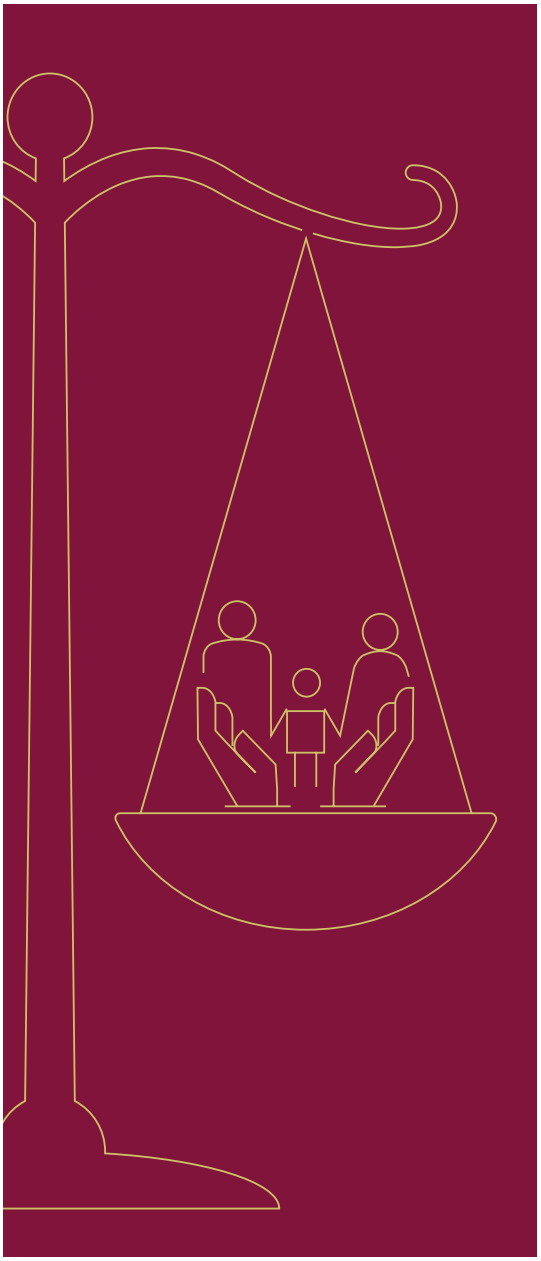
LEGAL BULLETIN

Part 3: *Barendregt v. Grebliunas,* December 2, 2021 (CanLii): Relocation issue



Introduction

The recent Supreme Court case discussed below was selected because it profiles an issue in family law since the amended *Divorce Act* (2021) came into force.* The focus is upon the rulings and the basis/rationale for the decisions, and how it aligns with the principles of that amended *Divorce Act* (or not). Each case proceeded through from the lower courts level before being dealt with at the Supreme Court (SC). What is interesting is how the SC did rely upon the statutory interpretation principles of the amended *Divorce Act* to support substantive equality for women and children in the cases, whereas at times in the lower level courts, they appeared not to be considered.*

Suggestions on How to Process This Summary

This case is one of a three-part series. In this case you will find three parts: first, a link to the actual case (December 21, 2021), the link to the LEAF summary, and the Case in Brief with the link to the final reasons for judgement (May 19, 2022). No Martinson/Jackson commentary was available; the latter absence resulting from the fact that the third case came out after our Learning Brief case discussion was written.

*Acknowledgement: Much of the first section of the Introduction is taken from the PHAC Learning Brief entitled:

The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases – The Honourable Donna Martinson and Dr. Margaret Jackson https://www.fredacentre.com/wp-content/uploads/Martinson_and_Jackson_Divorce_Act_2021_EN.pdf

Barendregt v. Grebliunas,
December 2, 2021 (CanLii): Relocation issue

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/19396/index.do

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West Coast LEAF and Rise Legal Centre (Co-Interveners) Summary

https://www.westcoastleaf.org/our-work/barendregt-v-grebliunas-2021/

Case in Brief – Reasons for the decision

https://www.scc-csc.ca/case-dossier/cb/2022/39533-eng.aspx

The Supreme Court rules children can relocate within British Columbia to live with their mother.

This is a child custody case. The mother and father met in 2011. Soon after, the mother moved to Kelowna, where the father was living. They got married, bought a house and had two boys. When their relationship ended in 2018, the mother took the children to her parents' home in Telkwa, a 10-hour drive from Kelowna.

The children split their time between Telkwa and Kelowna before the parents agreed the children should remain in Kelowna with the father until the mother returned there, although she never did return. Instead, she asked the court to relocate the children to Telkwa. If not, she said she was willing to move to Kelowna, but the father was unwilling to move to Telkwa.

At trial, the judge said the children could move to Telkwa with the mother for two reasons: the bitter relationship between the parents affected the children; and the father might not be able to afford to stay in the Kelowna home. The father then appealed to British Columbia's Court of Appeal, asking to present additional evidence about his financial situation.

The Court of Appeal sided with the father. It allowed the new evidence, saying it affected the trial judge's finding about the father's finances. As a result, the relocation could no longer be justified. The mother then appealed to the Supreme Court of Canada.

The Supreme Court has sided with the mother.

The new evidence should not have been allowed on appeal.

Writing for a majority of the judges of the Supreme Court, Justice Andromache Karakatsanis said the children can move to Telkwa with their mother.

The majority said the Court of Appeal was wrong to apply a different test than that set out by the Supreme Court in *Palmer v. The Queen* when deciding whether the father could present new evidence. As the majority explained, this test applies to evidence even at the appeal stage. According to the test, four criteria must be met for the evidence to be allowed: (1) despite the party's due diligence, the evidence could not have been presented at trial; (2) the evidence is relevant; (3) it is credible; and (4) it could have affected the result at trial.

In this case, the test was not met because the evidence about the father's finances could have been presented at trial if he had taken all reasonable steps to obtain it in time.

The move is in the children's best interests.

The majority said there was no reason for the Court of Appeal to change the trial judge's decision. The move was in the children's best interests. There was a significant risk that the bitter relationship between the parents would affect the children if they stayed in Kelowna. Also, the mother needed her parents' help to care for the children, and they are in Telkwa.

In such cases, the question is "whether relocation is in the best interests of the child, having regard to child's physical, emotional and psychological safety, security and well-being", the majority said. The analysis is highly fact-specific and discretionary, and the possibility for change on appeal is very narrow.

* All of the above indicates that applying well-established principles of statutory interpretation to the Divorce Act is a critical component of implementing and enhancing the substantive equality rights of women and of children generally and particularly with respect to family violence.

This Bulletin was prepared by Dr. Margaret Jackson Director of the FREDA Centre, and Professor Emerita School of Criminology, Simon Fraser University on behalf of the Alliance of Canadian Research Centres on Gender-Based Violence.

ALLIANCE OF CANADIAN RESEARCH CENTRES ON GENDER-BASED VIOLENCE

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The FREDA Centre for Research on Violence Against Women and Children