RELOCATION: A NEW ONTARIO CHECKLIST

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[Abbreviations: DA (Divorce Act); CLRA (Children's Law Reform Act); PT (parenting time); DMR (decision-making responsibility); CO (contact under contact order); SET (substantially equal time); VM (vast majority of time); FAQS (Relocation FAQS);

1. WHICH STATUTE?

Divorce Act

Children's Law Reform Act

2. WHAT STAGE?

Interim/temporary

Initial

Variation/motion to change

3. RELOCATION OR CHANGE OF RESIDENCE?

3.1 "Relocation": definition, s 2(1) DA, s 18(1) CLRA

"significant impact" on the child's relationships

3.2 If not "relocation", **"change of place of residence":** s 16.7 DA

Notice of change of place of residence: s 16.8 DA, s 39.1 CLRA

Either parent or child changes residence, in writing, no prescribed form

To: any other with PT, DMR or CO: s 16.8(1) DA, s 39.1(1) CLRA

Date of change, new address, contact info: s 16.8(3) DA, s 39.1(2) CLRA

Exception: court may exempt/modify, incl. if risk of FV: s 16.8(3), (4) DA, S 39.1(3), (4) CLRA

Notice by person with CO of change in residence: s 16.96(1) DA, s 39.2(1), (2) CLRA

No legal consequences, except possibly s. 16.92(1)(g) DA, s 39.4(3)(g) CLRA

4. Notice of Relocation and Process

Real start of relocation legal process

Purposes: to protect child from disruption

to avoid self-help and unilateral relocations

to create orderly process

to encourage negotiation/mediation/settlement

to allow a parent to relocate without court where no objection

4.1 Notice: s 16.9 DA, Form 1, SOR/2020-249,

s 39.3 CLRA, Notice of Relocation Form – Person with a Parenting Order, O.Reg 155/21

either parent who relocates, with or without child

In writing, at least 60 days in advance of relocation date

In form prescribed by regulations: Form 1, Ont Notice Form

To any other with PT, DMR or CO: s 16.9(1) DA, s 39.3(1) CLRA

Notice of person with CO of relocation: s 16.96(2), Form 3,

s 39.2(3) CLRA, Notice of Change in Place of Residence Form – Person with Contact, O.Reg 155/21

Contents of notice: s 16.9(2) DA, s 39.3(2) CLRA

Expected date of relocation

Address of new place of residence and contact info

Proposal re PT, DMR, CO

Exception: court may exempt/modify, incl. if risk of FV: s. 16.9(3), (4) DA

s 39.3(3), (4) CLRA

Service: by text, email, mail, personal, proof of service

CLRA service prescribed in detail by O.Reg 155/21, s 4

4.2 Notice of Objection or Filing of Application:

Only person with PT or DMR can object (not CO): s 16.91(1)(b)(i) DA

s 39.3(5) CLRA

Within 30 days after notice of relocation is received

Notice of objection: s 16.91(1)(b)(i)(A) DA, s 39.3(5)(a) CLRA

In form prescribed by DA regulations: Form 2

No prescribed form under CLRA, but service rules O.Reg 155/21, s 4

Contents of objection: s 16.91(2) DA, s 39.3(6) CLRA

Objects and reasons for objection

Views on proposal for PT, DMR or CO

Objection served on parent giving notice of relocation

Relocation not permitted until order

OR Filing of application in court: s 16.91(1)(b)(i)(B) DA, s 39.3(5)(b) CLRA

Relocation not permitted until order

Third party record of objection

What if objection/filing *after* 30 day time limit? Likely same effect

Purpose of 30 days to encourage discussion/negotiation/mediation

4.3 Process:

Relocation permitted if:

If no objection or filing of application *and*

If no *order* prohibiting relocation: s 16.91(1)(b) DA, s 39.4(2)(b) CLRA

Relocating parent who has given proper notice can relocate a child as of date

OR: if relocation is authorized by a court: s 16.91(1)(a) DA, s 39.4(2)(a) CLRA

4.4 What Options Available for Resolution?

(1) Relocation allowed/agreed, parenting time adjusted

(2) Relocation delayed, to end of school year, for further planning, etc.

(3) Temporary relocation, parent and child to return afterwards

(4) Relocation of child not to occur, and

Primary care or sharing parenting conditional upon relocating parent remaining

If relocating parent moves, then change primary care to other parent

(5) Change primary care to other parent unconditionally

(6) Can a new partner move to the children?

(7) Can left-behind parent relocate to the new location?

(8) Will supporting persons move to the new location, e.g. grandparents?

