THE NOT-SO-NEW RELOCATION LAWS:

35 QUESTIONS AND ANSWERS SO FAR

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Q1: What provinces have adopted the new relocation provisions that mirror the Divorce Act amendments?

A. Six provinces have adopted mirror laws so far, with two more on the way:

Saskatchewan: *Children's Law Act*, S.S. 2020, c. 2 (effective March 1, 2021)

New Brunswick: *Family Law Act*, S.N.B. 2020, c. 23 (March 1, 2021)

Prince Edward Island : *Children's Law Act*, S.P.E.I. 2020, c. 59 (March 1, 2021)

Ontario: *Children's Law Reform Act*, S.O. 2021, c. 4, Schedule 2 (March 1, 2021)

Nova Scotia: *Parenting and Support Act*, S.N.S. 2021, c. 15 (April 1, 2022) (replaces 2017 version)

Manitoba: *Family Law Act,* CCSM, c. F20 (2022)(July 1, 2023)

Newfoundland and Labrador: *Children's Law Act*, amended Bill 12, S.N.L. 2026, c. 10, to be proclaimed

Northwest Territories: *Children's Law Act*, amended, Bill 23, assent October 31, 2025, to be proclaimed

British Columbia maintains its earlier, more primitive relocation provisions in the *Family Law Act*, S.B.C. 2011, c. 25, in effect March 18, 2013. For a discussion of those changes, and the subsequent B.C. case law, see Thompson, "Where Is B.C. Law Going? The New Mobility" (2012), 30 Can.Fam.L.Q. 235 and Thompson, "Legislating About Relocating: Bill C-78, N.S. and B.C." (2019), 38 Can.Fam.L.Q. 219.

In August 2025, the B.C. Attorney General released a Policy Intentions Paper, stating the intention to bring the *Family Law Act* relocation provisions more in line with the divorce changes: Ministry of Attorney General, *Family Law Act* Modernization Project, Policy Intentions Paper, Part 2: Care of and Time with Children and Protection from Family Violence" (August 2025), pp. 2-1 to 2-5. To date, no bill has been introduced.

Two provinces (**Alberta, Quebec**) and two Territories (**Yukon, Nunavut**) have not ushered in mirror amendments to their laws. Both Alberta and Quebec courts have adopted many parts of the divorce relocation changes in their approaches to relocation under provincial laws, discussed below.

The best way to understand these new relocation laws is that they effectively reverse the Supreme Court of Canada's decision in *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

These laws create a new framework for the resolution of relocation claims: (i) a child-focussed definition of "relocation"; (ii) mandatory notice of relocation; (iii) burdens of proof of best interests in some cases; and (iv) added best interests factors specific to relocation cases. In the end, the decision is still one of best interests, but the new framework should give more structure and consistency to the process, the reasoning and the outcomes. It is still early, but there are some clear signs that the laws are having their desired impact.

That said, lawyers and judges still cite *Gordon v. Goertz* too often. This was not helped by the Supreme Court in *Barendregt v. Grebliunas*, 2022 SCC 22, mistakenly – or ingenuously – describing the new laws as having "largely codified this Court's framework in *Gordon*…. where they depart from *Gordon*, the changes reflect the collective judicial experience of applying the framework for over 25 years" (para. 108).

That's simply incorrect.

Q2: In general, what has been the effect of the new laws upon the likelihood of a parent being allowed to relocate, as compared to the "old" law of *Gordon v. Goertz*?

A. There has been a small but significant increase in reported decisions allowing moves. Significant interprovincial differences continue.

After five years and more than 300 reported decisions, there's been a small increase, from the consistent 50 per cent that prevailed in the "*Gordon*" years to **54 per cent** under the new laws. But this latter national percentage is affected by the large number of Ontario interim or temporary relocation cases, where the probability of a "yes" decision is much lower. If we only look at non-interim moves across Canada, the percentage in favour of relocation under the new laws has consistently been **58-60 per cent.**

That 58-60 per cent reflects differing percentages based upon parenting arrangements and orders: much higher for "vast majority" cases (85%), much lower for "substantially equal" cases (24%), and about the same for "both burdens" cases (61%). For interim moves, not surprisingly, the odds of being allowed to move pending trial is much lower (42%). Most of these are Ontario interim cases.

Most relocation cases (60%) are now initial orders. Just 10 per cent are variations like *Gordon v. Goertz*. There are no signficant differences in success rates between initial and variation cases. The other 30% are interim relocations, mostly in Ontario, with lower success rates.

There continue to be significant inter-provincial differences in outcomes, although the small numbers for some provinces make this harder to discern. A parent is still much

more likely to be allowed to move in Quebec (63%) or New Brunswick (63%) or Alberta (65%) than in other provinces, like Nova Scotia (43%) or Manitoba (33%). Ontario (52%), British Columbia (56%) and Saskatchewan (50%) fall closer to the national average.

The amendments have not, so far, led to greater consistency in outcomes across provinces. Long-standing regional differences in judicial attitudes to relocation have not changed. On this front, the new laws have not achieved their purpose.

Q3: Does gender matter in relocation cases?

A. Yes, because more than 90 per cent of the parents proposing to relocate with the children are mothers. Fathers are just as likely to succeed as mothers.

Consistently, over the years, Canadian case reports show that 90 per cent or more of relocating parents are mothers. That is also true of the 2021-2026 case law under the new statutes. This is not just a Canadian pattern. It is universally true around the world. It reflects the gendered nature of caregiving. Relocation decisions thus have a disproportionate impact upon women, notably their ability to make their own lives after separation and divorce.

Whether it's a mother or a father proposing to move, their chances of success are pretty much the same: where fathers propose to relocate, 51% of moves are allowed, not much below the general rate of 54%. The fathers' numbers are small, so that just 1 more "yes" case would make a difference.

Q4: Does the Supreme Court of Canada's 2022 decision in *Barendregt v. Grebliunas* apply to interpret the new statutory relocation provisions?

A. No. But *Barendregt* has confused courts, which have often applied a mix of *Barendregt* and the statute amendments. *Barendregt* does contain some helpful comments about some of the amendments.

In paragraph 110 of *Barendregt v. Grebliunas*, 2022 SCC 22, Justice Karakatsanis makes clear that her relocation analysis changes the "common law *Gordon* framework", and not the "amended *Divorce Act* framework". *Barendregt* was a case under the old pre-2021 *Divorce Act* which was silent on relocation. The "common law" or judge-made framework only applies to those jurisdictions that have not enacted specific relocation provisions in their family law statutes, i.e. the two provinces and three territories mentioned above. If and when these jurisdictions do enact mirror laws, the "common law" framework will no longer apply.

Some passages in *Barendregt* may offer assistance in interpreting the statutory provisions in the new laws, but that's it. Comments on specific topics may be helpful: best interests generally (paras 96-99); reasons for relocation (paras 124-130, 169-173);

maximum contact (paras 131-135); and family violence (paras 141-147). *Barendregt* is much less helpful on the double-bind question (paras 136-140) and it rejects burdens of proof in the "common law" (para 117-123).

***Barendregt* is NOT, repeat NOT, an interpretation of the new relocation laws themselves.** The statutory relocation provisions of the new laws must be applied, including the definition of "relocation", mandatory notices, burdens of proof, and the best interests factors.

Q5: Lawyers in British Columbia usually plead both the *Divorce Act* and the *Family Law Act* for married spouses. Which law then applies in a B.C. relocation case?

A. The *Divorce Act*.

The two sets of relocation provisions are inconsistent with each other.

The B.C. *Family Law Act* (FLA) sets out a simpler, cruder two-way approach: a presumption *against* moves where parents have "substantially equal parenting time" in s. 69(5) and, for everyone else, there is a presumption *in favour of* moves in s. 69(4). Or that's what the statute looks like. But the B.C. FLA also has a couple of threshold requirements to be proved, "good faith" and "reasonable and workable proposal", not found in the divorce amendments. These threshold requirements have been misinterpreted by the B.C. courts, I've argued, to impose a demanding burden upon relocating parents: see Thompson, "Legislating About Relocating", pp. 229-235. The FLA also has spawned a confusing case law about interim orders. And there are different best interests factors in the B.C. FLA.

Thus, if both statutes are pleaded, paramountcy and/or clarity means that the *Divorce Act* will apply.

This view traces back to the B.C. Court or Appeal decision in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20.

It is a view that has prevailed in trial relocation decisions both before and after the divorce amendments: *T.K. v. R.J.H.A.,* 2013 BCSC 2112 (Verhoeven J.) at paras. 38-39, affirmed without mention, 2013 BCCA 8; *L.S. v. R.S.,* 2014 BCSC 1213 (Dickson J.) at para. 73; *S.Z. v. D.Z.,* 2015 BCSC 2157 (Voith J.) at paras. 70-80; *T.S.T. v. S.Z.T.,* 2020 BCSC 1628 (Matthews J.) at paras. 35-42; *C.E.N. v. B.K.N.,* 2021 BCSC 1264 (Ball J.) at para. 62; *A.J.L. v. J.G.L.,* 2021 BCSC 2429 (Hori J.) at paras. 22-36 (no conflict, but *Divorce Act* applied); and *Joseph v. Washington,* 2021 BCSC 2014 (Warren J.) at paras. 81, 93 (*Divorce Act* applied, but FLA provisions also used, confusingly); *K.C.M. v. S.J.S.,* 2023 BCSC 435 (Girn J.); *Den Duyf v. Den Duyf*, 2024 BCSC 2151 (Elwood J).

Recently, the Court of Appeal has reaffirmed the paramount use of the *Divorce Act*: *K.S.P. v. J.T.P.*, 2025 BCCA 112 (Iyer J.A.) at para. 117.

The complications of the different burdens of proof have been recognised in the B.C. government's Policy Intentions Paper (p. 2-3):

> The differences between the FLA and *Divorce Act* can lead to confusion and strategic maneuvering by parties to rely on one or the other statute depending on the desired outcome.

The Paper proposes to adopt the same burdens as in the *Divorce Act* and to "remove the requirement that an applicant seeking to relocate a child must establish that the relocation application is made in 'good faith'" (p. 2-4). These changes mean "cases with similar facts should have similar outcomes under either statute, which will increase certainty and improve the likelihood of settlement" (p. 2-3).

Q6: What is the difference between a "relocation" and a "change in place of residence"?

A. Different notice requirements, and the detailed relocation provisions do not apply to a "change in place of residence".

The definition of "relocation" in s. 2(1) DA means "a change in the place of residence of a child or [a parent] that is likely to have a significant impact on the child's relationship" with parents or others with contact. "Significant impact" is the test, not distance or boundaries whether municipal or provincial or national. A relocation requires the use of the more demanding form of notice prescribed by the regulations: s. 16.9(1), (2). A "relocation" then engages the new legal framework for decision, with its burdens and added factors.

If a move does not have a "significant impact", if it is not a "relocation", then it is just a "change in place of residence". A notice is still required if a child or parent makes this less significant move, but with no prescribed form, less detail and no clear legal consequences for non-compliance: s. 16.8.

There can be arguments about whether a move is a "relocation" or a "change in place of residence", but these are rare. A move was held to be "change in place of residence" in the leading decision in *D.D.T. v. T.A.J.,* 2022 SKCA 34, as it only involved 15 minutes more driving time and had little impact on the father's parenting time. Some helpful factors were identified by Schwann J.A. in para. 47 and the appeal court deferred to the findings of the judge granting the interim order. *D.D.T.* was applied carefully to find only a "change in place of residence" in *Hiebert v. Hiebert*, 2025 ONSC 6595 (Price J.) at paras. 83-118.

In *Apa v. Vagadia*, 2021 ONSC 5802, on an interim move motion, Justice LeMay held he could not determine whether the move by the mother from Mississauga to Cambridge amounted to a "relocation", when the father resided in Woodbridge and had not always exercised his parenting time, with those issues put over to a full hearing of the variation.

At para. 37, LeMay J. identified some factors to consider in distinguishing a "relocation" from a "change in place of residence".

For some other helpful cases on this issue, see *Power v. Power*, 2026 NSSC 70 (Ingersoll J.); *Falarz v. Gullusci*, 2023 ONSC 2644 ; *Van Os v. Van Os*, 2022 SKQB 161 (Brown J.); *S.C. v. J.C.*, 2022 ONSC 4146 (Jain J.); and *S.L.F. v. T.K.F.,* 2022 NBKB 235 (Hackett J).

Under the BC FLA, there have been a number of decisions holding that a move within the Lower Mainland was not a "relocation": see Thompson, "Legislating" at p. 228.

One last twist. When the family moved from Alberta to Bermuda where the mother had a three-year position and then the father moved back to Canada and they separated, the move *before* separation was NOT a relocation under the *Divorce Act* as the father argued, but a voluntary temporary move as an entire family: *Smith v. Smith*, 2026 ABCA 130.

Q7: If parents have had shared parenting arrangements for pre-school children in different locations, does the decision about where the child attends school and which parent will have primary care amount to a "relocation"?

A: Yes.

Where parents have had equal shared parenting for a pre-school child between two communities, the child starting school full time forces a decision which parent will have primary care. Is this a "relocation" case? Some judges have said no, focussing upon the parents. In my view, if we focus on the child, the child will now spend more time in one community, which will have a "significant impact" on the child's relationships and thus it will be a "relocation". So far, the latter view has prevailed and the relocation analysis has been applied: *T.M. v. T.W.*, 2026 ABKB 286 (Simard J.); *Amamio v. Fraser,* 2026 NSSC 53 (Doucet J.); *Gill v. Kaur*, 2024 BCSC 542 (Shergill J.); *Monahan v. Monahan*, 2024 ABKB 454 (Ho J.); *Fisher-Harris v. Harris*, 2024 ONSC 4610 (Gareau J.).

