FAMLNWS 2025-40

Family Law Newsletters
November 03, 2025

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

Nobody Puts Baby *Plumley* in a Corner

Diallo v. Bah (2025), 18 R.F.L. (9th) 206 (Ont. Div. Ct.) — Sachs, Reid and Nakatsuru JJ.

Issues: Ontario — Interim Relocation

On account of the time it takes to get to trial in most jurisdictions, many relocation cases in Canada — especially in Ontario — are decided for all practical purposes at the interim stage. Ontario alone accounts for a whopping 70% of all interim relocation cases in Canada. As a result, the law of interim relocation is of particular importance.

With that introduction, combined with your deductive reasoning skills from law school, you have likely guessed that this is a case about interim relocation. And you would be right. It is a case from the Ontario Divisional Court, a specialized intermediate appeal court that specifically deals with appeals (with leave) from interim orders. This is a case not without problems, the most significant of which is the appellate "kicking to the curb" of *Plumley v. Plumley*, 1999 CarswellOnt 3503 (S.C.J.), which had previously been the authoritative decision regarding relocation for the last 25 years — cited over 200 times — with nothing really offered to replace it.

The parties were both originally from West Africa — Guinea to be precise. The Mother had immigrated to Winnipeg when she was two-years-old. She was raised in Winnipeg, where she also had extended family. She had moved to Toronto as an adult for work. The Father had immigrated to Philadelphia as a student, met the Mother and moved to Toronto to be with her in January of 2017. See? All roads lead to Toronto.

The parties got married on March 18, 2017 and separated six years later in September of 2023. They had two children, one who was eight and the other who was three. The children were born and raised in Toronto.

There was a history of family violence and police involvement with the family prior to separation. The Mother was the children's primary caregiver during the marriage and this continued after separation. After separation, the Mother and children lived in an apartment in Scarborough. From 2023 to January of 2025, the Father lived in a room that he rented in Ajax. The Father saw the children for three hours (but not overnight) during the week and every other Saturday and Sunday during the day. The only overnight time exercised by the Father occurred at the Mother's home when she travelled for work or at his sister's home when he took the children to visit her in Ottawa.

In June of 2024, the Mother commenced an application claiming primary residence of the children, final decision-making authority, and permission to relocate with the children to Winnipeg. She served and filed a Notice of Relocation and the Father filed an Objection to the relocation.

The parties attended an urgent Case Conference on October 3, 2024. A Consent Order issued, memorializing the Father's parenting time and allowing him to request more if he moved to a residence that could accommodate overnight parenting time. The Consent Order set out a voluntary child support amount (as the Father had not been paying any prior to the Conference) and provided that the Mother could not relocate with the children to Winnipeg without a court order.

On November 1, 2024, the Mother brought a regular (one hour) motion for permission to relocate to Winnipeg on a temporary basis. The Mother had accepted a job offer in Winnipeg that required her to be in Winnipeg by February of 2025. The motion was adjourned to a long motion with cross-examination.

In January of 2025, the Father bought a four-bedroom home in Whitby, Ontario. The parties agreed to vary his parenting schedule such that he had the children alternate weekends from Saturday morning at 10:00 a.m. to drop off at school/daycare on Monday morning. His weekday parenting time was not changed.

The motion was heard on February 13 and 19, 2025. It included both *viva voce* evidence and cross-examination. Five days after the motion, the motion judge issued a bare decision allowing the children to move to Winnipeg with the Mother — with reasons to follow. Those reasons were released on March 12, 2025. The motion judge explained that this was done to accommodate the "urgency" of the situation.

The motion judge identified three issues on the motion:

1. Whether the Mother met the onus of a material change in circumstances to justify a temporary relocation;

2. If she did, was there a "compelling case" to justify the proposed relocation on a temporary basis prior to trial; and

3. If she met both previous tests, was it in the best interests of the children to allow the proposed relocation based on the factors.

The motion judge set out the follow in terms of the test for when a party is seeking to vary an order to relocate children on a temporary basis:

> (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: *Gordon v. Goertz*, 1996 CanLII 191 (SCC) at para. 13, [1996] 2 S.C.R. 27.