Note: Court CAN'T order parent to move or not move, only *child*

5. BURDENS OF PROOF

Purposes: to provide greater certainty and consistency in some cases

to provide greater advance guidance for parties

to provide greater structure in judicial decision-making

to reflect expert and judicial consensus about best interests generally

5.1 Prerequisites for invocation of burdens: s. 16.93 DA, s. 39.4 CLRA

(1) "order, arbitral award, or agreement"

"order" may be an interim or final order

need not be divorce order, can be order under provincial statute

"agreement" is not expressly confined to written agreements

may include oral agreements: see FAQS

rationale: some objective record of parenting arrangements

problem? excludes reasonable parents who don't document agreements

If no order, arbitral award or agreement, then NO BURDEN

e.g. at interim/temporary stage

(2) "substantially comply"

to engage burdens, parents must "substantially comply"

with the parenting time set out in the order, arbitral award or agreement

i.e. the actual parenting time must not diverge too much from those terms

NB: this is NOT a determination of "denial of access/parenting time"!

this is NOT a penalty or forfeiture of the burden due to denial

It IS an assessment of whether the objective record is reflected in practice

If parties have changed parenting time vs record:

Burdens may not be engaged if substantial divergence

What if no “agreement”? Does aquiescence count?

What if “agreement” altering prior court order?

(3) What time period to assess parenting time?

Most recent? Longest standing? Shifting arrangements?

See below: s 16.93(3) DA, s 39.4(7) CLRA

5.2 Three-way split in burdens of proof:

(1) Is there “substantially equal time” in care of each parent?

(2) Does one parent have the “vast majority” of the time?

(3) Any other case? The residual category

(1) Is there “substantially equal time” in care of each parent?

s 16.93(1) DA; s 39.4(5) CLRA

if SET, then generally in best interests of child NOT to allow relocation

unless relocating parent can prove in best interests of *this* child

what does “substantially equal” mean?

40 to 50% of parenting time under order, arbitral award or agreement

40% not to be measured rigidly, rough guide, can be a bit lower

If SET, then burden of proof of best interests upon relocating parent

(2) Does one parent have the “vast majority” of parenting time?

s 16.93(2) DA; s 39.4(6) CLRA

If VM, then generally in best interests of child to ALLOW relocation

unless other parent can prove in best interest of *this* child NOT to relocate

what does “vast majority” mean?

80% or more of parenting time under order, arbitral award or agreement

Is relocating parent “primary caregiver” or “dominant primary caregiver”?

Again, rough guide, VM may go slightly below 80% in some cases

If VM, then burden of proof of best interests upon parent opposing

(3) Any other case?

s 16.93(3) DA; s 39.4(7) CLRA

This is a residual category: if parenting time arrangements do not fall within ss 16.93(1) or (2), then they must fall under s 16.93(3) DA, or if not under ss 39.4(5) or 39.4(6) CLRA, then under s 39.4(7) CLRA

If a case falls in this category, then **"both" parents** "have the burden" of proof

Or, more accurately, both parents have the burden of leading evidence about the best interests of this child, with no presumptions

Some common examples:

Parenting time between 60% and 80%: "in-between" cases

Parent proposing relocation is parent with less than 40% of time

No order, arbitral award or agreement

No "substantial compliance" with order, arbitral award or agreement

Where the "order" is an interim order, discretion not to apply: s. 16.94 DA

See below

Where relocation is sought at the interim stage: see below

5.3 Interim Orders: s 16.94 DA, s 39.4(8) CLRA

Starts from premise that interim orders are "orders" for burdens

Court has discretion "not to apply" burdens if interim order

When "not to apply"?

Recently separated parents

Makeshift orders where interim arrangements contested

No status quo of some permanence

When to apply burdens?

Status quo of some permanence reflected in interim order

Interim order reflects prior older agreement or order

NOT just about timing, other factors: *Link v. Lenskyj*, 2022 BCCA 341

6. INTERIM/TEMPORARY MOTIONS TO RELOCATE

Ontario has way more interim/temporary moves!

No explicit distinction in statutes between interim, initial or variation stages

But: if no order/agreement, no burdens

If only interim order, often no burdens

Then what law on burdens? Ontario law is clear

Burden on relocating parent on interim/temporary relocation

(Note: consistent with SET burden, at odds with VM burden)

***Plumley*, [1999] O.J. No. 3234 (SCJ)**

(a) no genuine issue for trial?

(b) compelling circumstances?

(c) strong possibility of success, even if issue for trial?

