* framework. These steps inform me that I am to conduct a fresh inquiry of the specific circumstances of this situation to determine what is in the best interests of T.S. and J.S. and that there is no is legal presumption in favour of Ms. being allowed to move the children to Saskatoon.

23 Ms. relies on the Alberta Court of Appeal's decision in *MacPhail v. Karasek*, 2006 ABCA 238, 409 A.R. 170 (Alta. C.A.), for the proposition that she ought to be allowed to move her and her children. Specifically, in applying *Gordon* the Court in *MacPhail* made the following findings at paras. 43 to 45:

> The trial judge seemed to be operating under a misconception that every time a parent moves for her own personal reasons it could not be in the best interests of the child. Thus, he concluded: I find this move from Medicine Hat to Okotoks was to satisfy the personal needs of Marcy Marie Karasek and her compliant husband, Shawn Karasek.
>
> There is no credible evidence that this move was in the best interests of the children, Saylor and Venture. I find it was not in the children's best interests to move to Okotoks.
>
> According to this logic, parents cannot move unless the move is calculated to further the best interests of their children. Custodial parents cannot be limited in this way. Canadians are mobile and the courts are not the arbiters of the reasonableness of every decision a custodial parent makes. Custodial parents cannot be held hostage to the place the access parent lives. Certainly access parents are not. Moreover, it is not an option to conclude that a child's best interests are best served by both parties living in the same place any more than it is an option to consider that it is in a child's best interest that their parents remain together.
>
> Canadians have the right to choose to separate and divorce, and they have the right to relocate, and it is not for the courts to determine whether they like or agree with the reason for separating or moving. Custodial parents should not be faced with a potential loss of custody simply because they choose to move. Nor should a decision to move be seen automatically as a negative factor in the ability to parent.

24 Since *MacPhail* Alberta Courts have been faced with a difficult dilemma. *Gordon* clearly states that

there is no presumption in favour of the custodial parent being allowed to relocate the children. However, the Court of Appeal in *MacPhail* emphasizes the relationship between the custodial parent and child in conducting its analysis: see especially paras. 34 to 36. This emphasis might be construed as suggesting that such a presumption exists.

25 Initially, it appears that *MacPhail* was interpreted as creating a presumption in favour of the custodial parent. For example in *Heikel v. Heikel*, 2007 ABQB 378 (Alta. Q.B.), Madam Justice Rawlins considered the issue in that case as to whether or not the mother should be allowed to move. She found that yes, the mother should be allowed to move with the children but with expanded access to the father. In paragraph 6 of her decision, Madam Justice Rawlins held:

> The reason for moving I found to be legit. It is not the Court's function to rearrange business or employment situations of primary care givers. As many cases have indicated, we live in a mobile society and as our Court of Appeal as said in *MacPhail v. Karasek* "custodial parents cannot be held hostage to the place the access parent lives" ...

26 Madam Justice Rawlins went on in paragraph 30:

> There is no suggesting that the mother is not a proper parent or that her role as primary care giver should change. Again as our Court of Appeal said in *MacPhail v. Karasek* "custodial parents should not be faced with the potential loss of custody simply because they chose to move nor should a decision to move be seen automatically as a negative factor in the ability to parent."

27 In *L. (R.) v. P. (M.)*, 2008 ABQB 49 (Alta. Q.B.), Mister Justice Nielsen held that primary residential care should remain with the children's mother, who had relocated to British Columbia. In discussing *MacPhail*, he emphasized the relationship between the custodial parent and the children, holding, at para. 76 that:

> Both *Spencer* and *McPhail* make it clear that I must always consider the matter from the perspective of the best interests of [the children] and not from the perspective of the impact which a change in primary residential care may have on either [the father] or [the mother]. My task in this case is to determine with which parent the children should live, having regard to the best interests of the children. I must consider the impact on the children if they are returned to Edmonton, to [the father] as primary residential care provider, without their mother and her extended family. That is, I must consider the effect on the children of reducing [the mother] to an access or parenting time parent.

28 This reasoning was not disturbed on appeal: 2008 ABCA 313 (Alta. C.A.). Notably, the Court of Appeal referenced *MacPhail* only in discussing the trial judge's pronouncement that he would not consider the mother's evidence that if the father succeeded in obtaining primary care of the children she would then move back to Alberta.

29 More recent decisions have not interpreted *MacPhail* as creating a presumption, although they do acknowledge the emphasis that the Court places on the relationship between the custodial parent and the children in determining mobility issues.

