Gordon *v.* Goertz, [1996] 2 S.C.R. 27

**Robin James Goertz** *Appellant*

*v.*

**Janet Rita Gordon (formerly**

**Janette Rita Goertz)** *Respondent*

and

**Women's Legal Education and Action Fund (LEAF)**

**and Children's Lawyer for Ontario** *Interveners*

**Indexed as:  Gordon *v.* Goertz**

File No.:  24622.

1995:  December 6; 1996:  May 2.

Present:  Lamer C.J. and La Forest, L'Heureux‑Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for saskatchewan

*Family law ‑‑ Custody and access ‑‑ Variation ‑‑ Change of residence*

*‑‑ Mother awarded custody on divorce wishing to move to Australia ‑‑ Father applying to vary custody ‑‑ Whether trial and appellate courts erred in permitting child to move to Australia with her mother ‑‑ Principles governing application for variation of custody or access order linked to change of residence of child by custodial parent ‑‑ Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), s. 17(5), (9).*

The parties resided in Saskatoon until their separation in 1990. The mother petitioned for divorce and at trial was granted permanent custody of the young child while the father received generous access. When the father learned that the mother intended to move to Australia to study orthodontics, he applied for custody of the child, or alternatively, an order restraining the mother from moving the child from Saskatoon. The mother cross‑applied to vary the access provisions of the custody order to permit her to move the child's residence to Australia. Relying heavily on the divorce judgment and the first judge's finding of fact that the mother was the proper person to have custody of this child, the judge dismissed the father's application and varied the access provisions in the custody order to allow the mother to move to Australia with the child while granting the father liberal and generous access on one month's notice to be exercised in Australia only. The Court of Appeal upheld that order.

*Held*: The appeal should be allowed in part.

*Per* Lamer C.J. and Sopinka, Cory, McLachlin, Iacobucci and Major JJ.: 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. For that threshold to be met, the judge must be satisfied of (1) a change in the condition, means, needs or circumstances of the child or in the ability of the parents to meet the needs of the child, (2) which materially affects the child, and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order. An application to vary custody cannot serve as an indirect route of appeal from the initial custody order. The judge must assume the correctness of the initial order and consider only the change in circumstances since the order was issued.

If the threshold is met, the judge on the application must embark on a fresh inquiry into 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. The focus of the inquiry is not the interests and rights of the parents. Each case turns on its own unique circumstances and the only issue is the best interest of the child in the particular circumstances of the case. Section 17(5) of the *Divorce Act* directs that the judge must consider the child's best interests "by reference" to the material change in circumstances. However, the inquiry cannot be confined to that change alone, isolated from the other factors bearing on the child's best interests. The inquiry, which is based on the findings of fact of the judge who made the initial or previous order as well as the evidence of the new circumstances, does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect. Once the applicant has discharged the burden of showing a material change in circumstances, both parents should bear the evidentiary burden of demonstrating where the best interests of the child lie. In assessing the best interests of the child, the judge should more particularly consider, *inter alia*: (a) the existing custody arrangement and relationship between the child and the custodial parent; (b) the existing access arrangement and the relationship between the child and the access parent; (c) the desirability of maximizing contact between the child and both parents; (d) the views of the child; (e) the custodial parent’s reason for moving, only in the exceptional case where it is relevant to that parent’s ability to meet the needs of the child; (f) disruption to the child of a change in custody; and (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know. The "maximum contact" principle mentioned in ss. 16(10) and 17(9) of the *Divorce Act* is mandatory but not absolute and the judge is only obliged to respect it to the extent that such contact is consistent with the child's best interests. As set out in s. 16(9) of the Act, parental conduct does not enter the analysis unless it relates to the ability of the parent to meet the needs of the child. 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?

Where, as here, the child enjoyed frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child. Further, since the terms of the previous order were premised on the child’s residence remaining within a reasonable distance of the access parent, the move to Australia would clearly breach this provision. The judge was thus required to embark on a fresh appraisal of the best interests of the child. While he failed to give sufficient weight to all relevant factors, when all these factors are taken into account, the judge was correct in continuing the mother’s custody of the child, despite her intended move to Australia. There is no support in the evidence, however, for restricting the father's access to Australia. Access in Canada would have the advantage of making the father’s limited time with the child more natural while allowing the child to maintain contact with friends and extended family. Accordingly, the custody order should be upheld and the access order should be varied to provide for access to be exercisable in Canada.

*Per* Gonthier J.: The reasons of McLachlin J. are agreed with. There is also agreement with L'Heureux‑Dubé J.'s explanations of factors pertinent to assessing the best interests of the child that are to be considered, though her views on onus of proof are not shared.

*Per* La Forest and L'Heureux‑Dubé JJ.: The notion of custody under the *Divorce Act* encompasses the right to choose the child's place of residence. Absent an agreement or a court order restricting the incidents of custody, such as the child's place of residence, it is thus within the custodial parent's powers to decide such a change of residence, subject to the right of the non‑custodial parent to oppose such choice by seeking a variation of the custody or access terms under s. 17(5) of the Act. Parental agreements as to any right of the child should be encouraged since parents are generally in a better position to assess the best interests of the child, but these agreements are not binding on courts. Restrictions on the rights of custodial parents should be the exception, not the rule, and such restrictions should not be inferred from generous or specified access provisions without more.

The first consideration in an application for variation of custody or access orders under s. 17(5) of the Act is whether there has been a material change of circumstances in accordance with the guidelines in *Willick*. Once this threshold is reached, the next step is whether the change is such as to trigger a reappraisal of the whole situation of the parties and the children or only necessitates an assessment of the impact of the alleged change or changes on the custody of the child. It is only where the alleged change or changes are of such a nature or magnitude as to make the original order irrelevant or no longer appropriate that an assessment of the whole situation is warranted.

In assessing the merits of a variation application linked to the change of residence of the child by the custodial parent, the following guidelines must inform the courts:

1.  All decisions as to custody and access must be made in the best interests of children, assessed from a child‑centred perspective. The *Divorce Act* makes it clear that the best interests of the child are the only consideration to be taken into account in making orders concerning children. The objective of promoting maximum contact with the non‑custodial parent, inasmuch as it is consistent with such interests, is an important consideration.

2.  In the absence of explicit restrictions on the incidents of custody, such as the child’s place of residence, it must be assumed that an existing custody order or agreement reflects the best interests of the child and that the appropriate decision‑making authority lies with the custodial parent. The attribution of custody to one parent carries with it the presumption that such parent is the most able to ensure the best interests of the child. Before custody can be entrusted to one of the parents in divorce proceedings, a number of factors play a role in the assessment of the best interests of the child. The desirability of maintaining maximum contact between the child and both parents is an important factor, but the court must also balance such considerations as the child’s physical, emotional, social and economic needs in light of the quality of his or her relationship with both parents, their respective ability to look after the child’s best interests and, where the child is old and mature enough, his or her wishes and preferences. The assessment of the child’s best interests also involves a consideration of the particular role and emotional bonding the child enjoys with his or her primary caregiver. If, after such an inquiry is conducted, or by mutual consent of the parties, a child's custody is entrusted to one of the parents, it necessarily follows that such parent has been found to be best able to ensure the best interests of the child, taking into account all the circumstances of the parties and the child. Given that day‑to‑day decisions affecting the child are clearly left to the custodial parent, there is no reason not to defer to his or her ability and responsibility to act in the child’s best interests when it comes to other decisions, such as the change of residence of the child, which will necessarily take into account the impact of access to the non‑custodial parent by the child. In both cases, if the decision constitutes a material change of circumstances, s. 17(5) of the Act allows for a variation inasmuch as such a decision will be found to impact on either the custody of the child or the access by the non‑custodial parent.

3.  In determining the best interests of the child under s. 17(5), courts must focus on the impact of the change of residence on the existing custody order and the appropriate modifications to access as the case may be, and generally not proceed to a *de novo* appraisal of all the circumstances of the child and the parties, since s. 17(5) of the Act provides that “the court shall take into consideration only the best interests of the child as determined by reference to that change”. This particular wording is indicative that where the change consists of the proposed relocation of the child by the custodial parent, what must be ascertained is the impact of such relocation on the existing custody order which must be assumed to properly ensure the child’s best interests. The best interests of the child are rightly presumed to lie with the custodial parent.

4.  The non‑custodial parent bears the onus of showing that the proposed change of residence will be detrimental to the best interests of the child to the extent that custody should be varied or, exceptionally, where there is cogent evidence that the child’s best interests could not in any reasonable way be otherwise accommodated, that the child should remain in the jurisdiction. The proposed change of residence of the child by the custodial parent will not justify a variation in custody unless the non‑custodial parent adduces cogent evidence that the child’s relocation with the custodial parent will prejudice the child’s best interests and, further, that the quality of the non‑custodial parent’s relationship with the child is of such importance to the child’s best interests that prohibiting the change of residence will not cause detriment to the child that is comparable to or greater than that caused by an order to vary custody. Where there is an agreement or court order explicitly restricting the child’s change of residence, the onus should shift to the custodial parent to establish that the decision to relocate is not made in order to undermine the access rights of the non‑custodial parent and that he or she is willing to make arrangements with the non‑custodial parent to restructure access, when appropriate, in light of the change of residence of the child.

The proposition that the determination of the best interests of the child under s. 17(5) is best left to the discretionary realm of questions of fact where each relevant factor is to be equally considered and where no party bears any specified burden of proof must be rejected because it fosters uncertainty in the application of the law and encourages litigation and ongoing parental conflict which clearly are not in the best interest of the children.

Here, the change of residence, which involves moving to another country and was also unforseen at the time the custody order was originally made, constitutes a material change in the circumstances of the child. The judge applied the correct test and, upon the evidence before him, properly concluded that the threshold upon which the merits of the application for variation could be considered had been met. Despite the father’s alleged increased involvement in his child’s life since the initial custody order, the custody challenge was essentially based on the inevitable limitation to his access rights the child’s change of residence would involve. Since less than two years had elapsed between the date of the order entrusting custody of the child to the mother and her projected change of residence, this initial order clearly remains highly relevant upon consideration of the merits of the application for variation. All other considerations being equal, in such circumstances a variation application would normally be restricted to an appraisal of the impact of the child’s change of residence on the prior custody determination as well as the appropriate modification to access as the case may be.

On the merits of the application, the judge did not err in law in concluding that the mother should be allowed to move with the child to Australia. The evidence supports his conclusion that the best interests of the child required upholding the custody of the mother. It was entirely proper for him to “rely heavily” on the divorce judge's determination that the best interests of the child were best served by entrusting custody to the mother and, accordingly, to examine the impact of the change of residence on such determination as well as the possible modifications to access. On the evidence, the judgment, in spite of its brevity, makes clear that the father did not satisfy the judge that the impact of the change of residence of the child was such as to warrant a variation of custody, particularly in light of the possibility of accommodating the father’s access and contact with the child. The judge was thus correct in upholding the mother’s custody of the child despite her intended move to Australia. He erred, however, in confining the exercise of the father’s access to the child to Australia. The evidence does not support such a conclusion. The access order should be varied to provide for access to be exercisable in Canada.

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By L'Heureux‑Dubé J.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (1995), 128 Sask. R. 156, 85 W.A.C. 156, which dismissed the appellant's appeal from a judgment of Gagne J., allowing the respondent's application to vary the access provisions of the custody order and dismissing the appellant's application for custody of his child. Appeal allowed in part.

*Noel S. Sandomirsky*, for the appellant.

*Neil Turcotte* and *Deryk Kendall*, for the respondent.

*Carole Curtis* and *Donna Wilson*, for the intervener LEAF.

*Daniel L. Goldberg* and *Jocelyn Kapusta*, for the intervener the Children's Lawyer for Ontario.

The judgment of Lamer C.J. and Sopinka, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

McLachlin J. -- When parents separate, one typically enjoys custody of the child, the other access. So long as both parents live in the same area, this arrangement protects the child's continuing relationship with both parents. However, if the custodial parent decides to move away and change the principal residence of the child, the situation may change. The access parent may be unable to see the child as often as before, if at all. He or she may seek a review of the custody order, contending that removing the child from its familiar surroundings and restricting or depriving the child of access to the other parent is not in that child's best interests. With the prevalence of separated families and the increasing mobility of modern society, such applications are more common. On this appeal, we are asked to establish the principles that should guide judges in making these difficult decisions.

I. The Proceedings to Date

A) *The Initial Order*

The family resided in Saskatoon until the events precipitating this case, and both parents enjoy a warm and loving relationship with their child. Upon separating from the child's father in November 1990, the mother petitioned for divorce under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). She obtained an order for interim custody of the child. The order granted the father reasonable access on reasonable notice.

The father saw the child frequently following separation. A custody access study prepared before trial showed that the father had “consistently spent more time with the child” than the mother had in the post-separation period. In a mediated agreement pending trial and judgment, the mother and father agreed that the child would reside with both parents on a rotating basis, and that if one party moved, the child would continue to reside in Saskatoon with the other.

The matter of custody came on for trial before Carter J. of the Unified Family Court of the Saskatchewan Court of Queen's Bench in February 1993. She dissolved the marriage pending appeal and awarded the mother permanent custody of the child with generous access to the father: (1993), 111 Sask. R. 1. Following the trial, the father continued to spend more time with his daughter than allowed by the order. The mother did not usually object to the additional time; indeed, it helped her to maintain a busy working schedule that often took her out of Saskatoon.