The burden on the relocating parent where there is a "substantially equal time" (SET) arrangement does not fit comfortably in this setting. In effect, both parents are seeking a "relocation". It would seem that *both* bearing the burden of proving the child's best interests would be appropriate. Where the only order is an interim order, a court may choose not to apply the SET burden and apply the "both" approach, as was true in *T.M. v. T.W*. Or one might think of *both* parents seeking a relocation to change the SET arrangement and thus both bearing a burden.

Q8: Have judges consistently applied the new framework, burdens and factors in the new relocation laws?

A. Generally, yes, but with pockets of confusion.

Some generalist judges have still applied *Gordon* or some mash-up of *Gordon* with the new amendments, in Quebec, Alberta and Ontario. Even specialist family law judges have done the same thing, in Saskatchewan and New Brunswick. Those who apply some version of *Gordon* skip over the burdens in the new laws and go straight to some mixture of best interests factors, especially in Quebec. *Barendregt* has made this worse, as it rejected burdens under the "common law" of relocation and mashed up *Gordon* with the divorce amendments.

Q9: How strictly have judges read the notice of relocation requirements?

A. Mostly practical, concerned about actual notice rather than form.

The divorce amendments not only impose a mandatory notice of relocation requirement, they also require that the forms prescribed by the regulations be used for the notice of relocation and the notice of objection: ss. 16.9(1) and 16.91(1): see Notice of Relocation Regulations, SOR/2020-249 for the prescribed forms. Some provincial mirror laws impose similar forms, but some don't (Nova Scotia and New Brunswick don't).

Many of the early reported cases were started before the amendments came into force and thus the notice provisions did not apply. In one egregious case, the mother moved without notice just before the amendments came into effect and the child's return was ordered: *Phillips v. Phillips*, 2021 ONSC 2480 (Kurz J.). In most jurisdictions, it takes long enough to get to a hearing that the filing of an application or motion will still give more than 60 days' notice.

For the most part, judges have taken a practical approach, less concerned about the proper forms and more focussed upon actual notice, often by letter, text or email. For some examples, see: *A.A.S. v. A.C.G.,* 2024 BCSC 1954 (Hughes A.J.)(informal notice); *M.A.B. v. J.A.B.,* 2023 BCSC 1276 (Hughes J.)(lack of proper notice, but father knew of move); *K.C.M. v. S.J.S*., 2023 BCSC 435 (Girn J.)(mother transparent, early texts and emails before "official" notice); *Imam v. Moonlilah*, 2023 ONSC 6264 (Vella J.)(didn't use CLRA form, but complied substantively in email); *Rioux v. McCutcheon*, 2022 ONCJ 246 (Oldham J.)(no formal notice, but details communicated).

Courts have also been understanding about timeliness issues: *Brown v. Harvie*, 2023 ONSC 6265 (Henderson J.)(notice provided, even if 2 weeks short); *Estrada-Solis v. Del Campo Quintero*, 2023 ONCJ 509 (Sager J.)(father 11 days short, father had to move); A.C. v. K.T., 2022 ONSC 2604 (Jain J.)(lack of notice due to mother's eviction).

For a helpful discussion of what constitutes sufficient notice, see Justice Sherr's discussion in *N.P. v. D.H*., 2022 ONCJ 535. In that case, despite the mother's deficient notice, the father filed his objection within time.

The failure to give timely notice can result in the relocation being allowed, but delayed: *N.F. v. S.G.,* 2023 ONSC 2644 (Charney J.).

On the ground, most parents are still unaware of their obligation to give notice of either a change of place of residence or a relocation. In most cases, it is only when the parent gets legal advice that a notice is given. Even then, a notice from the parent rather than the lawyer is often advised, to reduce the potential for conflict or "escalation".

There can be tricky issues around the notice of relocation, as demonstrated in *Keeping v. Keeping*, 2021 ABQB 892. There were texts back and forth about the mother's intended move to Moncton from Edmonton. The mother sent a registered letter to the father on July 12, 2021, but the father did not claim the letter and it was returned to the mother after 17 days. The mother knew the father was opposed to the relocation. The mother and the 11-year-old child eventually moved to Moncton on October 15, 2021. The father brought an emergency application seeking a return. Justice Leonard ruled that the mother had properly served the notice of relocation and, in the absence of a notice of objection or a court application by the father, the mother was free to relocate. The father was well aware of the contents of the latter, ruled the Court, but made "a conscious decision" not to respond. In these circumstances, under the amendments, the mother was not required to bring an application to court before moving. For a critical view of this decision, see Franks and Zalev, *This Week in Family Law*, 2022-05 (February 7, 2022), who thought the mother "lurked in the weeds". In my view, this was a defensible reading of the notice provisions, in a hard case where both parents "lurked", the father more than the mother.

A useful practical point was made in *Apa v. Vagadia*, 2022 ONSC 5802, that a relocating parent may be understandably unable to specify an address in the notice of relocation 60 days before the proposed move.

In two cases, the court noted the failure to give notice, but allowed the relocation, with the intention to address that failure by way of costs*: J.M.P. v. C.J.N.,* 2022 SKQB 170 (Brown J.); *Wright v. MacInnis*, 2023 NSSC 82 (Forgeron J.).

Q10: What if the left-behind parent consents or acquiesces to the relocation, then changes their mind?

A. The relocating parent's lack of notice will be understandable and the relocation will likely be allowed.

There is a sub-set of these cases, best described as "muddled moves". Interestingly, in all of them, the relocation was allowed. In these cases, the relocating parent doesn't give notice.

In some of these cases, the father consents to the mother's relocation, then reneges: *A.J. v. M.N.*, 2024 ONSC 4687 (MacPherson J.); *S.F. v. D.R.,* 2022 ONSC 2079 (Fregeau J.); *Fawcett v. Slyfield*, 2021 ONCJ 459 (Paull J.).

If the relocating parent alleges consent or acquiescence, the burden is upon the relocating parent to prove it: *S.D. v. C.H.,* 2023 ONSC 3354 (Fryer J.).

In one case, the mother had left with the child to her parents' community, but was prepared to return, when the father abruptly ended their relationship, so she didn't return: *J.J. v. T.H.,* 2023 ONSC 3294 (Nieckarz J.). In another, the mother had taken a "time out" after separation with her parents and the father acquiesced when she didn't return: *Foster v. Singh*, 2023 ONSC 1493 (Fraser J.).

Q11: What if the left-behind parent fails to serve a notice of objection within 30 days, but files a late court application objecting to the relocation?

A. The relocating parent can't move on the designated date in the notice of relocation, but a late objection will weigh against the left-behind parent, especially if the relocating parent has taken steps to effect the relocation.

No one gets turned away from the courts for failure to deliver a notice of objection or for a late objection to the move. A father failed to provide an objection, but his position had been clear all along: *T.L. v. R.A.C.,* 2024 ABKB 366 (Marion J.). The relocation was allowed.

In *R.R. v. S.L.R.,* 2023 ONSC 5498 (MacPherson J.), the father objected late, by which time the mother had many of the arrangements to move. She was allowed to move.

In my view, once the left-behind parent delivers a notice or files a court application after the 30 days, but before the date of relocation specified in the notice, the relocating parent is not free to move on the specified date.

For an example of a father's failure to make timely objection, apart from a bare plea in his response, followed by leading no evidence at the hearing, see *G.N.S.A. v. L.A.R.,* 2022 BCSC 1014 (Majawa J.).

Q12: What about waiver of notice of relocation?

A. Waiver in advance was granted in one prominent reported case of family violence. Where there is family violence, courts have also granted waivers of notice afterwards.

In a case of coercive and controlling family violence, *A.J.K. v. J.P.B.,* 2022 MBQB 43, Justice Dunlop granted a without notice application by the mother to relocate with the two young children. Notice of relocation to the father was waived, an order was made to seal the file and to exclude the public from the hearing, and the court ordered a delay before the father was served with the relocation order, to allow the relocation to take place first. It was a strong set of facts, with successive protection orders.

Where there is proof of family violence, courts have waived notice *after* the fact: *N.F. v. J.F.*, 2024 NSSC 29 (MacLeod-Archer J.); *Johnston v. Da Silva*, 2023 ONSC 2710)(Jain

J.); *P.M.Z. v. D.J.T.,* 2023 BCSC 1444 (Forth J.); *C.L.T. v. D.T.T.,* 2022 NBKB 239 (Delaquis J.); *McIntyre v. Tucker*, 2022 ONSC 5958 (Shelston J.).

In two other cases, where the moving parent had failed to give notice and the parent then sought a waiver of notice at the subsequent hearing, both were denied: *Credland v. Cymbalisty,* 2022 ONSC 433 (Monahan J.) and *Arabi v. Al Sahnawi,* 2021 ONSC 6124 (Coats J.). Family violence was not the basis for no notice in either case.

Q13: Have the courts had any difficulties interpreting "substantially equal time" or "vast majority of their time" in allocating the burden of proof?

A. No. There is a clear consensus already: "substantially equal time" means 40 to 50 per cent of time, and "vast majority" means 80 per cent or more of time, provided neither percentage is applied rigidly.

So far, courts have had little difficulty sorting out the parenting time arrangements as a preliminary issue, apart from the interim order issue discussed below.

The terms "substantially equal time" and "vast majority" of time are not defined in the statutes, so it was left to the courts. Fortunately, the courts have found an early consensus on the meaning of these terms. The measure is clear: it's a quantitative measure of parenting time. But what percentage? Parental "time" is actually a proxy for parental "care".

First, "substantially equal". The B.C. case law under their 2013 *Family Law Act* had used the 40 per cent threshold from the *Child Support Guidelines*, not as "a cut-off figure", but as "a rough guide" to "substantially equal parenting time": see *D.A.M. v. E.G.M.,* 2014 BCSC 2091 (Butler J.); Thompson, "Legislating", pp. 233-235 and 240-241.

That same flexible approach has been seen under the new laws. In most cases, the parenting time is equal, so no dispute. For a helpful review of the early case law on "substantially equal time", see *Malanowich v. Toth,* 2021 SKQB 249. Justice Brown found the father's time had been 33% in 2019, 40% in 2020 and 43% in 2020, for an average of 38.66% over the three years and rising over time, qualifying as "substantially equal". In another case, the father's 36% of time was held insufficient: *Rinetti v. Kent,* 2022 ABQB 1 (Hall J.) at para. 20. See also *Reid-Taylor v. Vecchio*, 2023 ONSC 7159 (Lemon J.)(43%) and *Tatarin v. Tatarin*, 2022 ABQB 305 (Arcand-Kootenay J.)(45%). There will be occasional errors, like *D.D.F. v. I.J.,* 2025 NBKB 241 at par. 105 (43% not "substantially equal").

This burden reflects an assumption that both shared-time parents will have performed the full range of care-giving tasks and ordinary decision-making, such that a child that does not relocate can have the benefit of continuity of community *and* continuity of care. Hence, the presumption *against* the relocation in the best interests analysis.

Second, "vast majority". Prior to the amendments taking effect, I expressed some concern about how "vast majority" might be interpreted, although I did suggest it was likely to be 80 per cent, based upon canvassing legal audiences: Thompson, "Legislating", pp. 241-243. That has proven to be the consensus threshold so far.

One of the early, and oft-quoted, decisions on this threshold is *Rinetti v. Kent,* 2022 ABQB 1 (Hall J.) at paras. 20-21. Others are *Credland v. Cymbalisty*, 2022 ONSC 433 (Monahan J.) at paras. 176-180; *Ting v. Ting*, 2022 ABQB 229 (Harris J.) at para. 238; and *M.J.V. v. J.R.,* 2022 BCSC 1068 (Gomery J.) at para. 34.

One of the leading decisions now is *Shipton v. Shipton*, 2024 ONCA 624, where the mother had 77.4% of the parenting time and should have had the benefit of the "vast majority" presumption (paras. 70-73). Justice Coroza also noted, at para. 73: "There is no suggestion in the legislation that anything other than actual time spent by the parent with the child is to be considered." The father's possible future increase in time was not relevant to the assessment.

Again, the underlying premise is that the parent with the "vast majority of the time" is the predominant primary caregiver of the child, whose presence and care is critical to the child's well-being. Hence the general presumption *in favour of* the relocation. See *Angelillo v. Mughal*, 2025 ONCA 769 at para. 17.

Keep in mind that the burdens of proof apply at the two ends of the parenting time spectrum, 40-60 per cent for "substantially equal time" and 80-100 per cent for "vast majority". An "in-between" case can fall in between 60 and 80 per cent of the time, for which *both* parties bear the burden.

The adjustment for many issues can be found in one of the relocation-specific factors, s. 16.92(1)(c): "the amount of time spent with the child by each [parent] and the level of involvement in the child's life of each [parent]": see Thompson, "Legislating", pp. 242-243, 248. A parent may have "time", but not "involvement", as was true in *Sidiqi v. Ahmadzai,* 2022 ONSC 3832 (Engelking J.)(child spends most of father's equal time with paternal grandmother and paternal aunt).

What about shifting parenting arrangements? In *Zorab v, Zourob*, 2021 ONSC 6552, Tobin J. noted that there is no guidance in the new laws about what period of time is to be used in assessing parenting arrangements for burden purposes. There the mother had had the vast majority of the time, but had been out of the country more recently, such that the "both burdens" residual provision applied. To similar effect, see *J.M. v. P.T.*, 2024 ABKB 349 (Thompson J.).

Q14: What has been the impact of these two burdens upon the outcomes in relocation cases?

A. The pattern of outcomes reflect the burdens and the policies underlying the burdens: relatively easy for "vast majority" parents (or "dominant primary caregivers") to relocate, and quite hard for "substantially equal parents" to relocate.

