COURT OF APPEAL FOR ONTARIO

CITATION: O'Brien v. Chuluunbaatar, 2021 ONCA 555
DATE: 20210805
DOCKET: C68793

Gillese, Tulloch and Roberts JJ.A.

BETWEEN

Jeffrey O'Brien

Applicant (Respondent) [1]

and

Bia Chuluunbaatar

Respondent (Appellant)

Bia Chuluunbaatar, acting in person

Jeffrey O'Brien, acting in person

Heard: June 14, 2021 by video conference

On appeal from the order of Justice James F. Diamond of the Superior Court of Justice, dated October 26, 2020, with reasons reported at 2020 ONSC 6394, and from his costs order, dated November 23, 2020.

Gillese J.A.:

I. OVERVIEW

[1] This family law appeal engages new provisions in the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "***CLRA***") governing relocation and allocation of parenting time.

[2] The mother and father have one child. They separated when she was about nine months old. Based on a consent order, the mother has sole custody of the child and the father has access on alternate weekends.[2]

[3] When the child was five years old, the mother brought a motion seeking permission to relocate with the child to Mongolia. The mother was born, raised,

educated, and employed in Mongolia before immigrating to Canada. The father opposed the motion.

[4] After a three-day trial in the Ontario Court of Justice, the trial judge issued an order permitting the relocation. The father's appeal to the Superior Court of Justice was successful and the relocation order was overturned.

[5] The mother appeals to this court. Her appeal depends, in part, on whether the recent amendments to the *CLRA* relating to relocation apply to a case started before the amendments came into effect on March 1, 2021. In my view, they do.

[6] Further, as I explain below, there was no basis to overturn the relocation order. A trial judge's decision on relocation is fact-based and discretionary. Because of this, it is to be given significant deference on appeal: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 11. Trial judges are in a better position than appellate judges to determine a child's best interests: *Reeves v. Brand*, 2018 ONCA 263, 8 R.F.L. (8th) 1, at para. 6. In this case, the trial judge made unimpeachable factual findings, correctly articulated the relevant legal principles governing relocation, and applied those principles to the facts as she found them, before concluding that relocation was in the child's best interests. There was no basis for the appeal judge to interfere with the trial judge's exercise of discretion.

[7] Accordingly, I would allow the appeal and restore the trial order, with the mother's requested variation of the winter access provision.

II. BACKGROUND

[8] The appellant (the "**mother**") was 43 years old at the time of trial and is from Mongolia. After graduating from a top school in Mongolia with a B.A. in Financial Management, she obtained an M.A. in Economics from Japan. In Mongolia, she worked as an economic analyst, a financial sector specialist, and a consultant for various international companies. She immigrated to Canada in January 2010. Unfortunately, despite her efforts and completing various programs to upgrade her skills, she has not had stable employment in Canada. She has been sporadically employed in low-level jobs and is currently unemployed.

[9] The respondent (the "**father**") was also 43 years old at the time of trial. He was born and raised in Peterborough, Ontario. He has full-time employment. In 2018, his annual income was $114,876.

[10] The parties became romantically involved in 2010. In 2013, they began living together and had a child. They separated in September 2014 when the child was about nine months old. The mother has been the child's primary caregiver since her birth.

[11] When the child was about two years old, a temporary court order allowed the mother to take her to Mongolia without the father's permission. Since then, the child has continued to have a relationship with her maternal grandparents, keeping

in touch with them through Skype. She has also kept in touch with her cousins in Mongolia, playing with them weekly on Skype. While English is the child's first language, she can understand Mongolian in the household environment.

[12] A consent order made in August 2016 (the "**Consent Order**") gave the mother sole custody of the child and the father access, as agreed-on, including on alternate weekends. Although weekend access was specified, overnight access did not begin until January 2019.

[13] In July 2018, the mother brought a motion to change the terms of the Consent Order so that she and the child could relocate to Ulaanbaatar, Mongolia (the "**Motion**"). Ulaanbaatar is the capital of Mongolia, a cosmopolitan city with a population of about 1,000,000. The mother's family lives in Ulaanbaatar. The mother asked that the father's access be adjusted and offered to provide him with extensive access at Christmas and during the school summer vacation, as well as at other times, both in Toronto and Mongolia. The father opposed the Motion and sought an order for joint custody.