The motion judge found that the threshold was met:

> [26] The Mother argues that there is a material change in her circumstances and that of her children. The Mother has been offered and accepted a higher-paying job, with greater growth potential, that requires her to be in-person in Winnipeg. I accept the Mother's evidence that there are valid and compelling reasons why she is required to work in-person in Winnipeg. I also accept her evidence that the higher income and lower costs of living in Winnipeg would significantly improve the children's and the Mother's circumstances. In Winnipeg, the younger child will be able to obtain speech therapy in the French language, the children will have better housing, and the children would be cared for by family in a Francophone environment.

However, though technically correct, this was really a non-issue. The Consent Order of Justice Horkins only clarified that the Mother could not relocate with the children absent an agreement or Order. There is not really anything to vary there. Second, the very issue of a potential relocation would be a material change.

The motion judge then cited *Plumley v. Plumley*, 1999 CarswellOnt 3503 (S.C.J.) — the leading authority and invariably-cited case on interim relocation — wherein Justice Marshman identified three important factors in deciding whether to permit relocation on an interim basis:

> 1. A court will be more reluctant to upset the status quo on an interim basis and permit the move when there is a genuine issue for trial;
>
> 2. There can be compelling circumstances that might dictate that a judge ought to allow the move. For example, the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial or the best interests of the children might dictate that they commence school at a new location;
>
> 3. Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong probability that the custodial parent's position will prevail at a trial.

Note the "genuine issue for trial" language in 3. That may be a source of confusion in this case, as set out below. Specifically, the third part of the test is not related to a motion for summary judgment, where there must be a finding that there is no genuine issue for trial. Rather, this part of the test would permit a move even were there to be a genuine issue for trial.

The motion judge found that there was no genuine issue for trial that would prevent a temporary order for relocation. (But, as noted above, that is not part of the *Plumley* test.) The motion judge also found there were compelling reasons to allow a temporary relocation. It would be of financial benefit to the family — the Mother had applied to over 100 jobs before obtaining the position in Winnipeg. The new position offered significant opportunities for career growth and an increased salary. Living in Winnipeg would also allow the Mother's money to go further — given its lower cost of living. (And who doesn't like Winnipeg?)

Interestingly, the motion judge also found that preventing the move would negatively impact the Mother. She had already experienced mental health issues that required her to travel to Winnipeg for family support. The motion judge found that it would adversely impact the children to have an "unhappy and dissatisfied mother." We all remember the old "happy parent is a good parent" rationale: *Bjornson v. Creighton* (2002), 31 R.F.L. (5th) 242 (Ont. C.A.); *Swenson v. Swenson* (2006), 27 R.F.L. (6th) 265 (Sask. C.A.); *MacPhail v. Karasek* (2006), 30 R.F.L. (6th) 324 (Alta. C.A.); *Orring v. Orring* (2006), 32 R.F.L. (6th) 253 (B.C. C.A.); *P. (D.) v. B. (R.)* (2007), 44 R.F.L. (6th) 9 (P.E.I. C.A.); *Burns v. Burns* (2000), 3 R.F.L. (5th) 189 (N.S. C.A.); and *Kazberov v. Kotlyachkova* (2021), 62 R.F.L. (8th) 107 (Ont. Div. Ct.) at para. 61. That said, for every successful relocation case, there is going to be one happy parent and one not-so-happy parent. But we digress.

Finally, the motion judge found that the move would provide the younger child in particular better access to French language speech therapy and would improve the access to educational facilities and better housing for both children.

The motion judge then considered the "best interests factors" set out under s. 16 of the *Divorce Act*. The motion judge weighed the advantages in terms of schooling, housing and other needs that she found would benefit the children in Winnipeg against the damage it would cause to the children's relationship with their father. The Mother had also set out in her materials that she was willing to *pay* for the Father to come to Winnipeg to spend time with the children and that she would arrange for his accommodations.

After weighing the factors and evidence, the motion judge found that the Mother had met her burden of proving that the relocation was in the children's best interests — notably also not part of the *Plumley* test. The relocation was ordered on the terms requested by the Mother, including that the Mother pay for the reasonable costs of the Father's travel to and from Winnipeg and his accommodations while there.