In the first five years of reported cases under the new laws, both federal and provincial, the over-all approval rate for relocations is **54 per cent**, higher than the usual 50 per cent rate that had prevailed after *Gordon* for over 20 years. Hard to say yet whether that heightened "yes" rate reflects a shift or not. Since 2021, the approval rate has slowly dropped from 60 per cent, down to the current 55 per cent.

In those cases where the burdens of proof have been engaged, the expected results occurred: in 51 of 60 (85%) "vast majority" (VM) cases, relocation was allowed, but in "substantially equal time" (SET) cases only 13 of 54 (24%) of moves were allowed.

The "no" decisions in "vast majority" (VM) cases were not surprising. Three "vast majority" cases were poorly-planned moves: *Tass v. Jackson,* 2023 ONSC 6564 (Chang J.); *Al Kowatli v. Berrwin,* 2021 ONSC 4999 (Mills J.); and *Young v. Peters*, 2022 ONSC 6869 (Labrosse J.)(also a unilateral move). Another was a "vast majority" father who had been violent: *E.B. v. G.B.,* 2024 ONSC 3475 (MacPherson J.). One VM mother had attempted to minimise the father's role: *Droit de la famille – 241213*, 2024 QCCS 2968 (Ouellet J.). In another Quebec case, there had been a longer period of equal shared time before the more recent "vast majority" by the mother: *Droit de la famille – 241157*, 2024 QCCS 2791 (Desfossés J.). In *Littler v. Fowler*, 2025 ONCJ 496 (Oldham J.), it was an interim move and the mother had previously failed to return the child from New Brunswick.In *M.J.B. v. K.J.M.*, 2025 ABKB 134 (Malik J.), the mother had made many unfounded allegations against the father to restrict his time. Last is Kendall v. Weagle, 2025 NSCA 48, affirming 2024 NSSC 220 (Ingersoll J.), discussed under appeals in question 15 below.

The "SET" moves allowed were also unusual cases. In *Botten v. Dupuis*, 2024 BCCA 284, the courts upheld an arbitrator. In *Sidiqi v. Ahmadzai,* 2022 ONSC 3832 (Engelking J.), the child's equal time with the father was mostly spent with the paternal grandmother and paternal aunt. In two cases there appeared to be an unspoken assumption that the other equal-time parent would move too: *N.F. v. S.G.*, 2023 ONSC 2644 (Charney J.); and *S.R. v. C.S.S.,* 2023 NBKB 222 (Godbout J.). In *Droit de la famille – 231970*, 2023 QCCS 4405 (Charrette J.), the mother from Saskatchewan was isolated, had little French and couldn't work as a teacher. In two Nova Scotia cases, Justice Forgeron allowed moves by mothers: *Westlake v. Morton*, 2024 NSSC 144 (both teens wanted to move); and *Wright v. MacInnis*, 2023 NSSC 82 (mother primary care before recent equal time). In A.L.K. v. K.W.S., 2023 ABKB 419 (Nielson J.), the Armed Forces father was posted to Kingston and the older child wanted to go. In *Brohart v. Brohart*, 2025 ONSC 1521 (Engelking J.), the mother had been allowed to move, surprisingly, at the interim stage, making it difficult to reverse at the final stage. In *Power v. Power*, 2026 NSSC 70 (Ingersoll J.), the mother's primary care had evolved into shared parenting, the father was coercive

and controlling, and it was a short distance move from one side of urban Halifax to the other.

There will be discussion below about the “both burdens” and “interim moves” cases.

Q15: Are there any helpful appeal decisions so far on these two burdens?

A. Two excellent Ontario decisions, some confusing decisions from Alberta and Quebec, plus a few others from elsewhere.

Ontario

In *Shipton v. Shipton*, 2024 ONCA 624 (Coroza J.A.), the Court of Appeal rejected the trial judge’s characterisation that the objecting parent’s role had to be “insignificant” for the “vast majority” burden to apply. It was accepted that the mother had the child for 77.4% of the parenting time and the Court agreed that the mother should have had the benefit of the presumption in favour of relocation (paras. 70-74). The trial judge had made a multitude of errors in rejecting the mother’s request to relocate with the 3-year-old child and the matter was remitted for a new trial. Note that the Court of Appeal did not rigidly apply an 80% threshold for “vast majority”.

On the retrial, Justice Sah allowed the relocation by the mother, after noting that the “substantially equal” shared parenting arrangement had continued after the first trial decision and thus the burden was now on the mother, which she met: 2025 ONSC 3219 at paras. 28-39.

Even more helpful on burdens is *Angelillo v. Mughal*, 2025 ONCA 769. The trial judge had refused the primary are father’s request to relocate to Montreal. The father’s appeal was allowed and a new trial ordered on an expedited basis, because of the judge’s errors on the burden of proof. The judge stated that the burden was on the mother, due to the father’s “vast majority” of the time, but then failed to apply that burden according to the Court of Appeal:

> 19 Having determined that the s. 16.93(2) presumption applies, the trial judge was required to do more than simply identify a flaw in the relocating parent's plan and then default to the status quo. This was particularly true here, where the trial judge accepted that Mr. Angelillo had bona fide reasons supporting his plan to relocate. Rather than apply the s. 16.93(2) presumption, the trial judge, in effect, applied a straightforward "best interests" analysis as if s. 16.93(3) applied, placing an equal burden of proof on both parties to show whether relocation would be in the best interests of the child.

But for this legal error, ruled the Court, “the trial judge could have reached a different conclusion regarding Mr. Angelillo's relocation request, which requires this court to set it aside.” (para. 20).

Alberta

The Alberta Court of Appeal weighed in on burdens in *Nurmi v. Nurmi*, 2023 ABCA 123. In that case, the burden of proof should have been determinative, said the Court. The mother was the "clear primary caregiver", with the "vast majority" of the time, so that the burden was on the father. The mother's plan for her move to Bulgaria was "vague", but the Alberta father offered no plan at all. In these circumstances, the trial judge was wrong to refuse the relocation, as the burden was on the father. So far, so good.

However, in its brief reasons, the Court was clearly wrong to characterise the statutory burdens as only playing an important role at the end of the case when the options are evenly balanced (para. 9). This is one of the impacts of the burdens, but the burdens also serve to allocate the burden of proof at the outset of cases. The Court of Appeal drew from *Barendregt* to emphasise the individual nature of the best interests analysis.

In turn, the Court of Appeal relied on *Nurmi* in *Naim v. Zawiwi*, 2025 ABCA 388. Affirming 2025 ABKB 382 (Oviatt J.). The mother was allowed to move with the two children to Surrey B.C., upheld on appeal. The Court properly observed that the burden of proof should be addressed before reviewing the best interests factors (para. 37), but then cited *Nurmi* to downplay the importance of burdens in the best interests analysis (para. 42). The trial judge did spend some time on burdens, noting that the mother satisfied the "vast majority" requirement with 80% of the parenting time, but then didn't apply that burden under s. 16.94 as the previous orders from 2023 were interim in nature (paras. 87-96). The burden was thus left on "both", despite the mother's primary care since a 2021 separation agreement followed by interim orders. *Naim* is an example of the too-ready non-application of the burdens.

Quebec

The Quebec Court of Appeal appeared to accept the thresholds of 40% and 80% of parenting time, reflecting the distinctive Quebec Child Support Guidelines: *Droit de la famille – 23190,* 2023 QCCA 207 at paras. 32-38. Remember that the Quebec Guidelines use a 40% threshold for "shared custody", readily transferable to "substantially equal" time ("essentiellement équivalentes"). Their Guidelines also provide a child support adjustment for "visiting and prolonged outing rights" of 20 to 40% of parenting time, hence the 80% threshold for Guidelines "sole custody" works for "vast majority" ("la très large majorité"). In this case, at trial, the father had conceded that the mother had the "vast majority" of the time, but the facts showed that the father had the child one-third of the time, so it was an error by the trial judge to place the burden upon the father. But it wasn't a determining error, as the mother was the child's primary caregiver and her relocation to France with the 4-year-old child was upheld on appeal.

Unfortunately, the Quebec Court of Appeal made less helpful comments here and there. For a start, Mainville J.A. cited *Barendregt* to emphasise the individuality of the best interests analysis for the trial judge, irrespective of burdens (para. 41), as did the Alberta Court of Appeal. The Court downplayed their significance for the parties, noting that the

burdens would have little impact upon the evidence offered by the parties, a *non sequitur* (para. 40). Even more confusing, after discussing "vast majority", the Court tossed out these comments at paras. 36 and 37:

> In this type of situation, the parent who has only a sporadic or unimportant relationship with the child could not prevent the relocation by the other parent except in rare circumstances.
>
> It is only in those cases where the parent who contests the relocation has only a sporadic or unimportant relationship with the child that they assume the burden of proving that the relocation is not in the interests of the child. [Author's translation]

Note that these remarks were made in an appeal where the father had the child with him for 33% of the time. But some lower courts have latched on to these phrases in their analysis of burdens, e.g. *Droit de la famille – 241204,* 2024 QCCS 2959 (Vaillancourt J.) at para. 69 (mother there had 32% of time) or *Droit de la famille – 231099*, 2023 QCCS 2687 (Narang J.) at para. 27 (would not calculate percentage, yet father seemed to have 22% of time).

The "sporadic" remark was repeated by the Court of Appeal in a *Civil Code* relocation case, *Droit de la famille – 26662*, 2026 QCCA 665. Technically, the burdens might not apply in the non-marital context, as the Court recognised, but the Court avoided the issue by maintaining its incorrect interpretation of "vast majority" (paras. 18-20).

This kind of language – "insignificant" or "sporadic" or "unimportant" was rejected by the Ontario Court of Appeal in *Shipton.* It does not reflect the "vast majority" (pun intended) of the trial-level case law across Canada.

Saskatchewan

I will leave aside for now the problematic treatment of family violence in both the Court of Appeal and at trial in *Friesen v. Friesen*, 2023 SKCA 60 (Tholl J.A.) (leave to SCC denied, [2023] S.C.C.A. No. 324). The mother was not allowed to relocate with the child to Alberta. Our focus here is on the burdens. On the facts, it is clear that the mother had the "vast majority" of the parenting time, as her counsel argued. At trial, however, Justice Megaw did not apply that burden, nor did he even consider the burdens in his relocation analysis: 2022 SKQB 83. Amazingly, the Court of Appeal glossed over this gap, in para. 102, and then compounded the problem by holding that the trial judge had found the parties had not "substantially complied" with the terms of the agreement and divorce judgment. True, the trial judge had been critical of the mother for not providing "additional time" to the father over time, but that was not discussed in the context of the burden analysis. In fact, the trial judge had criticised the mother for her strict compliance with the terms of the agreement and judgment. At no point did either the trial judge or the Court of Appeal address the "vast majority" burden issue. At the end of his appeal reasons, Justice Tholl did discuss the double-bind issue and the use of conditional orders, a topic to which I will turn later.

A recent decision of the Court addressed the "substantial compliance" element of the burdens: *D.S. v. K.C.*, 2026 SKCA 30 (Tholl J.A.). The father DS had succeeded in opposing the mother's relocation to Alberta in 2021, with primary care since then: 2022 SKCA 88. But then the father himself relocated to a different community in Alberta for employment. He tried to argue it was just a "change in residence" and not a "relocation" because he was moving closer to the mother, but that view was rejected after a careful analysis (paras. 19-28). The trial judge was held to have misinterpreted s. 16(4) of the *Children's Law Act* (equivalent to s. 16.94 *Divorce Act*), an important point:

> 32 I agree that the Chambers judge erred when he stated that s. 16(4) of the CLA permits a judge to not apply s. 16 on interim applications. The reference in s. 16(4) to an *interim order* is an explicit reference to an existing order, not the new interim order that is being sought on application. Section 16(4) does not provide authority to decline to apply the remainder of s. 16 to an application for an interim order. It provides discretion to not apply the provisions when the *underlying order* that a party seeks to vary on an interim basis is itself an interim order: see *T.K. v C.E.*, 2021 SKCA 138 at paras 25-33 [*T.K.].* Here, K.C. was applying to vary a final order. (emphasis in original)

But the appeal court found a different basis for not placing the burden on the mother KC. By his relocation of the child to Alberta, the father was no longer substantially complying with the final order, which required the child to live in a specified community in Saskatchewan as an integral part of the order. Substantial compliance can mean more than just the parenting time provisions of the order: para. 33. Thus, the burden was not upon the mother, but upon *both* under the residual provision. Primary care was changed to the mother.

Nova Scotia

The burdens arose in the second appeal go-round of *Kendall v. Weagle*, 2025 NSCA 48, affirming 2024 NSSC 220 (Ingersoll J.), a retrial following upon the first appeal, *Weagle v. Kendall*, 2023 NSCA 47 (Beaton J.A.), reversing 2022 NSSC 383. The first trial had allowed the mother to relocate to Ottawa with the child, but after the appeal the mother was required to return the child to Nova Scotia. The mother returned too and her primary care continued until the retrial, but she intended to return to Ottawa regardless of the relocation decision. Justice Ingersoll at trial conducted a careful review (at paras. 11-36) to conclude that the mother had the "vast majority" of the time (84%) and thus the father bore the burden of proof under ss. 18H(1A)(b) and (d) of the *Parenting and Support Act*. There was both the 2023 Court of Appeal order and a longer "tacit and informal arrangement" for the mother's primary care.

A helpful practical point was made by the Court of Appeal. The mother argued that the trial judge had shifted the burden of proof to her in his analysis of her evidence. The appeal court properly noted that Ingersoll J. had explicitly stated the correct burden at the start of his reasons and again at the end (para. 24). The mother had put forward

substantial evidence on the retrial and the trial judge assessed that evidence in determining best interests:

> 26 The hearing judge's impugned comments were simply a function of assessing the evidence and arguments that had been placed before him by the appellant (and the respondent). It is clear from his reasons, that he did not view the appellant's evidence in the manner she wished. The hearing judge did not agree the child's needs, as argued by the appellant, would be better met in Ottawa. That, however, is not indicative he reversed the burden of proof to her.

