The pure “best interests” approach to relocation law is a failure. It is unpredictable and expensive, increasing conflict and discouraging settlement. The “fundamental questions” proposed by Parkinson and Cashmore in their article will not reform the law. Real reform will require the use of presumptions or burdens to guide best interests. “Presumptions” are not “rules,” but only starting points. No simple presumption “for” or “against” all relocations can be justified, but there are large categories of cases that do warrant presumptions: interim moves, unilateral relocations, shared care, and predominant primary caregivers. The first three involve presumptions against relocation, while the last—the largest category—warrants a presumption that relocation is in the best interests of the child, unless the contrary is proved. There will remain a small minority of in-between cases where none of these presumptions will operate, recognizing the limits of our general knowledge. It is time to move the relocation reform debate beyond pure “best interests,” to the next stage, to a serious discussion of which cases warrant presumptions, and of what strength.

Key Points for the Family Court Community:
- Pure best interests approach to relocation law is a failure
- Presumptions or burdens needed to reform the law, but not just “for” or “against”
- Presumptions are identified for four categories of relocation cases: interim moves, unilateral relocations, shared care, and predominant primary caregivers

Keywords:  Best Interests; Custody Reform; Guidelines; Mobility; Parental Relocation; Presumptions

The pure, unguided “best interests” approach to relocation law is a failure—a failure quite well documented by the recent Australian and New Zealand research and one experienced by parents around the globe. Much as we might try to ignore that reality, as do Patrick Parkinson and Judy Cashmore in their article, we can’t. With our current approach, relocation law has been unpredictable and expensive, increasing conflict and discouraging settlement, leaving parents exhausted and unable to plan their lives.

Having diagnosed the illnesses so well in their own research, Parkinson and Cashmore simply propose more of the same as their treatment, not disguised by calling it an “evidence-informed approach” or “guided decision-making.” Asking their series of “fundamental questions” will not alter the “best interests” analysis, nor will telling courts to “focus resolutely on children’s interests.” Their “three fundamental questions” are asked in every relocation case already. In most jurisdictions, appellate courts have not been prepared to offer “guidance” in interpreting “best interests,” which is what Parkinson and Cashmore recommend. Despite the title of their article, they reject any real “reform” to relocation law: no presumptions, no special relocation provisions, no use of prior patterns of decision.

Is this the inevitable conclusion from the “evidence?” I don’t think so. There are a number of real reforms to relocation law that are possible. My views are inevitably shaped by my practical and academic experience with relocation in the Canadian context, and by having read hundreds of Canadian relocation decisions, both before and after our Supreme Court’s 1996 decision in Gordon v. Goertz, which rejected all presumptions and opted for a pure “best interests” test in relocation cases, with a list of seven or eight “best interest” factors. In this respect, Canadian law is similar to that in Australia, New Zealand, many American states, Israel and other countries. By “pure best interests,”
I mean case-by-case decision making, whether with or without a list of nonexhaustive factors. In conversations about parenting, child custody and relocation, it is important to define our terms, given the “language” problems that bedevil us.

Here is a short list of nine proposed reforms, which I will use to structure my comments upon Parkinson and Cashmore:

(1) The law should require notice of all parental moves and proper planning for any relocation.
(2) All options should be considered before a relocation takes place.
(3) “Presumptions” are not “rules,” but only starting points to structure the analysis of “best interests.” Presumptions can be stronger or weaker.
(4) A simple “for” or “against” presumption for all relocations is not supported by current research or policy.
(5) There are some categories of cases where presumptions can be devised to reduce the scope of uncertainty and to give some guidance in relocation cases. Helpful presumptions can be devised for cases of interim moves, unilateral relocations, shared care and predominant primary caregivers.
(6) Where the relocating parent seeks to move in the interim, pending a full hearing, there should be a presumption against relocation, with some scope for rebuttal.
(7) Where the relocating parent has moved or has attempted to move, unilaterally or surreptitiously or without notice, there should be a presumption that the relocation is not in the best interests of the child, unless the contrary is proved.
(8) Where the parents substantially share the care of a child, there should be a presumption that the relocation is not in the best interests of the child, unless the contrary is proved.
(9) Where the relocating parent is the predominant primary caregiver, there should be a presumption that the relocation is in the best interests of the child, unless the contrary is proved.

As I work through these nine points, you will see that there are a number of issues where I am in agreement with Parkinson and Cashmore, despite my disagreement with them on their central thesis.

In my opinion, to fall back upon a pure “best interests” approach in relocation cases is too easy, too conservative, mostly a way of maintaining consensus both nationally and internationally in family law circles. “Best interests” means individualized discretion, case-by-case decision making by trial judges. It is a test “more useful as legal aspiration than as legal analysis,” to quote Justice Abella in MacGyver v. Richards, a Canadian relocation case. Nor do long, nonexhaustive lists of unweighted relocation “factors” assist in giving shape to “best interests,” lists like those in the Washington Declaration on International Family Relocation or in the AAML Proposed Model Relocation Act.

And, in my view, asking a few general, open-ended questions will not constrain the “best interests” analysis either, as proposed by Parkinson and Cashmore.

We have long recognized the inherent indeterminacy of the “best interests” test in determining custody and parenting issues, and the systemic costs that ensue. Where most cases settle, where parents live in the same community, where only strange or high-conflict cases get to adjudication, then the operational failings of an unencumbered “best interests” test may be less obvious. Relocation disputes are a distinct sub-set of parenting cases, with a much more limited range of options and outcomes, and therefore are more amenable to intermediate-level guidance, whether we call them “presumptions,” “burdens,” “guidelines” or “discipline.”

NOTICE OF MOVES AND PLANNING FOR RELOCATION

Even if it is hard to find agreement on the substance of relocation law, there is wide consensus that a parental relocation should take place only upon proper notice and after adequate planning. At a minimum, any relocation provisions should address the process of relocation.
A parent who intends to change address, with or without a child, should be required to give notice of the date of the move and the parent’s new address, as well as to make a reasonable proposal for any necessary modifications to parental time with the child. Exemptions are necessary for domestic violence and some other situations. Mandatory notice provisions are common in American relocation statutes, and in model act proposals.\textsuperscript{10}

Note that both parents should be required to give notice of a change of address, not just a parent moving with a child.\textsuperscript{11} What limited data we have, not to mention simple logic, suggest that there is little difference between a child being moved away from a parent and a parent moving away from a child.\textsuperscript{12} A general notice provision of this kind, for both parents, avoids unequal burdens upon primary parents and drives home that both parents should have a duty to maintain parent–child relationships.