[14] The mother wanted to relocate to Mongolia with the child because they would have a better financial situation and increased family support, and it would help the mother's mental health. In Canada, she has been unable to obtain work at a level consistent with her education, ability, and experience. In Mongolia, she worked as a business consultant, economic analyst, and project specialist, but her most recent jobs in Canada have been as a door-to-door water tank salesperson, barista, interpreter, and data entry clerk. The mother expects to find permanent, full-time work as a mid-level professional with an international organization or foreign company in Mongolia.

[15] As a result of her employment situation in Canada, the mother has been unable to independently support herself and the child. They subsist on government benefits and child support from the father. In 2018, her total income was $38,380. The mother and the child live in a small bachelor apartment in Toronto where the child does not have her own room.

[16] The evidence at trial showed that the mother's family has provided her and the child with love, support, and financial assistance since the child's birth. The maternal grandmother was the only extended family member at the hospital when the child was born. No one from the father's large family in Peterborough attended at the hospital. The mother's mother and sister helped care for the child for six months after her birth. After the parties separated, the maternal grandparents deposited $5,000 in a bank account in Mongolia for the mother and the child. They also gifted the child their second apartment on her third birthday for her future use. The mother's evidence is that she also has an apartment, held in trust for her, in Mongolia.

[17] If the relocation is permitted, the mother's family will provide childcare and the child will enjoy a closer relationship with her maternal grandparents and cousins. In contrast, while the child has participated each year in a number of large

family events with the father's family, they have otherwise been largely absent from the lives of the mother and the child since the parties' separation.

[18] The mother has few friends and no family in Canada. She has been socially isolated since the child's birth, despite having sought help through mental health counselling, community supports, and her family doctor. The mother's isolation has had an impact on her psychological and emotional well-being.

[19] The Motion was heard over the course of a three-day trial where the parties were cross-examined on their affidavit evidence. The mother's evidence included a detailed plan of how the child's life would be improved in Mongolia (the "**Plan of Care**"). It shows how the child will benefit from close connection with her extended maternal family, the ability to participate in many extra-curricular activities, and developing a connection to her Mongolian heritage and tradition. As well, her evidence is that the child will have better living conditions, including having her own room for the first time. The mother intends to sell the apartment in Ulaanbaatar that her parents gifted the child. With the sale proceeds, she will buy a two-bedroom apartment and therefore not have to pay rent. She plans to enroll the child in a private school with a rigorous international curriculum where the child will continue with English language instruction and become more fluent in Mongolian.

[20] The trial judge found that the relocation was in the child's best interests, notwithstanding the change in access for the father. By order dated July 5, 2019 (the "**Order**"), she permitted the mother to relocate, with the child, to Mongolia; granted the father extensive access; dismissed the father's claim for joint custody; required the father to pay child support in accordance with the *Federal Child Support Guidelines*, S.O.R./97-175; and, adjusted child support to reflect the table amount for the years 2016, 2017, and 2018, based on the father's income for each of those years. The Order specified that winter access would take place in Canada, or another location of the father's choice. The mother was awarded trial costs of $25,000.

[21] The father appealed to the Superior Court of Justice. In reasons for decision dated October 26, 2020 (the "**First Appeal Decision**"), the appeal judge reversed the trial decision on relocation. He said the trial judge erred by focusing on the mother's reasons for relocation, rather than on whether relocation was in the child's best interests. He also said there was not a proper evidentiary record to show how the move was in the child's best interests. He further concluded that the trial judge had not given proper effect to the "maximum contact" principle.

[22] By endorsement dated November 23, 2020, the appeal judge ordered the mother to pay the father costs of the trial and the first appeal fixed at $37,500 (the "**First Appeal Costs Award**").

III. THE TRIAL DECISION

[23] The trial judge gave lengthy, thoughtful reasons for decision. On the relocation issue, she began by setting out the legal principles in *Gordon v.*

Goertz, 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27, as well as additional factors courts have since considered when applying those principles. She explained that although the Motion was brought under the *CLRA*, not the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), the legal principles in *Gordon* applied nonetheless.