Q16: What is the meaning of "substantially comply" with an order, arbitral award or agreement in the burden of proof provisions?

A. The concern is that the parenting time on the ground reflects what is documented in the order, arbitral award or agreement, NOT whether a parent has contemptuously or otherwise denied parenting time.

The leading case that provides this correct interpretation of "substantially comply" is *K.D.H. v. B.T.H.,* 2021 ABQB 548 (Lema J.). There the father argued that the mother's denials of parenting time, her failure to "substantially comply", meant that she could not claim the benefit of the "vast majority" presumption, an argument rejected by Justice Lema in careful reasons. The holding in *K.D.H.* was nicely summarised by Justice Marion in *T.L. v. R.A.C.*, 2024 ABKB 366 at para. 60: "As long as the *de facto* parenting 'on the ground' more-or-less squares with the order or agreement, there is substantial compliance for the purposes of s. 16.93(1))."

The Saskatchewan Court of Appeal added another aspect in *D.S. v. K.C.*, 2026 SKCA 30. Substantial compliance can mean more than just the parenting time provisions of the order: para. 33. By his relocation of the child to Alberta, the primary care father was no longer substantially complying with the final order, which required the child to live in a specified community in Saskatchewan as an integral part of the order. Thus, the burden was not upon the mother, but upon *both* under the residual provision.

For an example of a careful assessment of the mother's alleged substantial non-compliance, see *M.M.S. v. L.B*, 2026 MBKB 67 (Abel J.) at paras. 32-38, where the court found the mother had in fact complied with the virtual and in-person time provisions, including a term providing for parenting time where the parents could agree and agreement had not been reached. Contrast the erroneous approach in *M.B. v. K.V.*, 2026 BCSC 590 (Milman J.), where the vast majority mother was held to have not substantially complied where the order also vaguely stated the parties "will work towards a shared 50/50 parenting arrangement" (para. 18).

Obvious perhaps, but worth noting, a parent cannot overhold the child, contrary to the equal parenting time in the court order, and then argue that he doesn't have to meet the "substantially equal time" burden when he seeks to relocate: *Williams v. Power*, 2022

NSSC 156 (Chiasson J.). The father was actually found in contempt in that case for the overholding. Equally, a parent can't by self-help obtain the "vast majority" of the time: *McLaughlin v. Yusuf*, 2022 ONCJ 593 (O'Connell J.). See also *N.P. v. D.H.,* 2022 ONCJ 535 (Sherr J.) and *V.S. v. F.F.,* 2021 ONCJ 588 (Clay J.).

Q17: Does an "agreement" in "order, arbitral award or agreement" have to be in writing or can it be oral?

A. Courts have been prepared to recognize oral or *de facto* agreements, even oral agreements modifying written orders or agreements.

The Department of Justice took the view that "agreement" in the divorce amendments means a written agreement, but that is a difficult position to sustain in the absence of the word "written" in the statute: Thompson, "Legislating", p. 230. It is now clear that the DOJ position has not been accepted by the courts, and rightly so.

To date, courts have been quick to include oral or *de facto* "agreements" in assessing burdens of proof, for good practical reasons: *Tariq v. Khan*, 2022 ONSC 1167 at paras. 71-77. As Justice Ricchetti put it in *Tariq* at para. 74:

> It makes no sense that, where there has been a *de facto* agreement that a child spends the vast majority of their parenting time in the care of one parent, even if existing for years, that parent would not benefit from the reverse onus in this subsection.

A similar view was taken by Lema J in *K.D.H. v. B.T.H.,* 2021 ABQB 548, where the mother had the vast majority of the time under an "informal" agreement which was eventually confirmed in an interim without prejudice order.

An excellent review of this issue by Justice Marion can be found in *Lemay v. Lemay*, 2023 ABKB 303 at paras. 56-66. It was a complex case, with an oral agreement, a written settlement agreement and a divorce judgment. *De facto* agreements were found in *N.F. v. S.G*., 2023 ONSC 2644 (Charney J.) and *N.F. v. J.F*., 2024 NSSC 29 (MacLeod-Archer J.).

A striking example of the courts' willingness to reflect oral agreements would be *M.J.V. v. J.R.,* 2022 BCSC 1068, where Justice Gomery gave weight to the agreed-upon split custody arrangement, which effectively varied an equal parenting time order, so that the father was allowed to move with the son who spent the "vast majority" of his time with the relocating father.

In *Rygiel v. Mathes*, 2024 ONSC 33, Justice Brownstone relied on the parties' *de facto* agreement to reject both the formal statement of equal shared parenting and the mother's claim of vast majority, finding the father to spend 30% of the parenting time.

On the other hand, there were two cases where courts found no burdens, despite parenting arrangements of some standing that never became orders or written agreements: *Springstead v. Springstead,* 2022 ONSC 1906 (M. Smith J.); and *Waite v. Waite*, 2021 PESC 12 (Campbell J.). These cases should now be treated as outliers.

Sometimes oral or *de facto* agreements have been overlooked, as occurred in *J.M. v. J.C.,* 2025 NBKB 197 (Doucet J.) at para. 155, where the parties separated, the father moved away and then a series of interim orders left primary care with the mother and the trial occurred five years after separation.

To exclude oral and *de facto* agreements from the provincial relocation laws is particularly problematic, as many poor or young or disadvantaged parents do not put their parenting arrangements into proper legal form, but just live their lives. The *Divorce Act* deals with married parents, those more likely to formalize their arrangements. Provincial family law statutes apply to a far more complex constellation of "parents" – married parents separating but not divorcing, common-law couples, unmarried parents who never or only briefly lived together, and a variety of individuals who stand in the place of parents.

The Nova Scotia mirror amendments recognize this problem, by giving presumptive force, not just to an order or agreement, but also to "an informal or tacit arrangement between the parties in relation to the care of the child establishing a pattern or care": s. 18H(1A)(c) and (d) of the *Parenting and Support Act*, R.S.N.S. 1989, c. 160. The N.S. mirror amendments were S.N.S. 2021, c. 15.

Q18: If there is no "order, arbitral award or agreement" or if the parties are not "substantially complying" with the order, award or agreement, what relocation provisions do or don't apply?

A. Both parties bear the burden of proof and all the other relocation provisions apply. There is just no burden or presumption at work.

These threshold requirements only apply to allocate the burdens under s. 16.93(1) or (2) of the *Divorce Act*. Note the broad language of s. 16.93(3): "*In any other case*, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child." (emphasis added) That preliminary phrase makes clear that both/no burdens are the residual situation, where neither of the first two burdens apply.

For an excellent example of two parents not complying with the court orders, due to the primary caregiving mother having to leave the country, see *Zorab v. Zourab,* 2022 ONSC 6552, where Tobin J. found both parties to bear the burden, but allowed the mother's move.

Q19: When have courts found that *both* parties bear the burden of proof?

A. Most have been interim orders, where courts opted not to apply the burdens. Some were "in-between" cases, where neither of the other burdens applied to the parenting arrangements. Some were cases of no order or agreement. A surprising number of cases just ignored or didn't refer to the burdens.

Under s. 16.94 of the *Divorce Act*, a court may decide not to apply the burdens in s. 16.93(1) or (2) if the order referred to is an interim order. Turns out, that's a large chunk of the cases (47 of 113) where courts determine that *both* parties bear the burden of proof or, more concretely, *no* party has a burden of proof. These cases will be discussed below.

Remember that s. 16.93(3) is a residual category. Apart from interim orders, the "both burdens" category is a real mixed bag of cases. In 12 cases, there was no order or agreement. In another 18 cases, the court just skipped over the burden issue or didn't mention this step, moving right into the best interests factors. In 6 cases, courts found that the parents had not "substantially complied" with the terms of their order or agreement.

There were 19 "in-between" cases, cases where parenting time fell between "substantially equal" and "vast majority". In some cases, the court actually calculated the father's parenting time: *T.L. v. R.A.C.,* 2024 ABKB 366 (29%); *Van Os v. Van Os,* 2022 SKKB 161 (30-32%); *Rygiel v. Mathies*, 2024 ONSC 33 (26%); *S.V. v. R.V.,* 2022 ONSC 4850 (20-25%); *Droit de la famille – 23190*, 2023 QCCA 207 (33%); *Droit de la famille – 241204*, 2024 QCCS 2959 (32%); *Droit de la famille – 211767*, 2021 QCCS 3897 (28%); *Droit de la famille – 211795,* 2021 QCCS 3938 (37.5%); and *McCluskey v. Tobin,* 2023 NSSC 404 (35%); *Ting v. Ting,* 2022 ABQB 229 (31%). In two other Quebec cases, the father had more weekend time than usual: *Droit de la famille – 211777,* 2021 QCCS 4044 (2 weekends of 3); and *Droit de la famille – 211767,* 2021 QCCS 3897 (every weekend). In another case, there were no specifics as to time, but the court "ballparked" it: *Rinetti v. Kent,* 2022 ABQB 1 (not SET, but not VM).

There were 4 cases where the non-vast-majority parent was seeking to relocate the child, discussed in the next question.

When there are shifting parenting arrangements before trial, then the case can wind up in the residual "no burden/both" category: *Zorab v. Zourab,* 2021 ONSC 6552 (Tobin J.); *V.C. v. B.H.*, 2021 ABQB 575 (Jones J.); and *E.M. v. J.M.,* 2025 ABKB 263 (Parker J.).

Q20: What burden should apply when the non-vast-majority parent seeks to relocate with the child?

A: The statutes say BOTH parents bear the burden, but that seems wrong.

If a relocating parent does not have the "vast majority" of the parenting time nor do they have "substantially equal" time, then the residual category of s. 16.93(3) of the *Divorce*

Act directs that BOTH parents bear the burden of proof of the child's best interests in a relocation case, i.e. there is no presumption one way or another.

Courts have correctly applied this residual burden in these cases, with some misgivings: *K.A.L. v. J.H.B.,* 2026 NBKB 110 (Richard J.)(no); *J.M. v. J.C*., 2025 NBKB 197 (Doucet J.)(no); and *Marchand v. King*, 2025 NSSC 172 (Marche J.)(no, mother vs. paternal grandparents). In *Droit de la famille – 22579*, 2022 QCCS 1458, despite the father's apparent vast majority of the time, Barin J. nonetheless used shifting parenting arrangements and s. 16.93(1) to put the burden on the relocating mother.

There is plainly a flaw in the burdens of s. 16.93. If the parents share "substantially equal" time, then s. 16.93(1) says the relocating parent bears the burden. One would think, logically, that a non-vast-majority parent seeking to relocate the child away from the "vast majority" parent should bear the burden of proof that it IS in the child's best interests to allow the move, consistent with the policy of the statute.

Q21: In what circumstances have the burdens of proof been applied to interim orders?

A. Inconsistent so far, with too many cases where courts have been too quick to not apply the burdens. Courts have been prepared to apply the burdens to long-standing parenting arrangements reflected in interim orders.

To date, the courts have not been quick to apply the SET and VM burdens to interim orders, even when it would be appropriate. At times, the courts have appeared to use interim orders as an "out" from those burdens, either because of the anti-burdens hangover from *Gordon* or with one judicial eye on the desired outcome.

Section 16.94 starts from the premise that a court *will* apply the SET and VM burdens, but a court "may decide not to apply" them if the order is an interim order. The case law suggests the contrary, with courts seemingly starting from the assumption that the two burdens do not apply. There is very little analysis of the prior interim orders in these cases, or of the parenting arrangements that predate the interim orders. Few courts appear to be alive to the presence of oral or informal parenting agreements, which can engage the two burdens.

One serious misunderstanding should be cleared away immediately. In *Louafi v. Schneider*, 2025 ONSC 3687, Justice Kraft read s. 16.94 as providing that the two burdens may not be applied "if the order being sought is an interim order" (para. 62). That is plainly wrong, but has been repeated: *W.S. v. P.A.*, 2026 ONSC 27 (Leach J.) at para. 26. In *Louafi*, the error might have made less of a difference, as the underlying orders and agreements there were interim in nature.

The correct reading is found in *D.S. v. K.C.,* 2026 SKCA 30, where the same mistake was made in interpreting the *Children's Law Act* version of s. 16.94 and Justice Tholl ruled:

> 32 I agree that the Chambers judge erred when he stated that s. 16(4) of the CLA permits a judge to not apply s. 16 on interim applications. The reference in s. 16(4) to an *interim order* is an explicit reference to an existing order, not the new interim order that is being sought on application. Section 16(4) does not provide authority to decline to apply the remainder of s. 16 to an application for an interim order. It provides discretion to not apply the provisions when the *underlying order* that a party seeks to vary on an interim basis is itself an interim order: see *T.K. v C.E.*, 2021 SKCA 138 at paras 25-33 [*T.K.*]. Here, K.C. was applying to vary a final order.

The use of s. 16.94 to not apply the SET and VM burdens where the prior order was an interim order does have an impact. These cases then fall into the residual category of s. 16.93(3) and "both" bear the burden. In "substantially equal" case, this means the relocating parent no longer bears the burden. In "vast majority" cases, the objecting parent no longer bears the burden. Not surprisingly, the case law shows more SET parents allowed to relocate and fewer VM parents. Burdens matter.

Some of those interim orders were truly makeshift orders pending trial, with no established parenting pattern. Other interim orders, however, reflected longer-standing arrangements or had been in place much longer.

In *Doroteo v. Neudorf*, 2024 ABKB 764 at para. 81 Justice Poelman noted the prevalence of interim orders and offered this helpful advice:

> …in my view, courts should not too readily avoid the statutory burdens of proof merely because an order is interim; that would make section 16.93 inapplicable in a high percentage of cases. The factual context should inform whether the presumptive burdens should be applied.

