[Indexed as: **Jarrett v. Jarrett**]

PATRICIA JANE JARRETT v. GEORGE WILLIAM ALLAN JARRETT

Ontario Court of Justice (General Division)
Eberhard J.

Judgment – November 8, 1994.*

*James D. Singer*, for petitioner.
*Deborah Hastings*, for respondent.

(Doc. Whitby D3871/93)

1 November 8, 1994. EBERHARD J.: – This is the tragic circumstance of the family breakdown of Pat and Bill Jarrett, who are the parents of 5-year-old Christopher and 3-year-old Daniel. At issue are custody of those children, whether the mother may relocate them to British Columbia if she is granted custody, access arrangements, child support, spousal support, and a prohibition on change of the boys' surname. I heard evidence and granted a divorce on an uncontested basis on October 18, 1994, on the understanding that the corollary issues remain outstanding as listed.

2 In addition to the evidence of the parties and witnesses of the events and circumstances relating to these issues, I received the report and evidence of a social worker appointed by the Official Guardian to investigate as ordered in earlier proceedings. There were several medical reports received, as well as a psychiatric opinion commenting on the Official Guardian report and in support of the mother's plan based only on interviews with the mother and children and a consideration of hypotheticals as to Mr. Jarrett. I ruled statements made by the children to the parents admissible through the parent as evidence of the state of mind of the child, not for proof of the content of the statement unless persuaded that a particular remark was admissible hearsay, demonstrated as both necessary and reliable.

3 The best interests of both children of the marriage demand that the boys remain in the custody of the mother. It was well demonstrated that she has been the primary care-giver throughout their lives. She has consistently shown both competence and devotion in ensuring for them a safe environment, healthy and appropriate care and maintenance, with established routines to enhance their development. She has attended to their emotional needs and there is significant attachment apparent to those who observe them together. Indeed, they are almost always together. They are dependent upon her and trust in her to ensure their ongoing well-being. She has busily and imaginatively addressed their cultural needs, facilitating their exploration of language, the arts, sport, and imagination. I find her extremely tuned in to the societal supports and opportunities for children. To disrupt the continuity of her parenting would be devastating to the boys. She shall have custody.

4 That is not to say, and I make no finding to suggest, that Bill would not also be a competent parent. His style is different, but it would not disentitle him from continuing to provide care for the boys. No doubt they enjoy the more relaxed approach he takes and it is not an unhealthy balance to their mother's more regimented expectations. It is no criticism of his interaction with the boys that he does not fill their time together with structured activity or outings. They play together and that is a worthy pastime. I was persuaded by Bill's sincerity in identifying that Ms Jarrett's interaction with the boys may

lack a certain sensitivity to their individuality and perhaps a coldness and lack of spontaneous mutual celebration that he relishes and provides to his sons. He has followed through on plans for their well-being, such as postponing starting a family 10 years to ensure that the mother could remain home to care for them until they were in school, in a conscientious effort to be a better father to them than his own was to him. He impressed both me and the Official Guardian investigator as a caring father who loves his children and would be devastated by the prospect of not being regularly involved in their lives.

5 I find, however, that in the face of his wife's competence and highly organized style, he abdicated some essential aspects of parenting to her. In the context of an ongoing marriage, that can work very well but it places Mr. Jarrett at an extreme disadvantage now in any attempt to demonstrate that it would be in the boys' best interests that he take on the custodial role. It would have been extraordinary if he were to have "caught up" to Pat's level of attunement to the children's needs and adeptness in finding solutions for them. She has immersed herself in the task for years. It's conceded that well before this couple bore children they had jointly decided that the mother would remain home with them to provide for their care. This is what Pat has done, perhaps even to the exclusion of their father. Although it may seem unfair to Mr. Jarrett that the very exclusion that he says drove him from the marriage should also deny him custody of the children, looked at from the point of view of the best interests of the children, it would be inappropriate to interrupt the continuity of care to which they have long been accustomed. That care has been provided primarily by Pat. It was remarkable to the Official Guardian that the boys seem so well in the face of the substantial conflict around and since separation. A significant component in that wellness is no doubt a result of continued good care in their mother's household.

6 In giving evidence Mr. Jarrett presented as a very pleasant easygoing fellow. He has been extremely industrious throughout the marriage, providing a good income through long hours of employment, and enhanced lifestyle by clever and handy work around the home. I was particularly impressed with the self-control he exhibited in the face of tenacious, righteous, accusatorial, and sometimes petty cross-examination. He was remarkably unaggressive in response.