When the father learned in the fall of 1994 that the mother intended to move to Adelaide, Australia in January 1995, to study orthodontics, he applied for custody of the child, or alternatively, an order restraining the mother from moving the child from Saskatoon. The mother cross-applied to vary the access provisions of the custody order to permit her to move the child's residence to Australia.

B) *The Variation Order*

Gagne J. concluded that he should permit the child to go to Australia with her mother. After citing various decisions considering similar situations and noting the diverse results, he stated:

I relied heavily on Judge Carter’s judgment and her findings of fact that the mother was the proper person to have custody of this child. There will be an order that the petitioner be allowed to move to Australia to study orthodontics and to take the child Samantha with her.

Now, the respondent will have liberal and generous access to Samantha in Australia on one month’s notice and not to remove the child from Australia. Samantha’s school should be interfered with as little as possible during these visits.

The Saskatchewan Court of Appeal upheld the order, finding “no serious error of principle” in the decision, and citing *Willick v. Willick*, [1994] 3 S.C.R. 670, in support of a conservative standard of review: (1995), 128 Sask. R. 156, 85 W.A.C. 156. The father now appeals to this Court seeking a change of custody, or alternatively, an order permitting access on terms which would allow the child to leave Australia.

II. Relevant Statutory Provisions

*Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.)

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

. . .

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

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

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

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

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

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

. . .

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

. . .

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

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

. . .

(9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

III. The Issue

This appeal raises only one issue: did the trial and appeal court err in permitting the child to move to Australia with her mother, the custodial parent? This is the first time this Court has considered the effect of a custodial parent’s move on custody and access. Accordingly, both the parties and the two interveners, the Women's Legal Education and Action Fund (LEAF) and the Children's Lawyer for Ontario invited us to consider the principles which should guide judges in dealing with such applications in the future.

IV. Analysis

The principles which govern an application for a variation of an order relating to custody and access are set out in the *Divorce Act*. The Act directs a two-stage inquiry. First, the party seeking variation must show a material change in the situation of the child. If this is done, the judge must enter into a consideration of the merits and make the order that best reflects the interests of the child in the new circumstances. I propose to discuss each stage in turn.

A) *The Threshold Condition: Material Change*

Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the child since the last custody order was made. Section 17(5) provides that the court shall not vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child". Accordingly, if the applicant is unable to show the existence of a material change, the inquiry can go no farther: *Wilson v. Grassick* (1994), 2 R.F.L. (4th) 291 (Sask. C.A.).

The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued: *Baynes v. Baynes* (1987), 8 R.F.L. (3d) 139 (B.C.C.A); *Docherty v. Beckett* (1989), 21 R.F.L. (3d) 92 (Ont. C.A.); *Wesson v. Wesson* (1973), 10 R.F.L. 193 (N.S.S.C.), at p. 194.

What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

These are the principles which determine whether a move by the custodial parent is a material change in the "condition, means, needs or other circumstances of the child”. Relocation will always be a "change". Often, but not always, it will amount to a change which materially affects the circumstances of the child and the ability of the parent to meet them. A move to a neighbouring town might not affect the child or the parents' ability to meet its needs in any significant way. Similarly, if the child lacks a positive relationship with the access parent or extended family in the area, a move might not affect the child sufficiently to constitute a material change in its situation. Where, as here, the child enjoyed frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child.

The third branch of the threshold requirement of material change requires that the relocation of the custodial parent not have been within the reasonable contemplation of the judge who issued the previous order: *Messier v. Delage*, [1983] 2 S.C.R. 401. If a future move by the custodial parent was considered and not disallowed by the order sought to be varied, the access parent may be barred from bringing an application for variation on that ground alone. The same reasoning applies to a court-sanctioned separation agreement which contemplates a future move. In such cases, the application for variation amounts to an appeal of the original order.

Conversely, an order which specifies precise terms of access may lead to an inference that a move which would "effectively destroy that right of access" constitutes a material change in circumstances justifying a variation application. (See *Wickham v. Wickham* (1983), 35 R.F.L. (2d) 448 (Ont. C.A.), at p. 453; *Wright v. Wright* (1973), 40 D.L.R. (3d) 321 (Ont. C.A.), at p. 324; and see generally on this point *Wainwright v. Wainwright* (1987), 10 R.F.L. (3d) 387 (N.S.S.C.); *Korpesho v. Korpesho* (1982), 31 R.F.L. (2d) 449 (Man. C.A.), rev'g (1982), 31 R.F.L. (2d) 140 (Man. Q.B.).) Where, as here, the custody order stipulates terms of access on the assumption that the child's principal residence will remain near the access parent, the third branch of the threshold requirement of a material change in circumstance is met.

B) *The Best Interests of the Child*

(1) The Test

The threshold condition of a material change in circumstance satisfied, the court should consider the matter afresh without defaulting to the existing arrangement: *Francis v. Francis* (1972), 8 R.F.L. 209 (Sask. C.A.), at p. 217. The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative, since the existence of material change presupposes that the terms of the earlier order might have been different had the change been known at the time. (*Willick v. Willick*, *supra*, at p. 688, *per* Sopinka J.) The judge on the variation application must consider the findings of fact made by the first judge as well as the evidence of changed circumstances (*Wesson v. Wesson*, *supra*, at p. 194) to decide what custody arrangement now accords with the best interests of the child. The threshold of material change met, it is error for the judge on a variation application simply to defer to the views of the judge who made the earlier order. The judge on the variation application must consider the matter anew, in the circumstances that presently exist.

Section 17(5) of the *Divorce Act* directs that the judge must consider the child's best interests "by reference" to the material change in circumstances. However, the inquiry cannot be confined to that change alone, isolated from the other factors bearing on the child's best interests. In *Willick v. Willick*, *supra*, L'Heureux-Dubé J. discussed (at pp. 734-35) the scope of review of support orders in the context of similar wording in s. 17(4):

Once a sufficient change that will justify variation has been identified, the court must next determine the extent to which it will reconsider the circumstances underlying, and the basis for, the support order itself. For the reasons below, I believe that it is artificial for a court to restrict its analysis strictly to the change which has justified variation. Moreover, while a variation hearing is neither an appeal nor a trial *de novo*, where the alleged change or changes are of such a nature or magnitude as to make the original order irrelevant or no longer appropriate, then an assessment of the entirety of the present circumstances of the parties and the children which recognizes the interrelationship between the many factors to be considered is in order. [Emphasis added.]

The same principle holds true when an applicant is able to demonstrate a material change in circumstances in a custodial variation proceeding. In order to determine the child's best interest, the judge must consider how the change impacts on all aspects of the child's life. To put it another way, the material change places the original order in question; all factors relevant to that order fall to be considered in light of the new circumstances.

What principles should guide the judge on this fresh review of the situation? This inquiry takes us to the last clause of s. 17(5) of the *Divorce Act*: ". . . in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change". The amendments to the *Divorce Act* in 1986 (S.C. 1986, c. 4 (now R.S.C., 1985, c. 3 (2nd Supp.)) elevated the best interests of the child from a "paramount" consideration, to the "only" relevant issue.

The best interests of the child test has been characterized as "indeterminate" and "more useful as legal aspiration than as legal analysis": *per* Abella J.A. in *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.), at p. 443. Nevertheless, it stands as an eloquent expression of Parliament's view that the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake. The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty. Moreover, Parliament has offered assistance by providing two specific directions -- one relating to the conduct of the parents, the other to the ideal of maximizing beneficial contact between the child and both parents.

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

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

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

The second factor which Parliament specifically chose to mention in assessing the best interests of the child is maximum contact between the child and both parents. Both ss. 16(10) and 17(9) of the Act require that "the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child". The sections go on to say that for this purpose, the court "shall take into consideration the willingness of [the applicant] to facilitate" the child's contact with the non-custodial parent. The "maximum contact" principle, as it has been called, is mandatory, but not absolute. The Act only obliges the judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact: *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 117-18, *per* McLachlin J.

The reduction of beneficial contact between the child and the access parent does not always dictate a change of custody or an order which restricts moving the child. If the child's needs are likely to be best served by remaining with the custodial parent, and this consideration offsets the loss or reduction in contact with the access parent, then the judge should not vary custody and permit the move. This said, the reviewing judge must bear in mind that Parliament has indicated that maximum contact with both parents is generally in the best interests of the child.

(2) The Argument for a Presumption in Favour of the Custodial Parent

The child's mother argues that the inquiry into the best interests of the child should begin with a presumption in favour of the custodial parent. This would place the onus on the access parent to show why remaining with the custodial parent is not in the child's best interest. I have concluded that this submission must fail. However, before considering the arguments for and against a presumption in favour of the custodial parent, it may be useful to canvass briefly its history.

In the early years of the *Divorce Act*, S.C. 1967-1968, c. 24 (later R.S.C. 1970, c. D-8), some judges expressed the view that a custodial parent should be permitted to move with the child provided the decision to move was reasonable and absent an agreement or court order to the contrary. This approach was first signalled in *Wright v. Wright*, *supra*, where relocation was considered in the context of a separation agreement which provided for reasonable access to the father, but permitted the mother to live "at such place as she shall think fit" (p. 324). From its limited recognition in *Wright*, the presumption came to be more generally endorsed in subsequent cases: *Field v. Field* (1978), 6 R.F.L. (2d) 278 (Ont. H.C.); *Wells v. Wells*, *supra*; *Landry v. Lavers* (1985), 45 R.F.L. (2d) 235 (Ont. C.A.). To challenge successfully the custodial parent's right to remove the child from the jurisdiction, the access parent had first to show the existence of "special circumstances" which would indicate why the normal rule should not apply: "There is unassailable authority for the proposition that, in the absence of special circumstances, a parent who has custody has the right to remove the children without the permission of the other parent" (*Field v. Field*, *supra*, at p. 280, *per* Osler J.).

The 1985 *Divorce Act* now instructs courts that the interests of the parents are no longer relevant in custody determinations. As noted previously, the child's best interests are not merely "paramount", they are the only consideration. The revised Act also introduced statutory recognition of the principle that children generally benefit from contact with both parents. In the wake of these amendments, some judges began to question whether a presumption in favour of the custodial spouse should apply, and suggested that the only issue was whether the interests of the child would be better served by permitting the child to move with the custodial parent than by maintaining the status quo, where the move is contingent on the retention of custody, or transferring custody to the remaining parent: *Bennett v. Drouillard* (1988), 15 R.F.L. (3d) 353 (Ont. Fam. Ct.), at p. 358; *Appleby v. Appleby* (1989), 21 R.F.L. (3d) 307 (Ont. H.C.), at p. 315; *T. (K.A.) v. T. (J.)* (1989), 23 R.F.L. (3d) 214 (Ont. U.F.C.).

The Ontario Court of Appeal weighed both views in *Carter v. Brooks*, *supra*. Morden A.C.J.O., speaking for the court, rejected the idea of a presumption in favour of the custodial parent. In his view, "[b]oth parents should bear an evidential burden" of showing where the best interests of the child lie. He agreed that while judges should accord a "reasonable measure of respect" to the views of the custodial parent, whose own best interests are relevant in determining those of the child, they should not be obliged to defer to the custodial parent as a matter of law. Rather, the judge should balance the relevant factors "without any rigid preconceived notion as to what weight each factor should have" (p. 63). The process should not "begin with a general rule that one of the parties will be unsuccessful unless he or she satisfies a specified burden of proof" (p. 63). In Morden A.C.J.O.'s view, "[t]his over-emphasizes the adversary nature of the proceeding and depreciates the Court's parens patriae responsibility" (p. 63). He rejected the language of parental "rights" which coloured some earlier cases, stating (at p. 61):

. . . the only principle that governs is that of the best interests of the child and . . . it does not assist in applying this principle to rely upon a mechanical proposition such as that quoted in *Landry* which includes the expression `*the right* to remove'. [Emphasis in original.]

Having rejected the notion of a presumption in favour of the custodial parent, Morden A.C.J.O. went on to identify a non-exhaustive list of factors relevant to the child's best interests, including the existing custody arrangement, the closeness of the relationship between the child and access parent, the views of the child, the reason for the move, and the "maximum contact" principle of ss. 16(10) and 17(9) of the *Divorce Act*.

The same court revisited the issue in *MacGyver v. Richards*, *supra*. At stake was an order which conditioned the mother's retention of custody upon the child's continued residence in North Bay, Ontario, despite the mother's desire to move to Tacoma, Washington, to be with her fiancé. The court unanimously upheld the General Division's reversal of this order. Abella J.A., Grange J.A. concurring, argued for "particular sensitivity and a presumptive deference to the needs of the responsible custodial parent who, in the final analysis, lives the reality, not the speculation, of decisions dealing with the incidents of custody" (p. 444). She suggested that the court should be "overwhelmingly respectful of the decision-making capacity" of the custodial parent, and should defer to the exercise of those responsibilities "unless there is substantial evidence that those decisions impair the child's, not the access parent's, long-term well-being" (p. 445). Labrosse J.A. wrote concurring reasons applying the decision of the court in *Carter v. Brooks*, *supra*.

Although some have read *MacGyver* as a departure from *Carter v. Brooks* (see *Lapointe v. Lapointe*, [1995] 10 W.W.R. 609 (Man. C.A.), at p. 614), the difference between the cases may not be as great as sometimes supposed. Both cases urge careful consideration of the views of the custodial parent: the court is directed to accord them "a reasonable measure of respect" in *Carter*, and an "overwhelming respect" or "presumptive deference" in *MacGyver*. Despite the stronger language of the majority in *MacGyver*, neither decision proposes a legal presumption in favour of the custodial parent. Most importantly, both cases emphasize that the only and ultimate standard against which to evaluate the evidence is the best interests of the child: see J. G. McLeod, Annotation to *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 433, at p. 435.