30 In *M. (M.N.) v. M. (J.E.)*, 2009 ABQB 607 (Alta. Q.B.) Madame Justice Strekaf held that it would be in the best interests of the children in that case to continue to reside in Strathmore with their father, should their mother decided to relocate to Victoria. The Court referenced *MacPhail* and noted that it "emphasizes" the need

to take into consideration the effect on the child of the custodial parent becoming an access parent when determining the best interests of the child: para. 17. However, the Court relies on *Gordon* in making it's analysis.

31 Similar reasoning was adopted in *N. (P.) v. B. (L.)*, 2010 ABQB 33 (Alta. Q.B.) by Madam Justice Erb following a viva voce special chambers hearing that had been ordered by the Court of Appeal. The mother, who had primary care of the children, wished to relocate from Calgary to Nova Scotia. The Court found that the father was not in a position to provide primary care to the children. In allowing the relocation the Court referenced both *Gordon* and *MacPhail*. In discussing *MacPhail*, the Court noted as follows at paras. 37 to 38:

> This decision [*Gordon*] was applied by the Alberta Court of Appeal in *MacPhail v. Karsek*, [2006] A.J. No. 982in which case the Court reiterated that the test for custody is always the best interests of the children and that the real issue was whether the child's primary residence should continue with the parent who has primary care and intends to move or with the access parent who does not. The Court emphasized the need to take into consideration the effect on the child of the custodial parent becoming an access parent when determining the best interests.
>
> This Court, must, as directed by the Alberta Court of Appeal, balance the effect of the children residing with the custodial parent in a new place and the effect of the children remaining in the same place with the access parent including the effect of the custodial change.

32 In *D. (E.R.) v. M. (T.A.)*, 2006 ABQB 921 (Alta. Q.B.) Madam Justice Kent allowed the father's application for a change of the primary residence of the parties children. The father lived in central Alberta and the mother lived in northern Alberta. In allowing the application, the court simply referenced *MacPhail* as applying the test in *Gordon*.

33 More recently in *R. (C.C.) v. V. (M.A.)*, 2010 ABQB 237 (Alta. Q.B.), Madame Justice Strekaf again acknowledges that the Court of Appeal emphasized the need to take into consideration the effect on the child of the custodial parent becoming an access parent when determining the best interests of the child: para. 18. In denying the mother's application to relocate from Calgary to Chilliwack with the child, she noted that the Court in *MacPhail* reiterated that the test for custody is always the best interests of the child.

34 Finally, in *T. (P.O.) v. M. (B.E.)*, 2010 ABCA 22 (Alta. C.A.) the Alberta Court of Appeal upheld the trial judge's denial of the mother's application to relocate the children from Canmore to Montreal. Interestingly, the Court referenced *Gordon* in stating, at para. 10 that "a proper analysis is not guided by any legal presumption in favour of the custodial parent, although that parent's view is entitled to great respect," while *MacPhail* was referenced only in relation to the standard of review analysis. It would therefore appear that the Alberta Court of Appeal no longer, if it ever did, endorses any presumption in favour of the custodial parent in regard to mobility issues.

35 While the case law is alive to the fact that *MacPhail* can be read as emphasizing the importance of the relationship between the child and the custodial parent, this does not suggest that the Court of Appeal's reasoning has resulted in a particular approach to mobility cases (i.e. there is no presumption in favour of the custodial parent on mobility issues). Rather, it appears as though the courts continue to rely on *Gordon* for their primary analysis and reference *MacPhail* in tandem with *Gordon*.

36 In determining the appropriate course when one parent expresses a desire to relocate with the children the courts must determine what custody arrangement now accords with the best interest of the child. This is the

sole consideration, meaning that the interests and aspirations of all others, including the parents, assume a subsidiary role.

37 Thus, the specific factors listed in step seven of the *Gordon* framework must be examined in light of the instructions provided by the Supreme Court in steps two through six with the input that has been provided by the Alberta Court of Appeal in *MacPhail*, as summarized in *M. (M.N.)* and *N. (P.)*

(a) The Existing Custody Arrangement and Relationship Between the Children and Ms.

38 The existing custody arrangement between Ms. and her children is not in dispute. Ms. has had primary control over the children their entire lives.

39 Ms. is in charge of making the custodial decisions regarding the children, as for example Ms. unilaterally decided to inform T.S. that Mr. was not her biological father (although this may not be considered a custodial decision *per se* it demonstrates the nature of the relationship and lack of consultation on a very important matter), moved to Calgary, decides where they live, etc.

(b) Existing Access and the Relationship Between the Children and Mr.