7 I felt I was seeing during his cross-examination the communication style that characterized the marriage. He repeatedly took refuge in silence with a look that suggested we ought to know what he was thinking. He was careless at times with his facts. He was careless in the ordering of his affairs. Because of his failure to discuss anything, I find he left his wife and others in ignorance of his plans and priorities. Regrettably, there were many topics about which his evidence was simply not capable of belief. It appeared that he was not

lying so much as reconstructing events in such a way that he had convinced himself they had occurred. Otherwise, he would have had to acknowledge responsibility for the consequences of his actions in the early months of separation. His departure from the family home, his subsequent contacts which seemed to prioritize retention of his possessions rather than any sensitivity to the boys, his glib dismissal of any confusion they may have not only about his taking on a new family but a partner, Jan, whom they had known before as an aunt, were all well demonstrated. He was insensitive to the insecurity his wife experienced following separation, not only by reason of actual lack of funds but also because he failed to communicate any indication of the willingness to continue to provide for them that he now professes. Either he was callous to the boys' needs in the face of ample indication of their impoverishment, or he simply does not understand the ongoing financial requirements inherent in raising 2 young boys. Whichever the reason, his conduct as it relates to the children immediately after separation impacts on my assessment of his ability to put the needs of the children ahead of his own. That ability is called upon daily in parenting.

8 I certainly recognized his sincere affection for his boys and his fervent wish to parent them. However, he has presented no real plan. That may well be reflective of the fact that Ms Jarrett has done all the real organizing for these kids all their lives. Until he was cross-examined, Mr. Jarrett said nothing of how he intended to manage the practical aspects of parenting. He never addressed who would look after the boys while he continued to earn an income to provide for them, and when asked point blank about Jan's expected involvement, it was apparent that it has never been discussed. Indeed, the man does not discuss. It is extraordinary that he does not know, nor has he considered, the impact of Jan's cancer, which as far as he knows is terminal, upon the boys' well-being. He professes to be more sensitive to the boys' feelings than is Ms Jarrett, but he has skipped over essential details.

9 Jan McAffie, Mr. Jarrett's new partner, is a warm, trusting, sincere, guileless, and naïve individual who sensibly supports Bill in his parenting without interfering, and has developed a comfortable relationship with the boys as observed by the Official Guardian. It is most troubling, however, that she and Bill have very obviously never discussed the extent of the role she would play if he were to obtain custody, and it would of necessity be substantial since Daniel is a preschooler and Bill must both work and sleep. They simply have no plan and I infer from that that Bill lacks the necessary insight into the requirements of custodial care to have seen the need to formulate such a plan. Moreover, I find that Jan has a myriad of stresses that already overwhelm her. She showed real courage in giving her testimony, but

it could not mask the fact that she is already carrying all the burden she can bear, and as nurturing as she appears to be, she cannot reasonably be expected to assist Bill by providing daily care for his two boys.

10 I have considered, as a serious blemish in Ms Jarrett's parenting record, her inability to cheerfully support access. It is both the law as set out in s. 16(10) of the *Divorce Act* and my considered and passionate belief that, except in the rarest and most extreme circumstances, the one thing that children of separating parents need more than any other single factor in order to emerge healthy and undamaged by the disintegration of their family is the opportunity to know that they are still loved by both their parents. This is much more important than infections from which they will recover, or junk food, or missed deadlines. Loss of relationship with a parent is an injury from which, even as adults, they may suffer. This view was also most eloquently stated by the Official Guardian, Ms Wood.

11 Ms Jarrett has testified that she has not stood in the way of court ordered access and that she is working on necessary communication skills. She appears to understand at an intellectual level the importance of facilitating access. However, observation of Ms Jarrett as a witness and thorough review of both the reports and observations of her emotional circumstances persuade me that she has no real emotional willingness to facilitate the boys' relationship with their father. She recognizes none of Bill's substantial parenting strengths, gives him no credit for his efforts during the marriage that were different from but complementary to hers in the best interests of the household, and she blames him for all the stresses the children are experiencing, accepting none as her own. She acts as though access is a favour that she may dole out depending on her plans and convenience and on her judgement as to Bill's deservedness. She was very careful not to disturb the children's bank accounts because they belonged to the boys. Access is a right of her sons. She must uphold that right with the same tenacity. her attitude has been prejudicial to her sons' right to access.