Against this background, I turn to arguments for and against a presumption in favour of the custodial parent.

In support of a presumption in favour of the custodial parent, it is argued that determining the principal residence of the child is a normal incident of custody and the court should accordingly defer to the custodial parent. It is further argued that the personal freedom of the custodial parent requires that he or she be permitted to decide where to live. Yet another consideration is that the presumption would make the outcome of variation applications more predictable. Assuming that in most cases the decision of the custodial parent will be the best for the child, a presumption would ensure a certain uniformity of result that will accord with the best interests of most children. I will deal with each of these arguments in favour of a presumption in turn.

The first proposition is that the custodial parent should be able to choose the child’s residence because he or she has the legal responsibility of making all decisions concerning the child. The general obligation and right of the custodial parent to decide where the child shall live is not in dispute. Barring a situation which amounts to a material change in circumstances, the custodial parent may take the child wherever he or she pleases. When, however, the proposed move amounts to a material change, Parliament has decreed that the access parent is entitled to ask a judge to review the matter. The custodial parent has the right to decide where the child shall live, but that right is subject to the right of the access parent to apply for a change in custody once a material change in circumstances is established. As M. J. Bailey notes in a comment on *Young v. Young*:

Regardless of the respective roles of custodial and access parents addressed so extensively by L'Heureux-Dubé J., the current law does allow for challenges by the access parent to decisions taken by the custodial parent, and it allows custodial parents to seek restrictions on access. In both cases, the best interests of the child is the relevant criterion, and the authority of the custodial parent is not the issue.

(M. J. Bailey, "Custody, Access and Religion: A Comment on *Young v. Young* and *D.P. v. C.S.*" (1994), 11 *C.F.L.Q.* 317, at p. 340.)

It is thus no answer to an inquiry into the best interests of the child triggered by the material change to argue that the custodial parent has the right and responsibility to decide where the child shall live. The demonstration of a material change places that right at issue. The judge will normally place great weight on the views of the custodial parent, who may be expected to have the most intimate and perceptive knowledge of what is in the child's interest. The judge's ultimate task, however, is to determine where, in light of the material change, the best interests of the child lie.

The wording of the *Divorce Act* belies the need to defer to the custodial parent; rather, the Act has expressly stipulated that the judge hearing the application should be concerned only with the best interests of the child. The rights and interests of the parents, except as they impact on the best interests of the child, are irrelevant. Material change established, the question is not whether the rights of custodial parents can be restricted; the only question is the best interests of the child. Nor does the great burden borne by custodial parents justify a presumption in their favour. Custodial responsibilities curb the personal freedom of parents in many ways. The Act is clear. Once a material change is established, the judge must review the matter anew to determine the best interests of the child.

The argument that a presumption would render the law more predictable in a way which would do justice in the majority of cases and reduce conflict damaging to the child between the former spouses also founders on the rock of the *Divorce Act.* The Act contemplates individual justice. The judge is obliged to consider the best interests of the particular child in the particular circumstances of the case. Had Parliament wished to impose general rules at the expense of individual justice, it could have done so. It did not. The manner in which Parliament has chosen to resolve situations which may not be in the child's best interests should not be lightly abjured. Even if it could be shown that a presumption in favour of the custodial parent would reduce litigation that would not imply a reduction in conflict. The short-term pain of litigation may be preferable to the long-term pain of unresolved conflict. Foreclosing an avenue of legal redress exacts a price; it may, in extreme cases, even impel desperate parents to desperate measures in contravention of the law. A presumption would do little to reduce the underlying conflict endemic in custody disputes. As Bailey, *supra*, remarks (at p. 339):

. . . under the existing law the access parent may challenge decisions taken by the custodial parent, regardless of whether the access parent has decision-making power or not. If this power to challenge were made less meaningful by presumptive deference to the custodial parent, the result would not be to minimize conflict, but to disallow or inhibit challenges to the custodial parent.

Having considered the arguments supporting a presumption in favour of the custodial parent, I turn to those raised against it. The first stumbling block is the wording of the Divorce Act itself. As noted, the Act makes no reference to such a presumption. Indeed, the logic of the Act negates it. Parliament has decreed that a two-stage procedure must be used to decide applications for variation of custody and access orders: the threshold condition of establishing a material change in the circumstances or needs of the child and the ability of the parents to meet them; followed, if met, by a fresh inquiry into the best interests of the child. In imposing the threshold requirement of demonstrating a material change of circumstances, Parliament has laid a special burden on the party seeking variation, often the access parent. If the access parent meets that burden, the judge must then enter into a fresh inquiry as to where the best interests of the child lie. If Parliament intended to place yet another special burden on the access parent at the second stage, one would have expected it to say so.

Until a material change in the circumstances of the child is demonstrated, the best interests of the child are rightly presumed to lie with the custodial parent. The finding of a material change effectively erases that presumption. The judge is then charged with the fresh responsibility of determining the child's best interests "by reference to that change". To reinstate the presumption in favour of the custodial parent at this stage would derogate from the finding that the child's interests may, by reason of the change, no longer be best protected or advanced by the earlier order. It would be to reinforce the earlier order when its continuing propriety is the very issue placed before the court. This in turn would depreciate potential adverse effects of the established material change. In short, the two-stage procedure required by the Divorce Act supports the view of Morden A.C.J.O. in Carter v. Brooks, supra, that once the applicant has discharged the burden of showing a material change in circumstances, "[b]oth parents should bear an evidential burden" of demonstrating where the best interests of the child lie (p. 63).

A second argument against a presumption in favour of the custodial parent is its potential effect. If the presumption is to be introduced in cases based on relocation, it would seem as a matter of principle that it should be introduced in all applications for variation of custody and access. Again, had Parliament so intended, why would it not have said so?

A third argument against a presumption has been touched on in discussing the arguments raised in support of a presumption in favour of the custodial parent. This is the fact that Parliament has placed the duty of ascertaining the best interests of the child on the judge, not the custodial parent. To the extent that the judge is required, as a matter of law, to defer to the opinion of the custodial parent, the judge is required to cede part of the responsibility that Parliament has placed upon the judge and the judge alone. As Morden A.C.J.O. put it in *Carter v. Brooks*, it "is for the Court to weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have" (p. 63). (Emphasis added.) To "begin with a general rule that one of the parties will be unsuccessful unless he or she satisfies a specified burden of proof . . . depreciates the Court's parens patriae responsibility" (p. 63).

A fourth argument militating against the adoption of a presumption in favour of the custodial parent is its tendency to render the inquiry more technical and adversarial than necessary. The effect of the presumption might be to deflect the inquiry from the facts relating to the child's needs and the parents' ability to meet them to legal issues relating to whether the requisite burden of proof has been met. Instead of both parties simply presenting evidence on what is best for the child, the focus might shift to who has proved what. In this sense, the process may be seen as more inquisitorial than adversarial, "over-emphasiz[ing] the adversary nature of the proceeding", to quote Morden A.C.J.O. in *Carter v. Brooks*, *supra*, at p. 63.

Fifthly and most importantly, a presumption in favour of the custodial parent has the potential to impair the inquiry into the best interests of the child. This inquiry should not be undertaken with a mindset that defaults in favour of a preordained outcome absent persuasion to the contrary. It may be that in most cases the opinion of the custodial parent will reflect the best interests of the child. In such cases, the presumption might do no harm. But Parliament did not entrust the court with the best interests of most children; it entrusted the court with the best interests of the particular child whose custody arrangements fall to be determined. Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the *Divorce Act* for a contextually sensitive inquiry into the needs, means, condition and other circumstances of "the child" whose best interests the court is charged with determining. "[G]eneral rules that do not admit of frequent exceptions can[not] evenly and fairly accommodate all of the varying circumstances that can present themselves": *per* Morden A.J.C.O. in *Carter v. Brooks, supra*, at p. 62. The inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected: "No matter what test or axiom one adopts from the many and varied reported decisions on this subject, each case must, in the final analysis, fall to be determined on its particular facts and, on those facts, in which way are the best interests of the children met" (*Appleby v. Appleby, supra*, at p. 315).

A presumption in favour of the custodial parent may also impair the inquiry into the best interests of the child by undervaluing changes in the respective relationships between the child and its parents between the time of the custody order and the application for variation. The *Divorce Act*'s provision for variation of custody and access orders recognizes that the child’s needs and the parents’ ability to meet them may change with time and circumstance, and may require corresponding changes in custody and access arrangements. Children grow and mature, articulating new priorities and placing new demands on their parents. To the extent that the proposed presumption would give added weight to the arrangement imposed by the original custody order, it may diminish the weight accorded to the child's new needs and the ability of each parent to meet them. Consequently, its operation might be dangerous in a case, for example, where in the period following trial the access parent has demonstrated the desire, aptitude and temperament to assume a greater role in meeting the needs of the child, and the custodial parent has evinced a corresponding inability to do so.

Finally, the proposed presumption in favour of the custodial parent may be criticized on the ground that it tends to shift the focus from the best interests of the child to the interests of the parents. As mentioned earlier, underlying much of the argument for the presumption is the suggestion that the custodial parent has the "right" to move where he or she pleases and should not be restricted in doing so by the desire of the access parent to maintain contact with the child. However, the *Divorce Act*  does not speak of parental "rights": see *Young v. Young*, *supra*. The child's best interest must be found within the practical context of the reality of the parents' lives and circumstances, one aspect of which may involve relocation. But to begin from the premise that one parent has the *prima facie* right to take the child where he or she wishes may unduly deflect the focus from the child to its parents.

For these reasons, I would reject the submission that there should be a presumption in favour of the custodial parent in applications to vary custody and access resulting from relocation of the custodial parent. The parent seeking the change bears the initial burden of demonstrating a material change of circumstances. Once that burden has been discharged, the judge must embark on a fresh inquiry in light of the change and all other relevant factors to determine the best interests of the child. There is neither need nor place to begin this inquiry with a general rule that one of the parties will be unsuccessful if he or she fails to satisfy a specified burden of proof.

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.

C) *Summary*

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.

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 views of the child;

(e) the custodial parent’s reason for moving, only in the exceptional case where it is relevant to that parent’s ability to meet the needs of the child;

(f) disruption to the child of a change in custody;

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

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?

V. Application of the Test to this Case

The threshold requirement of material change in the circumstances of the child and the parents’ ability to meet them was established by the mother’s intended move to Australia and the consequent disruption of the child’s life and diminution of the father’s contact with her. The terms of the order of Carter J. were premised on the child’s residence remaining within a reasonable distance of the access parent. The move would clearly breach this provision. Accordingly, the trial judge was required to embark on a fresh appraisal of the best interests of the child.

The reasons of the trial judge fall short of demonstrating that he engaged in the full and sensitive inquiry into the best interests of the child required by s. 17 of the *Divorce Act*. He mentioned only one factor in support of his decision: that he "relied heavily" on the reasons of Carter J., who had already concluded that the mother was the "proper person to have custody of th[e] child". Other factors, such as the child's relationship with her father, her extended family and her Saskatchewan community, were not mentioned. No reference was made to the circumstances prevailing after the trial, the current needs and desires of the child, or the respective abilities of each parent to meet them. One may speculate that the trial judge, having heard full argument, had such factors in his mind when he made his decision in favour of the mother. But one may equally infer that the necessary fresh inquiry was not fully undertaken. In either event, it seems clear that the trial judge failed to give sufficient weight to all relevant considerations (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 77), and it is therefore appropriate for this Court to review the decision and, should it find the conclusion unsupported on the evidence, vary the order accordingly.

This case requires the Court to balance the benefits derived from continuing custody with the mother against the desirability of maintaining generous contact between the child and her father, as well as her extended Canadian family and her Canadian community. The fact that the child has been in the custody of the mother for some years, that the reasons for initially granting the mother custody have not been shown to have substantially changed, and that a change of custody at this time would probably be highly disruptive to her, argue in favour of the mother retaining custody. On the other hand, the child’s access to her father, with whom she enjoyed a close relationship, has been greatly diminished as a consequence of her mother's move, and the child has been removed from her extended family and community in Canada. These factors are somewhat attenuated, however, by the fact that the father has the means to travel to Australia and spend time with the child, and that she could return to Canada for periodic visits with her family and community in Saskatchewan if the terms of access were varied.

Taking all these factors into account, I am of the view that the trial judge did not err in continuing the mother’s custody of the child, notwithstanding her intended move to Australia. I find no support in the evidence, however, for restricting the father's access to Australia. Access in Canada would have the advantage of making the father’s limited time with the child more natural while it allows her to maintain contact with friends and extended family. Accordingly, I would uphold the custody order and vary the access order to provide for access to be exercisable in Canada. I would add that both parents should equally share the cost of sending her to Canada, in that both have ample means. If the parties cannot agree on the details of access on these terms, or the necessary financial arrangements, they may apply to the Saskatchewan Court of Queen’s Bench for direction.

VI. Conclusion

I would affirm the order of the trial judge granting the respondent custody. I would allow the appeal in part, to permit the father to exercise access to the child in Canada on the terms set out above. The parties will bear their own costs throughout.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

56 L'Heureux-Dubé J. -- At the heart of this case is the notion of custody of children as regards a change of residence of the custodial parent.