On February 28, 2025, the Divisional Court granted an interim-interim stay of the motion judge's order pending the hearing of a stay motion. On March 7, 2025, the Divisional Court stayed the interim order allowing relocation pending the hearing of the motion for leave. (The stay was issued five days before the motion judge released the reasons supporting her decision.) On March 28, 2025, leave to appeal was granted, and the stay was extended pending the hearing of the appeal. The Divisional Court then extended the stay pending the release of their decision.

Counsel for the Father likely felt quite buoyed by these stays and the successful leave to appeal motion. But sometimes buoys can quickly take on water.

The Father argued that the motion judge had erred in the test that she applied and the process she followed. The Father argued that the motion judge had made the following errors:

> 1. The material change test set out in *Gordon v. Goertz* is a conjunctive one. The Father argued that the third part of the test — whether the claimed change (the Mother's new job in Winnipeg) — was known or ought to have been known at the time the order was made by Justice Horkins at the Case Conference.
>
> 2. The motion judge erred in finding there was no genuine issue for trial. First, according to the Father, the motion judge should have been cautious in applying the principles set out in *Plumley* because it was decided before the 2021 amendments to the *Divorce Act* regarding relocation and before the Supreme Court's decision in *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.) which set out that the only question to consider is whether the relocation is in the best interest of the child. Second, the motion judge erred in using the summary judgment test when the motion was not a motion for summary judgment.
>
> 3. The motion judge erred in failing to properly assess the impact of relocation on the children's relationship with the Father.
>
> 4. The motion judge erred in the process that she followed. The Father argued that the motion judge should have put the matter over to a full trial. The Father claimed there was no urgency as he could have cared for the children pending trial. Further, the Father argued there had been a "process error" when the motion judge released her decision with reasons to follow. The Father claimed that the written reasons that were delivered were such that a reasonable person would apprehend that they were an "after-the-fact justification" for the decision, rather than an articulation of the reasons that had led the motion judge to the decision.

The Divisional Court reminds us that the scope of review in family law cases is narrow, and as set out in *Barendregt*, determining a child's best interests is always a "fact-specific and highly discretionary determination." An appellate court may only intervene where there is a material error, a serious misapprehension of the evidence or an error in law.

The Divisional Court then dealt with the first of the Father's arguments: that the motion judge had erred in failing to correctly apply the third part of the *Gordon v. Goertz* test. The Divisional Court set out that in *Barendregt* the Supreme Court made the following points about *Gordon* and the role it plays in the current statutory regime:

> • "[T]he *Gordon* framework is flexible by design; it is not an unyielding set of rules": para. 94.
>
> • "At the time *Gordon* was rendered, the *Divorce Act* and provincial family legislations did not contain any provisions pertaining to relocation. In 2019, Parliament amended the *Divorce Act* to provide a statutory regime that governs relocation applications . . . . Subject to some notable exceptions, the *Divorce Act* and these provincial statutes largely codified this court's framework in *Gordon* As I will explain, where they depart from *Gordon*, the changes reflect the collective judicial experience of applying the framework for over 25 years": paras. 107-108.
>
> • The approach to mobility issues is different when there has been a pre-existing judicial determination with respect to a parenting arrangement. In that case, there is a need to vary the initial order, which requires satisfying the usual test for variation, namely, demonstrating a material change in circumstance. However, "[e]ven where there is an existing parenting order, relocation will typically constitute a material change in circumstances and therefore satisfy the first stage of the *Gordon* framework": para. 113. Therefore, "the first stage of the *Gordon* inquiry will likely not raise a contentious issue. That said, when the relocation issue arises by way of a variation application, a court must consider the findings of fact of the judge who made the previous order, together with the evidence of new circumstances": para. 114.

The Father argued that the motion judge should have considered whether it was *foreseeable* that the Mother would obtain the job she did in Winnipeg at the time of the Case Conference, as the Mother was aware that she was applying to jobs in Winnipeg.

