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Family

SCC's fluid treatment of 'best interests of the child' test: Seminal jurisprudence

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(February 10, 2021, 10:12 AM EST) -- The test of what is in the "best interests" of the child is entrenched as a guiding principle in modern family law in Canada, and now embedded in the pending amendments to the federal *Divorce Act* and family law legislation of the provinces. The Supreme Court of Canada appears to have established a fluid test, dependent on the circumstances, in consideration of the facts before the court. The test has been made more specific when viewed through the focused lens of litigation in the lower courts and through enhanced provisions of provincial legislation.

In view of the fluidity of the test as expressed by the past decisions of the Supreme Court of Canada, the *Divorce Act* will be amended effective March 1. The amendments will prescribe a very detailed meaning of "best interests of the child," which will include considerations of family violence, amongst other things. In view of the new legislative prescriptions, it is helpful to examine the past guidance of the Supreme Court regarding best interests.

The Supreme Court of Canada first entrenched the test in the seminal case of *Young v. Young* [1993] 4 S.C.R. 3, with Justice Claire L'Heureux-Dubé, writing for the majority on this point but dissenting in the result, saying that in matters of custody and access "the best interests of the children" was the only applicable test — (the appellate court below had held the test was one of harm to the children that the custodial parent must show to restrict access).

In *Young*, the father, who had access rights, sought to introduce his three children to his Jehovah's Witness faith. The custodial mother objected to this, and the evidence suggested that two of the children, aged 6 and 8, also objected. At trial, the father's access rights vis-à-vis religion were restricted. On appeal, the father raised the issue of freedom of religion and expression and raised Charter concerns in objecting to restrictions placed on his access rights.

Justice L'Heureux-Dubé noted the statutory framework of the *Divorce Act*, which required that the court make an order regarding custody and access taking into consideration only "the best interests of the children" as determined by reference to the condition, means, needs and other circumstances of the child (s. 16(8)). She noted that the best interests of the child was to be determined without the benefit of a presumption in favour of the mother or the father, and, contact of the child with both parents is a worthy goal consistent with the best interests of the child.

The test is contextual and future focused, encompassing a myriad of considerations. It is "person-oriented" rather than "act-oriented" and requires a consideration of the " 'whole person viewed as a social being.' … Courts are required to predict the happening of future events rather than to assess the legal import of past acts and judge the effect of various relationships on the best interests of the child, all the while weighing innumerable variables without the benefit of a simple formula." (para. 71).

"In making a determination as to the best interests of the child, courts must attempt to balance such

considerations as the age, physical and emotional constitution and psychology of both the child and his or her parents and the particular milieu in which the child will live" (para. 72).

The Supreme Court of Canada again tried to give meaning to the "best interests" test in the seminal decision of *Gordon v. Goertz* [1996] 2 S.C.R. 27. In *Gordon*, the majority decision per Justice Beverley McLachlin commenced by acknowledging the necessarily "indeterminate" nature of the test as "a more precise test would risk sacrificing the child's best interests to expediency and certainty" (para. 20).

She reiterated her view expressed in *Young* that the maximum contact principle must defer to the best interests of the child. The rights and interests of the parents, except as they impact the best interests of the child, are irrelevant (para. 37). There is no presumption in favour of the custodial parent, although the views of the custodial parent are entitled to great respect and "the most serious consideration" (*Gordon*, para. 48).

In her minority judgment in *Gordon*, Justice L'Heureux-Dubé would have applied, as a starting point, the presumption that the custodial parent was the most able to ensure the best interests of the child, stemming from the inextricable link between the significant decision-making responsibility entrusted to the custodial parent and the best interests of the child (paras. 117, 118, 140). (Some authors are of the opinion that this minority viewpoint has, in fact, been adopted de facto by the lower courts in mobility cases). She made clear that the "best interests" test must be assessed from the child's perspective and not from the perspective of the parents (para. 69).

In addition to the paramountcy of the best interests of the child, there is the objective of promoting maximum contact with the non-custodial parent, although in the reality of the breakup of the family unit, maximum contact with both parents will simply not be possible in every case (para. 142). Best interests encompasses not only physical and economic well-being, but also emotional, psychological, intellectual and moral well-being.

Courts must balance such considerations in light of the quality of the child's relationship with both parents, their respective ability to look after the child's best interests, and, when the child is old and mature enough, the child's wishes and preferences (para. 120). 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 (para. 121).

This is part one of a two-part series. In part two of this series we will explore the additional texture given to the best interests test in more recent Supreme Court of Canada jurisprudence.

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