57 My colleague McLachlin J. concludes that, on the facts of this case, the trial judge was correct in upholding the respondent mother’s custody of the child despite her intended move to Australia, but that he erred in confining the exercise of the appellant father’s access to the child to Australia. I agree, but arrive at this conclusion via a different analysis.

58 Since the facts and judgments are recounted in my colleague’s opinion, for a better understanding of what follows, a brief recall will suffice.

The custody of the now seven-year-old daughter of the parties was entrusted to the respondent upon the divorce of the parties on February 26, 1993, after an eight-day trial which dealt primarily with the issues of custody of the child and division of matrimonial property: (1993), 111 Sask. R. 1 (Q.B.). Both parties resided at the time in Saskatoon. While the custody order provides for specified access to the appellant, it contains no restrictions as to the respondent’s exercise of the full panoply of custody rights.

Since then, the respondent has moved with her daughter to Australia where she studies orthodontics. When informed by the respondent of her intended change of residence in early November 1994, the appellant applied for custody of his daughter or, alternatively, for an order to prevent the respondent from removing the child from Saskatoon. The respondent cross-applied for a variation of the access order to accommodate her move to Australia with the child. The appellant’s application was denied and the access order was varied to allow the respondent to move to Australia with the child while granting the appellant “liberal and generous access” on one month's notice to be exercised in Australia only: Sask. Q.B., December 30, 1994, unreported, aff’d (1995), 128 Sask. R. 156, 85 W.A.C. 156.

The issue, as I see it, is the impact of a change of residence of the custodial parent on a custody order where a variation order is sought under s. 17(1)(*b*) of the *Divorce Act*, R.C.S., 1985, c. 3 (2nd Supp.) (the “Act”).

Before discussing this issue, however, a preliminary matter must be dealt with, that is the conditions required to trigger a variation order.

I. Variation

The first consideration in any application for variation of custody or access orders under the Act is whether there has been, according to s. 17(5) of the Act:

. . . a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order . . .

The guidelines as regards variation of custody or access orders are found in this Court’s decision in *Willick v. Willick*, [1994] 3 S.C.R. 670. Although that case dealt with the conditions for a variation order in respect of child support pursuant to s. 17(4) of the Act, it applies to variation orders in general. As Sopinka J. states, at p. 688:

In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

I echoed this statement, stressing further the purpose of this requirement, at pp. 733-34:

. . . the preliminary threshold test ensures that child support orders will not be reassessed by courts anytime a change, however minimal, occurs in the circumstances of the parties or their children. This approach recognizes the value in some degree of certainty and stability between the parties. Parties must be encouraged to settle their difficulties without coming before the courts on each and every occasion. Nonetheless, the threshold test cannot be applied properly unless the sufficiency of the change in circumstances is evaluated against the backdrop of the particular facts of the case at hand.... Most importantly, however, and notwithstanding the above observations, while the onus of proving the sufficiency of the change in condition, means, needs or other circumstances rests upon the applicant . . . the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the *Divorce Act* provisions.

See also *Benoît v. Reid* (1995), 171 N.B.R. (2d) 161 (C.A.); *Talbot v. Henry* (1990), 25 R.F.L. (3d) 415 (Sask. C.A.); *Brothwell v. Brothwell* (1995), 135 Sask. R. 178 (Q.B.).

A change of residence, which, in this case, involves moving to another country and was also unforseen at the time the custody order was originally made, no doubt constitutes a change of the nature contemplated by s. 17(5) of the Act and falls within the parameters of *Willick*, *supra*. Once this threshold is reached, the next question is whether the change is such as to trigger a reappraisal of the whole situation of the parties and the children or only necessitates an assessment of the impact of the alleged change or changes on the custody of the child, remembering that, in any event, a variation hearing is not an appeal (*Willick*, *supra*, at p. 687 (*per* Sopinka J.)). As I said in *Willick*, at p. 734, it is only “where the alleged change or changes are of such a nature or magnitude as to make the original order irrelevant or no longer appropriate” that an assessment of the whole situation anew is appropriate.

In the case at bar, despite the appellant’s alleged increased involvement in his daughter’s life since the original custody order, the custody challenge was essentially based on the inevitable limitation to his access rights the child’s change of residence would involve. Less than two years had elapsed between the date of the original custody order and that of the respondent’s projected change of residence. The original order entrusting custody of the child to the respondent clearly remains highly relevant upon consideration of the merits of the application for variation. All other considerations being equal, in such circumstances a variation application would normally be restricted to an appraisal of the impact of the child’s change of residence on the prior custody determination as well as the appropriate modification to access as the case may be. In a case such as this one, as my colleague McLachlin J. observes, “[t]he court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued” (para. 11 (emphasis in the original)).

I am satisfied that the trial judge applied the correct test and, upon the evidence before him, properly concluded that the threshold upon which the merits of the application for variation could be considered had been met.

This being said, the question at issue here requires us to determine the proper analysis governing a change of residence by the custodial parent when courts have to rule on a variation application such as the one before us. The answer to this question rests mainly on the view one takes of the notion of custody, a notion no longer controversial in my opinion.

At the outset, however, there are fundamental and uncontroversial premises which must be recalled:

1. It is the right of children that custody and access adjudications under the Act be governed by their best interests (ss. 16(8) and 17(5); *Young v. Young*, [1993] 4 S.C.R. 3, at p. 63 (*per* L’Heureux-Dubé J.) and at p. 117 (*per* McLachlin J.)).

2. The best interests of the child test under the Act is constitutional (*Young*, *supra*, at p. 71 (*per* L’Heureux-Dubé J.), and at p. 124 (*per* McLachlin J.)).

3. The Act provides that the best interests of the child must be “determined by reference to the condition, means, needs and other circumstances of the child” (s. 16(8)) or, where “there has been a change in the condition, means, needs or other circumstances of the child, . . . by reference to that change” (s. 17(5)). It is thus from the child’s perspective, and not from the perspective of either parent, that his or her best interests must be assessed (J. D. Payne, *Payne on Divorce* (3rd ed. 1993), at p. 279; *Young*, *supra*, at p. 63 (*per* L’Heureux-Dubé J.)).

4. Custody and access confer entitlements only to the extent that they enable both parents to discharge their responsibilities and obligations to their children in order to ensure and promote their best interests (*Racine v. Woods*, [1983] 2 S.C.R. 173, at p. 185 (*per* Wilson J.); *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 132 (*per* Wilson J.); *Young*, *supra*, at p. 59 (*per* L’Heureux-Dubé J.)).

5. The Act provides that, in making an order regarding the child, “the court shall give effect to the principle that a child ... should have as much contact with each spouse as is consistent with the best interests of the child” (ss. 16(10) and 17(9) (emphasis added)); *Young*, *supra*, at p. 53 (*per* L’Heureux-Dubé J.) and at p. 118 (*per* McLachlin J.)).

6. Agreements between parents as to any right of the child, be it custody, access or child support, are not binding on courts and must be viewed in light of the best interests of the child (*Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 845 (*per* Wilson J.); *Richardson v. Richardson*, [1987] 1 S.C.R. 857, at p. 869 (*per* Wilson J.); *Willick*, *supra*, at p. 686 (*per* Sopinka J.) and at p. 727 (*per* L'Heureux-Dubé J.); *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370, at pp. 396-99 (*per* L'Heureux-Dubé J.)).

With these premises in mind, I now turn to the notion of custody which lies at the heart of this appeal.

II. Custody

The starting point of the analysis is: what does custody encompass? A brief survey of custody at common law, under the Act and provincial statutes as well as under the *Civil Code of Québec* and various international documents, together with a comparative analysis of the trend in other jurisdictions, is in order here.

(1) *The Common Law*

In *Young*, *supra*, I examined in detail the rationale underlying custody at common law from an historical perspective, although *Young* dealt with restrictions on access linked to the non-custodial parent’s religious activities.

At common law, the focus of custody determinations gradually shifted from the father’s exclusive right to his children to the child’s best interests as the paramount consideration. Most importantly, however, as I underscored in *Young*, *supra*, at pp. 37-38:

Despite these changes over time with respect to who is regarded as the appropriate custodial parent, the nature and scope of custody itself have remained relatively constant. The chief feature of such orders was, and still is, the implied, if not explicit, conferral of parental authority on the person granted custody. The long-standing rule at common law is that an order of custody entails the right to exercise full parental authority. In the case of a sole custody order, that authority is vested in one parent to the exclusion of the other.

The power of the custodial parent is not a "right" with independent value which is granted by courts for the benefit of the parent, but is designed to enable that parent to discharge his or her responsibilities and obligations to the child. It is, in fact, the child's right to a parent who will look after his or her best interests. . . .

It has long been recognized that the custodial parent has a duty to ensure, protect and promote the best interests of the child. That duty includes the sole and primary responsibility to oversee all aspects of day to day life and long‑term well‑being, as well as major decisions with respect to education, religion, health and well‑being. [Emphasis added.]

This traditional view is eloquently reflected by the following passage of the decision of the Ontario Court of Appeal in *Kruger v. Kruger* (1979), 25 O.R. (2d) 673, at p. 677 (*per* Thorson J.A.):

In my view, to award one parent the exclusive custody of a child is to clothe that parent, for whatever period he or she is awarded the custody, with full parental control over, and ultimate parental responsibility for, the care, upbringing and education of the child, generally to the exclusion of the right of the other parent to interfere in the decisions that are made in exercising that control or in carrying out that responsibility. [Emphasis added.]

More specifically related to the issue in this appeal, the right to determine the place of residence of a child is, at common law, regarded as an incident of custody which is, accordingly, vested in the person to whom custody is entrusted. The evolution of the common law as regards the right to determine the place of residence of a child has been thoroughly canvassed in the recent decision of the Manitoba Court of Appeal in *Lapointe v. Lapointe*, [1995] 10 W.W.R. 609. Writing for the court, Twaddle J.A. observes that once the father no longer had an exclusive right to the custody of his children, “[t]he incidents of that right ... became vested in whichever parent happened to have custody, whether by decree or agreement” (p. 614). As his careful review of the case law demonstrates, one such incident was the power to decide where the children should live, at p. 615:

*Hunt v. Hunt* (1884), 28 Ch. D. 606 (C.A.), was one of the first cases to deal with the competing rights of one parent as custodian and the other as an access parent. The case turned on the construction of a deed of separation which gave the father custody of his children with "free liberty of access" to the mother. The father, an army medical officer, was posted to Egypt. He intended to take two of his children with him. The mother sought to restrain the father from doing so on the ground that the move would frustrate access. The court was unsympathetic. Fry L.J. said (at p. 613):

The deed appears to me only to give the wife a right of access to them where they happen to be, and to hold that it obliges the husband to keep the children in such a place that she can conveniently have access to them, would create formidable difficulties, for how could it be determined what was the limit to the places to which the husband might take them.

As viewed by Fry L.J., the only possible limitation on the father's right to move the children's residence was a need for the father to show good faith.

. . .

*Hunt v. Hunt* was followed not only in England, but also in Canada. The right of the custodial parent (be that the father or the mother) to move the children away from the access parent continued to be recognized subject only to the kinds of limitation contemplated by Fry and Bowen L.JJ.: see *Douglas v. Douglas*, [1948] 1 W.W.R. 473 (Sask. K.B.), *Lamond v. Lamond*, [1948] 1 W.W.R. 1087 (Sask. K.B.), and *Beck v. Beck* (1949), [1950] 1 D.L.R. 492 (B.C.C.A.). [Emphasis added.]

After reviewing numerous cases and their underlying principles, Twaddle J.A. concludes that, as of 1985, “[a] custodial parent was free to change the place of residence of a child in his or her custody without prior approval unless the power to make the decision to do so was restricted by court order or agreement” (p. 618).

The issue of the mobility of the custodial parent was dealt with by the Ontario Court of Appeal in *Wright v. Wright*  (1973), 40 D.L.R. (3d) 321. Evans J.A., for the majority, summarized the applicable principles at common law as follows, at p. 324:

Absenting all consideration of unreasonableness, which, in the circumstances of this case is not a factor, the parent who has custody of children has the right to remove the children without the permission of the other parent in the absence of some specific agreement to the contrary or in the absence of such specific terms with respect to access as would clearly indicate that the parties must have intended that the children remain in close proximity if the specified right of access provided in the agreement was to be an effective right. [Emphasis added.]

See also *Field v. Field* (1978), 6 R.F.L. (2d) 278 (Ont. H.C.); *Landry v. Lavers* (1985), 45 R.F.L. (2d) 235 (Ont. C.A.); *Wells v. Wells* (1984), 38 R.F.L. (2d) 405 (Sask. Q.B.); *Adie v. Adie* (1991), 89 Sask. R. 183 (Q.B.).

Thus, custody at common law has been historically recognized as a wide and inclusive concept which grants the person entrusted with it, *inter alia*, the power to choose where the child shall live, subject to the right of the non-custodial parent to oppose such choice by seeking a variation order of the custody or access terms and such other limitations as may be warranted on the facts of the case.

(2) *The* *Divorce Act*

The notion of custody under the Act essentially reflects the common law. As Professor Payne notes, *supra*, at p. 240, a wide concept of custody is well entrenched in Canadian law:

In Canadian divorce proceedings, case law tends to support the conclusion that, in the absence of directions to the contrary, an order granting “sole custody” to one parent signifies that the custodial parent shall exercise all the powers of the legal guardian of the child. The non‑custodial parent with access privileges is thus deprived of the rights and responsibilities that previously vested in that parent as a joint custodian of the child. [Emphasis added.]