[24] The trial judge then canvassed the evidence relevant to the relocation request and applied the *Gordon* principles and additional factors to her factual findings. Throughout her reasons, the trial judge repeatedly stressed that the question for determination was whether relocation was in the child's best interests.

[25] The trial judge's reasons for concluding that relocation was in the child's best interests include the following:

- The mother's family in Mongolia has a long and strong relationship with the mother and the child; the family members have made them a priority in their lives, which the father's family has not. The mother's family will continue to support them, particularly now when the mother especially needs their help;
- The mother is struggling in Toronto as a single mother living alone, and feels isolated and insecure. She would benefit from the support of her family and friends in Mongolia;
- The mother and child will have a better life in Mongolia – the mother's employment prospects are better, she will be more financially secure, and she will have help from her family financially and with childcare for as long as she needs it;
- The mother will regain her confidence and her emotional, psychological, social, and economic well-being, which will benefit the child and is, therefore, in the child's best interests;
- The child will benefit from a close connection with the mother's extended family, being able to participate in numerous extracurricular activities, having better living arrangements in a more spacious apartment, and developing a connection to her Mongolian heritage and tradition.

[26] The trial judge found that even with the relocation, the mother would facilitate the relationship between the child and the father, which the mother recognized as important. On the trial judge's findings, the mother has always followed the court ordered access; been generous with additional access; encouraged telephone access between the father and the child even when they were in Mongolia; and, allowed the father to attend her residence for access in a period when the father had mental health difficulties.

[27] The trial judge considered the relationship between the father and the child, and the disruption that would result from the relocation. She recognized that the father has a good relationship with the child and noted the mother's evidence that the child has developed a strong bond with her father and enjoys spending time with him. She concluded that the advantages for the mother and the child of moving outweighed the disadvantages of a possible reduction of the father's contact with the child. She ordered extensive access for the father including ten weeks in

the summer, three to four weeks in the winter, and, in Mongolia any time during a school break, for up to two weeks, on one month's notice.

IV. THE FIRST APPEAL DECISION

[28] The appeal judge acknowledged that the trial judge properly articulated the key principles on relocation from *Gordon*. He also accepted the trial judge's findings on the mother's mental health, isolation, and loneliness. However, the appeal judge concluded that the trial judge erred by "focusing solely upon the [mother's] reasons for relocating", saying that a parent's reasons for moving cannot be the only reason upon which to ground a relocation request.

[29] The appeal judge stated that the court must respect the maximum contact principle to the extent that such contact is consistent with the child's best interests. He noted that the trial judge had found the father to be a good parent but had done "little analysis" of the negative impact the move to Mongolia would have on the relationship between the father and the child.

[30] The appeal judge also said there was an inadequate evidentiary record for the trial judge's conclusion that the proposed move was in the child's best interests. He described the mother's Plan of Care as "speculative", saying it was made "without any independent, corroborative evidence from any admissible source". He added that it was surprising that there was no evidence from any of the mother's family members, friends, or business colleagues in Mongolia, and that the mother had failed to provide evidence to substantiate the qualifications of the private school she intended the child would attend or its admission requirements. He also questioned the mother's evidence about her financial and job prospects in Mongolia and was critical of her failure to provide the court with more information about Mongolia.

V. THE ISSUES

[31] The mother submits that the appeal judge erred in:

1. finding that the trial judge improperly applied the test for relocation;
2. reweighing the trial judge's assessment of the maximum contact principle; and,
3. intervening because of an allegedly deficient evidentiary basis for the move.

[32] If the appeal is allowed, the mother asks that the winter access provision be varied. On this matter, she seeks to introduce fresh evidence bearing on the appropriate location for the father's winter break access. The fresh evidence consists of two affidavits: one from her and the other from the child's doctor.