This, according to the Divisional Court, was based on a misunderstanding of the third branch of the threshold requirement of a material change set out in *Gordon* which the Supreme Court explained in *Barendregt*:

> [15] The third branch of the threshold requirement of material change requires that the relocation of the custodial parent not have been within the reasonable contemplation of the judge who issued the previous order. 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.
>
> [16] Conversely, an order which specifies precise terms of access may lead to an inference that a move which would "effectively destroy that right of access" constitutes a material change in circumstances justifying a variation application. [Citations omitted.]

Again, the (interim) Order of Justice Horkins from the Case Conference was not about allowing or preventing the Mother's proposed move to Winnipeg. Rather, it was just setting out that she could not move without an agreement or court order. There were no finding of facts associated with that Order. The Consent Order of Justice Horkins did put a parenting arrangement in place which could no longer function if the move was allowed. This meant that there was a change, and it was material. The motion judge was aware of this when she made her decision.

To this we would add, the notion of "foreseeability" has no part in determining a material change. Rather, the question is what was actually contemplated by the parties at the time. The notion of "foreseeability" in the variation context is improperly lifted from *Miglin*-type cases: *Hickey v. Princ* (2014), 50 R.F.L. (7th) 138 (Ont. S.C.J.), rev'd (2015), 69 R.F.L. (7th) 312 (Ont. Div. Ct.); *Walts v. Walts* (2016), 84 R.F.L. (7th) 441 (Ont. S.C.J.); *Dedes v. Dedes* (2015), 58 R.F.L. (7th) 261 (B.C. C.A.); *Goodkey v. Goodkey*, 2015 CarswellAlta 2269 (C.A.); *Droit de la famille - 141364*, 2014 CarswellQue 5386 (C.A. Que.); *Q.D.T. v. H.L.D.*, 2020 CarswellNB 142 (C.A.); *Licata v. Shure*, 2022 CarswellOnt 4209 (C.A.).

The Divisional Court then considered the Father's second ground of appeal: the motion judge's finding that there was no "genuine" issue for trial. This is where things get a bit interesting.

The Divisional Court determined that the test and factors set out in *Plumley* have been "overtaken" by the amendments to the *Divorce Act*. Section 16(1) of the *Divorce Act* states that "[t]he court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order." Section 16(2) makes it clear that this also applies to interim parenting orders.

There are two problems with this analysis. First, the *Divorce Act* has always made it clear that courts are to only consider the best interests of children in making parenting orders. That did not change — so that cannot possibly be a basis to suggest that *Plumley* had been "overtaken" by the *Divorce Act* amendments. Second while the best interests test undoubtedly also applies to interim parenting orders, the *Divorce Act* (nor *Barendregt* for that matter) does not say *anything* about interim moves; so that also cannot possibly be a basis to suggest that *Plumley* has been "overtaken." So — where does that leave us? That *Plumley* was an aberration that was never fixed and we have all been wrong to follow it for the last 25 years? Ouch.

It is important to point out that, on the appeal, the Father had counsel. The Mother did not. So there was no one to argue in favour of the continued application of *Plumley*.

According to the Divisional Court, the motion judge had properly canvassed all of the factors set out in the *Divorce Act* relating to the best interests of children. As the motion judge's analysis of those factors disclosed no error of law or palpable overriding error of fact, there was no basis to set aside her decision — despite the fact that it purported to rely on the *Plumley* decision (which we say she should, in fact, have done).

The Divisional Court also set out that the reference in *Plumley* to the "need" to find that there is no genuine issue for trial is a "recognition of the fact that relocation decisions are hard to reverse at trial, without causing major disruption to the children."

Interim relocation motions have an "air of finality." The process should be considered carefully, particularly whether a process for a final decision should be utilized. In this case specifically, the expanded process limited some of those concerns.

There is a problem with this statement as well — it is a mis-statement of *Plumley*. *Plumley* does *not* suggest that, to allow an interim move, there is a "need" to find that there is no genuine issue for trial. *Plumley* was *not* a summary judgment case to allow an interim move. All *Plumley* has to say about a "genuine issue" is that (as above): (1) a court will be more reluctant to upset the *status quo* on an interim basis and permit the move when there is a genuine issue for trial; and (2) *although there may be a genuine issue for trial*, the move may be permitted on an interim basis if there is a strong probability that the custodial parent's position will prevail at a trial. The very suggestion that there may be a genuine issue for trial makes it clear that *Plumley* was *not* looking at this issue as one of summary judgment.