Q22: What burden of proof has been applied to interim relocations?

A. The pre-existing law had been applied to place a demanding burden of proof upon the parent seeking to relocate before trial or hearing. Until *Diallo v. Bah*, an ill-considered May 2025 decision from the Ontario Divisional Court that has confused the law in Ontario. The rest of Canada should ignore *Diallo*.

The interim relocation cases are mostly found in Ontario, 66 out of 91 Canadian cases. In Ontario, interim or temporary moves make up almost half of the reported relocation cases. The rest of the interim moves are scattered across Canada: B.C. 7, Saskatchewan 5, New Brunswick 7, Nova Scotia 3, Newfoundland and Labrador 2 and 1 in Quebec. The success rates in Ontario are only marginally higher (47%) than in the rest of the country (45%).

The law in Ontario changed after the May 2025 decision of the Ontario Divisional Court in *Diallo v. Bah*, 2025 ONSC 2106 (Sachs J.). The Court eventually upheld the motion judge's decision allowing the mother's interim move to Winnipeg, but ruled that *Plumley*

had been “overtaken” by the 2021 divorce amendments. The Court did not provide an alternative test for an interim relocation, other than just “best interests”. See my Law360 article: “Ontario Divisional Court confused relocation law” (June 27, 2025).

The implications of that decision in Ontario and the subsequent Ontario case law are discussed in the next question.

My advice for courts in the rest of Canada? *Plumley* is a sound decision. Just because the Ontario Divisional Court got it wrong, doesn’t mean the rest of us have to run off the cliff behind them. At the end of this question, I’ll address a couple of Nova Scotia cases after *Diallo*.

The new relocation laws are silent about the burden of proof in such cases, and most courts had ruled that the new laws therefore did not change the demanding burden of proof for any relocation before trial or hearing. Frequently cited is the test from *Plumley v. Plumley*, 1999 CanLII 13990 (Ont.S.C.) – over 180 times in Ontario and over 40 times in the rest of Canada in every province and territory exception Quebec and P.E.I.

For a modern restatement and slight expansion of the *Plumley* test, an excellent summary is found in the recent reasons of Justice Sherr in *P.I. v. R.O.,* 2021 ONCJ 463 at paras. 33-34:

> 33 The leading case for determining if a relocation should be permitted on a temporary motion is *Plumley v. Plumley*, [1999] O.J. No. 3234 (S.C.J.), where the court set out the following principles:
>
> a) A court will be more reluctant to upset the status quo on an interim motion and permit the move when there is a genuine issue for trial.
>
> b) There can be compelling circumstances which might dictate that a justice ought to allow the move. For example, the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial of the best interests of the children or the best interests of the children might dictate that they commence school at a new location.
>
> c) Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong possibility that the custodial parent's position will prevail at trial.
>
> 34 The following are additional principles regarding temporary relocation cases:
>
> a) The burden is on the parent seeking the change to prove compelling circumstances exist that are sufficient to justify the move. See: *Mackenzie v. Newby*, [2013] O.J. No. 4613 (OCJ).
>
> b) Courts are generally reluctant to permit relocation on a temporary basis. The decision will often have a strong influence on the final outcome of the case, particularly if the order permits relocation. The reality is that courts do not like to

create disruptions in the lives of children by making an order that may have to cause further disruption later if the order has to be reversed. See: *Goodship v. McMaster*, [2003] O.J. No. 4255 (OCJ).

c) Courts will be more cautious about permitting a temporary relocation where there are material facts in dispute that would likely impact on the final outcome. See: *Fair v. Rutherford-Fair* ,2004 CarswellOnt 1705 (Ont. S.C.J.). In such cases, the court requires a full testing of the evidence. See: *Kennedy v. Hull,* [2005] ONCJ 275.

d) Courts will be even more cautious in permitting a temporary relocation when the proposed move involves a long distance. It is unlikely that the move will be permitted unless the court is certain that it will be the final result. See: *Boudreault v. Charles*, 2014 ONCJ 273.

e) Courts will permit temporary relocation where there is no genuine issue for trial (see: *Yousuf v. Shoaib*, [2007] O.J. No. 747 (OCJ)), or where the result would be inevitable after a trial (see*: Mackenzie v. Newby, supra*, where the court observed that the importance of the father's contact with the child could not override the benefits that the move would have on the child).

Given these requirements, interim relocations have only been allowed in 38 of 91 cases (42%), as might be expected. Where the “vast majority” burden would otherwise apply, 28 of 36 relocations were allowed (78%), contrasting sharply to the “substantially equal” cases where only 1 of 12 interim moves were granted (8%). Where “both burdens” applied, only 9 of 43 moves were allowed (21%).

Courts did apply the burdens of proof on interim relocations in 48 of the 91 cases, slightly more than half of the cases. Surprisingly, that proportion isn’t much different from the use of the SET and VM burdens for non-interim cases. In my view, the lack of difference reflects a tendency in *both* settings to avoid use of the two burdens.

How do these burdens interact with the substantial burden on the relocating parent for interim moves? The correct way to apply *Plumley* is through its third requirement: a “vast majority” parent has a strong probability of success at trial, thanks to the burden, while a “substantially equal” parent has a low probability of success at trial, again thanks to the burden.

The “yes” rate on interim moves for VM parents is only slightly below the rate more generally for these cases (85%). The chances of an SET interim move being allowed is almost zero, the exception being the Ontario case of *N.F. v. S.G.*, 2023 ONSC 2644, an unusual set of facts. Compare this low interim rate to the general rate of “yes” for SET cases, 24%. Where a SET parent seeks to move on an interim or temporary basis, effectively *two burdens* are at work: the *Plumley* interim burden plus the SET burden at trial. Finally, note the low success rate for “both burdens” cases, well below the 62% general rate for these residual cases. Where both parents have the burden, or more

accurately neither has a burden in their favour at trial, their chances of moving on an interim or temporary basis is very low.

If I had to identify one dramatic effect of the new laws, it would be here. A "vast majority" parent now has a much better chance of being allowed to relocate with their child before trial, thanks to the allocation of the burden of proof at trial to the left-behind parent. Proof of a compelling circumstance will still be required, of course.

As noted earlier, interim or temporary relocation cases dominate the Ontario case law, constituting almost half of Ontario relocation cases, unlike any other Canadian jurisdiction. This is a long-standing trend. For a detailed discussion of Ontario temporary relocation cases under the old *Gordon* law, see Thompson, "*Berry v. Berry*: Recent Ontario Relocation Trends" (2012), 7 R.F.L. (7th) 10. To my surprise, the success rate for Ontario interim relocation cases under the new laws is little different from those in the rest of Canada.

Two Nova Scotia judges have addressed the continuing significance of *Plumley* after *Diallo*. In *B.M. v. T.G*., 2025 NSSC 417, Justice MacDowell applied *Plumley* on an interim variation (paras. 63-71, 123-124), but also applied the "both" burden where there was no substantial compliance (paras. 73-79) and then worked through best interests as in *Diallo* (paras. 125-126). The mother's interim relocation was refused either way. In *Power v. Power*, 2026 NSSC 70, Ingersoll J. referred to both *Plumley* and *Diallo*, but then explained why his interim decision was more like a trial decision, thus avoiding a choice between the two (paras. 16-20). The burden wound up on the relocating mother in any event, as the parents had had a "substantially equal time" arrangement (para. 170). The court reviewed the best interests factors at length in allowing the mother to relocate.

The New Brunswick Court of Appeal applied *Plumley* on an interim appeal after the 2021 amendments and just before *Diallo* and thus remains good law in that province: *D.P. v. S.M.M.B*., 2025 NBCA 49 (Quigg J.A.) at paras. 95-98 (leave to SCC refused, [2025] S.C.C.A. No. 216). *D.P.* and *Plumley* were applied in *K.A.L. v. J.H.B.,* 2026 NBKB 110 (Richard J.).

Once again, *Plumley* is a sound decision on the law of interim relocation and those outside of Ontario should stick with it, rather than the ill-considered *Diallo* decision.

Q23: In interim or temporary relocation cases, how have Ontario courts coped with the May 2025 Divisional Court decision in *Diallo v. Bah*?

A: Most Ontario courts have just applied the best interests factors. Some have tried to incorporate aspects of *Plumley*'s policy concerns about interim relocation decisions. Some have just muddled the law.

In *Diallo v. Bah,* 2025 ONSC 2106, the Divisional Court misunderstood *Plumley*'s reference to "genuine issue for trial" as if it were the summary judgment test. That aspect

of *Plumley* was emphatically rejected. The rest of the *Plumley* test was "overtaken" by the 2021 amendments. "Only" the best interests of the child matter, even on an interim relocation (paras. 35, 44-47). The mother and children were allowed to relocate to Winnipeg based upon best interests (and a final decision eventually agreed with that outcome: *Bah v. Diallo,* 2026 ONSC 2355 (Wasseenaar J.)).

To date, 9 Ontario trial judges have tried to figure out how *Diallo* changes the law in Ontario. Some judges have just lapsed into a straight "best interests" analysis, with little discussion of the policy concerns that underpinned *Plumley*. So far, it does not appear that *Diallo* has actually changed interim outcomes.

The best guidance can be found in Justice Sherr's decision in *Gomez v. Isaza*, 2025 ONCJ 324, drawing upon some other statements in *Diallo* to bring back aspects of *Plumley*:

> 84 *Diallo* sets out that it is appropriate for courts to consider on temporary relocation motions whether they should be decided based on the process used on the temporary motion or by way of a process designed to make final decisions, such as a trial of an issue. The court wrote at paragraph 47:
>
> > I pause here to note that *Plumley*'s reference to the need to find that there is no genuine issue for trial is a recognition of the fact that relocation decisions are hard to reverse at trial without causing major disruption to the children. For that reason, as the panel granting leave in this case appears to have implicitly recognized, they have an air of finality which makes it appropriate to consider whether they should be decided by way of a process designed to make final decisions, such as a summary judgement motion or a trial of an issue. In this case, as the motion judge noted, there was an expanded process that allowed for the giving of oral evidence and cross-examination on that evidence. However, it was still a process aimed at making an interim, not a final decision.
>
> …..
>
> 99 *Diallo* sets out at paragraph 47 that it is appropriate for courts to consider whether the relocation issue should be decided based on the process used on these temporary motions or whether it should decide the issue by way of a process designed to make final decisions. This determination should be made in accordance with the children's best interests.
>
> …..
>
> 106 Courts are more cautious about permitting a temporary relocation where there are material facts in dispute that would likely impact on the final outcome that cannot be determined on a temporary motion. See: *Fair v. Rutherford-Fair*, 2004 CarswellOnt 1705 (Ont. S.C.J.); *Schul v. Schmidt*, 2023 ONCJ 30. The reality is that courts do not like to create disruptions in the lives of children by making an

> order that may have to cause further disruption later if the order has to be reversed. See: *Goodship v. McMaster* [2003] O.J. No. 4255 (OCJ); *Schul*, supra. This caution is consistent with the best interests factors relating to a child's stability set out in clause 24 (3) (a) of the Act and the impact of relocation on a child set out in clause 39.4 (3) (b) of the Act. It is also consistent with the comments made at paragraph 47 in *Diallo*, set out above.

Policy concerns about insufficient process and disruption are thus incorporated in Justice Sherr's assessment of best interests at the interim or temporary relocation stage. One concern: his identification that the burden was on "both" parents at paras. 85-89. I would have thought that the burden of proof that a temporary relocation should be allowed would always be on the parent proposing to relocate before trial.

Also helpful is *Louafi v. Schneider*, 2025 ONSC 3687, despite some mis-steps in an admittedly complex case. Thanks to the error about s. 16.94, Kraft J. chose not to apply the "vast majority" burden on an interim move (paras. 61-64). Fortunately, the court got the burden right at para. 64, requiring the parent seeking to more before trial to prove the interim relocation should be allowed. And the court rightly required that the reason for the move before trial be "compelling", another important aspect of *Plumley* (paras. 67, 83). The mother's "no genuine issue for trial" argument was rejected based on *Diallo*. Then the court went back to *Gordon* (!), then *Barendregt,* then worked through all the divorce "best interests" factors, because that's what *Diallo* says is the test. At the very end, the Court properly noted that the father would bear the burden of proof at the trial on relocation, as it would be "premature" to allow the move without a full record (para. 87).

A number of the early decisions came out of the Ontario Court of Justice. In *J.L. v. K.C.,* 2025 ONCJ 435 at paras. 48-50, Jenner J. cited *Gomez*, identified the vast majority burden as potentially applicable but undone by substantial non-compliance, leaving the burden on "both" (paras. 48-50). The mother was allowed a move of "relatively modest magnitude", one that was unlikely to be reversed at trial. In *Littler v. Fowler*, 2025 ONCJ 496 (Oldham J.), the mother's vast majority meant the burden was on the father on an interim move. After a foray into *Gordon, Plumley* and *Diallo*, the temporary relocation was refused after a review of best interests because of the 14-year-old's wishes, the lack of strong reasons for the relocation and the mother's unilateral move and likely non-compliance with court orders. Finally, in *Cardarelli v. Fillippilli*, 2025 ONCJ 589, Justice Kapurura cited *Gomez, Diallo, Barendgregt* and the burden provisions, only to find the "both" subsection applied as there were no existing orders or agreements (paras. 45-53). Yet the court then stated that the relocating mother had not met her onus of proving the move was in the children's best interests. Her no notice relocation was her undoing.