40 Since April 2009 Mr. has had access with the children from Friday evening until Sunday evening every second week. This arrangement replaced the old access schedule that had existed since 2001, whereby Mr. had enjoyed access every week with the children from Saturday at 6:30 p.m. until Sunday at 6:30 p.m.

41 Mr. moved with his current wife from Saskatoon to the Calgary area to be closer to the children.

(c) The Desirability of Maximizing Contact Between the Children and Both Parents

42 One of the responsibilities of this Court is to ensure that children get as much contact with both parents as possible. The proposed move to Saskatoon will inevitably lead to the children seeing less of Mr. than they currently do. Of course if Ms. moves without the children they will see less of her.

(d) The Views of the Children

43 The children were represented by counsel at this hearing. Their views were expressed through their counsel, and can be summarized as follows.

44 T.S. was not able to express an opinion in regard to what she wants. She indicated that if the parties could not come to a mutually agreeable solution that a Court should make the decision regarding the proposed move to Saskatoon. This is telling: she does not want to hurt either parent.

45 J.S. on the other hand indicated that he wants to move to Saskatoon. This would allow his mother to marry her new boyfriend, and would allow him to see more of Saskatoon. He further indicated that he could see his Dad on holidays, and could communicate with him over the phone or internet.

46 T.S.'s indifference and J.S.'s comments regarding the proposed move demonstrate the inherent conflict children are placed in when forced to choose between people who love them. A move of this magnitude will invariably create a mix of emotions for the children as they are excited, confused, and saddened all at the same time. They simply want Mr. and Ms. to be happy. It is therefore inherently risky to rely on their views, particu-

larly when the child expresses his or her desires in terms of what will make their parents happy, as J.S. has done.

47 Therefore, the views expressed by the children do not factor into this decision.

(e) Ms.'s Reason For Moving

48 In *Gordon* the Supreme Court indicated that only in the exceptional case where it is relevant to that parent's ability to meet the needs of the children should the reason for moving become relevant to this analysis.

49 Ms. has put her reason for moving at issue. She indicates that she wishes to relocate in order to move in with her boyfriend and eventually marry him. She asserts that this will be beneficial for the children as she and her boyfriend will be able to purchase a home which will be a substantial upgrade over her current living conditions in Calgary. She has no job prospects and will be dependent on her boyfriend who is self-employed and works out of his apartment in sales.

50 However, Ms. has not actually found a home in Saskatoon for the children, nor have any other essential custodial decisions been made in this regard. She claims that all these issues will be resolved after this legal dispute is decided. Mr. takes issue with the fact that Ms. has not provided any information on whether the above-mentioned plan is in fact feasible.

51 In this regard my job would be much easier had Ms. provided financial information about her boyfriend and actually provided evidence on how the transition to Saskatoon would work for the children. Given that no actual plan has been advanced this must be a concern, as if all goes well it would presumably be beneficial for the children; however, if all goes awry then it would not be in the best interests of the children. In sum there is simply not enough evidence on this point to make an informed decision.

(f) Disruption to the Children From the Change in Custody

52 A move to Saskatoon is undoubtedly going to disrupt the children's lives. They love Mr. and have grown accustomed to his regular access schedule. A move to Saskatoon would result in the children seeing Mr. less often.

53 It has been argued that telephone and internet communication could increase between the children and Mr. However, even if I were to assume this would happen this is still a change to the current custody relationship. At best this type of interaction and communication is extremely poor and inadequate to maintain a meaningful relationship.

54 Ms. indicates that T.S.'s family lives in Saskatoon and that access to the children could be enjoyed when Mr. visits his in-laws. This may be true; however, Mr. does not visit his in-laws as often as he does his children currently.

(g) Disruption to the Children Consequent on Removal From Family, Schools, and their Community

55 Again there is no doubt that this a move to Saskatoon will be disruptive to the children. Their friends, school(s), and community are all located in Calgary. Mr. lives a few minutes away from them. This will all change. The children will be forced to make new friends at a new school, and get to know a new community, largely without the assistance of Mr.

56 Of particular concern is the fact that Ms. wishes to make this move without a concrete plan of how the children are going to be integrated into Saskatoon. She has indicated that she will wait until after this school term is completed before making the move; however, for a move of this magnitude these plans should already have been considered.

Mobility Conclusion

57 Ultimately, the seven factors from *Gordon* which I have just gone through produce mixed results. Some factors support Mr.'s application while others support Ms.'s desire to move the children to Saskatoon. However, when the circumstances are examined in totality it is my opinion that it is in the best interests of the children not to move with Ms. should she wish to relocate to Saskatoon.