The Divisional Court determined that there were no concerns about the motion judge's decision in terms of a failure to assess the impact of the relocation on the children's relationship with their father. The motion judge explicitly referenced this concern. While the Father claimed it was an error for the motion judge not to explicitly state that video contact during the week was not the same as in-person parenting time, and that exercising parenting time in another city is not the same as having parenting time in one's own home, the Divisional Court stated that these facts are obvious and there was no need to explicitly set them out.

Finally, the Divisional Court found no "process errors" in the motion judge's decision. There was no indication that the motion judge had made an error in refusing to put the matter over to a trial. The motion judge specifically dealt with the Father's submission that he could care for the children if the Mother left for Winnipeg. The motion judge had found that remaining with the Father, given their connection with their mother, would not be in the children's best interests.

However, on this point, the Divisional Court does direct lower courts to give careful consideration to the sort of hearing appropriate on a request for an interim relocation:

> [47] I pause here to note that *Plumley*'s reference to the need to find that there is no genuine issue for trial is a recognition of the fact that relocation decisions are hard to reverse at trial without causing major disruption to the children. For that reason, as the panel granting leave in this case appears to have implicitly recognized, they have an air of finality which makes it appropriate to consider whether they should be decided by way of a process designed to make final decisions, such as a summary judgement motion or a trial of an issue. In this case, as the motion judge noted, there was an expanded process that allowed for the giving of oral evidence and cross-examination on that evidence. However, it was still a process aimed at making an interim, not a final decision.

This is echoed by Justice Sherr in the decision of *Gomez v. Isaza*, 2025 CarswellOnt 9531 (C.J.), the first court to grapple with the decision of the Divisional Court in *Bah*:

> [106] Courts are more cautious about permitting a temporary relocation where there are material facts in dispute that would likely impact on the final outcome that cannot be determined on a temporary motion. See: *Fair v. Rutherford-Fair* 2004 CarswellOnt 1705 (Ont. S.C.J.); *Schul v. Schmidt*, 2023 ONCJ 30. The reality is that courts do not like to create disruptions in the lives of children by making an order that may have to cause further disruption later if the order has to be reversed. See: *Goodship v. McMaster* 2003 CanLII 53670 (ON CJ), [2003] O.J. No. 4255 (OCJ); *Schul*, supra. This caution is consistent with the best interests factors relating to a child's stability . . . and the impact of relocation on a child . . . It is also consistent with the comments made at paragraph 47 in *Diallo*, set out above.
>
> [107] The court finds there remain many material facts in dispute that will likely impact on the final outcome of the relocation issue. These material facts should be determined by a process where there is a full presentation and testing of the evidence. They should be decided after a trial.

The Divisional Court also rejected the claim that the motion judge erred when she allowed the children to relocate to Winnipeg "with reasons to follow." While it was not ideal, the Divisional Court set out that, in urgent situations, judges will frequently proceed this way. The motion judge had to canvas a number of factors. Writing decisions, according to the Divisional Court, takes time, and there was not a lot of it.

There was also no basis to the submission that a reasonable person would conclude that the reasons released were an *ex post facto* justification for the decision that the motion judge had already made.

Ultimately, the Divisional Court dismissed the appeal and lifted the stay of the motion judge's order. The issue of relocation on a final basis was left to be determined at an expedited trial.

Where does that leave us? Aside from our musings above, here is the practical problem. The Divisional Court dismantled *Plumley*. It said the *Plumley* test has been "overtaken" by the *Divorce Act* amendments. The Divisional Court did not actually set out a new test for an interim/temporary move. So in place of the test in *Plumley*, we now have . . . crickets. To borrow an analogy from Professor Thompson, that is like having your contractor demolish the inside of your house, but without any plans from there.

What is the current test for an interim move? Absent further direction from the Divisional Court, and given the blessing by the Divisional Court of the lower court's consideration of best interest factors, it would seem that we are back to basics: what is in the best interests of the children? This appears to be where things were left by the Divisional Court — not ideal in our view. All we know is that, whatever the test, the process has to be reasonable taking into account that an interim relocation can often be final.

End of Document