According to the same author, at pp. 242-43, nothing in the Act warrants an inference that Parliament intended to retrench from the meaning of custody previously recognized at common law:

The provisions of the *Divorce Act, 1985*, and particularly the definitions of “custody” and “accès” in section 2(1), may preclude Canadian courts from reverting to a narrow definition of custody. Pursuant to section 2(1), “‘custody’ includes care, upbringing and any other incident of custody” and “‘accès’ comporte le droit de visite.” The use of the word “includes” in the definition of “custody” implies that the term embraces a wider range of powers than those specifically designated in section 2(1). . . . Consequently, in the absence of an order for shared parenting or a court-ordered division of the incidents of custody, a non‑custodial spouse with access privileges would remain a passive bystander who is excluded from the decision‑making process in matters relating to the child's welfare, growth and development. This remains true notwithstanding that section 16(10) of the *Divorce Act, 1985* provides that the court shall promote “maximum contact” between the child and the non‑custodial parent to the extent that this is consistent with the best interests of the child. [Footnotes omitted; emphasis added.]

In line with the accepted meaning of custody at common law and under the divorce legislation, it comes as no surprise, therefore, that the decision as to the residence of the child has been held to fall within the incidents of custody under the Act. As Twaddle J.A. concludes in *Lapointe v. Lapointe*, *supra*, at p. 619:

[Section 16(7) of the Act which provides that the custodial parent may be required to give notice of any change of residence of the child to the non-custodial parent who has been granted access rights] presupposes the existence of a right to make such a change of residence without express approval by the court. There would be no purpose in requiring a person to give such notice, as distinct from a notice of application for permission to move, if the change of residence could not be made unilaterally. Unless, then, the right to decide on a change of residence is expressly excluded from the order of custody, the custodial parent has the right.

The notice requirement would seem to serve two purposes, the first to ensure that the access parent has notice of the move and its significant details and the second to give the access parent the opportunity to seek an order forbidding the move or one making new provision for access after it. [Emphasis added.]

The proposition that the right to decide where a child should reside is vested in the custodial parent as an incident of custody finds ample support in the case law. No fewer than four Canadian appellate courts have fully endorsed it, namely those of British Columbia, Manitoba, New Brunswick and Quebec: *Levesque v. Lapointe* (1993), 21 B.C.A.C. 285; *Lapointe v. Lapointe*, *supra*; *Benoît v. Reid*, *supra*; *Droit de la famille* -- *1826*, [1993] R.J.Q. 1728 (C.A.), aff'd [1995] 4 S.C.R. 592 (*sub nom. P. (M.) v. L.B. (G.)*). In *Droit de la famille -- 1826*, Proulx J.A., writing for the Quebec Court of Appeal, states unequivocally that [translation] "there is attached to the right of custody a right to decide where the child will live" (p. 1735). In *Carter v. Brooks* (1990), 30 R.F.L. (3d) 53, Morden A.C.J.O., delivering the judgment for the Ontario Court of Appeal, comments that "it is reasonable to think that an incident of custody includes the determination by the custodial parent of where the parent and the child shall live" (p. 63).

The Act itself, the authors as well as the case law demonstrate that, as at common law, the custody of a child within the context of divorce is an all-encompassing concept which grants the custodial parent the exclusive right to decide where the child shall live, subject to restrictions which may be ordered where the best interests of the child so require (Payne, *supra*, at p. 243) as well as the non-custodial parent's right to apply for “an order varying . . . a custody order or any provision thereof” pursuant to s. 17(1)(*b*) of the Act.

(3) *Provincial Statutes*

Definitions of custody in provincial statutes are consistent with the wide notion of custody recognized at common law and under the Act. The Saskatchewan *Children's Law Act*, S.S. 1990-91, c. C-8.1, for instance, specifies that access rights are not to be construed as granting the right to be consulted about or to participate in the making of decisions of the custodial parent unless the court orders otherwise (s. 9(3)); it further provides that the custodial parent may be required to give notice of any change of residence of the child to a person who has been granted access rights, thereby implying that the custodial parent is entitled to make such change of residence (s. 6(5)(b)). Similarly, under the Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C.12, the choice of the child’s place of residence falls within the incidents of custody (s. 20(2) and (5); *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.)). See also the Newfoundland *Children's Law Act*, R.S.N. 1990, c. C-13, s. 26(2) and (6); the Prince Edward Island *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 3(2) and (5); the Yukon Territory *Children’s Act*, R.S.Y. 1986, c. 22, s. 31(2), (5) and (6).

From a comparative standpoint, it is interesting to note that custody as regards the right to choose the place of residence of a child is given a similar interpretation under the *Civil Code of Québec*, under various international documents as well as in some other common law and civil law jurisdictions.

(4) *The Civil Code of Québec*

This Court has recently had occasion to revisit the notion of custody under the *Civil Code of Québec* in *W. (V.) v. S. (D.)*, [1996] 2 S.C.R. 108, to which I refer for a more detailed analysis.

In brief, although custody is nowhere defined in the *Civil Code of Québec*, it is generally recognized that the attributes of parental authority encompass, among other things, the right to decide the place of residence of a child. See A. Mayrand, “La garde conjointe, rééquilibrage de l'autorité parentale» (1988), 67 *Can. Bar Rev.* 193, at p. 195; M. Ouellette, *Droit de la famille* (3rd ed. 1995), at p. 224; P. B. Mignault, *Le droit civil canadien* (1896), t. 2, at p. 145.

Upon separation or divorce of the parents, while parental authority remains, the parent or the third person entrusted with the custody of the child is provided with sole decision-making power with respect to all matters relating to the child, including where he or she shall live (*C. (G.) v. V.-F. (T.)*, [1987] 2 S.C.R. 244, at p. 285 (*per* Beetz J.)). That is not to say, however, that the non-custodial parent is deprived of all exercise of parental authority: so far as it is not incompatible with the rights of the custodial parent, the non-custodial parent must exercise his duties of supervision and education towards the child by means of the right to access (*P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 164 (*per* L'Heureux-Dubé J.); art. 605 *C.C.Q.* (previously art. 570)), as well as the right to refer any litigious matter relating to the exercise of the parental authority to the court (art. 604 *C.C.Q.* (previously art. 653)).

(5) *International Documents*

International awareness of children’s rights is illustrated by various international documents such as the League of Nations *Declaration of the Rights of the Child* (1924), the United Nations *Declaration of the Rights of the Child* (1959) and the 1989 United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 3(1) of which recognizes the need to make the best interests of the child the primary consideration in all actions concerning children, including legal proceedings. More particularly relevant to the issue raised in this appeal, however, is the Hague *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 (the “Convention”). Since in *W. (V.) v. S. (D.)*, *supra*, this Court has had occasion to discuss the notion of custody under the Convention, I will only refer to it briefly here.

For the purpose of the Convention, which is the enforcement of custody rights (*Thomson v. Thomson*, [1994] 3 S.C.R. 551, at p. 579 (*per* La Forest J.)), custody is understood as the “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence” (art. 5). As this Court stressed in *W. (V.) v. S. (D.)*, it is significant that the international community has adopted a wide concept of custody under the Convention which entails the right to determine the place of residence of a child unless specifically taken away by such means as an explicit non-removal clause included in an interim custody order (*Thomson*, *supra*, at p. 588 (*per* La Forest J.)).

(6) *Other Jurisdictions*

In England, the *Children Act 1989* (U.K.), 1989, c. 41, replaced the concept of custody by that of “parental responsibility” which is defined as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property” (s. 3(1)). The common law must still be referred to, however, in order to determine the scope of the powers normally included within parental responsibility: *Halsbury's Laws of England* (4th ed. 1993), vol. 5(2), at para. 730. As regards the right of the custodial parent to move with the child, the leading English authority is *P. (L.M.) v. P. (G.E.)*, [1970] 3 All E.R. 659 (C.A.), in which the oft-quoted passage of Sachs L.J.’s opinion may be found, at p. 662:

When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may . . . produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results. [Emphasis added.]

This proposition is reinforced by Davies L.J. in *Nash v. Nash*, [1973] 2 All E.R. 704 (C.A.), at p. 706:

. . . when one parent has been given custody it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody.

See, however, ss. 8(1), 13(1)(b) and (3) of the *Children Act 1989* which provide that where “a residence order” has determined the person with whom the child is to live, then no one may remove him or her from the United Kingdom except with the consent of every person who has parental responsibility for the child or with leave of the court (which may be granted with the residence order).

The Full Court of the Family Court of Australia has adopted a stronger stance in recognizing that the right to decide where a child lives is an incident of custody under the *Family Law Act 1975* (Australia), No. 53 of 1975, s. 63E(1) and (2); *Halsbury’s Laws of Australia* (1993), vol. 13, at p. 378,788. Such right is not absolute, however, and remains subject to a court-ordered variation or limitation under s. 64(1)(c) which may be ordered where the best interests of the child so require (*In the Marriage of R and R* (1985), 60 A.L.R. 727 (Fam. Ct. (Full Ct.)); *In the Marriage of Holmes* (1988), 92 F.L.R. 290 (Fam. Ct. (Full Ct.)); *In the Marriage of Fragomeli* (1993), 113 F.L.R. 229 (Fam. Ct. (Full Ct.)); *In the Marriage of I* (1995), 19 Fam. L.R. 147 (Full Ct.); see also J. Eades, "A custodial parent's rights to take a child out of Australia: limited or unlimited?" (1995), 33 *Law Soc. J.* 46).

Closer to us, in the United States, there is authority for the proposition that, upon the parents’ divorce or separation, “*all* rights of decision and control over the child go to the parent awarded custody, except when joint custody is awarded”: H. D. Krause, *Family Law in a Nutshell* (3rd ed. 1995), at p. 227 (emphasis in original). Although the rules governing a relocation of the custodial parent may vary from state to state, there is an implicit assumption that the custodial parent has the right to decide where the child should reside, subject to an inquiry into the best interests of the child upon such relocation which may warrant a modification of custody in certain circumstances. See generally E. Sivin, “Residence Restrictions on Custodial Parents: Implications for the Right to Travel” (1980-81), 12 *Rutgers L.J.* 341; M. S. Cohen, “A Toss of the Dice . . . The Gamble with Post-Divorce Relocation Laws” (1989), 18 *Hofstra L. Rev.* 127; D. T. Kramer, *Legal Rights of Children* (2nd ed. 1994), vol. 1, at pp. 150-57; C. S. Bruch and J. M. Bowermaster, “The Relocation of Children and Custodial Parents: Public Policy, Past and Present”, to be published in (1996), 30 *Fam. L.Q.* 245.

Civil law jurisdictions have legislation similar to that of the *Civil Code of Québec*. In France, for instance, it is generally recognized that the notion of custody is inextricably linked to the right to choose where the child shall live (P. Simler, “La notion de garde de l'enfant (sa signification et son rôle au regard de l'autorité parentale)” (1972), 70 *Rev. trim. dr. civ.* 685, at p. 708; G. Marty and P. Raynaud, *Les personnes* (3rd ed. 1976), at p. 288; G. Cornu, *Droit civil: la famille* (3rd ed. 1993), at pp. 126-27).

Given this background, any application for variation of custody or access dealing with a change of residence of the custodial parent and the child must start with the proposition that, absent an agreement or court order restricting the incidents of custody, such as the place of residence of the child, it is within the powers of a custodial parent to decide such a change of residence. I disagree with McLachlin J. that “[t]he demonstration of a material change places that right at issue” (para. 36). What that premise does entail, however, is that the onus of showing why the move is not in the best interests of the child lies with the party who opposes such a move.

I pause here to address restrictions that may be imposed on custodial parents.

III. Restrictions on the Rights of Custodial Parents

Section 16(6) of the Act empowers a court to impose terms, conditions or restrictions in connection with its orders for custody and access. The imposition of restrictions on the rights of custodial parents are and should remain the exception rather than the rule. As Professor J. G. McLeod, Annotation to *Young v. Young* (1994), 49 R.F.L. (3d) 129, points out, at p. 133:

The trend in custody and access cases is to deal with incidents of custody. Based on social biases and past parenting practices, mothers usually receive custody. Most fathers are content to be involved in making major decisions. Accordingly, courts are called on to decide religion, education and residence issues. That is essentially what happens in *Young v. Young*. Nevertheless, there is much to be said for the view that courts should not continue to sever the incidents of custody and continually second-guess the custodial parent. In those instances, the custodial parent is responsible for the child but has no decision making power. [Emphasis added.]

In this regard, although entitled to respect and deserving of encouragement, agreements entered into between parents regarding children are not binding on courts and must be based on the best interests of children assessed from the vantage point of the child (Payne, *supra*, at p. 304). See also *Richardson*, *supra*, at p. 869 (*per* Wilson J.); *Pelech*, *supra*, at p. 845 (Wilson J.); *Willick*, *supra*, at p. 686 (*per* Sopinka J.) and at p. 727 (*per* L’Heureux-Dubé J.); *Cabott v. Binns* (1987), 9 R.F.L. (3d) 390 (B.C.C.A.), at p. 396; *Droit de la famille — 501*, [1989] R.D.F. 316 (Que. C.A.); *Stewart v. Stewart* (1990), 30 R.F.L. (3d) 67 (Alta. C.A.).