Five cases in the Superior Court revealed continuing struggles in the aftermath of *Diallo*. I already discussed *Louafi*. The temporary relocation was allowed in *J.J. v. J.H.,* 2025 ONSC 5234 (Fitzpatrick J.), where the court reviewed the interim authorities, resolved to apply the vast majority burden (apparently based on a separation agreement) (paras. 8-12) and allowed the relocation. The "substantially equal" subsection would have applied

in *W.S. v. A.P.*, 2026 ONSC 27, but Justice Leach followed *Louafi* to find a different route to impose the burden on the relocating father: s. 16.94 was used to not apply the SET burden (based on that misintepretation of s. 16.94), but the father was seeking an interim move so he had the burden (paras. 25-29). There followed an exhaustive review of the best interests factors, with a refusal of the interim move. See also *N.M. v. M.M.*, 2026 ONSC 2766 (Gibson J.), esp. paras. 22-24 (statutory burden on "both", burden on mother on relocation met, temporary relocation allowed).

Last comes *Wilamowski v. Kostyurko*, 2026 ONSC 2126, a case of repeated defiance of court orders by the mother who had already moved to B.C. What is especially valuable about Justice Law's decision is her careful discussion of the procedural and evidentiary limits of a temporary hearing (paras. 23-26). After discussing *Plumley*, *Diallo* and *Gomez*, Law J. finds the mother has failed to comply with the orders, thus "both" bear the burden under s. 16.93(3), but the mother bears the burden of proving the children's best interests on the proposed temporary relocation (paras. 27-28). As with *Gomez*, this is a confusing way to frame the burdens. Justice Law explains in detail how the poor quality of the evidence from both parties meant that the court was unable to determine the critical issues and thus the mother had not met her burden (paras. 29-30).

Where does this leave judges in Ontario, after *Diallo* blew up the familiar *Plumley* test, but didn't replace it with anything? Herewith a modest attempt to restate the best of the case law:

1. The new laws are silent on interim or tempory relocations, leaving the law to judges.
2. The parent proposing an interim relocation generally has the burden of proving that it is in the best interests of the child to relocate, given the disruption and consequences of an interim relocation.
3. *Plumley* is no longer good law in Ontario, even though it was pretty good law for a very long time. And is still good law outside of Ontario.
4. The test for interim or temporary relocation is the best interests of the child.
5. The statutory burdens do not alway fit comfortably at the interim stage.
6. Where there is a "substantially equal time" order or agreement of some duration and stability (whether a final or interim order or agreement), then the burden is on the relocating parent under the statutes and this meshes neatly with the general interim burden on the relocating parent.
7. In many cases, there will be no order or agreement or only a makeshift interim order or some other reason to fall into the residual setting, i.e. s. 16.93(3), where "both" parties have the burden of proving best interests. In short, there is no presumption at work. The general interim burden on the relocating parent still applies.
8. Where there is a "vast majority" order or agreement of some duration and stability (whether a final or interim order or agreement), a court may shift the

burden, requring the parent opposing the relocation to prove that an interim relocation is contrary to the child's best interests.

9. Given the disruption and consequences of an interim relocation, a court should assess the likelihood of success at trial. The burdens of proof at trial are relevant to that determination, especially the "vast majority" burden which favours relocation.
10. The procedural and evidentiary limits of interim hearings will often make it difficult to determine a child's best interests, especially where there is conflicting evidence and credibility on critical issues, such that a trial is needed and relocation cannot occur before that trial.

Q24: How have courts intepreted the burdens of proof in cases of unilateral or attempted unilateral relocations?

A. Courts have rightly shown a reluctance to apply the "vast majority" burden in cases where the vast majority parent has acted unilaterally.

The relocation-specific best interests factors include s. 16.92(1)(d), compliance with any notice requirement. In my view, that gives too little weight to non-compliance or unilateral moves. Any sensible scheme would place a burden of proof upon a parent who engages in a unilateral or surreptitious or no-notice relocation, or a similar attempt to relocate: Thompson, "Legislating", pp. 245-246 and Thompson, "Presumptions, Burdens and Best Interests in Relocation" (2015), 53 Fam.Ct.Rev. 40 at p. 49.

There were 43 cases of unilateral or no notice moves. It may be surprising that 16 of them were allowed by the courts, 37% of them. It turns out that 7 of the successful cases involved family violence. Another 5 involved "muddled moves", where the left-behind parent changed their mind, discussed earlier.

The 4 most recent cases are a mixed bag: one a relocation of "relatively modest magnitude" (*J.L. v. K.C.,* 2025 ONCJ 435 (Jenner J.); one where the father had very little relationship with the children and only virtual parenting time by reason of his own earlier abduction (*Moghimi v. Moodi*, 2026 ONSC 2766 (Gibson J.); one treated as "a very unfortunate lapse in judgment" by the mother (*T.M. v. T.W.,* 2026 ABKB 286 (Simard J.); and one where the primary caregiving mother was allowed to move, but with costs awarded against her, upheld on appeal (*Roman v. Maranovici*, 2024 ABCA 357).

Some individual judges have rightly been critical about the "vast majority" burden being used in unilateral cases. Justice Stephens went so far as to place the burden of proof upon the "unilateral father" in *S.T. v. A.T.*, 2023 BCSC 875. It is not clear how this was done, despite the reference to the parents having substantially equal time while cohabiting. In *R.H. v. R.S.*, 2022 SKQB 52, Justice Zuk was explicit: even if the unilaterally-relocating mother had the "vast majority" of the time, it would be "unfair" to the father to impose a burden upon him (para. 53). The Court then used the interim nature

of the previous order to find “no burden” either way, before ordering the return of the child to Prince Albert.

In two unilateral situations, the burden of proof of best interests is squarely placed upon the parent seeking to relocate: where the parents had “substantially equal time” or where the parent is seeking to relocate at the interim or temporary stage. The real difficulty is a “vast majority” case, as noted above. Still problematic is a case where *both* parents bear the burden under the residual provision.

Q25: How does proof of family violence affect the likelihood of relocation being allowed?

A. Where there is family violence, almost all mothers are allowed to move. In every one of these cases, the mother had the “vast majority” of the time or was the primary caregiver or had primary care.

There were 28 cases where family violence was found to be proved. **In 26 of those 28 cases, the mothers were allowed to move.**

The most egregious “no” case is *Friesen v. Friesen*, 2023 SKCA 60 (Tholl J.A.), affirming 2022 SKQB 83 (Megaw J.), leave to SCC refused: [2023] S.C.C.A. No. 324. The father pleaded guilty to assault for four incidents of post-separation family violence, the mother had the vast majority of the parenting time, and yet the trial judge refused her relocation back home to her family in Cochrane, Alberta and ordered a transition to equal shared parenting in Saskatoon. Both the trial judge and the Court of Appeal said all the right things about family violence in the abstract, but failed to apply these generalities to the facts on the ground. The Court of Appeal decision was even more surprising, given that the Provincial Association of Transition Houses and Services of Saskatchewan (PATHS) and the National Association of Women and the Law (NAWL) were granted intervenor status on the appeal. PATHS argued that, where family violence was alleged, a trial judge had to made specific findings of fact about family violence, a view that was rejected by the Court of Appeal (paras. 58, 79). The Saskatchewan Court of Appeal emphasised that family violence was only one of a number of best interests factors, with deference to the trial judge’s balancing of those factors. For an appeal court that did require specific findings of fact, in a parenting case, contrast the reasoning in *K.M.N. v. S.Z.M.*, 2024 BCCA 70 (DeWitt-Van Oosten J.A.).

The other “no” case was *E.R.G. v. J.R.G.,* 2024 BCSC 789 (Chan J.), where the father’s abusive communications were found to be “family violence”, but the parents had “substantially equal time”, the mother was found to be relocating to restrict the father’s parenting time, and her plan lacked details.

The Supreme Court’s decision in *Barendregt v. Grebliunas*, 2022 SCC 24, is required reading on the subject of family violence, at paras. 141-147. *Barendregt* was a relocation case, where the father’s family violence played a central role in the trial decision to allow the mother to relocate with the children.

Q26: How have the courts treated "the reasons for the relocation" as a factor to consider in determining best interests?

A. In practice, courts have almost always considered the reasons, despite *Gordon*. Courts now do so more openly and more carefully.

Even the Supreme Court of Canada has now admitted in *Barendregt v. Grebliunas*, 2022 SCC 22, that a court should look at the reasons for relocation, despite *Gordon*. To quote Justice Karakatsanis, at paras. 126 and 128:

> In practice, courts across the country have found that the reason for the move often bears upon the best interests of the child….
>
> Indeed, isolating the custodial parent's reasons for the move from the broad individualized inquiry of the child's best interests has frequently proven impractical.

Yes, and that was true back in 1996 too, when *Gordon* was decided.

In practice, courts have almost always taken into account the reasons for the move. In most cases, relocating parents *want* the judge to look at their good reasons for their move. It has only been parents with no good reason for their move that insist upon *Gordon*'s incomprehensible prohibition on looking at the reasons. A prominent example would be the Ontario Court of Appeal decision in *Ligate v. Richardson* (1997), 34 O.R. (3d) 423, a decision subsequently ignored by that Court of Appeal, and for good cause, but oddly cited in *Barendregt* (para. 129).

There was one concrete instance where *Gordon* suggested a court could consider the reason for the move, at para. 23:

> Usually, the reasons or motives for moving will not be relevant to the custodial parent's parenting ability. Occasionally, however, the motive may reflect adversely on the parent's perception of the needs of the child or the parent's judgment about how they may best be fulfilled. For example, the decision of a custodial parent to move solely to thwart salutary contact between the child and access parent might be argued to show a lack of appreciation for the child's best interests….

A number of such "bad faith" cases can be found under the new laws: *E.R.G. v. J.R.G.*, 2024 BCSC 789 (Chan J.); *J.R.A. v. L.C.D.,* 2023 BCSC 541 (G.P. Weatherill J.); *E.B. v. G.B.,* 2024 ONSC 3475 (MacPherson J.); *Droit de la famille – 241213,* 2024 QCCA 2968 (Ouellet J.); *D.C.W. v. A.C.M.,* 2022 NBQB 106 (Petrie J.); *X.D. v. S.Z.,* 2022 NSSC 202 (MacLeod-Archer J.). No surprise, the court said "no" to the relocation in every one of these cases. It may be that, now the courts can look at the reasons for the relocation, they are more able and willing to find the move to reflect bad faith.

In my previous research, I have demonstrated that there are no categories of reasons that are more or less likely to lead to approval of relocation: for employment or education,

to join a new partner, for the new partner's employment, or to return home for parental and family support,. What matters is not the *category* of the reasons, but the *quality.*

There is nothing under the new laws to indicate any big change. The three major reasons for relocation – for a new partner, for family support, for employment/education/finances – are about equally common in relocation claims. Moving home to family support or moving for employment/education/finances shows slightly-higher approval rates than moving to a new partner or for a new partner's employment. There is a very small number of cases where a parent relocated for a child's health care or special needs, all approved.

What is striking is that the residual category of "other", often weaker, reasons for relocation does particularly poorly, with only about 20 per cent of moves allowed.

Note that s. 16.91(1)(a) refers to "the reasons for the relocation", using the plural. The case law demonstrates that a relocating parent often has multiple reasons, e.g. for family support and away from family violence, or for family support and employment.

"Family support" as a reason for relocation was singled out for treatment by the Supreme Court of Canada in *Barendregt v. Grebliunas*, 2022 SCC 22 at paras. 168-175, under the heading, "The Mother's Need for Emotional Support". There has been no obvious upward "bump" for that reason under the new laws, but that probably reflects that most trial judges already took that approach, including Justice Saunders, the trial judge in *Barendregt*.

Q27: Are long-distance moves less likely to be approved, compared to shorter or intra-provincial moves?

A. International relocations, away from Canada and outside of North America, still have the greatest likelihood of being allowed.

This seems counterintuitive, I know. The further away a parent proposes to relocate, the more likely the move will be allowed. Of the 34 international relocation cases, 25 were approved (74%). Of the nine cases where the courts said "no", five were "substantially equal time", one was an interim move, one was a child with special needs, one was a non-primary mother seeking to relocate, and one was a primary caregiving mother moving to Portugal, just "because" and with no plan.

Most striking is that that every "vast majority" or "primary caregiver" parent was allowed to relocate internationally, to go back "home", to the country they came from, where they had family support.

Relocations to the United States show little different outcomes than domestic Canadian cases and the numbers are small, 9 of 15 (60%).

If we remove these two categories of moves from the total, this means relocations within Canada are granted in about 51 per cent of cases.

This is a long-standing pattern in Canadian relocation law, as I demonstrated in my earlier article, "Heading for the Light: International Relocation from Canada" (2011), 30 Can.Fam.L.Q. 1, where I canvassed the relevant case law from 2005 to 2010.

Q28: What about the other relocation-specific best interests factors in the new laws? Have any of them changed the way courts address relocation cases?

A. No obvious changes, except perhaps factor (g), non-compliance by a parent with family law obligations.

Most judges so far have trundled their way through the best interests factors, both the general ones in s. 16(3) of the *Divorce Act* and then the relocation-specific factors in s.16.92(1). It has been rare that any one factor is given substantial weight, or at least hard to tell from the reasons.

That's a total of 11 general best interests factors, plus another 7 relocation-specific factors. Almost all judges start their relocation analysis with the first of the eleven, then go from there, through the whole list. By the time judges get to the relocation-specific factors, it's all become quite repetitive and the result is less attention to the 7 relocation-specific factors.

My modest suggestion is that judges instead start with the seven relocation-specific factors in s. 16.92(1) in relocation cases, then go to the general factors listed in s. 16(3).

As noted above, there has been no strong use of s. 16.92(1)(d), non-compliance with notice, to impose anything like a burden on a parent who relocated or attempted to relocate unilaterally. Further, the "geographic restriction" factor in s. 16.92(1)(e) has not so far led to any heightened treatment as a strong factor against relocation. Finally, the addition of the "general non-compliance" factor in s. 16.92(1)(g) has allowed courts to deal with non-payment of child support by objecting parents: *Zorab v. Zourab,* 2021 ONSC 6552 (Tobin J.); and *Williams v. Power*, 2022 NSSC 156 (Chiasson J.).