Further, a “change of address” is much broader than “relocation,” thus avoiding definitional squabbles at the notice stage. Notice of this kind is just good parental behavior, not much more than common courtesy. This is just notice, not intended to trigger any dramatic legal consequences, although the failure to give proper notice should be a factor for the court to consider if a relocation\textsuperscript{13} reaches that stage. In some jurisdictions, notice of relocation is given critical legal effect as the first step towards default relocation, absent objection from the other parent.\textsuperscript{14} Given the importance of relocation to parent–child relationships, it is debatable whether such a default procedure remains a good idea.

There is a clear consensus that the relocation of a child by a parent should not be done unilaterally, surreptitiously, or without notice. To go one step further, most agree that any relocation should be planned and orderly, ensuring a smooth transition for the children to their new community, school, childcare, family and activities. The case law is replete with examples of poorly-thought-out relocation proposals, mid-term moves that disrupt schooling, and the like.\textsuperscript{15} In some instances, courts have postponed moves to permit such planning to take place.

Parkinson and Cashmore focus upon substantive relocation provisions, but their rejection of any “special provisions” for relocation leaves this notice issue unclear.\textsuperscript{16} In my view, they are much too concerned about the definition of “relocation.” I agree with them that “bright line” definitions tied to distance or state boundaries are unwise and arbitrary, since the concern is for a move that has a significant impact upon the child’s relationship with a parent. In my experience, whether a parental move is or is not a “relocation” has not been a big practical problem in the case law. For the most part, relocation is self-defining. The parties will commonly define their own geography in residence restrictions in orders and agreements. In practice, only moves with a real impact bring forth disputes and litigation.

CONSIDER ALL OPTIONS EARLY AND OFTEN

Parkinson and Cashmore leave the topic of relocation options to the very end of their analysis, to their question 3(a) about “the viable alternatives to the parents living a long distance apart.”\textsuperscript{17} That is unfortunate when one of their reasons for rejecting relocation presumptions is that presumptions “tend to lead to binary thinking.”\textsuperscript{18} Binary thinking does not flow from presumptions, but from the tendency of an adversarial system to focus upon a party’s primary position. We see lots of binary thinking right now in disputes under a pure “best interests” regime.

A consideration of the options has to be part of negotiations, mediation and judicial settlement conferences at the front end of the process. All the options should be canvassed as early as possible and certainly before any relocation case gets to a contested hearing.

What are the options in the typical relocation case?\textsuperscript{19}

(1) The relocating parent is allowed to move with the child, with modifications to the parenting time for the nonrelocating parent.

(2) The relocating parent is not allowed to move with the child, the parent relocates anyway, and there is a change of primary care to the nonrelocating parent. (If the relocating
parent is uncertain about moving, there may be a conditional order for change of primary care).

3) The relocating parent is not allowed to move with the child, the parent remains, and parenting time arrangements continue, or are changed for other reasons.

4) The relocating parent is allowed to move, on the basis that the other parent can and should move too, with consequential changes to parenting time. 20

5) If the relocating parent is moving to join a new partner or spouse, the new partner/spouse may be able to move to the children’s current community. 21

Even if the relocation is to be allowed, the move can be deferred or postponed, which is implicit in options (1) and (4) above and adds further options. 22 A move may also be “permanent” or just temporary, where a parent is undertaking an education program or a short-term job posting.

Even after a relocation decision has been made, it turns out that parents continue to reassess their options, an important finding in both the New Zealand and Australian research projects. Relocating parents may decide not to relocate after all, or they relocate with the children and then come back. Or, left-behind parents decide to move too. 23 As the New Zealanders put it, “a relocation ‘dispute’ is not a discrete, one-time-only event, but is instead illustrative of an ongoing process of family post-separation transition(s).” 24

There is one option that is never seriously considered, but should be. The prevailing legal view is that a parent cannot be stopped from moving away from their child, as it is only the child’s residence that can be subjected to court order. That “option” is not on the table, even if the parental move away harms the child. Most parents who move without children are fathers, and they are free of legal restraints under the present law. At the same time, eighty-five to ninety-five percent of the parents seeking to move with children are mothers, so the burden of relocation law falls disproportionately upon women. The next horizon in relocation law may be remedies directed to the parent who moves away from children.

There is nothing earthshaking about these options, but the options must be canvassed early and throughout the process. Parental views can shift as the process unfolds. One of the benefits of presumptions is to clarify which of the two parties may have to think harder about his or her options.

PRESUMPTIONS AREN’T “RULES,” JUST STARTING POINTS

Parkinson and Cashmore reject “presumptions” without defining what they mean by the term. 25 So often I say “presumption” and I can see the listener hears “rule.” Or, as one lawyer once said to me about relocation law, “I don’t like presumptions, but I’m okay with burdens.” Clarifying our terms will help the discussion.

Rules lie at one extreme of a legal spectrum that runs to untrammelled discretion at the other end. 26 For example, most child support “guidelines” are in truth “rules” for most cases, while a pure “best interests” test amounts to “untrammelled discretion” or a “standard.” 27 Rules attempt to specify outcomes in advance, before particular cases arise. 28 Rules do require fact-finding, but the applicable “law” is clear once facts are found. Rules usually have at least some exceptions, again known in advance. As those exceptions become more numerous and “larger,” the rule weakens and looks more like a presumption.

Let’s take a classic definition of a “presumption,” drawn from McCormick: “a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts.” 29 Presumptions, unlike rules, are always rebuttable, i.e. “proof of fact A shall constitute proof of fact B, unless the contrary is proved.” In civil matters, almost all presumptions will shift the burden of proof to the opposing party to prove the contrary on the balance of probabilities. Sometimes, like in relocation law, the word “presumption” is used loosely.