However, as far as court orders are concerned, s. 16(8) of the Act provides:

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

With respect to variation orders, s. 17(5) is to the same effect:

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

Having regard to these statutory parameters, limitations on the rights of the custodial parent should not be imposed as a matter of routine. Only if they are found to be required in the best interests of the child, from the child’s point of view, can such limitations be justified. Consequently, it is evident that restrictions to incidents of custody cannot be made for frivolous reasons, for the sole purpose of insuring the non-custodial parent’s access, to frustrate the custodial parent's mobility, as a bargaining tool, etc. This view is shared by Professor Payne, *supra*, at p. 276:

Canadian courts may include directions in an order for custody that limit or preclude the custodial parent from removing the children from the jurisdiction without the consent of the non-custodial parent or a further order of the court. Such restrictions on the constitutionally guaranteed right of mobility should not be lightly imposed in the absence of cogent evidence that the best interests of the child will thereby be served. [Emphasis added.]

Accepting that perspective, restrictions on incidents of custody, such as the right to determine where the child should live, should not be inferred, for instance, from generous or specified access provisions without more. As Abella J.A. (Grange J.A. concurring) cautioned in *MacGyver v. Richards*, *supra*, at p. 445:

In deciding what restrictions, if any, should be placed on a parent with custody, courts should be wary about interfering with that parent's capacity to decide, daily, what is best for the child. That is the very responsibility a custody order imposes on a parent, and it obliges — and entitles — the parent to exercise judgments which range from the trivial to the dramatic. Those judgments may include whether to change neighbourhoods, or provinces, or partners, or jobs, or friends, or schools, or religions. Each of those significant judgments may affect the child in some way, but that does not mean that the court has the right to prevent the change.

The inevitable genesis of a court having to make a decision is because of some stress and instability. To minimize future stresses, as opposed to more utopian and less realistic objectives, the court should be overwhelmingly respectful of the decision‑making capacity of the person in whom the court or the other parent has entrusted primary responsibility for the child. We cannot design a system which shields the non‑custodial parent from any change in the custodial parent's life which may affect the exercise of access. [Emphasis added.]

Coming back to the impact of a change of residence by the custodial parent in the context of an application to vary custody, I now turn to the question of who bears the onus of proof.

IV. Onus

The custodial parent’s right, as part of the incidents of custody, to decide the place of residence of the child has consequences for the allocation of the burden of proof.

At the outset, it must be noted that there is no clear legal obligation on the part of the custodial parent to notify the non-custodial parent of a change of residence of the child, absent a court order under s. 16(7) of the Act or a valid consensual covenant to that effect. Nevertheless, it would be appropriate for the custodial parent to notify the non-custodial parent of a proposed change of residence except, of course, where there is a threat or fear of violence to the custodial parent or the child, or some other circumstance where such notice would not be in the child’s best interests or may not be possible.

This being said, it seems clear that, as in any other type of litigation, the onus of proof lies on the party seeking the variation of a previous court order (Payne, *supra*, at p. 306). This is particularly so in cases implying a change of residence, given the custodial parent’s right to elect the place of residence of the children. As Sopinka J. states in *Snell v. Farrell*, [1990] 2 S.C.R. 311, at p. 321:

In a civil case, the two broad principles are:

1.that the onus is on the party who asserts a proposition, usually the plaintiff;

2.that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

The non-custodial parent must bear the onus of showing that the proposed change of residence will be detrimental to the best interests of the child to the extent that custody or access should be varied or, exceptionally, where there is cogent evidence that the child’s best interests could not otherwise be accommodated in any reasonable way, that the child should remain in the jurisdiction. Where, however, there is a covenant or court order expressly restricting the child’s change of residence, the onus should shift to the custodial parent to establish that the decision to relocate is not made in order to undermine the access rights of the non-custodial parent and that he or she is willing to make arrangements with the non-custodial parent to restructure access, when appropriate, in light of the change of residence of the child. In short, as Professors Bruch and Bowermaster, *supra*, put it (at p. 268):

Given the importance of maintaining the custodial household unless the child’s welfare will be advanced by a custody transfer, and viewed strictly from the child’s vantage point, it seems clear that a parent’s motives for moving are generally irrelevant. [Emphasis added.]

In the most recent American decision on the question of relocation of custodial parents in California (*In re Marriage of Burgess*, 51 Cal.Rptr.2d 444 (1996)), where the law provides for “frequent and continuous contact” with the non-custodial parent and where, as here, there also exists a “presumptive “right” of a parent entitled to custody to change the residence of his or her minor children”, Mosk J., for the majority of the Supreme Court of California (Lucas C.J. and Kennard, George, Werdegar and Chin JJ. concurring), held on the precise point of the onus (at pp. 452-53):

Ordinarily, after a judicial custody determination, the noncustodial parent seeking to alter the order for legal and physical custody can do so only on a showing that there has been a substantial change of circumstances so affecting the minor child that modification is essential to the child’s welfare. As we have explained: “The (changed circumstance) rule requires that one identify a prior custody decision based upon circumstances then existing which rendered that decision in the best interest of the child. The court can then inquire whether alleged new circumstances represent a significant change from preexisting circumstances, requiring reevaluation of the child’s custody.”

We conclude that the same allocation of the burden of persuasion applies in the case of a custodial parent’s relocation as in any other proceeding to alter existing custody arrangements: “(I)n view of the child’s interest in stable custodial and emotional ties, custody lawfully acquired and maintained for a significant period will have the effect of compelling the noncustodial parent to assume the burden of persuading the trier of fact that a change (in custody) is in the child’s best interests.”

Similarly, the same standard of proof applies in a motion for change in custody based on the custodial parent’s decision to relocate with the minor children as in any other matter involving changed circumstances: “(O)nce it has been established (under a judicial custody decision) that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest.”

The showing required is substantial. We have previously held that a child should not be removed from prior custody of one parent and given to the other “ ‘unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change.’ ” In a “move away” case, a change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of relocation with that parent, the child will suffer detriment rendering it “ ‘essential or expedient for the welfare of the child that there be a change.’ ”

This construction is consistent with the presumptive “right” of a parent entitled to custody to change the residence of his or her minor children, unless such removal would result in “prejudice” to their “rights or welfare”. The dispositive issue is, accordingly, *not* whether *relocating* is itself “essential or expedient” either for the welfare of the custodial parent or the child, but whether a *change in custody* is “ ‘essential or expedient for the welfare of the child.’ ” [Italics in original; underlining added; references and footnotes omitted.]

Baxter J. (concurring in part, dissenting in part) agreed (at p. 455):

I also agree with the majority that when a relocation dispute arises *after* an initial award of custody has been made, the usual “changed circumstances” rule should apply. A child’s welfare is not served by casual changes in caregiving arrangements, and the law abhors the endless relitigation of matters already determined. Hence, the parent who seeks a change in formal custody based on “changed circumstances” (including a parental relocation) bears the burden of persuading the court that *in light of the new circumstances*, an alteration of the existing award is in the child's “best interest.” Thus again, a parent who wishes to relocate with the child has no special burden of proving the move is “necessary.” [Italics in original; underlining added; references omitted.]

The difficulty, of course, lies in determining what standard should be applied by courts when deciding relocation disputes upon an application for variation of custody, a matter I will now turn to.

V. Standard for Resolving Relocation Disputes

Although the Act makes clear that the best interests of the child are the only consideration to be taken into account in making orders concerning children (ss. 16(8) and 17(5)), in assessing those interests, a number of factors must be considered, not the least of which is the desirability of promoting maximum contact between the child and the non-custodial parent, as the Act also makes clear (ss. 16(10) and 17(9)).

Access exists in recognition of the fact that it is usually in the best interests of the child to maintain and foster a meaningful relationship with both parents after divorce or separation. As McLachlin J. notes in *Young*, *supra*, at p. 118, research suggests that ongoing contact with the non-custodial parent may mitigate the detrimental consequences of divorce upon children. See alsoN. Weisman, “On Access After Parental Separation” (1992), 36 R.F.L. (3d) 35, at pp. 48-54; S. Maidment, *Child Custody and Divorce* (1984), at p. 253; J. D. Payne and K. L. Kallish, “A Behavioural Science and Legal Analysis of Access to the Child in the Post-Separation/Divorce Family” (1981), 13 *Ottawa L. Rev.* 215, at pp. 220-25. This finds expression in the fact that, in Canada, access is denied in only 2.4 percent of cases (Department of Justice of Canada, *Evaluation of the Divorce Act — Phase II: Monitoring and Evaluation* (1990), at p. 111).

Important as contact with the non-custodial parent may be, it should be noted that not all experts agree on the weight to be given to such contact in assessing the best interests of children. Several studies suggest that, after parental separation, “the visits by the non-custodial parent will [likely] gradually diminish or terminate” (Payne and Kallish, *supra*, at p. 223; see also Weisman, *supra*, at p. 62; M. Richards, “Divorcing children: roles for parents and the state”, in J. Eekelaar and M. Maclean, eds., *Family Law* (1994), 249, at p. 251). Other concerns relate to access enforcement and the risk of tensions between the parents as regards access (Department of Justice of Canada, *Custody and Access: Public Discussion Paper* (1993), at p. 9; S. B. Boyd, “Women, Men and Relationships with Children: Is Equality Possible?”, in K. Busby, L. Fainstein and H. Penner, eds., *Equality Issues in Family Law: Considerations for Test Case Litigation* (1990), 69, at p. 84).

The paramountcy of the best interests of the child and the objective of promoting maximum contact with the non-custodial parent consistent with such interests are thus the two fundamental premises which must inform the decision of the court in an application to vary custody linked to the change of residence of the custodial parent.

Changes of residence, which might imply a move to another province, territory or country for instance, are inevitable in light of the economic needs and the growing mobility of our society as well as the desirable objective that individuals rebuild their lives after divorce or separation. Faced with such a change of residence, parents generally come to an agreement and rearrange access modalities in order to ensure that the contact with the non-custodial parent is maintained in a meaningful way, in spite of the relocation. In fact, statistics indicate that only a small proportion of custody cases are litigated or court imposed (Department of Justice of Canada, *Custody and Access: Public Discussion Paper*, *supra*, at p. 18; see also J. D. Payne and M. A. Payne, *Introduction to Canadian Family Law* (1994), at p. 124, suggesting that less than one percent of divorces result in a custody trial).

In *Burgess*, *supra*, Mosk J., for the majority, shared similar views (at pp. 451-52):

As this case demonstrates, ours is an increasingly mobile society. Amici curiae point out that approximately one American in five changes residences each year. Economic necessity and remarriage account for the bulk of relocations. Because of the ordinary needs for *both* parents after a marital dissolution to secure or retain employment, pursue educational or career opportunities, or reside in the same location as a new spouse or other family or friends, it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution or to exert pressure on them to do so. It would also undermine the interest in minimizing costly litigation over custody and require the trial courts to “micromanage” family decisionmaking by second-guessing reasons for everyday decisions about career and family.

More fundamentally, the “necessity” of relocating frequently has little, if any, substantive bearing on the suitability of a parent to retain the role of a custodial parent. A parent who has been the primary caretaker for minor children is ordinarily no less capable of maintaining the responsibilities and obligations of parenting simply by virtue of a reasonable decision to change his or her geographical location. [Italics in original; underlining added; footnotes omitted.]

Parental agreements should be the rule and must be encouraged since parents are generally in the best position to assess the best interests of the child. In addition, such agreements minimize ongoing parental conflict and litigation, which are clearly not in the best interests of children. Research on the emotional impact on children of such conflict, notwithstanding its limits, widely supports this common sense observation. See *Young*, *supra*, at p. 80 (*per* L’Heureux-Dubé J.); N. Weisman, *supra*, at pp. 54-61; R. Krell, “The Emotional Impact on Children of Divorce and Custody Disputes”, in R. S. Abella and C. L’Heureux-Dubé, eds., *Family Law: Dimensions of Justice* (1983), 175.

In the few cases where agreement between the parents is not possible, courts will be called upon to decide. It is never an easy task and sometimes courts can only choose between the lesser of two evils. As Weisman, *supra*, quite realistically observes, at p. 36:

. . . access issues often present the most intractable problems in all family law. On occasion, fairness and enforceability are impossible to achieve, and the most for which one can hope is the least detrimental alternative for the child. [Footnotes omitted.]

In order to assist courts in making those difficult determinations, some guidelines may be useful.

In the absence of express restrictions relating to the incidents of custody, such as the child’s place of residence, it must be assumed that an existing custody order or agreement reflects the best interests of the child and that such interests lie with the custodial parent. There is nothing revolutionary about this proposition, which flows from the Act which states that courts, in making orders under s. 16(8), “shall take into consideration only the best interests of the child”. In this respect, deciding upon the merits of an application to vary custody under the Act, in *Docherty v. Beckett* (1989), 21 R.F.L. (3d) 92, leave to appeal to S.C.C., refused, [1990] 1 S.C.R. vii, the Ontario Court of Appeal, *per curiam*, states, at p. 96:

It is fundamental that where custody has been awarded to the mother pursuant to a decree nisi, that order is presumed to be the right order in the child’s best interests. Where, as here, the mother has enjoyed custody for several years pursuant to such an order, then obviously there is a burden on the father to prove that circumstances have so changed that it is no longer in the best interests of the child that he should remain in the custody of the mother. [Emphasis added.]

See also *Willick*, *supra*, at pp. 687 (*per* Sopinka J.) and at pp. 734-35 (*per* L’Heureux-Dubé J.).