(Note: parent with VM more likely to succeed at trial)

Add considerations in *NP v DH*, 2022 ONCJ 535, less likely if:

(d) material facts in dispute

(e) long distance

(f) no order (or agreement)

But many Ontario cases treat interim/temporary as “final”

7. RELOCATION AT INITIAL STAGE

Most common situation outside Ontario, common in Ontario too

No "requirement" that custody be determined first, relocation second

Moreton v Inthavixay, 2021 ONCA 501

Often relocation issue needs to be determined quickly

Sequence depends on circumstances of case

"Blended analysis": relocation as part of parenting plans proposed

Terris v Marcoux, [2003] O.J. No. 2829, 2003 CanLII 2040 (Mackinnon J)

Impact of interim orders: see above

8. VARIATION/MOTIONS TO CHANGE

Two stages: (1) proof of material change; (2) what varied order to make

ss 17(1)(b), 17(5) DA; s 29 (1) CLRA

8.1 Material Change

Burden on parent proposing variation to prove material change

"Relocation" "deemed to constitute" material change: s 17(5.2) DA, s 29(2) CLRA

"significant impact" for "relocation"

If relocation prohibited, "not, in itself" a material change: s 17(5.3) DA, s 29(2) CLRA

i.e. prohibited *in this decision*

other reasons possible for changing parenting orders

test for material change generally: *Gordon v Goertz*, paras. 10-16

8.2 Varied Order

Relocation provisions govern making of varied order

10. DETERMINING BEST INTERESTS IN RELOCATION CASES

Overview of structure of decision-making factors:

(1) Assign the burden of proving best interests: see above
(2) Assess the relocation-specific best interests factors
(3) Do not consider double-bind question
(4) Assess the general best interests factors

Best interests is not a closed list of factors

10.1 Two Over-Arching Concerns

Relocating Parent's Plan:

Relocating parent must have careful, thought-out plan for child at new location: housing, school, day care, activities, any special health or other needs

Common reason for denial of relocation, even if VM and burden in favour

Compliance and Encouragement of PT:

Major concern: will relocating parent comply with and encourage parenting time *after* relocation in future, consistent with order?

Best evidence: did relocating parent comply with and encourage parenting time in the past, before notice of relocation and while proceedings under way?

If not, then harder to succeed

10.2 The Relocation-Specific Best Interests Factors

s 16.92(1) DA, s 39.4(3) CLRA: assess these first, before general factors

(a) The Reasons for Relocation

Can be multiple reasons

Most common reasons: for employment or education of parent

to live with new partner

for new partner's employment

for family support: grandparents, siblings, relatives

for better housing

to avoid family violence

to reduce parental conflict (but not to thwart parenting time)

(b) The Impact of Relocation on the Child

mostly about loss of time with left-behind parent

disruption from extended family

disruption from community, school, friends, activities, etc.

(c) Parental Time Spent and Involvement with Child

unlike burdens, not confined to “time’, also “involvement”

qualitative assessment of parental involvement and care

if less than SET, greater involvement militate against relocation

if less than VM, greater involvement militate for relocation

even if SET, one parent may be more of manager

even if VM, other parent may be critical for child

(d) Compliance with Notice of Relocation

“any applicable notice requirements”

“under s. 16.9 , provincial family law legislation, an order, arbitral award, or agreement”

non-compliance does not shift burden of proof generally

may be faulty compliance, lack of knowledge, unwise

may be risk of family violence

OR intentional, unilateral, surreptitious

(NB: In latter situation, may see burden shift)

(e) Geographic Restriction

residence restrictions common in orders/agreements

orders: s 16.1(7) DA, s 28(1)(c)(iii) CLRA

just a factor to be considered

(f) Reasonableness of Proposal

test is “reasonable” proposal, not “perfect”, not one court chooses

need for realism in proposals

(g) Compliance with Family Law Obligations

Have both parents complied with their parenting obligations?

has the left-behind parent paid child support? Or spousal support?

Has either parent complied with property or other orders/agreements?

10.2 The Double-Bind Question

A factor NOT to be considered: s 16.92(2) DA, s 39.4(4) CLRA

“whether the person who intends to relocate the child would relocate without the child or not relocate”

ONLY applies to parent proposing to relocate

NOT the left-behind parent, NOT the relocating parent’s new partner

NOT the relocating parent’s parents

Purpose: to avoid defaulting to the status quo, with no relocation

to avoid unfairness of posing hypothetical question to relocating parent

If court can’t consider, then any question by opposing party or court “irrelevant”

objection should be sustainable

Can relocating parent “volunteer” their intention on direct or in affidavit?