12 On the witness stand Ms Jarrett was extraordinarily precise and, I find, accurate in her review of the history of the conflict. She was not tripped up significantly in any factual testimony. However, this initially pleasant and accommodating woman disintegrated into a picture of rage, bitterness, and hatred as she talked about her husband. During gentle and extremely polite cross-examination she was repeatedly evasive, argumentative, defensive, rude, rigid, and unreasonable. Her husband has described her to some as a bitch. No doubt what I observed in her is what he has had to contend with in any spousal interaction for some time. It may well be that she is merely fighting for her life with her boys with all the admirable ferocity of a

mother bear. The disconcerting aspect is that she does not appear to recognize the change in herself when she contemplates Bill. She has no apparent insight that she appears so hateful. I have no doubt, however, that her children recognize the change. The boys are placed in a terrible conflict as they try to continue to love both parents. The stress of that is considerable. It hurts more than a sore tummy or the fevers of which they complain. Neither is it a natural incident of childhood as I find the health complaints which so concern their mother to be. Ms Jarrett has failed to identify that her own behaviour and attitude are injurious to her sons in this regard.

13 I observed Ms Jarrett, as Ms Wood repeatedly expressed concern about Ms Jarrett's ability to fully support access. Such testimony, given as it was with intelligence and sensitivity, can be therapeutic as a means of communicating, to a person who needs to make changes, the importance and reasons for such an effort. Ms Jarrett appeared uninterested. When Ms Jarrett testified about her efforts to obtain counselling, a necessary and valuable step, she nevertheless failed to persuade me that she was able to identify her own need for personal counselling in order to change her attitudes towards access. It is difficult to cure a problem until you gain the insight that there is a problem to be cured. I am speaking at some length in the hope that the clear identification of it by an objective and, after this long trial, informed observer will assist Mr Jarrett in gaining that insight for the sake of the boys.

14 Notwithstanding this very serious flaw, I am granting custody to the mother because it is outweighed in this case by her significant parenting strengths and the importance of continuity in the boys' already much disrupted lives. The flaw must not, however, be ignored as I continue to relate my determination of the remaining issues.

15 I digress here for the purpose of identifying specific findings of fact in some of the many areas of dispute that were the subject of evidence.

16 Mr. Jarrett is not a violent individual and alleged incidents of a physical aggressiveness form no part of my reasons. I am not concerned that Ms Jarrett physically disciplines her children to excess and an alleged incident of her "walloping" Christopher does not support any such concern.

17 Mr. Jarrett did abdicate involvement with the children in favour of his own interests during the marriage. If his reason was that he felt shut out by Pat's routines from doing so, he failed to communicate or take steps to facilitate increased involvement.

18 Mr. Jarrett provides, and is capable of providing, appropriate care for the children, and the concerns raised by Ms Jarrett are unfounded. As an exception to this is the evidence regarding the use of motorcycles and all-terrain vehicles by the boys. No objective

evidence regarding safety practices was led and I am left with some concern.

19 Mr. Jarrett has not dealt adequately with the boys with the subject of his new relationship with a person formerly known to them as their aunt. He should do so. However, the relationship itself is legal and not morally dangerous to the boys if sensitively explained. Therefore, I find that Ms Jarrett's open disapproval of the relationship is just as potentially damaging to the boys and she must find a way to project to the boys support of their father's autonomy to enter a new relationship.

20 Mr. Jarrett left the marriage without adequately providing for either the financial or emotional consequences of his departure. He failed to communicate any vision he may have had about how he could support Ms Jarrett and the boys in their transition to a father-absent family, and his actions resulted in not only a period of desperate instability, but also fed the fire of conflict, which has prevented the parents from co-operating to develop a parenting plan to meet both the practical and the relationship needs of the children.

21 By November, however, Mr. Jarrett had begun to behave more appropriately. I do not judge him harshly for the time it took to sort out Family Support Plan and income tax factors. Subsequent disputes, of which there have been many, cannot be attributed to the fault of either, but to both. The parties lacked the communications skills and the resolve to sort out even the most petty grievance. They have exhausted their assets in the litigation and there is no money remaining to fund the start-up cost for a new plan. At present they remain completely unable to co-operate regarding access. They both require personal counselling.