Q29: How have courts interpreted the "double-bind question" as a factor NOT to be considered?

A. Most provinces already had appellate authority to this effect, except for Saskatchewan, Ontario and Nova Scotia, all of which now have statutory prohibitions. Courts continue to struggle in its application, exacerbated by the contorted B.C. law in the area.

While the new laws add 7 relocation-specific best interests factors, they also prohibit consideration of one factor, namely an answer to the "double-bind question" in s. 16.92(2):

> In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

The legal history and background of this section is discussed in Thompson, "Legislating", pp. 249-256, including the tortured B.C. case law on the subject, which Smith J.A. once called "this jurisprudential minefield" in *T.K. v. R.J.H.A.,* 2015 BCCA 154.

The history starts with Justice Paperny's reasons in *Spencer v. Spencer,* 2005 ABCA 262. Around the same time, the Quebec Court of Appeal had taken the same view in 2003. The B.C. *Family Law Act* then incorporated that view in its ss. 46(2)(b) and 69(7). Appeal courts across Canada agreed with *Spencer*: P.E.I., New Brunswick, Newfoundland and Labrador, and Manitoba. The hold-outs were the appeal courts in Saskatchewan, Ontario and Nova Scotia. Of course, these three provinces have all now adopted mirror legislation, including this double-bind section.

The real policy concern here is that a judge might too easily default to the status quo, if the relocating parent will not go without the child but will stay if the relocation is refused. A secondary policy concern is that the hypothetical question for the relocating parent is unfair.

It is worth noting what s. 16.92(2) and its equivalents do and don't permit to be considered.

> First, it only applies to "the person who intends to relocate the child". It does not apply to anyone else's plans.
>
> Second, the left-behind parent can still be asked if they will move too if the child relocates.
>
> Third, the relocating parent's new partner can still be asked if they can or will move, to avoid the need for the child to move.
>
> Fourth, grandparents can be asked about their plans post-relocation, whether they will or won't move along with the relocating parent.

In *Barendregt v. Grebliunas*, 2022 SCC 22, Karakatsanis J. devoted five paragraphs (paras. 136-140) to this issue. Unfortunately, she cited an early B.C. decision under the new law, *Joseph v. Washington*, 2021 BCSC 2014. Unfortunate for a couple of reasons. First, the B.C. case law on the subject is painfully tortured, with many twists and turns and double-backs, especially by the B.C. Court of Appeal. Justice Warren in *Joseph* takes us through some of that law, but not all of it – that can be found in my "Legislating" article, cited above. Second, Justice Karakatsanis then cites *Joseph* in support of this statement:

> [140] The same approach is now reflected in the *Divorce Act*: s. 16.92(2) precludes the court from considering whether the moving parent would relocate with or without the children. I would add that a responding parent could just as easily fall victim to the problematic inferences associated with the double bind: see *Joseph v. Washington*, 2021 BCSC 2014, at paras. 101-11 (CanLII). Therefore, in all

cases, the court should not consider how the outcome of an application would affect the parties' relocation plans.

Note that this view ONLY applies to the "common law Gordon framework" and is not an authoritative interpretion of the divorce amendments. There is nothing in s. 16.92(2) that requires this gloss, or even permits it. In fact, the B.C. Court of Appeal noted that the similar provision in the 2013 B.C. *Family Law Act* "is expressly limited to the relocating guardian": *Fotsch v. Begin*, 2015 BCCA 403 (Smith J.A.) at para. 81.

In *Joseph,* ironically, the court knew the plans of both parents! The father was clear that if the mother was allowed to move to New York, he would follow, just as the mother was equally clear that, if the children were not allowed to relocate, she would stay in Victoria. Thus no "definitive findings" had to be made, especially as the parties had not made submissions on the meaning of s. 16.92(2), as Warren J. noted at para. 111.

In a couple more cases under the new laws, courts have considered that a father will follow the mother if she is allowed to move with the children: *N.F. v. S.G.,* 2023 ONSC 2644 (Charney J.) at para. 94 (father has family and employment near mother's new location in Orangeville); *Zawahreh v. Alkhoury*, 2021 ONSC 7956 (Himel J.) at para. 54 (father has option of moving to Montreal too).

In one Nova Scotia case, the judge held that the mother's new partner could not be asked if he would move to the children's current location in Bridgewater, if the relocation was denied: *C.D.B. v. R.S.F.G*., 2024 NSSC 228. Justice Sheppard held this was "a backdoor way of asking the Mother herself, which is prohibited" (para. 16). I think this is wrong, but it likely reflects the awkward way the question was asked. The new partner should just have been asked if he would be able or willing to move to Bridgewater, and the question should not have been tied to the relocation being denied.

Section 16.92(2) means that a court can't "consider" a relocating parent's evidence that they will not go without their children, as Forgeron J. ruled in *Westlake v. Morton*, 2024 NSSC 144 at paras. 19-20.

In a leading appeal decision, the Saskatchewan Court of Appeal also noted the specific language of the provision, that the court cannot "consider" the answer to the hypothetical question: *Chapman v. Somerville*, 2022 SKCA 88 (Tholl J.A.). Like any other kind of inadmissible evidence, the court shall not "consider" the answer if the relocating parent does offer it. Justice Tholl did point out, at para. 17, that the section "would likely ground a valid objection to that line of questioning on the basis of relevancy". If a court cannot "consider" the parent's answer, then the question and answer – on direct, cross or redirect – are not "relevant" and thus any objection should be sustained. See also *Hefter v. Hefter,* 2016 BCSC 1504 (N.H. Smith J.), with a similar interpretation of the BC double-bind provision.

Shortly before the new laws came into effect, the Ontario Court of Appeal broached the double-bind question for the first time in *Bourke v. Davis*, 2021 ONCA 97 at paras. 43-52.

It raises a broader issue: what if the relocating parent's plans are not "hypothetical", but definite?

In *Bourke*, the father complained that the trial judge, Broad J., had placed too much emphasis upon the mother's definite decision to move from Ontario to Washington State with her new husband (employed by Microsoft) and newborn child, even if her two children with the father were not allowed to go with her. The appeal was dismissed, after Feldman J.A. discussed the new statutory provisions and the policy issues. What was unusual was the father only proposed equal shared parenting and he was the one arguing that the court should not consider the mother's definite, if difficult, plan to go to Washington. See also *Kazberov v. Kotlyachkova*, 2021 ONSC 5006 (Div.Ct.) at para. 64.

If the relocating parent is definite, that they are going "regardless", like in *Bourke*, or, if they have already moved, that they aren't coming back, the question and answer are no longer "hypothetical", so there's no unfairness there. Nor is there any risk of defaulting to the *status quo*, obviously.

Consider the retrial in *Weagle v. Kendall*, 2024 NSSC 220 (Ingersoll J.), where the mother had already moved to Ottawa and was not coming back. Or the mother in *Nurmi v. Nurmi*, 2023 ABCA 123, who was definitely going to Bulgaria. Or the mother in *Burton v. Carter*, 2022 BCSC 2004 (Branch J.), who had already moved to Salmon Arm. Despite the wide language of s. 16.92(2), these circumstances do not fall within the policy concerns of the subsection.

In the first few years of the new laws, judges have proven to be very good at reciting s. 16.92(2), acknowledging what can't be considered, but they have struggled with how to apply it, understandably.

Increasingly, courts address the double-bind issue by positing only two alternatives when presented with a relocation request: primary care in the new location with the relocating parent versus primary care in the old location with the left-behind parent.

The decision is framed as a binary choice, whatever the plans of the parents. This forces the left-behind parent to put forward a plan for primary care, which some cannot do and which some don't even want to do. The left-behind parent may be content to have shared parenting in the old location. It equally forces the relocating parent to roll the dice, whether they want to or not. And a court may reach the conclusion that primary care with the left-behind parent is in the child's best interests.

It may be clear that I am not a fan of these double-bind provisions, which use a legal sledgehammer to resolve a specific problem – the tendency of judges to default to the status quo, knowing that the relocating parent will not move without their child if the relocation is refused. It would be better to say that, rather than to limit the information available to the court. Limiting information about parental plans means more work for the court in assessing hypothetical options that aren't really on the table.

Note that there is nothing in s. 16.92(2) to suggest that the relocating parent's plans cannot be considered at a settlement conference. It would be truly unfortunate if this section were used to limit the options available for settlement, as these cases are hard enough to settle already.

Finally, there is much wisdom in the following quotation from Justice Prowse in *Stav v. Stav*, 2012 BCCA 154 at para. 64:

> I should observe, however, that I perceive a problem with the stricture against courts expressly taking into account evidence of what one or the other parent would do depending upon the decision made by the trial judge in relation to mobility. It is arguable that avoidance of questions giving rise to the double-bind is directed more to the interests of the parents than it is to the interests of the children. It may be unfair to place either or both parents in the double-bind, but is it unfair to the children? Is it contrary to their best interests? Arguably, the answer is that is only by asking this question of both parents and assessing their answers, that the court can make a determination in the children's best interests, cognizant of all the options.

These sage comments should be kept in mind when trying to cope with s. 16.92(2).

The Nova Scotia provision is worded slightly differently, to better recognize the mischief at which it is aimed, in s. 18H(3) of the *Parenting and Support Act*:

> (3) In deciding whether to authorize a relocation of a child, the court shall not ask or permit a party who opposes the relocation to ask whether the party who intends to relocate the child would relocate without the child or not relocate if the child's relocation is prohibited.

Note this does not bar the relocating parent from voluntarily offering their answer to that double-bind question, leaving it up to them to make that strategic decision. It only bars judges and opposing parties from asking the question. The Nova Scotia Court of Appeal noted and explained this difference in *Weagle v. Kendall*, 2023 NSCA 47 (Beaton J.A.).

Q30: If the court doesn't know whether or not the relocating parent will relocate without the child, how does the court resolve parenting arrangements after relocation?

A. Two remedial options. First, the court can make conditional parenting orders. Or, second, the court can decide the relocation issue and then adjourn for parenting submissions.

One of the side-effects of s. 16.92(2) is its impact at the remedial stage. If a court can't consider the relocating parent's plans as part of the relocation decision, then the court has only the two options:

(a) make conditional orders, one if the relocating parent does go and one if the parent doesn't go; or
(b) adjourn the proceedings, for the parties to consider their options and make submissions for parenting arrangements in light of the relocation decision.

Neither of these options is efficient.

In *Friesen v. Friesen*, 2023 SKCA 60, the Court of Appeal said that conditional orders would take care of these remedial issues: paras. 86-98. If the court decides to permit the relocation of the children, then only one parenting order need be made. That would be the resolution for the 54% of cases where the move is allowed. If the s. 16.92(2) prohibition is read not to apply to the plans of the left-behind parent, then the court will be aware of that parent's plans.

If, however, the court refuses to allow the relocation of the children, the court can then make conditional orders for two possibilities, i.e. if the relocating parent goes or if the relocating parent stays. Two possible orders, with all the detail required for parenting time schedules and travel terms and decision-making responsibility in each scenario.

On initial claims, where a "blended analysis" is the norm, conditional orders will usually be necessary, as the Court of Appeal recognised in *Friesen*. In the vast, vast majority of relocation cases, the parent proposing to relocate will not move without the children, so much of this "conditional" work is unnecessary.

For some cases where conditional orders were made, see: *D.A. v. C.C.,* 2024 MBKB 37 (Mirwaldt J.); *Van Os v. Van Os*, 2022 SKQB 161 (Brown J.); *Moreland v. Latimer*, 2024 ONCJ 60 (Vickerd J.); *N.P. v. D.H*., 2022 ONCJ 535 (Sherr J.); *Tabbert v. Walker*, 2022 ONSC 4651 (Doyle J.); *Owda v. Husseini*, 2024 NSSC 23 (Cormier J.).

The other remedial alternative is to decide the relocation issue first, and then adjourn the proceedings for subsequent submissions on parenting arrangements. An adjournment permits the parties an opportunity to assess their plans and to discuss parenting arrangements, with the possibility of settlement. But adjournments can be problematic for courts and court scheduling.

For some cases where the court adjourned, see: *M.J.B. v. K.J.M.,* 2025 ABKB 134 (Malik J.); *S.K.G. v. B.S.G.,* 2024 BCSC 455 (Morellato J.); *E.R.G. v. J.R.G.,* 2024 BCSC 789 (Chan J.); *Engel v. Greer*, 2024 NSSC 323 (Cromwell J.); *C.D.B. v. R.S.F.G*., 2024 NSSC 228 (Sheppard J.).

Q31: What is the meaning of sections 17(5.2) and (5.3), the "deemed material change" clause and the "prohibition of relocation not in itself a change" clause?

A. A "relocation" is one which has a "substantial impact" upon the child's relationships and thus will always be a "material change". Section 17(5.3) applies

where a court has refused a proposed relocation and there are no other material changes in circumstances.

As *Gordon v. Goertz* made clear, and it is still the law, to vary a parenting order there must first be proof of a "material change". Of course, a proposed relocation of any significance has always satisfied the "material change" requirement.

The new s. 17(5.2) has confused some people, as it says "the relocation of a child is *deemed* to constitute" a material change (italics added). But the definition of "relocation" requires "a change in the place of residence of a child… that is likely to have a substantial impact" on the child's relationships. "Substantial impact" ensures that the change will be "material".

The new s. 17(5.3) has caused more confusion, so it needs to be quoted here:

> A relocation of a child that has been prohibited by a court under paragraph (1)(b) or section 16.1 does not, in itself, constitute a change in the circumstances of the child for the purposes of subsection (5).