A simple presumption “for” or “against” relocation is not really a presumption, but more of an initial allocation of the burden of proof to one party, more of an “assumption.” There are no “basic
facts” to be proved, apart from the mere fact of “relocation.” There are some U.S. states that do set up “shifting burdens,” like New Jersey, where the relocating parent must first establish a prima facie case that there is a good faith reason for the move and that the move will not be inimical to the child’s interests, and then the burden of proof shifts to the nonrelocating parent to show the move would not be in the child’s best interests.

The “best interests” test does not allocate a burden of proof to any party. In the words of our Chief Justice in Gordon v. Goertz, “both parents should bear an evidential burden of demonstrating where the best interests of the child lie.” Implicit in the “best interests” test is that both parents are treated equally, that each case is decided on its individual facts, and that the critical facts or factors in any particular case may only be known after the decision comes out. Unlike a “rule,” a discretionary test like “best interests” allows for a healthy proportion of ex post law-making.

In variation or modification cases, where a relocation is proposed after an initial order, most jurisdictions construct a two-step analysis. The applicant is first required to prove a material or substantial change in circumstances and then, if that initial burden is met, the court moves into the burden-free “best interests” inquiry. That can leave the impression that a substantive burden of proof has been allocated in a relocation case. Not really. A proposed move that has a significant impact upon the other parent’s relationship with the child will almost always be a “change of circumstances.” The initial burden thus does no work, and a proposed relocation always throws us into the full “best interests” inquiry.

For the purposes of this article, I will continue to use the word “presumption” to include the allocation of the burden of proof in a relocation case. Presumptions vary in strength, depending upon how hard or easy they are to rebut. Generally, relocation presumptions would be described as “weak,” since they can usually be rebutted by proof that the child’s best interests are otherwise. The American Law Institute did propose a “strong” pro-move presumption for a parent “who has been exercising a significant majority of the custodial responsibility.” Once the relocating parent proves that “the relocation is for a valid purpose, in good faith and to a location that is reasonable in light of the purpose,” the move will be allowed. The nonrelocating parent would have to undercut one of those three requirements to stop a move, not an easy task.

Some argue that a “weak” presumption that could be rebutted by proof of “best interests” would have little impact upon relocation litigation and its attendant costs. In my view, this underestimates the difficulty of proving “best interests” in many cases where the burden allocation will make a difference. Further, any presumption would have its greatest impact in negotiation, mediation and other pre-trial proceedings, forcing the party with the burden to be more precise in evidence and argument.

Parkinson and Cashmore oppose all presumptions, that much is clear. At times, they seem to assume something more like a “rule” or a “strong” presumption, but it is difficult to tell. For example, their comment that presumptions would “freeze relocation law by reference to patterns” from existing cases or their reference to “codification” seem to assume something more like a rule, since presumptions cannot “freeze” the law.

### NO SIMPLE PRESUMPTION “FOR” OR “AGAINST” RELOCATION

In their “four reasons” to reject presumptions, Parkinson and Cashmore seem to assume a simple across-the-board presumption “for” or “against” relocation. Most of the “shifting” burdens turn out to fall into one or the other camp in practice. I agree that a simple presumption of this kind cannot be supported, either by the current research or broad policy.

In the next part, I will develop a more sophisticated and a more modest approach towards relocation presumptions. Historically, the power to decide a child’s place of residence was seen as one of the incidents of legal custody in a world where sole legal custody was the norm. The issue was seen as a matter of “law.” Two developments have altered that rule-like view: the rise in joint legal custody, shared parenting and judicial supervision of parenting decisions through “best interests;” and the use of clinical and social science expertise to interpret and apply “best interests.”
At an earlier stage, around the time of the California *Burgess* decision, there were emphatic statements that “the social science” supported a presumption in favor of allowing the custodial mother to move.41 Those who studied the role of fathers took a different view, suggesting that relocation had “consistent negative effects on youngsters across all family structures (single/never married, separated and divorced, stepfamily, married) when compared to children in comparable groups of parents who did not move.”42 The clear implication of this line of research is a presumption against relocation. A careful reading of the work in each camp reveals a tendency to over-reach in their policy prescriptions from their data.

In recent years, there has been a trend in the literature to speak of the “risks” of relocation. The much-debated Braver et al. college student study pointed out the correlation of relocation with poor outcomes on some measures, but the authors said their data could not establish “with certainty that moves cause children substantial harm,” only that “there is no empirical basis on which to justify a legal presumption” in favor of moves.43 William Austin’s two-part review article was not prepared to use the research to support a presumption, “because of the salient social policy issues,” but he characterized “relocation as a general risk factor” or “a base rate of harm for the population of children from nonintact families who move, even as few as one time.”44 A balanced review by Taylor and Freeman noted the mixed findings of relocation studies, but nonetheless described relocation as a “heightened risk” for a child, “particularly if there have been prior moves and multiple changes in family structure.”45 But another critical review of the literature by Horsfall and Kaspiew noted the dangers of generalising from some of the American data and found the results “equivocal at best,” suggesting deeper factors behind relocation were at work to explain the conflicting research results.46 The current “consensus” about the “risks” of relocation is less empirical, I would suggest, and more speculative, reflecting the tilt of the father’s role researchers.

There have been two major research projects on relocation, in New Zealand and in Australia. Parkinson and Cashmore in their article report on some aspects of their Australian study, which has provided many practical and qualitative insights into relocation issues. Interestingly, the interviews with children who moved showed that they “generally navigated the transitions well.”47 The New Zealand research report came to similar conclusions after interviewing children in that study:

> What came through very strongly in these interviews was, that for the most part, the children and young people were relatively happy, well-adjusted and satisfied with how things had worked out for them and their families. This is not to say that the relocation experience was not difficult or traumatic for some, but rather there was the sense that they had adjusted and moved on. This was particularly true of those children and young people for whom the relocation issue had occurred some years previously.48

These conclusions certainly soften some of the “risk” talk, but leave us more uncertain than ever.49 Parkinson and Cashmore do not reject presumptions based upon social science research, but mostly for pragmatic reasons. They offer four reasons in their article. First, a presumption would focus attention on just one issue, citing the immediate postseparation context which I will discuss below. Reason number two is just that international consensus is hard to find across jurisdictions. Third is that “relocation cases occur in a variety of different family contexts.” Fourth is that “presumptions tend to lead to binary thinking.” These last two reasons do seem to assume a simple binary presumption across the board.