Court can’t “consider”, but not clear

What if relocating parent has already moved?

10.3 The General Best Interests Factors

In relocation case, in determining best interests of child, court to consider relocation-specific factors *in addition to* factors in s 16/24:
s 16.92(1) DA, s 39.4(3) CLRA

Court to consider "**only** the best interests of the child": s 16(1) DA, s 24(1) CLRA

Primary consideration: "the child's physical, emotional and psychological safety, security and well-being": s 16(2) DA, s 24(2) CLRA

Court to consider "all factors related to the circumstances of the child"

"including" listed factors, i.e. not exhaustive: s 16(3) DA, s 24(3) CLRA

(a) Child's Needs, Given Age and Stage of Development
(b) Nature and Strength of Child's Relationships to Parents, Others
(c) Parent's Willingness to Support Child's Relationship with Other Parent
(d) History of Care of Child
(e) Child's Views and Preferences
    assessor, OCL, counsel, judicial interview, other methods
    child hearsay to parents, adults: state of mind exception, weight?
(f) Child's Cultural, Linguistic, Religious and Spiritual Heritage, Incl. Indigenous
(g) Plans for Child's Care
(h) Ability and Willingness of Parent to Care for and Meet Needs of Child
(i) Ability of Parent to Communicate and Cooperate
(j) Family Violence and Its Impact (Factors to Consider)
(k) Civil or Criminal Proceeding, Order, Condition, or Measure Relevant to Safety, Security and Well-Being of Child

NOT past conduct, unless relevant to parenting: s 16(5) DA, s 24(5) CLRA

Parenting time factor: Child to have as much time with each parent as is consistent with best interests: s 16(6) DA, s 24(6) CLRA

11. PRACTICAL CONSIDERATIONS IN RELOCATION CASES

(1) Child with special needs

compare current and proposed locations:

individual educational programs

support services, financial assistance

any specialised health care

(2) Age and stage of child

no clear pattern in case law, pre-school (0-5) vs early school (6-11)

very few older children, 12+

wishes more important, unless with siblings

young children less connected to community,

but less able to handle block access

older children more connected to community,

but better able to handle block access

block access: 3 or 4 times a year

can child handle that? how much time in summer?

Note: should children under a certain age not be allowed to move?

postponed until older, relationship established, controversial

(3) Extended family, supports

location of grandparents, other relatives, family supports

relationships of child with extended families, children

(4) Community Connections

day care, school, sports, other activities, friends

(5) Race, culture, language, Indigenous heritage

where move away from community, extended family

methods of maintaining connections, heritage

(6) Assessment?

value of assessments generally in relocation cases?

problems of delay, cost

are there some cases where assessments are more helpful?

12. WHAT PARENTING TIME POSSIBILITIES AFTER RELOCATION?

12.1 Long-Distance Parenting Considerations

(a) **Child:**

age and stage of child

ability to tolerate block access

(b) **Distance**:

how far?

air travel? age, unaccompanied minors, guardian fare

auto travel: who drives, how shared, mid-point exchange

(c) **Finances**:

can the left-behind parent afford parenting time

how much can each parent finance

if no money, no access, reconsider relocation

(d) **Family:**

will relocating parent return to community to visit family/relatives

does left-behind parent have family in new location

(e) **Willingness:**

past history of relocating parent in encouraging parenting time

compliance with past orders or agreements

enforcement methods

(f) **Technology:**

telephone, Skype/Facetime, age of child

virtual access no substitute for in-person access, but can supplement

see Himel and Paulseth, “1-800-ZOOM-ME: A Divorce Act Update on Post-Relocation Parenting Time, Travel Costs and Child Support” (2022), 41 CanFamLQ 195

Himel and Paulseth, “1-800-Skype-Me” (2016), 54 FamCtRev 457

12.2 Financing parenting time after relocation, in order of priority

Costs of parenting time: s 16.95 DA, s. 39.4(9) CLRA

apportionment of costs of parenting time as term of relocation order

cost per trip, who pays, when, what happens if trip not made

Reduction of (or lower or zero) spousal support

especially where relocating parent improves financial position by relocation

Reduce or zero s. 7 contributions

wide discretion to order no contribution to s. 7 expenses

Last resort: reduce or eliminate table amount of child support

payor must prove undue hardship: s. 10(2)(b) CSG

unusually high expenses for parenting time, *and*

lower household standard of living under s. 10(3), *and*

judicial discretion to reduce child support

can relocating parent waive table amount of child support?

if necessary to reduce/eliminate child support, should move be allowed?