ISSUE #1 THE TRIAL JUDGE MADE NO ERROR IN HER APPLICATION OF THE TEST FOR RELOCATION

[33] At para. 67 of his decision, the appeal judge gave two reasons for concluding that the trial judge erred in her application of the test for relocation. First, he said that instead of determining whether relocation was in the child's best interests, the

trial judge permitted it because the mother would have an improved life in Mongolia. Second, he said that the trial judge erred in considering the mother's reasons for moving because those reasons should have been considered only in an exceptional case where they were relevant to her ability to meet the child's needs. In my view, neither reason is correct. The trial judge made no error in her application of the test for relocation.

[34] In terms of the first reason, it is simply incorrect to say that the trial judge focussed solely on the mother's reasons for relocation. The trial judge's focus throughout was squarely on whether the relocation was in the child's best interests. She repeatedly stressed this: see paras. 15-16, 28-29, 32-34, 36, 39, 121, 123, 125, 128-30, 132, 136-37, 139, and 141-46. Further, the trial judge's weighing of the various considerations demonstrates her adherence to that focus. Three examples are sufficient to demonstrate this.

[35] At para. 39 of her reasons, the trial judge wrote:

> Requiring a parent to remain in a community isolated from his or her family and supports and in difficult financial circumstances will adversely impact a child. **The economic and financial benefits of moving to a community where the parent will have supports**, financial security and the ability to complete their education and establish a career **are properly considered in assessing whether or not the move is in the child's best interests** …. [Emphasis added.]

[36] At para. 137, she wrote:

> The court considered all of the following: that the mother feels isolated and insecure in Canada; that she would benefit from the support of her family and friends in the other location; that her employment prospects are better there; that **the child will benefit if the mother is able to become independent and live in a stable environment**; and that **the child will suffer if the mother is restricted and remains insecure.** [Emphasis added.]

It follows that an improvement in the mother's social, emotional, and financial circumstances are in the child's best interests.

[37] And, at paras. 141-42 of her reasons, the trial judge wrote:

> There is also a psychological, social and emotional component to [the mother's] desire to move, in order for her to regain the general stability and control in her life that has been absent since the relationship with the

> father ended in September 2014. There is a connection between the quality of a parent's emotional, psychological and social and economic well-being and the quality of the child's primary care-giving environment.
>
> **An improvement in the mother's physical, emotional, and financial circumstances can only benefit the child and therefore be in the child's best interests.** [Emphasis added.]

[38] The appeal judge's second reason for concluding that the trial judge erred in her application of the test for relocation – namely, that the trial judge erred because she considered the mother's reasons for moving – disappears because of recent amendments to the *CLRA* governing relocation.

[39] The *CLRA* amendments largely mirror amendments to the *Divorce Act.* Section 16.92(1)(a) of the *Divorce Act* explicitly directs the court, when deciding whether to authorize a relocation, to take into consideration the reasons for the relocation. It reads as follows:

> **16.92(1)** In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,
>
> (a) the reasons for the relocation;

[40] The *Divorce Act* amendments came into force and effect on March 1, 2021. The transition provision in s. 35.3 of the *Divorce Act* makes it clear that the new relocation provision in s. 16.92(1)(a) applies, as of that date, to any ongoing proceeding:

> **35.3** A proceeding commenced under this Act before the day on which this section comes into force and not finally disposed of before that day shall be dealt with and disposed of in accordance with this Act as it reads as of that day.

[41] Section 39.4(3) of the *CLRA* also now directs the court to take into account the reasons for the relocation:

> **39.4(3)** In determining whether to authorize the relocation of a child, the court shall take into account the best interests of the child in accordance with section 24, as well as,
>
> (a) the reasons for the relocation;

[42] Unlike the *Divorce Act*, the *CLRA* does not contain an explicit transition provision governing the amendments. However, in my view,

the *CLRA* amendments must also apply to any ongoing proceedings when they came into force on March 1, 2021. Common sense dictates that the parallel amendments in the *Divorce Act*, governing parenting orders for children on married parties, and the *CLRA*, governing parenting orders for children of non-married parties, operate in the same fashion.

[43] Accordingly, on this appeal, the reasons for relocation are a proper consideration and this supposed error on the part of the trial judge falls away.

[44] For these reasons, in my view, the mother succeeds on this ground of appeal.