What do Parkinson and Cashmore propose as an alternative to reform relocation law? They set out “three fundamental questions that ought to be explored in every relocation case.”50 These questions are to provide the basis for appeal courts “to provide guidance that offers greater certainty and predictability about the outcomes of such cases.”51 It is not clear how the asking of these three questions interacts with the broader “best interests” analysis, and it is doubtful that the three questions could constrain the analysis, even if legislated. All three of their questions are asked now in every relocation case, in my experience, with no observable effect upon certainty or predictability of outcomes. Who doesn’t ask about the nonresident parent’s relationship with the child, or the possible contact or access arrangements after a move, or the available alternatives to a move, under a “best interests” test for
relocation? Certainly in Canada, we do, every time, and the same seems to be true when I read American cases. These are not real “reforms,” certainly none that will reduce the downside costs of the current system. It is instructive that their three questions focus almost entirely upon the nonresident parent, except for 3(b), creating a subtle but noticeable “nudge” against relocation.52 The child’s relationship with the resident parent can vary tremendously too, and may be critical to the outcome, as I explain below. To simply treat this relationship as a “given,” as do Parkinson and Cashmore, is to miss an important part of the relocation analysis.

SOME PRESUMPTIONS FOR SOME CATEGORIES OF CASES

We don’t have all the answers on relocation, based upon our current research and knowledge of relocation decision making. But that should not stop us from a more modest approach, devising some presumptions for some categories of cases, keeping in mind our definition of “presumptions” above. We can allocate burdens of proof to some parents in some recurring fact situations, and not in others. And presumptions are not “rules,” as they can always be rebutted.

(A) PATTERNS AND PRESUMPTIONS

Despite our cherished notion that all family law cases are “unique,” there are recurring or “typical” cases. Even if “best interests” says that each judge must exercise discretion on a case-by-case basis, patterns do emerge from those discretionary decisions. After all, that is how the “common law” is built in other areas of the law, as those patterns are shaped into tests, presumptions, guidelines, disciplines, or factors by judges who attempt to synthesize previous decisions. In turn, those leading decisions shape subsequent trial decisions. Unfortunately, a commitment to a pure “best interests” test means an unwillingness to allow the “law” to accumulate and develop in its usual fashion, as trial judges must determinedly avoid any hint of “presumptions” (or invite reversal by appeal courts).

The incrementalism of the common law can be modified or “sped up” by statutory changes, or even by informal “guidelines” if courts are willing to use them. In Canada, we have national “Spousal Support Advisory Guidelines,” created by a seven-year Department of Justice project, of which I was the co-director along with Professor Carol Rogerson.53 These guidelines for the amount and duration of spousal support were developed from dominant patterns in adjudicated and negotiated outcomes across the country. What I learned from this experience was that you can develop presumptive guidelines for “typical cases,” even if you can’t for the cases that are unusual or exceptional or otherwise difficult. At least you can encourage settlement and reduce conflict in the large number of “typical” cases.

A reading of relocation cases does reveal recurring fact situations and dominant patterns in the decisions. It is ironic that Parkinson and Cashmore reject the use of previous judicial decisions as any basis for reforming relocation law, given that they propose continuing with the current “best interests” approach into the future, the very regime upon which the previous decisions were made.

They are correct that aggregated outcomes or “averages” are not that helpful, but no one suggests using averages. It is also true there are some “irrational” or “outlier” decisions within the mass of relocation cases. That is what you would expect from the discretionary application of a “best interests” test. For them to suggest that there are “irrational patterns” in the case law is baffling, however, as that would be inconsistent with the basic premises of the “best interests” test. But Parkinson and Cashmore don’t entirely trust judges using the “best interests” test, with their suggestions that many judges lack “social science knowledge” or “child development expertise.”

I would not say that there are “irrational patterns” in the case law, even though my research gets cited in support of that argument by Parkinson and Cashmore.54 In Canada, we live under a regime of untrammelled “best interests” thanks to the Supreme Court of Canada’s 1996 decision in Gordon v. Goertz,55 a decision which applies to every relocation case in Canada, domestic or international. That
different Canadian provinces develop different rates of allowing moves doesn’t mean that the more pro-move province of British Columbia is “irrational” or that the more anti-move province of Nova Scotia is “rational.” I have hypothesized that some of the difference may be explained by the dominance of specialist family judges in Nova Scotia versus mostly generalist judges in British Columbia. However, that may also be because the Nova Scotia family judges have been more heavily influenced by the claims of “father’s role” researchers like Joan Kelly, Richard Warshak and William Austin.

What Parkinson and Cashmore don’t acknowledge is that my research has demonstrated that there are some clear patterns in the Canadian case law for certain kinds of cases, no matter whether the case is heard in British Columbia or Nova Scotia, or by a generalist or a specialist judge. Cases involving interim moves, unilateral moves, shared care parents and predominant primary caregiving parents do show stability and consistency across a wide range of facts, factors and judicial backgrounds.

To construct presumptions from patterns of decision is not deriving an “ought” from an “is.” First, presumptions are not as “ought” as rules. They are starting points. They are rebuttable. True, if there is insufficient evidence in rebuttal, then a relocation presumption will drive the outcome. Second, much of what “is” in those patterns is “rational,” to use their terms. To push presumptions that were substantially at odds with current judicial ideas of “best interests” would be doomed. Third, Parkinson and Cashmore seem to miss that presumptions are one way of informing parents, lawyers, mediators, and judges of social science and child development research in an explicit way. My research into Canadian decisions has revealed that no more than 25 per cent of relocation cases have any form of expert evidence or custody assessments before the court, in any province in Canada. Parents can’t afford the cost or the delay of expert evidence. Often they can’t even afford lawyers. Legislation or guidelines are the only way to “inform” the relocation process.