The attribution of custody to one parent carries with it the presumption that such parent is the most able to ensure the best interests of the child, for whatever reasons custody is decided. For that matter, both parents may be loving, concerned and caring, they may be equally fit and good parents, but assessing the material, moral and psychological needs of a child commands a much broader inquiry. If, after conducting such an inquiry, or by mutual consent of the parties, a child’s custody is entrusted to one of them, it necessarily follows that such parent has been found to be best able to ensure the best interests of the child, taking into account all the circumstances of the parties and the child.

The basic premise according to which the custodial parent must be assumed to carry out his or her decision-making responsibilities in the child’s best interests is in no way attached to a particular incident of custody, but rather stems from the inextricable link between the significant decision-making responsibility entrusted to the custodial parent and the best interests of the child. As I stated in *Young*, *supra*, at pp. 41-42:

The traditional decision‑making power of the custodial parent recognized by law is intimately connected to the welfare of the child, as the need for a secure and constant source of parental responsibility in the life of the child is well understood among those who are knowledgeable in the psychology of children. J. Goldstein, A. Freud and A. J. Solnit in *Beyond the Best Interests of the Child* (1979) identified three imperatives that must govern child placement decisions such as custody arrangements. Such decisions should: safeguard the child's need for continuity of relationships, reflect the child's, not the adult's, sense of time, and take into account the law's inability to supervise interpersonal relationships and the limits of knowledge to make long‑range predictions (*supra*, at pp. 31, 40 and 49). The need for continuity generally requires that the custodial parent have the autonomy to raise the child as he or she sees fit without interference with that authority by the state or the non‑custodial parent, as it is the inability of the custodial parent to protect those interests sufficiently which poses the real threat to the welfare of the child. A custody award can thus be regarded as a matter of whose decisions to prefer, as opposed to which decisions to prefer. . . .

As Goldstein, Freud and Solnit stress, an important function of the law on divorce or separation is to reinforce the remainder of the family unit so that children may get on with their lives with as little disruption as possible. Courts are not in a position, nor do they presume to be able, to make the necessary day‑to‑day decisions which affect the best interests of the child. That task must rest with the custodial parent, as he or she is the person best placed to assess the needs of the child in all its dimensions.... Once a court has determined who is the appropriate custodial parent, it must, indeed it can do no more than, presume that that parent will act in the best interests of the child. [Emphasis added.]

It follows that where, as here, a decision of the custodial parent is challenged by the non-custodial parent on the basis that it is not in the child’s best interests, “[t]he emphasis should be . . . on deferring to the decision‑making responsibilities of the custodial parent, unless there is substantial evidence that those decisions impair the child's, not the access parent's, long‑term well‑being” (*MacGyver v. Richards*, *supra*, at p. 445 (*per* Abella J.A.); emphasis added). It must be remembered, as Twaddle J.A. points out in *Lapointe v. Lapointe*, *supra*, at p. 620:

In all but unusual cases, the custodial parent is in a better position than a judge to decide what is in the child’s best interests. A judge can scrutinize the decision, ensure that it is reasonable and even say, when clearly shown, that the custodial parent’s decision is not in fact in the child’s best interests, but initially it is the person entrusted with the responsibility of bringing up the child who probably knows best.

The same line of thought was endorsed by the New Brunswick Court of Appeal in the more recent decision *Benoît v. Reid*, *supra*, dealing with the issue of the custodial parent's mobility in the context of custody. In light of the fact that “[a] custody award can . . . be regarded as a matter of whose decisions to prefer, as opposed to which decisions to prefer” (p. 178 (emphasis in the original)), Bastarache J.A. (Ryan J.A. concurring) writes, at p. 180:

The test to be applied is whether there is any reason to believe that the move would not be in the best interests of the child. [Emphasis added.]

Upon entrusting custody to the custodial parent, a number of factors play a role in the assessment of the best interests of the child, for such best interests “encompass not only physical and economic well-being, but also emotional, psychological, intellectual and moral well-being” (Payne, *supra*, at p. 279). Courts are called upon to balance such considerations as the child’s physical, emotional, social and economic needs in light of the quality of his or her relationship with both parents, their respective ability to look after the child’s best interests and, where the child is old and mature enough, his or her wishes and preferences (see, for instance, s. 8 of the Saskatchewan *Children’s Law Act*). The desirability of maintaining maximum contact between the child and both parents is but one of those numerous factors, albeit a very significant one.

The assessment of the child’s best interests also involves a consideration of the particular role and emotional bonding the child enjoys with his or her primary caregiver. The importance of preserving the child’s relationship with his or her psychological parent has long been recognized by this Court on a number of occasions (*Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, at p. 202; *Racine v. Woods*, *supra*, at p. 188; *King v. Low*, [1985] 1 S.C.R. 87, at p. 101). There is a growing body of evidence that this relationship may well be the most determinative factor on the child’s long-term welfare. As I mentioned in *Young*, *supra*, at p. 66, the vital link between continuity in the emotional bonding of the child with his or her psychological parent and the best interest of the child finds ample support in the literature:

Goldstein, Freud and Solnit's *Beyond the Best Interests of the Child*, *supra*, while perhaps lacking in empirical data, remains an influential analysis of the psychological needs of children following divorce. The authors emphasize, among other factors, the importance of continuity in the child's relationships and conclude that the major focus of custody decisions should be to preserve and protect the relationship between the child and his or her psychological parent. [Emphasis added.]

See also Weisman, *supra*, at p. 47; cited in Bruch and Bowermaster, *supra*: F. F. Furstenberg and A. J. Cherlin, *Divided Families: What Happens to Children When Parents Part* (1991), at pp. 107-8; E. E. Maccoby and R. H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (1992), at p. 295; and V. King, “Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?” (1994), 15 *J. Fam. Issues* 78.

It is against the backdrop of those various factors that came into play in the prior decision as to custody that, upon deciding the merits of an application for variation linked to a change in the circumstances of the child, “the court shall take into consideration only the best interests of the child as determined by reference to that change” (s. 17(5) of the Act (emphasis added)). If, as my colleague suggests, “[t]he judge on the variation application must consider the matter anew” and that “[t]he earlier conclusion that the custodial parent was the best person to have custody is no longer determinative” (para. 17), one wonders why s. 17(5) has added after the words “the best interests of the child” the words “as determined by reference to that change”. This particular wording is indicative that where the change consists of the proposed relocation of the child by the custodial parent, what must be ascertained is the impact of such relocation on the existing custody order which must be assumed to properly ensure the child's best interests.

The change of residence of the child will generally imply restructuring access. In most cases, it will be possible to rearrange access in such a way that, if less frequent, it will be for longer periods of time (J. D. Montgomery, “Long-Distance Visitation/Access in Family Law Cases: Some Creative Approaches” (1991), 5 *Am. J. Fam. L.* 1, at p. 4; Payne, *supra*, at p. 318). Indeed, studies reveal that the quality of the non-custodial parent's relationship with the child is not tied to the duration or frequency of visits (J. S. Wallerstein, “Children of Divorce: Report of a Ten-Year Follow-Up of Early Latency-Age Children” (1987), 57 *Am. J. Orthopsychiatry* 199, at p. 208, as cited in Bruch and Bowermaster, *supra*). Furthermore, there are a number of ways other than personal visits to maintain contact, such as telephone calls or other technological devices. These are encompassed by ss. 16(10) and 17(9) of the Act which provide for facilitating “contact” between the child and both parents.

By itself, the proposed move of the child does not affect his or her relationship with the non-custodial parent nor does it put at issue the ability of the custodial parent to look after the best interests of the child. In most cases, however, such a change of residence does entail a change to access. All other factors being equal and given that access is but one factor which was taken into account in entrusting custody of the child to the custodial parent, it seems logical that, in order for a change to access to overweigh all others considerations, substantial evidence of a net detriment accruing to the child as a result of such change must be adduced by the non-custodial parent.

While a change of residence does entail some amount of adaptation on the part of the child as well as both parents, a variation of custody is clearly a more violent disruption in the life of a child. It must be remembered that if a transfer of custody is ordered, another move is to take place, that of the child with the non-custodial parent, with all it implies in terms of future limitations on the child's relationship with his or her primary caretaker. Those considerations underlie the courts’ general reluctance to interfere with the custodial parent’s decision to relocate by ordering a variation of custody. According to Professor Payne, *supra*, at pp. 305-6:

The discretionary power to vary a subsisting custody order should be exercised cautiously. Existing custody arrangements will not lightly be disturbed unless the evidence cogently demonstrates that the best interests of the children will be served by the changes being made. [Footnotes omitted.]

Generally, disrupting the relationship of the child with his or her primary caregiver will be more detrimental to the child than reduced contact with the non-custodial parent (J. G. McLeod, Annotation to *MacGyver v. Richards* (1995), 11 R.F.L. (4th) 433, at p. 435; B. Hovius, "The Changing Role of the Access Parent" (1994), 10 *C.F.L.Q.* 123, at p. 132; Richards, *supra*, at p. 252). However, where the children are older and can manifest their preferences, a change of custody may be envisaged, particularly when the relationship with the non-custodial parent is of such a quality and benefit to the child as to make a change of custody the best alternative taking into account all the circumstances.

It must be emphasised that cogent evidence of the quality and richness of such a relationship will be required to offset the effect upon the child of disrupting his or her relationship with the custodial parent. As Abella J.A. puts it in *MacGyver v. Richards*, *supra*, at p. 443:

. . . it is, in my view, a quantum leap from the observation that a child has a good relationship with a non-custodial parent to the conclusion that the preservation of this relationship is the determinative factor in deciding what is in the child’s best interests.

The significance of such a relationship in the child’s life should not be assumed, even in the presence of a restrictive covenant or court order as to the child’s place of residence, broad or specified access or joint custody. Rather, in assessing the child’s best interests, the focus should be on the reality of the parenting and child care arrangements (J. D. Payne and E. Overend, “The Co-parental Divorce: Removing the Children from the Jurisdiction” (1984), 15 *R.G.D.* 645, at pp. 652-55).

In the majority of situations, the child’s best interests will be easily ascertainable. Where, for instance, access is not regularly exercised, not in the child’s best interests nor significant enough, the child is very young or has clearly expressed his or her preferences to remain with the custodial parent or the proposed relocation is for a limited period of time, it will be rare that such relocation will impact on the child’s best interests to the extent that custody should be varied.

Where, however, both parents have a good relationship with the child and both are proven equally capable of acting as the custodial parent, determining what is in the best interests of the child may be more difficult, but the line, no matter how fine, must nevertheless be drawn.

There is a controversy on this issue to which my colleague McLachlin J. alludes in her reasons. It has to do with two decisions of the Ontario Court of Appeal: Carter v. Brooks, supra, and MacGyver v. Richards, supra. Although my colleague advances that those decisions may be consistent in that both mandate careful consideration of the views of the custodial parent, they could not, in my view, be further apart in their approach to deciding an application for variation in the context of the relocation of custodial parents.

Before Carter v. Brooks, as I have demonstrated earlier, the well-established rule was that absent a contractual restriction or court order as to the child’s place of residence, the custodial parent had a *prima facie* right to move with the child, provided that such move was reasonable and not intended to frustrate the non-custodial parent’s access, as the best interests of the child had been determined by the prior custody order. By adopting an exclusively fact based analysis, *Carter v. Brooks* departed from that well-settled jurisprudence as the following passage of Morden A.C.J.O.’s opinion for the court illustrates, at p. 63:

I think that the preferable approach in the application of the [best interests of the child] standard is for the Court to weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. I do not think that the process should begin with a general rule that one of the parties will be unsuccessful unless he or she satisfies a specified burden of proof. This over-emphasizes the adversary nature of the proceeding and depreciates the Court’s parens patriae responsibility. Both parents should bear an evidential burden. At the end of the process, the Court should arrive at a determinate conclusion on the result which better accords with the best interests of the child. If this is impossible, then the result must necessarily be in accordance with the legal status quo on the issue to be decided. [Emphasis added.]

*MacGyver v. Richards*, on the other hand, is more in line with the earlier jurisprudence by reintroducing its more principled approach whose essence is expressed by Abella J.A., at p. 447:

When, therefore, a court has been asked to decide what is in the child's best interests, and a choice must be made between the responsible wishes and needs of the parent with custody and the parent with access, it seems to me manifestly unfair to treat these wishes and needs as being on an equal footing. When one adds to this the dimension that a court's decision ought to favour the possibility that the former partners can get on with their lives and their responsibilities, one reaches the admittedly difficult conclusion that a parent with custody, acting responsibly, should not be prevented from leaving a jurisdiction because the move would interfere with access by the other parent with the child, even if the relationship between the child and the access parent is a good one. [Emphasis added.]

Contrary to my colleague, I am of the view that *Carter v. Brooks* and *MacGyver v. Richards* reveal significant differences of approach. While *Carter v. Brooks* essentially stands for the proposition that the determination of the best interests of the child is best left to the discretionary realm of questions of fact where each relevant factor is to be equally considered and where no party bears any specified burden of proof, *MacGyver v. Richards* recognizes that courts should grant a “presumptive deference to the needs of the responsible custodial parent who, in the final analysis, lives the reality, not the speculation, of decisions dealing with the incidents of custody” (p. 444). Given that the decision-making authority of the custodial parent entails the right to decide where the child shall live, the onus to adduce substantial evidence that such decision is contrary to the best interests of the child must be placed on the non-custodial parent.