ISSUE #2 THE TRIAL JUDGE MADE NO ERROR IN RESPECT OF THE MAXIMUM CONTACT PRINCIPLE

[45] The appeal judge found fault with the trial judge's application of the maximum contact principle, saying that the trial judge did "little analysis" of how the move would negatively impact the relationship between the father and the child. I do not agree for two reasons.

[46] First, on the law as it stood when the Motion was decided, the trial judge made no error. She was fully alive to the maximum contact principle and its importance when assessing whether the relocation was in the child's best interests. Her relocation decision was an exercise of discretion that involved the weighing of competing considerations, including those arising from the maximum contact principle. That decision was entitled to deference. Rather than the trial judge having erred, it was the appeal judge who fell into error by reweighing the competing considerations based on his view of the weight to be afforded to the maximum contact principle.

[47] At paras. 84-91 of her reasons, the trial judge addressed the maximum contact principle under the heading "The Desirability of Maximizing Contact between the Child and Both Parents". She referred to the mother's detailed plan for regular contact between the father and the child, including a plan for extensive access and encouraging the child to have regular video chats as often as possible with the father. At para. 91, the trial judge explicitly found that the mother has always been supportive of the father's relationship with the child. Other of her findings show how the mother has fostered and preserved that relationship. However, the trial judge found at para. 145 of her reasons, the importance of the father's contact with the child could not override the positive effects of the move for the child: "The advantages for the mother and the child in moving outweigh the disadvantage of the possible reduction of contact with the father."

[48] The appeal judge interfered with the trial judge's relocation decision because, in his view, she had given insufficient weight to the maximum contact principle. In so doing, the appeal judge erred in law. An appeal court is not to reweigh the relevant considerations. Interference with the trial judge's exercise of discretion would have been justified only if the appeal judge was satisfied that it was

unreasonable: *Reeves*, at para. 23. The appeal judge did not suggest that the trial judge's relocation decision was unreasonable nor, on the record, could he have.

[49] Second, the maximum contact principle has been replaced by s. 24(6) of the *CLRA,* another new provision[3]. As I have explained, because this appeal was heard after March 1, 2021, s. 24(6) applies.

[50] Section 24(6) highlights the importance of a child having time with each parent while explicitly providing that the allocation of parenting time must be consistent with the child's best interests. It provides that:

> In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the child.

[51] The trial judge's reasons demonstrate that she was alive to the importance of the child having time with each parent so long as the allocation of parenting time was consistent with the child's best interests. Accordingly, in my view, the trial judge's relocation decision and access order are fully consonant with s. 24(6).

[52] For these reasons, in my view, this ground of appeal also succeeds.

ISSUE #3 THE TRIAL EVIDENCE WAS SUFFICIENT

[53] The appeal judge said there was an "absence of a proper evidentiary record" to support the trial judge's finding that the proposed move to Mongolia was in the child's best interests. In my view, he erred. The mother's evidence was led through her affidavits and that evidence was tested before the trial judge through cross-examination. The trial judge was best positioned to assess the sufficiency of the evidence. Further, she was entitled to accept the mother's evidence, as she did.

[54] In her affidavit evidence, the mother gave detailed information about the proposed move and how it would affect the child. For example, at para. 50 of her affidavit dated April 4, 2019, the mother deposed:

> With the move to Mongolia, [the child's] standard of living will improve because of my property ownership in Mongolia, she will reside in a middle class type of accommodation where for the first time she will have her own room and bed. The income that I expect to earn from my consulting job, support from [the father] and my parents help will cover [the child's] private school tuition, a cost that I could otherwise have not afforded here in Canada. I will also be able to enrol her in many extra-curricular activities as detailed in [the child's] Plan of Care in Mongolia. I expect [the child] and I to have a similar lifestyle as that of my sister's with her two children including going away on vacations …

[55] And, in the mother's Plan of Care, she addressed her plans for the child's education, schooling, healthcare, and extra-curricular activities; the role the maternal family would play with respect to the child and as support for the mother; managing the child's language and emotional transitions; how the father could stay connected with the child while she is in Mongolia; and, how the child would become more fluent in Mongolian and learn about her Mongolian heritage, while maintaining her English.

[56] The mother's evidence also included information about her career opportunities, her connections and professional networks in Mongolia, and sample job postings from Mongolia, complete with expected or potential salaries.