(B) SOME BAD IDEAS FOR PRESUMPTIONS AND BURDENS

I do agree with Parkinson and Cashmore on some important points. I agree that “good faith” is an unhelpful term that should not be used in relocation law. I also agree that the child should not be placed at the centre of the conflict. And I agree that the reasons for the move should matter.

The idea of “good faith” in relocation law appears to derive from New Jersey law, from Holder v. Polanski’s attempt to lighten the burden upon the relocating parent, who only had to prove “any sincere, good faith reason” for the move rather than the older “real advantage.” In relocation law, “good faith” does have a particular meaning, namely that the parent is moving for a reason other than to deny the other parent access to or a relationship with the child. Parkinson and Cashmore first acknowledge that view, but then suggest the term has no real meaning, and are concerned it might bar a move just to “get away” or “start afresh” (which it probably would).

The bigger problem with a “good faith reason” is that it is too easy to prove, precisely because all but the least imaginative parents (or their lawyers) can always come up with some kind of plausible reason for a move. It is a minimal test that serves little purpose. The American Law Institute only marginally added to this test, with its elaboration that the relocation must be “for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose.”

I also agree that “children should not be placed in the centre of the conflict,” even if their voices should be heard in the process. Bala and Wheeler actually proposed that a presumption be founded upon the wishes of a child, based upon whether the child does or does not wish to move, a very bad idea for some of the reasons expressed by Parkinson and Cashmore. I also agree that the reasons for relocation do matter, and courts that suggest otherwise, like the Supreme Court of Canada in Gordon v. Goertz, are just plain wrong-headed. I also think the American Law Institute got it wrong, by simply listing off categories of “valid purposes” that would permit a move, without more. Any review of case law reveals that what matters is not the category of the reason, but the quality of the reason, as Parkinson and Cashmore also note.
(C) THE FAMILY AND PROCEDURAL CONTEXT

One of the worries that runs through the Parkinson and Cashmore article is that relocation is often only one issue amongst many in a custody case, especially when the case arises soon after separation. This worry also underpins their concern for defining what is or is not a “relocation” case.

In most variation or modification cases, it is the relocation that is the problem. Parenting issues have been resolved with both parents in the same community, but one parent subsequently wants to relocate and a dispute arises. We tend to think of this as the usual relocation case.

My Canadian research shows that half of “relocation” cases now arise at the initial custody stage, rather than variations or interim moves. Closer analysis reveals that only about a third of these cases raise the concern identified by Parkinson and Cashmore, i.e., where relocation is only one issue in the determination of parenting arrangements. The other two-thirds involve either a written separation agreement that sets out parenting arrangements or a long-standing postseparation status quo. In these cases, it is the relocation dispute that brings them to court.

Even those cases where primary residence and parenting arrangements are very much in dispute shortly after separation, the practical reality is that the relocation issue dominates the proceeding, however many other issues may arise. The location of the parents is fundamental to the parenting plans put forward. In many of these cases, there is a clear pattern of child care before separation, especially in cases where the cohabitation was brief or nonexistent, and that pattern can form the basis for relocation presumptions.

(D) A MODEST PROPOSAL

I think we can set out some presumptions for some categories of relocation cases, to give some structure to relocation decision making and to reduce some of the costs of the current “best interests” approach. In doing so here, I am starting from areas of greater consensus to those with less. Thus, I will begin with interim moves, then unilateral moves, then shared care cases, and finally cases where there is a predominant primary caregiver. This collection of presumptions addresses the bulk of relocation cases, but still leaves a minority of cases without any operative presumption, what I’ve called the “in-between” cases. While these presumptions are based upon my knowledge of Canadian cases decided under a “best interests” test, they reflect much broader variables at work in the law of relocation generally, as I point out below.

It is time to move the reform debate to the next stage, away from a simple “presumptions-or-no-presumptions” debate, to a serious discussion of which cases warrant presumptions, of what strength. Apart from the interim situation, each of these presumptions are closer to “true presumptions,” where proof of a basic fact [unilateral removal, shared care, predominant primary caregiver] is treated as presumptive proof of another fact [the best interests of the child], absent proof to the contrary.

INTERIM RELOCATION

However much we might like to encourage orderly, planned moves, the reality is that many relocation cases come up on short notice and lead to requests for a move pending trial. A job offer must be accepted within a time frame, or there is a last-minute acceptance to an education program. Even in a “best interests” jurisdiction like Canada, there are special principles developed for these interim cases.

There is and should be a presumption against allowing relocation on an interim basis. A leading Canadian case suggested two circumstances in which that presumption could be rebutted:

(α) There are compelling circumstances which might dictate that justice ought to allow a move, e.g. a job opportunity that might be lost; or
There is a genuine issue for trial, but there is a strong probability that the relocation will be allowed at trial. Underpinning this presumption is the view that the child’s best interests are generally not served by the yo-yo of moving and then moving back. Also at work are judicial management and fairness concerns that the trial outcome should not be predetermined by an interim order and that the real decision should be made only after a proper hearing. These latter concerns remind us that even “best interests” can be modified by systemic concerns in limited circumstances.

UNILATERAL RELOCATION

There should also be a presumption against relocation where a relocating parent has moved, or attempted to move, unilaterally or surreptitiously or without notice, which I will abbreviate to “unilateral relocation”). This presumption is driven by a policy of discouraging abduction and encouraging orderly moves, policies that go beyond the interests of this particular child to the interests of children generally. A presumption would be a clear public statement, one that lawyers and others could convey to parents thinking about relocation.

The reported decisions also indicate a second case-specific rationale relevant to this child. The parent who makes such a move prima facie demonstrates a lack of concern about the child’s stability and the child’s relationship with the other parent. Further, depending upon the legal context, such a move may be strong evidence of an unwillingness to comply with agreements or orders, auguring poorly for future compliance with parenting orders.

The nonrelocating parent would have to prove the unilateral move, or attempted move. In most cases, this will not be difficult, but there are some tricky cases, especially where there are allegations of consent or acquiescence to the move. How might this presumption be rebutted by the “unilateral parent?” First, by proof of justification for the unilateral relocation, for example fear of domestic violence or harm to the child. Second, by proof that it is in the best interests of this particular child to move, despite the unilateral action.