22 Christopher and Daniel are emotionally attached to their father and currently enjoy their regular access.

23 Christopher and Daniel are not significantly attached to members of either extended family, with the possible exception of Paul Snow, with whom they have resided with their mother for almost a year.

24 Once it is understood that Ms Jarrett shall have custody (having had both de facto and interim custody), it becomes the task of the court to identify the plan that will most likely work in the best interests of the children. In this case that requires a determination of whether the mother may relocate her children in her care to British Columbia.

25 I am in complete agreement, as I have said, that a principal component in the healthy development of the boys is a real opportunity to experience, without conflict, the love of both parents.

26 Like the Official Guardian, I am of the view that this is best facilitated for young children by frequent interaction of relatively

short duration. That way their routines remain intact and they feel secure, but they are accustomed, as part of that routine, to regular visits in a second household. Young children have difficulty sustaining a relationship that is interrupted by long gaps between periods of interaction.

27 The complicating factor in this case arises out of a demonstrated history of strife and stress associated with the exercise of access. Although visits have become increasingly regular as the support payments have been brought current, there is still no flexibility in attitude or accommodation. It is not particularly instructive to review the history of the parties and assign fault for this. It is shared. The net result is that the anxiety and anger experienced by Ms Jarrett is real and debilitating. She has not been able to get beyond it. She is stuck in the fallout from this battle, largely for good reason, since she has been introduced in this year to extremes of emotional rejection, poverty, and the fear of loss of her children. Although I give no weight to the factual findings or recommendations of Dr. Cooper's report, for reasons I will set out, I find that he has identified the other side of the dilemma to be resolved: where it has been determined who shall have custody of the children, and it is accepted, as he asserts, that the emotional health of the primary care-giver is a significant factor in the emotional health of the children, the best interest of the children will be served by facilitating the emotional health of the primary care-giver.

28 The conflict associated with access creates alternative concerns. If Ms Jarrett relocates to British Columbia with the boys, lack of communication will undermine the access relationship. Explains Ms Wood, unless the custodial parent actively promotes continued relationship with the access parent, he is out of sight, out of mind. He is never brought up in daily conversation and is ultimately dismissed. On the other hand, If Ms Jarrett remains in Ontario with the boys, they will be subjected to the continuing stress of bitter confrontation repeated before and after each visit. Ms Wood and Mr. Jarrett each assert that this is the less damaging alternative because the relationship between father and sons will thrive anyway. There will be regular direct interaction upon which the relationship can be based. Counsel for the mother argues that statistical evidence, accepted as accurate by the Official Guardian, demonstrates the likelihood that the relationship will diminish in any event.

29 I give no weight to the findings of the eminent Dr. Cooper because he purports to determine the custodial issue without hearing both sides. The hypotheticals he was given, unsafe at best because they paint such a partial picture, are gross exaggerations, if accurate at all. He spoke to the children in the presence of, certainly under the influence of, their mother, almost ensuring responses in her favour.

He took pains to point out that the report was necessarily one-sided and that he was not a child psychiatrist, perhaps predicting that the report would be of little value. He gave a report based on what was available to him. What was available to him was an inadequate basis for custodial recommendations. This kind of assessment should be discouraged. I do not accept his findings. I agree, however, with his expert assertion of the importance of the emotional health of the parent upon children in one's care.

30 The observations of Nancy Wood, the Official Guardian's social worker, are validated by process and are helpful. Her observations of the parties matched my own. Her delineation of the issues and her familiarity with the factors impacting on the emotional health of the children within this family system were learned, helpful, and most troubling. Although she is not a clinical psychologist, her understanding of the necessary concepts was well supported both by experience and her academic training as described to the court. The conclusions, however, are not determinative upon the court. I also frankly found it somewhat disconcerting that part of the experience she related was personal, not professional. Where the central issue in a case is relocation, it is not helpful that the assessor carries with her certain baggage relating to her own experiences with the relocation of her children. It raises the spectre of bias, not from any mala fides, but because personal experience tends to colour one's thoughts and may reduce the objectivity that is so necessary to an assessor's role.

31 Ms Wood made observations of the parties that matched my own. She had the advantage of observing the parties and the children in their natural environment. I respect that significant advantage and am much influenced by her report of the observations she made. On the other hand, I had the advantage of hearing the lengthy testimony of the parties, tested by cross-examination. I also have the responsibility to decide, and do not delegate, that decision.