[57] The appeal judge questioned the absence of witness testimony from the mother's family in Mongolia. The language, financial, and technical barriers to having witnesses from Mongolia testify, coupled with the mother's limited financial means, go a long way to explaining why direct witness evidence from Mongolia was not before the trial court. In any event, however, there was no question about the veracity of the information that the mother provided about her education and work experience in Mongolia. The evidence concerning the emotional, financial, and physical help that the mother's family had already given her and the child was unchallenged. Nor was there any dispute about the mother's commitment to the father's relationship with the child and the many ways she had fostered it. I will not repeat the evidence on these matters, details of which can be found above. The point is that this uncontested evidence provided the context within which the trial judge considered the mother's evidence and came to the determination that relocation was in the child's best interests. There is no basis on which to question the trial judge's acceptance of that evidence, much less to interfere with her decision to permit relocation.

[58] To say there was an inadequate evidentiary record on which the trial judge based her decision fails to recognize that the mother's affidavits and her oral evidence at the trial was evidence that the trial judge was entitled to accept. That evidence contained detailed information on all aspects of the move and how it would affect the child.

[59] The trial judge saw and heard the parties. As *Van de Perre* makes clear, she was in the best position to decide whether relocation was in the child's best interests. She concluded that it was and exercised her discretion accordingly. There was no basis for interference by the first appeal court.

[60] In my view, the mother succeeds on this ground of appeal as well.

VI. THE FRESH EVIDENCE APPLICATION

[61] The trial judge ordered both summer and winter access to be in Canada or another location of the father's choice. However, at trial, the mother and father had agreed that if the move were allowed, winter access should take place in Mongolia until the child is 12 years old.

[62] The mother seeks to introduce fresh evidence to show the difficulties for the child if winter access were to take place in Canada. That evidence shows, among other things, that the child would have to fly for over 25 hours across 12 time zones in a 3-week period at an extraordinary financial cost to the parties. The fresh evidence also includes an unchallenged letter from the child's doctor that such a trip would likely lead to health issues for the child, interruptions in her schooling, and behavioural issues arising from sleep loss and fatigue.

[63] I would admit the fresh evidence and make the requested change to winter access. I commend the parties for placing the child's best interests ahead of their own as demonstrated by their continuing agreement that winter access should take place in Mongolia until the child is 12 years old and thereafter rotate, with one winter access period taking place in Toronto and the following one in Mongolia.

VII. DISPOSITION

[64] For these reasons, I would:

a. allow the appeal;
b. set aside the First Appeal Decision and the First Appeal Costs Award;
c. restore the trial judge's Order, with the exception that I would vary para. 3(b) so that access during the child's winter school break shall take place in Mongolia up to and including 2026 and, thereafter, shall alternate between Canada and Mongolia, with the visit in 2027 taking place in Canada;
d. restore the Trial Costs Award; and,
e. substitute a costs award of $12,500 all inclusive, in favour of the mother, in place of the First Appeal Costs Award.

[65] Because the parties each said at the oral hearing of this appeal they would not seek costs of this appeal, I would make no order as to costs of this appeal or the motion heard by Sossin J.A. on January 19, 2021.

Released: August 5, 2021 "E.E.G."

"E.E. Gillese J.A."
"I agree. M. Tulloch J.A."
"I agree. L.B. Roberts J.A."

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[1] The mother requested the use of initials only in the title of proceedings. Absent legislative or court-ordered prohibition on identification, this court's general practice in private family law disputes is to retain the parties' names in the title of proceedings while otherwise protecting the child's privacy to the fullest possible extent.

[2] Pursuant to amendments to the *CLRA*, which came into effect on March 1, 2021, the terms parental "custody" and "access" have been replaced by the terms "decision-making responsibility" and "parenting time". Sections 76(2) and (3) of the *CLRA* provide that references to custody and access in orders prior to March 1, 2021, "shall be read as references to decision-making responsibility" and to "parenting time" respectively. However, to avoid confusion, in these reasons I use the original language in the existing orders.

[3] The *Divorce Act* now also contains a similar provision in s. 16(6): "In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child."