A sizeable proportion of these “unilateral parents” are eventually allowed to go, usually because the relocating parent is the child’s primary caregiver and the move is in the child’s best interests.

SHARED CARE

Many jurisdictions treat relocation in shared care cases differently than in other cases, whether by statute or judicial decision. Under the “best interests” test, there is no question that courts are much less likely to allow relocation where there is shared care. In my work, I’ve also found that Canadian courts usually say “no” to moves in “typical” shared care cases, with relocation only being allowed in the unusual fact situations. That pattern is entirely consistent with much of the modern social science research about the importance of active fathers. Based on my Canadian work, shared case cases appear to be “over-represented” in relocation decisions, making up 20 to 30 per cent of the cases, a higher proportion than in the custody population generally.

Parkinson and Cashmore appear to accept this pattern as “rational,” but later say “the existing care arrangements are a poor proxy for evaluating the importance to the child of the father-child relationship,” with a special concern for child-support-based definitions of “shared care.” Neither of these criticisms addresses the real issue: should we treat shared care cases differently in any reform of relocation law? There can be no doubt about the importance of both parents in shared care cases, even if there may be some debate as we move further away from substantial shared care.

Even U.S. statutes that establish a general pro-move presumption separate out shared care cases for different treatment where there is “substantially equal” shared care. California’s judicial presumption in favor of relocation under In re Marriage of Burgess made an exception in situations of joint
physical custody, where a “best interests” test would be applied. So too New Jersey’s shifting burden that favors relocation was held “entirely inapplicable to a case where the noncustodial parent shares physical custody” and a simple best interests was to be applied. Similarly, in England and Wales, where the pro-relocation guidance of Payne v. Payne applies to international moves by a primary carer, the Payne analysis does not apply where the parents have “more or less equal” share care, as the Court of Appeal pointed out in K v. K.

What drives differential treatment of this class of cases is the substantial sharing of care, not the legal form of the custody or residence order. In effect, where there are two capable parents sharing care in roughly equal fashion, and one of those parents wants to relocate, the child can get the benefit of continuity of community and continuity of care at the same time. In Canada, relocation is permitted in only ten to twenty-five percent of shared care cases, and even appeal courts have recognized that shared care cases are different.

But how do we define “shared care” cases for purposes of this presumption? I agree with Parkinson and Cashmore that we must not just apply some quantitative measure drawn from child support rules, some percentage of overnights. Ultimately, shared care demands a qualitative definition, one that looks not just at time but also at the distribution of caregiving functions and ordinary decision-making responsibilities respecting the child. But time remains an element of the definition. If the presumption does not include some quantitative measure, courts will devise their own.

In my view, the test should not be a narrow one, not confined to something like “substantially equal” care, more like “substantial shared care” or “substantial shared parenting.” If we had to include a threshold percentage as part of a broader qualitative definition, I would pitch it around thirty-five percent of the time, or more practically five overnights in an ordinary two-week period.

By creating a presumption against relocation in shared care cases, we are stating that it is generally not in a child’s best interests to relocate in these cases. The presumption can be rebutted by proof by the relocating parent that, on the facts of this case, it is in this particular child’s best interests to relocate.

**PREDOMINANT PRIMARY CAREGIVER**

I know this term sounds a bit redundant, but it is important to be clear that this category is a narrower subset of those with primary care, narrower than the “primary carer” of Payne v. Payne, narrower than the everyone-who-doesn’t-have-substantially-equal-parenting-time of the British Columbia relocation provisions. The three presumptions set out above are all presumptions against relocation, but this presumption favors relocation. Again, we must be careful about language. We often use the term “primary caregiver” just to mean the residential parent or the primary carer or the person with more than fifty to sixty percent of the parenting time, hence my use of the term “predominant primary caregiver” to describe this subset of cases.

In the Canadian case law, once a parent (usually the mother) has been identified explicitly as “the primary caregiver” in a decision, that is, the “predominant primary caregiver” in my terms here, and assuming no unilateral moves, she (or occasionally he) will almost always be allowed to relocate with the child. When a Canadian court describes a parent as “the primary caregiver,” it incorporates two assertions, one positive and one negative: “the caregiver is the dominant figure in the child’s life and the noncustodial parent is much less important.” It is a qualitative test, but one anchored in her (or his) predominance in parenting time, caregiving functions, and decision-making responsibilities. In Canada, one parent is identified as the predominant “primary caregiver” in about fifty percent of the decided relocation cases.

Given the importance of Payne v. Payne in international debates about presumptions, it is worth distinguishing my proposed presumption from Payne’s “discipline.” First, Payne itself is overbroad, extending to any “primary carer,” not just a predominant primary carer. It amounts to a general pro-move presumption, which can’t be justified. Second, the “happy/unhappy mother” rationale for
Payne has always been dubious. It’s not the primary caregiving parent’s mental state that matters, but his or her predominant significance to the child’s emotional health and adjustment.

Even my proposed predominant primary caregiver presumption may be too expansive for some. It is easy to pick extreme cases within this category: The primary caregiving mother where the father has been denied access or has been absent or has failed to spend much time with the child;79 or the mother who has experienced a pattern of domestic violence and the father exercises limited supervised access. Parkinson and Cashmore appear willing to accept some form of presumption in these cases. Included would be the single mother who never cohabited with the father and who is pretty much on her own. Also included in this group is a significant international group of young mothers with young children stranded in a foreign country after a brief relationship with the father, wishing to return to their home country and their supportive family there. Again, much of the social science learning that emphasizes the critical role of the primary parent works to support this presumption in favor of a “predominant primary caregiver.”

I would include under this presumption the relocating parent who is clearly the “only” custodial or primary care option, where the other parent is unable or unprepared to assume primary care but nonetheless opposes the relocation.

The debate is where to draw the line. Again, a straight quantitative measure is a bad idea, but time remains an important element of any qualitative test and can be used to illustrate the scope of this proposed presumption. In Canadian discussions, with Prof. Bala and others, we have used measures such as eighty percent of the time with the primary caregiving parent, or twelve days in an ordinary fourteen-day period.80

In the case of a predominant primary caregiver, there should be a presumption that relocation is in the best interests of the child, which can be rebutted by the nonrelocating parent proving the contrary. A related issue is how this pro-move presumption interacts with the two anti-move presumptions above for interim or unilateral relocations. In my view, those two presumptions should be given priority over this one. A predominant primary caregiver will more likely be able to prove that an interim move is warranted, or to rebut the implications of a unilateral move.