32 Ms Wood suggested that we should move slowly, allow the family to live in its separated state, undergo counselling, and attempt to work out new strategies for communication. She is concerned about the number of significant disruptions the boys are having to endure. She wonders how much more they can take before symptoms of damage begin to appear. She quite rightly points out that if the children are permitted to relocate, the opportunity to preserve for these children a viable chance for the kind of access that will facilitate ongoing relationship with both parents will likely be lost forever. Since it is impossible to predict the effects of proposed change, she proposes that the court err on the side of caution. She suggests that the court devise a structure for access and improved communication with a view to reassessing the success of the plan in a few years. Then, she says, if there is no real chance for ongoing relationship, relocation might be considered.

33 With greatest and sincere respect for that view, I find I cannot follow that recommendation. I agree that the litigation process is divisive and unlikely to lead to joint consideration by the parents of what might be in the best interests of their children. I too am an enthusiastic proponent of methods that encourage resolution without driving parents into conflicting positions. Early intervention by way of counselling, mediation, alternative dispute resolution, and wise advice from committed counsel are far more likely to produce resolutions that leave the children healthy and undamaged by parental conflict. However, if the parties have not availed themselves of these opportunities, if they have chosen instead to seek resolution in the adversary system, then the court must be prepared to make a decision intended to be final. It would be irresponsible for a court, after 10 days of expensive and destructive trial, to give a tentative response. The parties have come for judgment, not advice. It is not my intention to prolong the litigious stage of the dissolution of this marriage.

34 Today, I am the judge and it is I who will decide upon relocation. However, in future days, my views will matter not at all. Christopher and Daniel will be the sole judges whose opinions matter. If I allow relocation and it results in the loss of relationship between the boys and their father, I believe they will ultimately come to understand most accurately who is responsible for that loss. If their mother has been anything less than 100 per cent in her support for and cheerful facilitation of generous and flexible access to their dad, I expect they will blame her for this most grievous loss and she will lose them and their devotion by her own action. In my experience, children are ultimately seldom fooled about which of their parents really acts in their best interests.

35 The likelihood of this long-term failure is a necessary factor to consider because of Ms Jarrett's demonstrated negativity towards access. It is the strongest argument against allowing her to relocate that she will make it difficult to ensure continuing access because she will continue to find impediments. Ms Jarrett doesn't really like to let her children out of her sight, or control. She must learn to let go a little. She must understand that Mr. Jarrett is quite capable of providing parental care. Childhood illnesses, decisions about safety, care, and morality are well within his competence, even if he would make somewhat different choices. Ms Jarrett must allow him autonomy in his time with the boys just as she wishes to be allowed to provide for their care in her time without interference. She must remind herself that they may be getting something out of their relationship with him that she can't give them. She must accept as accurate the objective view that the boys have a wonderful time with their dad and that the only reasons they don't tell her so is that she has caused them to believe that they can't, that it will hurt her to know that they love their dad.

36 The contrasting scenario, if relocation is not permitted, is the all too familiar circumstance of the single parent household, caught in a cycle of poverty and hopelessness. I am quite persuaded that Ms Jarrett will experience great difficulty if she remains in Ontario, in trying to get a start towards a return to a reasonably prosperous lifestyle. Ms Wood opines that Pat may not have had her heart in a job search to date and that the lack of desire to remain in Ontario may be a significant factor in her lack of success to date in finding employment. Understanding this as a causal factor does not solve the problem. Pat will face many obstacles as a basically unskilled worker, having little formal education, being 8 years out of the workforce, having much energy consumed by the tasks of parenting, needing to find accommodation and day care, and having used up the significant resources acquired over the years in the cost of this litigation. Arising from this is a financial dependency upon Mr. Jarrett, whose income is secure but limited and subject to new pressures as he begins to build a new life. Superimposed upon this is the imperative to facilitate unwanted, frequent access and the requested limitation of autonomy and freedom of movement. All of this Ms Jarrett is asked to shoulder alone because her married life yielded few friendships and the family from whom she has garnered growing support is in a province far distant and forbidden to her.

37 The saving quality in this scenario is said to be that Ms Jarrett is a "survivor." Ms Wood thinks that with her demonstrated stamina and strength, psychologically speaking, Ms Jarrett can accomplish this. Paul Snow, her brother, who has taken her in for 11 months and who coined the "survivor" term, indicates that he means that she will not kill herself or run away from her children. For herself, Ms Jarrett states she wants her children to not merely survive, but to thrive.