There are many reasons why, in my view, this principled approach is preferable to a case-by-case determination on the evidence of each case.

At the outset, it must be stressed that I do not suggest that such a principled approach overrides or replaces the best interests of the child as the ultimate test. It is rather a reinforcement of the best interests test and not a contradiction to it. It may well be that, in some circumstances, the custodial parent’s decision to relocate may not accord with the best interests of the child and, upon review of the impact of that decision on the child, a court may conclude that a variation of custody or access or, exceptionally, a restriction on the child’s mobility is in order. Quite the opposite from shifting the focus from the best interests of children, a principled approach, in adopting the best interests test as the guiding principle, provides much needed clarity and certainty in this difficult area of the law and minimizes the need to resort to protracted acrimonious negotiations or, even worse, traumatic and costly litigation which, ultimately, cannot but injuriously affect the children. In passing, it is interesting to note that similar rules which recognize the custodial parent’s *prima facie* right to move with the child have been judged consistent with the best interests of the child in other jurisdictions, such as the United States (see Bruch and Bowermaster, *supra*) and Australia (Eades, *supra*), where, like in Canada, all decisions affecting children are to be governed solely by their best interests.

Under *Carter v. Brooks*, the fact-specific case-by-case approach to the best interests of the child test, the absence of guidelines and the inherent discretion it involves foster unpredictability and inconsistency in the application of the law which, in turn, encourages litigation. This uncertainty takes its toll on individual justice by favouring the party most willing to take the risks and best able to bear the financial and emotional costs of litigation rather than inducing reasonable settlements which are, in the final analysis, the most appropriate means of ensuring that the best interests of the child will be met. Contrary to my colleague, I believe that, by reducing the incentive for litigation, the incentive for settlement is increased, not conflict. Reference to “desperate parents” which might resort to “desperate measures in contravention of the law” (McLachlin J. at para. 38), is totally inappropriate, in my view, in a context where reasonable solutions are favoured rather than protracted litigation between parents who have the best interests of their children at heart. Indeed, while there may be diverging views on the preferable way of applying the best interests of the child test, as I observed earlier, one cannot but acknowledge the fact that ongoing parental conflict is not in the best interests of children. See *Young*, *supra*, at pp. 67-68 (*per* L’Heureux-Dubé J.); J. Wilson, *Wilson on Children and the Law* (1994), at p. 2.41.3; W. Glen How, “*Young v. Young* and *D.P. v. C.S.*: Custody and Access — The Supreme Court Compounds Confusion” (1994), 11 *C.F.L.Q.* 109, at pp. 125-26; McLeod, Annotation to *MacGyver v. Richards*, *supra*, at p. 436; Hovius, *supra*, at pp. 142-43; Department of Justice of Canada, *Custody and Access: Public Discussion Paper*, *supra*, at pp. 19-20; N. Bala and S. Miklas, *Rethinking Decisions About Children: Is the “Best Interests of the Child” Approach Really in the Best Interests of Children*? (1993), at pp. 46-53.

This Court is asked to provide a clear answer to the question of the mobility of custodial parents in the context of custody, an answer which strikes a balance between the need for certainty in this area of the law and the right of children to have their interests dictate every decision which concerns them. This fine balance, in my view, finds expression in the rule reinstated in *MacGyver v. Richards*, *supra*, whose effect is simply to translate into practical terms the right of the custodial parent to determine the place of residence of the child by placing the burden of proving that the move is not in the child's best interests on the party challenging the legal status quo. I agree with my colleague McLachlin J. that "the question is not whether the rights of custodial parents can be restricted" (para. 37). Rather, as I stated at the outset, the best interests of the child will always govern any decision affecting that child. However, what I am suggesting here is how to assess that best interest.

The certainty provided by the approach I outlined has much to commend it as Twaddle J.A. concludes in *Lapointe v. Lapointe*, *supra*, at pp. 621-22:

The alternative approach of *Carter v. Brooks* would lead to uncertainty and inconsistent decisions and tend to immobilize custodial parents in an age when mobility is often necessary for psychological if not economic survival. On the other hand, the law as I understand it allows a custodial parent a measure of choice subject to sufficient safeguards to ensure that the custodial parent does not act maliciously, unreasonably or contrary to what is adjudged to be the best interests of the child in any special circumstances which may be applicable. [Emphasis added.]

More particularly linked to the issues raised in relocation cases, however, the proper approach in determining the child's best interests must be informed by the nature of a variation application for custody under the Act as well as the reality of parental separation.

In the context of an application for variation triggered by a change in the circumstances of the child, according to s. 17(5) of the Act, the court must not determine the child's best interests in a vacuum, but “by reference to that change”. Had Parliament intended a fresh inquiry into the child's best interests in such a context, as my colleague McLachlin J. suggests, s. 17(5) would have provided, as for original custody and access orders, that “the court shall take into consideration only the best interests of the child . . . as determined by reference to the condition, means, needs and other circumstances of the child” (s. 16(8)). It did not. The particular nature of an application for variation and its implications on the determination of the child's best interests are well expressed by Bastarache J.A., in *Benoît v. Reid*, *supra*, at p. 180:

Since decisions with regard to the variation of a custody order will invariably take into account the importance of the continuity of relationships of the child and the very fact that an award of custody has already been made, I do not believe it is necessary to accord a preemptive or presumptive right to the custodial parent in all cases. [Emphasis added.]

The starting point, then, is that the best interests of the child are rightly presumed to lie with the custodial parent. Indeed, it is at the core of the significant responsibilities entrusted to the custodial parent to look after and promote those interests in the course of making the often difficult decisions in the daily lives of children as well as those most susceptible to affect their future. Why then should the custodial parent not be trusted when it comes to a change of residence? The change of residence, albeit qualifying as a material change in the circumstances of the child under s. 17(5) of the Act, cannot, by itself, displace this presumption as my colleague proposes.

Given that day-to-day decisions affecting the child are clearly left to the custodial parent, there is no reason not to defer to his or her ability and responsibility to act in the child’s best interests when it comes to other decisions, such as the change of residence of the child which will necessarily take into account the impact of access to the non-custodial parent by the child. In both cases, if the decision constitutes a material change of circumstances, s. 17(5) of the Act does allow for a variation in as much as such a decision will be found to impact on either the custody of the child or the access by the non-custodial parent. In reconsidering the prior custody or access orders, however, courts must start from the proposition that the child’s best interests are assumed to lie with the custodial parent. Accordingly, what must be assessed is the impact of the contested decision on the best interests of the child or, in other words, “the best interests of the child as determined by reference to that change” (s. 17(5) of the Act).

Moreover, in attempting to assess what constitutes the best interests of children, courts should not forget the reality of parental separation and its inherent risk for children. While it may not be in the best interests of children, in some cases, that their parents separate, nonetheless our legal system sanctions their right to do so. Once parental separation is judicially recognized, the law must be sensitive to the reality of the breakup of the family unit and, more specifically, to the fact that maximum contact with both parents will simply not be possible in every case. It is generally accepted, for instance, that contact may be denied or curtailed if there is evidence that contact itself, or unrestricted contact, with the non-custodial parent clashes with the best interests of the child (*Young*, *supra*, at p. 53 (*per* L’Heureux-Dubé J.) and at p. 118 (*per* McLachlin J.)). In any event, while it is true that maximum contact is normally desirable, it is also true that custody must be, in the best interests of the child, as meaningful and stable as possible. Simply put, an application to vary custody is not the proper remedy for enforcing access rights.

To conclude, in assessing the merits of an application for variation under s. 17(5) of the Act linked to the change of residence of the child by the custodial parent, the guidelines which must inform the courts may be summarized as follows:

1. All decisions as to custody and access must be made in the best interests of children, assessed from a child-centred perspective.

2. In the absence of explicit restrictions on the incidents of custody, such as the child's place of residence, it must be assumed that an existing custody order or agreement reflects the best interests of the child and that the appropriate decision-making authority lies with the custodial parent.

3. In determining the best interests of the child, courts must focus on the impact of the change of residence on the existing custody order and the appropriate modifications to access as the case may be, and generally not proceed to a *de novo* appraisal of all the circumstances of the child and the parties.

4. The non-custodial parent bears the onus of showing that the proposed change of residence will be detrimental to the best interests of the child to the extent that custody should be varied or, exceptionally, where there is cogent evidence that the child’s best interests could not in any reasonable way be otherwise accommodated, that the child should remain in the jurisdiction.

5. The proposed change of residence of the child by the custodial parent will not justify a variation in custody unless the non-custodial parent adduces cogent evidence that the child’s relocation with the custodial parent will prejudice the child’s best interests and, further, that the quality of the non-custodial parent’s relationship with the child is of such importance to the child’s best interests that prohibiting the change of residence will not cause comparable or greater detriment to the child than an order to vary custody.

6. Where there is an agreement or court order explicitly restricting the child’s change of residence, the onus should shift to the custodial parent to establish that the decision to relocate is not made in order to undermine the access rights of the non-custodial parent and that he or she is willing to make arrangements with the non-custodial parent to restructure access, when appropriate, in light of the change of residence of the child.

This brings us to the evidence in this case which led the trial judge to uphold the custody of the respondent and to confine the exercise of the appellant’s access to Australia.

VI. Application to the Facts

At the outset, two preliminary observations are in order. First, this Court has always made clear that caution should be exercised by appellate courts before interfering with the exercise of discretion by a trial judge in custody matters, the applicable standard being that decisions should not be interfered with unless there is a gross distortion of the evidence or misapprehension of the relevant legal principles (*Young*, *supra*, at p. 101 (*per* L’Heureux-Dubé J.)). Furthermore, in light of the considerable expertise trial judges develop in the area of family law and the restricted time allotted to write long and detailed reasons in all cases, brief reasons will often be sufficient, particularly in cases which do not present any exceptional feature (*Willick*, *supra*, at p. 746 (*per* L’Heureux-Dubé J.)).

The present case proceeded as it should have. Notice of the intended change of residence was properly given by the respondent to the appellant who then made a motion before the court opposing such change by requesting custody of the child or, alternatively, a restructuration of his rights of access. With respect to the threshold upon which the merits of the variation application could be considered, as I already mentioned, I am satisfied that the trial judge applied the correct test and, upon the evidence before him, properly concluded that the appellant had discharged the onus of proving that the change of residence constituted a material change in the circumstances of the child. Since the custody order in favour of the respondent did not include any restriction as to the child’s place of residence, it was further incumbent on the appellant to show that such a change of residence was detrimental to the child’s best interests to the extent that custody should be varied.

Upon reviewing cases such as *Wells v. Wells*, *supra*, *Adie v. Adie*, *supra*, and *Grant v. Brotzel* (1993), 115 Sask. R. 96 (Q.B.), all of which stand for the proposition that the custodial parent has the right to remove the child from the jurisdiction if such a move is not intended to cut off access by the non-custodial parent nor contrary to the child’s best interests, the trial judge concluded that the respondent should be allowed to move with the child to Australia. As the previous discussion on the standard in relocation disputes makes clear, I am in agreement with the Court of Appeal that the trial judge did not err in law as to the applicable principles. The only remaining question is whether the evidence supports the trial judge’s conclusion that the best interests of the child required upholding the custody of the respondent.

To this end, the trial judge explicitly stated that he “relied heavily on Judge Carter’s judgment and her findings of fact that the mother was the proper person to have custody of this child”. Carter J., at the end of an eight-day trial for which almost 500 pages of examinations for discovery for each parties were produced, found that the respondent was the primary caregiver to the child although the appellant had made every effort to have more access to the child after their separation (at pp. 7-8). She also agreed with the recommendations of the custody and access report filed to the court that the respondent have sole custody of the child and that very structured access was warranted in order to avoid the constant friction between the parties (at p. 8). Since there was no evidence that each parent did not sincerely love their daughter and spend quality time with her, Carter J. entrusted sole custody of the child to the respondent, while granting generous but specified access to the appellant, without any restrictions as to the child’s place of residence.

Since less than two years had elapsed between the date of the original order and that of the proceedings before the trial judge, it was entirely proper for him to “rely heavily” on the prior determination that the best interests of the child were best served by entrusting custody to the respondent and, accordingly, to examine the impact of the change of residence on such determination as well as the possible modifications to access. On the basis of the extensive affidavit material submitted by the parties and some two and a half hours of argument, the trial judge’s oral judgment, in spite of its brevity, makes clear that the appellant did not satisfy him that the impact of the change of residence of the child was such as to warrant a variation of custody, particularly in light of the possibility of accommodating the appellant’s access and contact with the child.

Given that the evidence supports the trial judge’s conclusion that the impact of the change of residence of the child was less detrimental to her than ordering a variation of custody, I conclude that he did not err in upholding the custody of the respondent.

As regards the trial judge’s order granting access to the appellant, I share the opinion of my colleague McLachlin J. that the evidence does not support confining its exercise to Australia and I agree to the terms she sets out.

On the matter of costs, since the appellant’s success before us is minimal, he should bear the costs.

VII. Conclusion

For these reasons, I would allow the appeal in part as proposed by my colleague McLachlin J., with costs throughout against the appellant.

The following are the reasons delivered by

Gonthier J. -- I have had the benefit of the reasons for judgment of Justice L'Heureux-Dubé and Justice McLachlin. I concur in the reasons of McLachlin J. I also agree with L'Heureux-Dubé J.'s explanations of factors pertinent to assessing the best interests of the child and that they are to be considered in doing so, though I do not share her views on onus of proof.

*Appeal allowed in part*.

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