WHERE TO FROM HERE?

Relocation law is in need of reform. There is a recognition that a pure “best interests” test has not worked, or at least that the systemic costs of its individualized determinations have been immense. That much has been made clear by the New Zealand and Australian research. If we are to reform relocation law, we must look to presumptions, whether created by statute or by judicial decision. Our experience with “factors” and “questions” demonstrates that these do little to bring greater predictability to the law.

Propounding presumptions is a dangerous business, but we need to start this conversation. I have made some suggestions here, all the while recognizing that these four presumptions will still leave a sizeable chunk of cases to be decided by a burden-free “best interests” test, somewhere between twenty and forty percent of the cases, depending upon the scope of the presumptions and local fact patterns. Most of these will involve active fathers and mothers who lie in between shared care and predominant primary caregiving.81

Others might suggest different presumptions or wish to add further presumptions. For example, some have suggested that relocation should be discouraged for pre-school children and adolescents, the latter because of the importance of peers and the former because of disrupted attachments and the difficulty of designing age-appropriate long-distance access.82 In practice, we see very few relocation cases involving adolescents, so the real issue here is children under six and those aged six to eleven. Our Canadian studies show little difference in judicial outcomes between these two age groups, and no clear age-related pattern appeared in England and Wales either.83

I think it is important to keep the number of presumptions small and powerful, to avoid duelling presumptions84 and a descent into something like the cacophony of multiple “factors” we have now.
It is also critical to remember that these are “presumptions,” not “rules,” presumptions that can be rebutted. In my experience with spousal guidelines, one of the salutary effects of presumptions is the structure they give to discretionary decision making for all concerned, helping to focus them upon the critical issues.

Carefully constructed and modest presumptions can bring some order and predictability to relocation disputes, not just in adjudication, but also in the earlier stages of negotiation, mediation, and judicial settlement conferences, as parties are forced to think more clearly about the recognizable options available to them. If we really want to reform relocation law, we will have to start talking seriously about presumptions.

NOTES

2. For a brief account of Canadian relocation law, see Rollie Thompson, Movin’ On: Parental Relocation in Canada, 42 FAM. CT. REV. 398 (2004).
3. Three of my most recent articles addressing Canadian relocation trends in reported decisions are: Rollie Thompson, Heading for the Light: International Relocation from Canada, 30 CAN. FAM. L.Q. (2011); Rollie Thompson, Where is B.C. Law Going? The New Mobility, 30 CAN. FAM. L.Q. 235 (2012); Rollie Thompson, Berry v. Berry: Recent Ontario Relocation Trends, 7 R.F.L. (7th) 10 (2012) (reviewing trends in Canada’s largest province).
10. See Elrod, supra note 6.
11. As was done in the recent British Columbia relocation provisions, in effect as of March 2013: Family Law Act, S.B.C. 2011, c. 25, § 68 (2014).
13. Some jurisdictions make the notice the foundation of a permissible relocation if no legal document objecting to the move is filed with the competent court. Obviously, that gives much more legal importance to the notice, as well as forcing the procedural burden onto the nonrelocating parent. In my view, this default procedure reflects an underlying assumption that a custodial or primary parent is entitled to move, an assumption that is no longer justified.
15. In some cases, courts have postponed moves to allow such careful planning to take place first.
17. Id. at 23.
18. Id. at 12–13.
19. I reviewed these options in Thompson, supra note 2, at 403.
20. One of my favorite Canadian cases offers a dramatic example of this option, where the relocating father arranged for a job in the new location for the mother: Camphausen v. Camphausen, [2000] B.C.J. No. 1454 (B.C.S.C.) (QL).
21. The same option might be considered in those situations where the relocating parent proposes to move closer to family members—can they move to the children’s current community? I am also aware of one case where the new partner was unwilling to move, because of the children of his first family, but then his first wife proved to be agreeable to a move too.
22. In their alternatives, Parkinson and Cashmore suggest a deferral of the move, in the hope that the relocating parent will become more content with her/his current location, with additional financial support or more frequent trips “home” to family:
Parkinson & Cashmore, supra note 1, at 23. This is a good example of an option that should be pressed up front, not left until late in the process.

23. Parkinson & Cashmore, supra note 1, at 7–8.


25. Parkinson & Cashmore, supra note 1, at 11–12.


28. See supra note 22, at 961.

29. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE (Kenneth S. Broun et al., 7th ed. 2013).

30. This initial burden is “not a particularly onerous one,” said the Supreme Court in Baures v. Lewis, 167 N.J. 91, 770 A.2d 214 (2001).


32. Our leading Canadian relocation case, Gordon v. Goertz, was a variation case, when the custodial mother proposed moving from Saskatchewan to Australia in 1995, after a 1990 separation and a 1993 divorce order. See supra note 4.

33. There will be the occasional case where the parent makes a second application to relocate to the same location for the same reason and thus fails to show a change of circumstances.

34. Sunstein, supra note 26, at 963 (“With presumptions, it is necessary to know what counts as a rebuttal, and whether the presumption and the rebuttal are specific or vague, broad or narrow”).

35. Washington State would be an example of this kind of presumption: WASH. REV. CODE ANN., § 26.09.520 (West, Westlaw through 2014 Sess.).


37. Especially because section 2.17(4)(a)(ii) specifies the six most common “purposes” or reasons as “valid.”


39. In some civil law countries, like Sweden, the issue of relocation is dealt with by the legal form of custody. If the parents have joint legal custody, then the relocating parent applies for sole legal custody. If the relocating parent has sole legal custody, the nonrelocating parent applies for joint legal custody to stop the move. Joint legal custody is the norm for both married and unmarried parents. See Maarit Jänterä-Jareborg et al., National Report: Sweden on Parental Responsibilities to the Commission on European Family Law, posted at celflonline.net, question 40.