38 Ms Jarrett has a plan. I am persuaded it is a viable one. Her relationships, though recently renewed, have been remarkably supportive. The environment she can provide for her children in British Columbia is far superior to that which she could hope for here and very much more similar to plans for the children that Mr. and Mrs. Jarrett shared as a couple. It is immediately available. She has an appropriate job and a plan for improvement. She has researched counselling options for herself and her children that may serve to avert the dire prediction of ultimate loss I have recited above. Moreover, she has family members who appear to take a more objective stance toward Mr. Jarrett and who may well assist in reducing the risk of loss of relationship between the children and their father.

39 Ms Wood has described an ideal. I have no quarrel with the view that the court should attempt to promote, if at all possible, a custodial arrangement that will facilitate ongoing relationship with both parents even when the current situation is one in which the relation-

ship has become marginal at the time of trial because of conflict between the parents (*MacInnis v. MacInnis* (1992), 40 R.F.L. (3d) 345 (Ont. U.F.C.)).

40 Ms Wood reminds the court that moving to British Columbia will not resolve for Pat the pain that haunts her or the unresolved issues that arise from her past. British Columbia, contrary to the hopes of many and to Ms Jarrett's firm belief, is not a panacea. Ms Wood strongly disapproved of Ms Jarrett's having conveyed to the boys the expectation that they would be moving to an appealingly described British Columbia before that has been determined. I agree that there was real lack of judgment in continuing to allow them to think that they were going but for Mr. Jarrett's objection. That both creates an unnecessary potential for resentment against their dad and also sets the boys up for disappointment should the court decide otherwise. I agree with those criticisms but I would add a factor that Ms Wood could not know from the period of her involvement: Ms Jarrett was in poverty in the fall of 1993. The house was being sold. She had no place to live. Voluntary payments of support had been grossly insufficient and obtainable only after substantial confrontation. Court ordered support was being held up due to procrastination by Mr. Jarrett's former counsel. Mr. Jarrett's exercise of access had been extremely irregular and, until November at least, appeared to be quite secondary in importance to Mr. Jarrett to his retention of various automobiles and items of property and his establishment of an independent life. Ms Jarrett was desperate. There was no relief apparent. Then, opportunity arose through family for accommodation and employment in British Columbia. How can she be faulted for acting to secure that relief? In those circumstances, telling the boys they were moving to British Columbia, and even some insensitivity to their relationship with their father, is quite understandable. Her decision was not 100 per cent free of a personal desire to leave Mr. Jarrett behind and begin anew. Motivation is seldom pure. I find her decision in November 1993 to be bona fide.

41 Since then, she has been delayed by court process. Since then, Mr. Jarrett has established a pattern of interaction that did not exist before. It was stressed by Ms Wood that Mr. Jarrett had felt freer to relate to the boys outside the marriage than before separation. So, since her decision to relocate out of desperation to a viable and attractive plan, circumstances have developed such that it appears that she was giving insufficient consideration to the boys' psychological needs in order to meet her own.

42 However, this assumption exposes the weakness I find in the Official Guardian's report: the conclusions are based on psychological criteria to the exclusion of the information that I would find useful in a social work report. It fails to consider Mr. Jarrett's total lack of a

plan. It fails to compare the overall viability of the plan Ms Jarrett can offer in Ontario and the one available to her in British Columbia. In short, it fails to address what is most likely to work to give the boys a reasonable quality of life. Ms Wood urges the court not to impose any more change upon the boys. I cannot agree when they are now living in unsuitable, necessarily temporary, unstable, and impoverished circumstances in the eye of a storm of confrontation. A change now is necessary and available.

43 I am persuaded that the children will be caught up in an endless cycle of conflict and poverty if their mother is not permitted to relocate them to British Columbia. I recognize the risk of loss of relationship with their father, but I find that in this case a hierarchy of needs demands that their mother be situated in circumstances where she can reasonably attend to their safety, their nurturance and care, their emotional security, and their educational and cultural growth. A significant factor in her ability to do so will be the likely improvement in her own attitude and mental health that will be made possible by the change. I am allowing relocation to British Columbia, knowing that it may impair significantly a relationship necessary and important to the boys, in favour of allowing them the opportunity to thrive in improved daily circumstances, to develop out of the shadow of the constant, continuing stress of conflict and poverty. I have weighed the condition, means, needs, and circumstances of the children with the lack of real willingness on the part of Pat to promote contact between Bill and the boys, and find that the best interests of the children require that relocation be permitted.