58 I base this decision on the following factors. Notwithstanding Ms. has always had primary control of the children, and she makes the custodial decisions for the children. To order the children remain in Alberta with Mr. should Ms. move to Saskatoon would be less disruptive to the children than if they move. In either arrangement the children would still have to switch friends and community. In addition having to adjust to a new primary caregiver Ms.'s boyfriend. The fact that Ms. has not made concrete plans is troubling. The future with the boyfriend in his apartment is fraught with difficulty. Mr. and his wife whom the children love are able and willing to provide a stable environment, emotionally, financially and with community continuity. Therefore, I find the children must remain with Mr. when Ms. moves.

Parenting Time

59 Mr. has requested additional parenting time with the children. Ms. indicates that she has never had a problem with Mr. enjoying more access. Therefore, until Ms. does in fact relocate to Saskatoon Mr. shall enjoy increased parenting time as follows: from Saturday evening to Sunday evening twice per month, and from Friday evening to Sunday evening twice per month. I leave it to the parties to work out the exact logistics.

60 If and when Ms. relocates to Saskatoon Ms. can enjoy parenting time as follows:

44. Liberal and generous telephone and internet access;

45. A even share of long weekends, with the exception of Mother's Day Long-weekend which will always be enjoyed by Ms.;

46. Half of the Winter (Christmas), Spring (Easter), and Summer Holidays.

47. Access in Alberta when Ms. is in the Province, and

48. Such further and other parenting time as agreed to by the parties.

Child Support

61 Mr. is J.S.'s biological father and as such has an obligation to pay child support. Since the parties were never married and since T.S. is not Mr.'s biological child, s. 48 of the *Family Law Act* must be employed to determine if Mr. ever had a "settled intention" to stand in place of parent in regard to T.S. He must have had such an intention at some point to engage child support obligations for T.S.

62 This issue would appear to be easily resolved, as Mr. is not disputing that he stands in place of parent to T.S. and he has in fact entered into a Consent Order whereby he accepted that he stands in place of parent to T.S.

63 The factors outlined in s. 48(2) of the *Family Law Act* must be carefully examined. Mr.'s evidence indicates that: he has enjoyed a relationship with T.S.. Mr. was not active in rearing T.S. for the year and a half he lived with Ms. following T.S.'s birth, there has generally been inconsistent contact between T.S. and Mr. until he moved to Alberta. Mr. applied for guardianship of T.S., and he has provided child support to T.S. since 2008. Therefore, on Mr.'s evidence it would seem that he does stand in place of parent to T.S..

64 The evidence of Ms. indicates that Mr. has never stood in place of a parent to T.S. The following paragraphs of Ms.'s October 16, 2009 affidavit are instructive:

> 5. ... the Respondent [Mr.] and I continued to live together for a year and a half after [T.S.] was born. The Respondent was never fully involved with parenting her [T.S.]. He did not get up during the night for feedings. He rarely changed diapers, bathed or dressed her. I purchased all of the necessities for [T.S.] on my own including furniture, clothes, stroller, car seat etc. with help from my parents.
>
> 6. When the relationship between the Respondent and I began to deteriorate he withdrew further from [T.S.]. ... We continued to live together in the same house for a number of months after our separation and the Respondent refused to help with [T.S.] in any way for that period of time.
>
> 8. When [T.S.] and I left our home we moved into a rental apartment in Saskatoon. We lived there approximately 4 months. During this time the Respondent visited [T.S.] on 2 occasions initiated by me. He did not telephone to check on her at any other time and during those two visits simply sat and watched her, but did not interact with her.

65 Mr. is attempting to prevent the children including his own child, J.S., from moving from Calgary to Saskatoon, and has stood in place of parent to T.S. Specifically, since the time this application has been filed Mr. has taken the following steps:

> 49. He has increased his parenting time with both children;
>
> 50. He has applied for guardianship of both children;
>
> 51. He entered into a Consent Judgement indicating that he does stand in place of parent to T.S.; and
>
> 52. He has entered evidence in a very general way as to how he has always been a father to T.S..

66 Further, Mr. started paying child support for T.S. in January 2008.

67 Therefore, it is my finding that Mr.'s actions and evidence have demonstrated his desire to keep T.S. and J.S. in Calgary.

68 The factors leaning towards finding that Mr. stands in place of a parent are that he has had a long relationship with T.S., which is explained by the fact that T.S. is J.S.'s sister, and that she appears to perceive him to be her father. However, these two factors, although important, are not determinative on their own, and the other factors indicate that Mr. has stood in place of parent to T.S.