43. To be more precise, they said there is “no empirical basis on which to justify a legal presumption that a move by a custodial parent to a destination which she plausibly believes will improve her life will necessarily confer benefits on the children she takes with her.” Sanford L. Braver et al., Relocation of Children After Divorce and Children’s Best Interests: New Evidence and Legal Considerations, 17 J. FAM. PSYCHOL. 206, 215 (2003). Their findings were refined and elaborated in William V. Fabricius & Sanford L. Braver, Relocation, Parental Conflict, and Domestic Violence: Independent Risk Factors for Children of Divorce, 3 J. CHILD CUSTODY 7 (2006). Their findings were severely criticized by Bruch, supra note. 41, and Robert Pasahow, A Critical Analysis of the First Empirical Research Study on Child Relocation, 19 J. AM. ACAD. MATRIMONIAL LAW. 321 (2005).


47. Parkinson & Cashmore, supra note 1, at 10.

48. Taylor et al., supra note 23, at 141.

49. Of course, some children missed their fathers more than others, and some found the adjustment harder than others. Neither of these observations warrants rejection of presumptions in some cases, as I propose.

50. Supra note 1, at 20.

51. Id. at 24. In Canada, our provincial appeal courts have avoided and even refused to articulate intermediate premises or principles in relocation law. Rollie Thompson, *Ten Years After Gordon: No Law, Nowhere*, 35 R.F.L. (6) 307 (2007). Of the sixty-seven appeals heard in those ten years, forty-five percent were allowed. Since 2007, there have been more appeals annually, but the percentage allowed has gone down, to a more normal thirty percent.


54. Supra note 1, at 16–17.


56. Supra note 3. Parkinson and Cashmore are correct to point out that a better-resourced family justice system might make such reports more readily available. An efficient system might even reduce some of the delays in obtaining reports, but delay will remain a big issue in the relocation context. In litigated cases, judges may or may not follow the recommendations of the report-writing experts in their “best interests” analysis


58. Parkinson and Cashmore refer to the requirement of good faith in the recent British Columbia statutory changes: Family Law Act, S.B.C. 2011, § 69(4)(a). Subsection 69(6) then elaborates the “relevant factors” a court should consider in determining good faith, including the reason for the proposed relocation, its likelihood of enhancing the child’s quality of life, and the giving of notice and any residence restrictions in an agreement or order. Unfortunately, the B.C. courts have made a hash of interpreting the new relocation provisions in some early cases, starting with *L.J.R. v. S.W.R.*, [2013], B.C.J. No. 1645, 2013 BCSC 1344.

59. Supra note 36, § 2.17(4)(a).

60. Supra note 1, at 17–19.


62. Canadian courts solve this problem by simply ignoring this part of the Supreme Court’s decision: Thompson, supra note 2, at 406. The B.C. relocation provisions actually override this part of the court’s decision, supra note 11, § 69(6)(a). It is interesting that the Israel Supreme Court followed *Gordon* on this point in *Jane Doe v. John Doe*, RCA 4575/00 (Jan. 8, 2001). I thank Yoav Mazeh of Ono Academic College, Faculty of Law, for bringing this case to my attention.

63. Supra note 1, at 20.


65. Bala and Wheeler also recommend a presumption where “the parent seeking relocation has unilaterally moved the child.” Supra note 61, at 317.

66. A similar pattern has been found in Australia they say, citing Patricia L. Eastal & Kate Harkins, *Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act*, 22 A.J.F.L. 259 (2008). The pattern is not as pronounced as in Canada.

67. Supra note 1, at 16, 22.


69. Supra note 41, at 483 n.12.


73. In Canada, the test for child support purposes is “40 percent of the time over the course of a year,” a fairly high threshold, which I examined in detail in Rollie Thompson, The TLC of Shared Parenting: Time, Language and Cash, 32 CAN. FAM. L.Q. 315 (2013).

74. Tennessee just uses the term “substantially equal intervals of time with their child,” which was then judicially analysed in Kawatra v. Kawatra, 182 SW.3d 800 (2005), with the father falling short at 37.8 percent measured by days and part-days over the previous twelve months.

75. Parkinson and Cashmore express a concern about “strategic positioning” by parents in response to a presumption against relocation in substantial shared care cases. Their concern is overstated. First, it is clear that shared care is already a strong basis for opposing relocation, even under the pure “best interests” regime. Lawyers give this advice to parents now. Second, any time you make the law clearer, rather than muddled, you create the possibility for “strategic positioning” by a few, but you also create the ability to offer better advice about the implications of current parenting decisions for the many.

76. Thompson, supra note 55, at 478.

77. Most Canadian judges believe that they can make this qualitative judgment, even though time is an important factor in making the judgment.

78. Supra note 71. Parkinson and Cashmore point out, quite correctly, that their three questions are not asked by Payne’s discipline. But Payne remains an unusual decision and an unusual rationale amongst relocation jurisdictions.

79. This group, with no direct contact or direct contact less than weekly, sticks out in George’s English analysis, supra note 71, at 59–61, 88–89.

80. Certainly nothing as low as the seventy percent used by West Virginia in implementing the ALI proposals: W. VA. CODE § 48-9-403(d)(1) (2014). In Canada, the smaller provinces of Manitoba and Nova Scotia have been considering proposals for use of presumptions in relocation cases, and thus the conversations described in the text.

81. These “in-between” cases are less unpredictable than you might think. In Ontario and Nova Scotia, the courts have generally said “no” to moves in these cases, while British Columbia was more inclined to allow such moves (although the B.C. numbers were very small).

82. This is implied in Joan Kelly’s review, supra note 42, at 28–33 and also by Austin, supra note 44 at 351–53.

83. Thompson, supra note 3, and more recent research; Bala & Wheeler, supra note 61, at 298–300; Elizabeth Jollimore & Ramona Sladic, Mobility: Are we there yet?, 27 CAN. FAM. L.Q. 341 (2008). In England and Wales, no clear pattern emerged based upon age, either for international or domestic moves: George, supra note 71, at 62–3, 90–92.

84. This is one of the problems with the nine presumptions proposed by Bala & Wheeler, supra note 61, at 317. I should note that Professor Bala has significantly revised and reduced the number of presumptions in his most recent version.

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