44 I have reviewed the several cases cited by counsel as to the factors to be considered regarding the best interests of the children, including *Carter v. Brooks* (1990), 30 R.F.L. (3d) 53 (C.A.), *Wainio v. Gilmour* (1994), 2 R.F.L. (4th) 116 (Ont. C.A.), and *Moge v. Moge*, [1992] 3 S.C.R. 813.

45 I am assisted by the scholarly comment of Professor McLeod following the *Wainio v. Gilmour* case, supra, in which he connects the mobility issue with the wider context of the decision:

> Currently, the two most common reasons given for moving relate to the economic status of the family. Either the custodial parent will have formed a new family and his or her partner has found, or hopes to find, employment elsewhere or the custodial parent will be unemployed and wishes to relocate to secure a job. Before a court limits a custodial parent's mobility right, it should assess the economic effect of its decision: see *Appleby v. Appleby* (1989), 21 R.F.L. (3d) 307 (Ont. H.C.). In *Moge v. Moge*, [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345, [1993] 1 W.W.R. 481, 145 N.R. 1, 81 Man. R. (2d) 161, 30 W.A.C. 161, 99 D.L.R. (4th) 456, and *Peter v. Beblow*, [1993] 1 S.C.R. 980, 44 R.F.L. (3d) 329, [1993] 3 W.W.R. 337, 77 B.C.L.R. (2d) 1, 48 E.T.R. 1, 150 N.R. 1, 23 B.C.A.C. 81, 39

> W.A.C. 81, 101 D.L.R. (4th) 621, the Supreme Court of Canada noted that the law has led to the feminization of poverty, and may have reinforced the inequality that exists between men and women in society. That is improper and should be changed. The mobility issue is tangential to maintenance and should be viewed in the same light. Judges should be careful not to prevent a custodial parent from moving if it will result in the parent and children having a poor standard of living. A custodial parent assumes substantial responsibility. In *Moge v. Moge* L'Heureux-Dubé J. stated that a mother's child-care responsibility limits her ability to earn income, and thus her ability to ensure her future security. She must arrange her work schedule around the children's needs. If she is restrained from moving, then her options will be even more limited.

46 In light of the determination allowing relocation, access arrangements must necessarily take into account the significant cost and practical difficulties. It will not be possible to follow the ideal of frequent visits of short duration. However, since the children are so young, there must be at least the opportunity for access often enough that they remember their father in between, and each visit is not an occasion in which they perceive themselves sent for a long period to a virtual stranger.

47 A second general principle must be to recognize that access to a parent thus limited by distance takes priority over a variety of otherwise appropriate concerns. For instance, while normally it would not be appropriate to keep children from their regular routines, including school, that becomes secondary to the importance of access. While every effort should be made to co-ordinate access with the school year, in the primary years (kindergarten to Grade 3) at least, access arrangements should take precedence. Many responsible parents allow young kids to miss a week of school for a family holiday. Missing a few days of school must not become a pretext for denying access.

48 Finally, Ms Jarrett must step back and take steps such as personal counselling so as not to intentionally or unintentionally interfere with access. It is predictable that while they are very small the boys will be reluctant to leave her for blocks of time. This kind of "homesickness" is experienced by many children who have not experienced family breakdown. It is necessary at least until Daniel is 5, and advisable for several years after that, that an adult must accompany the children on the airplane. Unless it is hereafter agreed between the parties, that adult should not be Ms Jarrett. Let her see them off in British Columbia. If there is upset, it can be far from Mr. Jarrett and less likely to infect the access visit with a scene of conflict between parents, or reluctance for the boys to leave the airport with their dad. It would be helpful for the parents to appoint a British Columbia adult, such as Martha or Aunt Anita, to serve, on their con-

sent, as a go-between to ensure complete and safe arrangements for access transportation, timing, and to help deal with the unforeseen problems as they arise.

49 Access shall occur as follows:

1. Until Ms Jarrett relocates in British Columbia, or at any time when the parties reside within 100 k/m of each other, access is to continue every other weekend from Friday at 6 p.m. to Sunday at 6 p.m. If such access falls on a long weekend, the access shall be extended to include the additional day. Transportation is to be shared equally at such time as Ms Jarrett acquires a car.