Retroactive Child Support

69 Ms. seeks retroactive child support from Mr. for both children.

70 The leading case on retroactive child support is the Supreme Court of Canada's decision in *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 (S.C.C.). In *S. (D.B.)* the Court articulated three scenarios in which it may be appropriate for a court to award retroactive support:

> 53. Where there is an existing court order
>
> 54. Where support has been established by agreement between the parties
>
> 55. Where support has not been paid.

71 The parties have been entering into child support agreements since September 22, 1999. These have continually been varied by consent and since January 2008 Mr. began paying support for T.S. in addition to J.S.

72 Overall in *S. (D.B.)* the Supreme Court indicated that awarding retroactive child support is discretionary and that a multitude of factors should be considered when making such a determination. Certainty for the payor (Mr. in this case) what is important, as is the reasonableness of the delay in paying appropriate support, the conduct of the payor, the circumstances of the child, and any hardship that a retroactive award would cause.

73 As was previously mentioned Mr. and Ms. came to an initial agreement regarding child support following the birth of J.S. This agreement saw Mr. pay Ms.$150.00 per month for J.S.. Then in July 2001 the parties agreed to increase the support to $200.00 per month for J.S.. Then in January 2004 J.S.'s child support was again increased this time to $350.00 per month. Then in 2007 after Ms. informed Mr. that she had learned that he should be paying child support for T.S. in addition to J.S. as prescribed by the *Child Support Guidelines* the parties agreed to increase Mr.'s child support payments to $1,050.00 per month. Then in May 2008 Ms. requested Mr. provide her with his income information. Mr. responded by providing his last three Notice of Assessments, which ultimately led to the latest agreement between the parties which sees Mr. pay $1,400.00 per month for child support, which is the proper *Guideline* amount.

74 In regard to J.S. Mr. has always paid child support. The amount of child support that has been paid has been set by the parties, who until 2007 never obtained legal advice. Further, when the history of J.S.'s child support is reviewed it is clear that Mr. made continued efforts to increase J.S.'s support as time has gone by. Finally, it is clear that after becoming aware of the true extent of his obligation in regard to J.S.'s child support Mr. willingly paid.

75 Turning to T.S., Mr. has voluntarily paid child support for her since January 2008. He has done this under the understanding that he was standing in place of a parent to T.S.. Prior to this time the parties believed that T.S.'s biological father should provide for her, which he should, and despite knowing her biological father's identity Ms. has never pursed him for child support.

76 The delay in Mr. not paying the proper amount of child support is understandable. The parties entered into a child support agreement which was varied from time to time in regard to J.S., and in *S. (D.B.)* at para. 78 the Supreme Court articulated that child support agreements "reached by parents should be given considerable weight." The parties did not know *Child Support Guidelines* existed for many years and as soon as they became

aware of the *Guidelines* Mr. drastically increased the amount of support he paid. Thus, there can be no malicious conduct attributed to Mr. as he has voluntarily paid mutually agreeable child support for J.S.

77 There is no evidence before me that Mr. would suffer hardship should retroactive support be issued, nor is there any evidence before me indicating that children's circumstances at this juncture require retroactive child support.

78 Overall, I am not persuaded that retroactive child support is appropriate in this case. Mr. and Ms. made several agreements in regard to child support and these agreements are owed deference. Further, there has been no malice on the part of Mr. to defeat his child support obligations. In fact the opposite has been true, as he has willingly paid support for his biological child for his entire life, and he has willingly paid child support for T.S. for over two years and only very recently acquired a legal status regarding T.S.

Disposition

79 Mr. shall become a named guardian of both children and a parent to T.S.

80 Ms. is free to relocate to Saskatoon if she so wishes. The children will then move to the primary care of Mr.

81 Ms.'s parenting time will be set as follows:

> 56. Until Ms. relocates to Saskatoon Mr. shall enjoy parenting time from Saturday evening to Sunday evening twice per month, and from Friday evening to Sunday evening twice per month. I leave it to the parties to work out the exact logistics.
>
> 57. If and when Ms. relocates to Saskatoon Ms. can enjoy parenting time as follows:
>
> 58. Liberal and generous telephone and internet access;
>
> 59. A even share of long weekends, with the exception of Mother's Day Long-weekend which will always be enjoyed by Ms.;
>
> 60. Half of the Winter (Christmas), Spring (Easter), and Summer Holidays.
>
> 61. Access in Alberta when Ms. is in the Province, and
>
> 62. Such further and other parenting time as agreed to by the parties.

82 Mr. shall pay child support for his children for the prescribed amount, which based on his income for the year 2008 is $1,400.00 per month. This amount should be varied by the parties to reflect Mr.'s 2009 income.

83 No retroactive child support is owed by Mr.

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