2. Within the last 3 weeks before Ms Jarrett relocates to British Columbia with the children, access shall be for 2 full weeks commencing Friday at 6 p.m. to the Sunday 2 weeks hence at 6 p.m. This will necessitate Christopher missing school but his school year will be disrupted by the relocation anyway. Since I have found Mr. Jarrett to be a caring and non-violent man, I am trusting him to exercise such access appropriately notwithstanding the sadness he will no doubt be experiencing.

3. Ten days inclusive of travel time in spring 1995. Ms Jarrett shall advise Mr. Jarrett before January 1, 1995, the period of Christopher's school break in the spring. Mr. Jarrett shall make best efforts to arrange his annual "spa week" to coincide with the school break. If co-ordination of the respective holiday weeks cannot be accomplished, then the access may occur during Mr. Jarrett's spa week if he should so request. Otherwise, it shall coincide with Christopher's school break.

4. Thirty days inclusive of travel time in summer, commencing 1995 and thereafter. Ms Jarrett shall advise Mr. Jarrett before January 1 each year of the last school day and shall advise him as soon as possible of convenient travel times of adults travelling to Ontario to avoid duplication of costs for a responsible adult to accompany the children as they travel. Using best efforts to co-ordinate such times with access, Mr. Jarrett shall notify Ms Jarrett of the intended dates for summer access by April 1 of each year.

5. Ten days inclusive of travel time to include Christmas Day in 1995. Ms Jarrett is to advise Mr. Jarrett as soon as possible of any adults travelling to Ontario to avoid duplication of costs for a responsible adult to accompany the children as they travel.

Using best efforts to co-ordinate such times with access, Mr. Jarrett shall notify Ms Jarrett of the intended dates for Christmas access by November 1, 1995.

6. In 1996, and alternate years thereafter, March access shall be as set out in paragraph 3 hereof.

7. In 1997, and alternate years thereafter, Christmas access as set out in paragraph 5 hereof, provided that in 1996 and even years thereafter, at Mr. Jarrett's option and expense, 10 days inclusive of travel time, commencing after Christmas Day.

8. In addition to such access, Mr. Jarrett may exercise access in British Columbia on 60 days' notice. If this access occurs during the school year, Mr. Jarrett shall plan the visit so as to take into account and reasonably follow regularly scheduled routines, including school.

9. Each parent shall send with the boys written information concerning health, care, and maintenance that may impact upon the care given or necessary during access.

10. Mr. Jarrett shall obtain and supply to Ms Jarrett a written opinion by a qualified licensing official on motorcycle safety issues relating to the use and enjoyment of motorcycles by children as drivers or passengers. Neither party shall permit Christopher or Daniel to use or enjoy a motorcycle except in compliance with that opinion.

11. Ms Jarrett shall facilitate the boys' receiving regular telephone access at all times before established bedtimes and shall encourage the boys to speak to their father and such members of Bill's extended family as may so communicate with them. Mr. Jarrett shall bear the cost of same. If the parties cannot agree as to time when the children shall be available to receive telephone communications, it shall be each Sunday evening between 7:00 and 8:00 p.m. British Columbia time. Ms Jarrett shall bear the cost of and assist the boys in telephoning and speaking to their father at least once a month.

12. Ms Jarrett shall facilitate and encourage written communication between the boys and their father and such members of Bill's extended family as may so communicate with them.

13. Ms Jarrett shall arrange and attend counselling for the purpose of promoting her ability to cheerfully and fully support access between the boys and their father.

14. In the first week of March 1995, 1996, and even years thereafter, the first week of December 1995 and odd years thereafter, and the first week of July 1995 and each year thereafter, the regular payment of child support shall not be paid through the Family Support Plan (or equivalent) as set out in my ruling on financial issues, but may be used by Mr. Jarrett towards the transportation costs of access visits or for the care of the children during access. For tax purposes such amounts will be deemed to have received by Ms Jarrett and paid by her as a contribution to facilitate the access rights of the children.

50 It will be of little solace to Mr. Jarrett to hear it, but I tell you that I have carefully and to the best of my ability considered the best interests of your children, knowing how every devastating my decision will be to the unsuccessful parent. It is with great sadness that I announce my decision but I pledge to you that I have done my very best to understand and wisely decide. All four of you – Bill, Pat, Christopher, and Daniel – have had my concern and my regard. Thank you for your respect throughout.

*Order accordingly.*