Some lawyers and some judges have attempted to apply this provision to the standard geographic restriction clause found in many court orders. Usually the term says something like: "Neither party shall change the children's place of residence to a location outside the boundaries of the Greater Toronto Area without prior written consent of the other or a court order." This "no change" clause is then read as a "prohibited relocation" under s. 17(5.3), which means any proposed relocation thereafter *cannot* amount to a material change. This reading of s. 17(5.3) is wrong, and ignores the history and policy behind this provision.

This "no change outside of the GTA" was the clause in issue in *D.G. v. A.M.*, 2022 ONSC 2478. Justice Sharma carefully explained the history and policy underpinning s. 17(5.3)(and quoted me along the way):

> 131 In "The *Divorce Act* Changes Explained" found on the Government of Canada's website, it explains that s. 17(5.3) "prevents the variation of an order simply on the basis that an application for relocation was denied." It explains the reason for the change as follows:
>
> > If there is no change to the child's circumstances, the fact that a request for relocation has been denied does not, in and of itself, form the basis for a variation.
> >
> > At any time, however, if there was a material change in circumstances, a party could seek to vary a parenting order.
> >
> > This provision is similar to one in British Columbia's *Family Law Act.*1
>
> 132 This explanation suggests that where there has been a request for relocation which has been "denied" (i.e., requested and rejected by the Court), this does not

in itself form the basis for a variation order. For example, after denying a relocation, the court must still satisfy itself there has been a material change before changing the primary care from one parent to another.

133 As explained by Prof. Rollie Thompson, "[a] simple proposal to relocate, that is refused, does not empower a court to make other changes in the terms of a parenting order...The concern underpinning 17(5.3) is that judges will treat a failed relocation proposal as grounds to change custody or primary care to the other parent, unconditionally, a noticeable trend in the relocation case law."2

134 In my view, s. 17(5.3) does not require that a material change analysis be undertaken when a prior court order exists which prohibits relocation. Rather s. 17(5.3) must be interpreted more narrowly to prevent the court from making other parenting orders automatically when a relocation is denied.

135 This interpretation is consistent with the deeming provision found in s. 17(5.2) and the definition of "relocation" in s. 2(1). A relocation is only a "relocation" as defined in s. 2(1) if it has a "significant impact" on the child's relationship with parents and those with whom the child has contact. Because of the "significant impact" requirement in the new definition of "relocation", in almost all cases of relocation, there will a "material change." Therefore, the deeming provision in s. 17(5.2) makes sense. Nothing turns on whether there is or is not an existing court order. In either case, a finding that the proposed move would have a "significant impact" on the child suggests that there is a material change, and therefore, it is not necessary to conduct a further material change analysis.

136 With this understanding, s. 17(5.3) can be understood in its narrow context as described on the Government of Canada's website and by Prof. Thompson.

137 Accordingly, I interpret s. 17(5.3) as meaning that only where the court has denied a relocation (in this case, in the context of a motion to change), this denial does not, in itself, form the basis for a variation on another aspect of the parenting arrangement. Its application in this case only arises if I deny the applicant's relocation and contemplate changes to the existing parenting order, as requested by the respondent.

138 Of course, I must still consider the existence of a prior order restricting a relocation. Section 16.92(2)(e) expressly requires that I consider, on a relocation motion, the existence of an order that specifies the geographic area in which the child is to reside.

Footnote 2 above cites my article, “Legislating” for that quotation. In that article, I also pointed out, at pp. 257-8: “In family law, there’s never just an ‘in itself’, there are almost

always other changes in child or parental behaviour, either before or after the relocation proposal, often because of the proposal itself."

Q32: How have the courts used the new section that addresses travel and parenting time costs in relocation cases?

A: There has been little careful consideration of the new s. 16.95, which explicitly empowers a relocation court to apportion the costs of parenting time between the parties. Partly, this reflects that this new provision merely confirms what many judges already did, using their power to attach terms and conditions to parenting orders, like under s. 16(6) of the *Divorce Act*.

It is preferable for courts to directly apportion these costs, rather than to grant a reduction from the table amount of child support. The reduction of a table amount requires proof of undue hardship under s. 10(2)(b). It is clear that no proof of undue hardship is needed for apportioning travel and parenting costs under s. 16.95 or its equivalents: *Hepburn v. Trimper*, 2022 ONSC 1190 (Piccoli J.) at para. 175; *Szakalay v. Smith*, 2024 ABCJ 128 (O'Gorman J.) at para. 25. Courts have considered parental incomes, finances and other factors in apportioning costs: *Droit de la famille – 24737*, 2024 QCCA 615 ($17,000 annual costs shared equally); *D.S. v. K.C.,* 2021 SKQB 178 (Richmond J.) at paras. 73-76 (based on substanial disparity in incomes), affirmed generally 2026 SKCA 30.

Before reducing the table amount of child support for parenting costs, a court should first address spousal support or the left-behind parent's contributions to s. 7 expenses, both much more discretionary. That said, many relocating parents will offer to reduce the table amount, such that no proof of undue hardship is required. For a example where the mother agreed to waive her $400 monthly child support in any month where the father visited from Ontario to New Brunswick, see *Lepine-Maynard v. Boomen-Majstorovic,* 2022 ONSC 656 (Sah J.).

Q33: How have the divorce amendments affected the judge-made Alberta relocation law under the *Family Law Act*?

A: A line of cases has adopted the divorce best interests factors and relocation analysis, but not the burdens of proof or the mandatory notice regime.

In the leading decision, *C.R. v. P.S.*, 2022 ABQB 410, Justice Graesser followed *Barendregt* to incorporate most of the divorce best interests factors and analysis for relocation decisions under the *Family Law Act*, at paras. 59-61:

> 59 I have not been made aware of any authority on the impact of the *Divorce Act* changes on mobility applications under the *Family Law Act*. I know of no reasons why, in principle, children of unmarried parents should be treated differently from children of married parents. Mobility affects everyone the same, whether marriage is involved are not. Children of unmarried parents love their parents just as much

> as children of married parents, and their parents give no differential treatment based on marital status. Parents in committed common law marriages undoubtedly love their children the same as do committed married parents.
>
> 60 The specified factors in s 18 of the *Family Law Act* do not purport to be the only considerations to be taken into account on applications under that legislation. *Gordon v Goertz* prefaces its list of considerations with "inter alia". In my view, the Court should consider the recent amendments to the *Divorce Act* as relevant considerations in *Family Law Act* applications to the extent that they are appropriate to the facts and issues.
>
> 61 I do not think I can take the same approach to the new *Divorce Act* provisions on onus of proof, and for the purposes of this application I will hold the Applicant to the normal balance of probabilities test for her mobility application regardless of the present status of parenting time.

The court also noted that the divorce requirements for notice or parenting proposals also did not apply under the FLA (para. 57).

Paragraphs 59 and 60 above were approved by the Alberta Court of Appeal in *N.E.W. v. M.A.D.M.*, 2022 ABCA 255 at para. 12 as part of the “common law” applicable under the FLA.

Since then, trial decisions have repeatedly affirmed this approach: *N.T. v. C.L.H.*, 2023 ABKB 379 (Yungwirth J.) at paras. 24-29; *Potts v. Marschlik*, 2023 ABKB 362 (Poelman J.); *K.M.K. v. J.J.W.,* 2025 ABKB 116 (Jugnauth J.) at paras. 22-30; *M.L. v. A.S.*, 2025 ABCJ 76 (Hancock J.) at paras. 54-58.

Alberta thus has “half a relocation regime”, absent statutory changes to the FLA. No mandatory notice regime, no altered burdens of proof. Graesser J. left the burden of proof of best interests on the applicant mother, as seen in para. 61 above, despite her primary caregiver role, and refused the relocation.

Q34: How have the divorce amendments affected the judge-made relocation law under the Quebec *Civil Code*?

A: Quebec courts have applied some of the divorce relocation analysis to *Civil Code* cases, mostly the best interests factors, with some debates about the use of the burdens.

In an early case, *Droit de la famille – 221551*, 2022 QCCA 1210, the Quebec Court of Appeal readily used the divorce “best interests” factors to uphold the trial judge’s inquiries into the reasons for the relocation in allowing the move in a *Civil Code* case.

More recently, in *Droit de la famille – 26662*, 2026 QCCA 665, the mother argued that the trial judge had failed to apply the new divorce analysis in denying the relocation to Nova

Scotia. She argued that her "vast majority" of parenting time meant the father had the burden of proof. The appeal court sidestepped whether the divorce burdens might be mandatory under the *Civil Code* analysis, by finding this wasn't a "vast majority" case, by applying an erroneous test, discussed above. Nonetheless, the double bind provision was applied on appeal, as the trial judge had wrongly compared the mother residing in Nova Scotia with primary care versus the two parents sharing time in Quebec. The case was sent back to the trial court.

Quebec lawyers argue for the use of the divorce burdens in the interest of their clients, with conflicting results. No burdens under the *Civil Code*, said two judges: *Droit de la famille – 251095*, 2025 QCCS 2877 (Tremblay J.); and *Droit de la famille – 251306,* 2025 QCCS 3225 (Ferland J.) at para. 26. Maybe burdens said two others: *Droit de la famille – 251448,* 2025 QCCS 3449 (Villeneuve J.) at para. 44; and *Droit de la famille – 251003*, 2025 QCCS 2702 (O'Bomsawin J.) at paras. 16-24.

Quebec judges, like the Alberta judges above, are concerned that the relocation regime for unmarried parents should not significantly differ from that under the *Divorce Act*. Much of the divorce best interests on relocation analysis can easily be accommodated in *Civil Code* cases. In divorce cases, the Quebec Court of Appeal has downplayed the significance of burdens of proof in *Droit de la famille – 23190*, 2023 QCCA 207, discussed above under question 15. In many divorce decisions, Quebec trial judges simply skip over the burdens and go straight to best interests, often citing *Gordon* and *Barendregt*. Thus, there may not be much difference in Quebec between divorce and *Civil Code* cases! There remains one big difference: the absence of mandatory notice of relocation under the *Civil Code*.

Q35: How might the proposed Bill C-223 change the 2021 *Divorce Act* provisions on relocation?

A: Bill C-223 would ruin the relocation provisions.

At the time of writing, the status and fate of Bill C-223 is uncertain. It has passed second reading and is currently before the Standing Committee on Justice and Human Rights for clause-by-clause consideration.

Attached is my brief to the Standing Committee, explaining the problems with the Bill's proposed relocation changes.

I also wrote a number of articles for Law360 on Bill C-223: "Bill C-223: Bad ideas on relocation" (October 29, 2025); "Bill C-223 won't 'fix' relocation law, it'll ruin it" (May 1, 2026); "Bill C-223 won't 'fix' relocation law, it'll distort the burden of proof" (May 4, 2026).

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March 16, 2026

Standing Committee on Justice and Human Rights
House of Commons, Parliament of Canada

Dear Committee Members:

Submissions on Bill C-223, Amendments to the Divorce Act

I previously emailed the Committee to indicate my willingness to present to the Committee on my views and concerns about Bill C-223, particularly its provisions affecting the relocation of parents and children. Please accept this letter and my attached article as my written submission on Bill C-223.

It is not clear why the relocation provisions have been tacked on to Bill C-233, which is mostly about family violence and alienation. The preamble makes no mention of relocation. The proponents of the Bill don't mention relocation. At second reading of the Bill, there was no reference to relocation. We are now just five years into a brand new relocation regime, which appears to be working well. Absent some evidence of serious problems, we need a longer period of experience before the drastic changes proposed in Bill C-223.

In these circumstances, I would suggest that **sections 6 and 7 of Bill C-223 be deleted.**

1 My Background

I have practised family law, both in private practice and at legal aid in Nova Scotia. As a professor, I taught family law at Dalhousie for over 30 years, from 1982 to 2020, as well as courses in evidence, civil procedure, advanced family law and child protection law. I am counsel at Epstein Cole LLP, the well-known Toronto family law firm. I have been researching and writing about relocation issues since before the Supreme Court of Canada decision in *Gordon v. Goertz* in 1996. That decision guided Canadian relocation law until 2021, when the federal divorce amendments came into effect. Some of the 2021 amendments reflected my own research and writing in the field, notably the use of presumptions in some relocation cases. I have presented on relocation issues to lawyers and judges across Canada and at international conferences.

When the 2021 divorce amendments were introduced, I published an article about its provisions and its antecedents: "Legislating About Relocating: Bill C-78, N.S. and B.C." (2019), 38 Canadian Family Law Quarterly 219-258. More recently, I wrote a paper, "The New Relocation

Laws: Questions and Some Early Answers" (December 2024). The latter is the most comprehensive analysis available of the impact so far of the new 2021 relocation laws. I have attached it to this submission.

1 Section 7: Relocation Presumptions or Burdens

The current *Divorce Act* creates *three* presumptions or burdens in s. 16.93:

16.93(1): if the parents are exercising "substantially equal" parenting time, then the burden of proof is upon the relocating parent to show that the relocation is in the best interests of the child (effectively a presumption *against* relocation);

16.93(2): if one parent has the "vast majority" of the parenting time, then the burden of proof is upon the parent opposing the relocation to show that the relocation is not in the best interests of the child (effectively a presumption *in favour of* the relocation);

16.93(3): in all other cases, both parents have the burden of proving the child's best interests (no presumption).

These presumptions reflect what we do know, empirically and clinically, about the impact of relocation upon children generally. Since 2021, courts have been quick to reach a consensus: "substantially equal" means each parent has roughly 40 to 50% of the parenting time; and "vast majority" means one parent has roughly 80% or more of the parenting time. These are just presumptions, which means that the other parent can lead evidence that it is not in the best interests of this particular child in order to rebut the presumption.

Bill C-223 would replace this three-way split, with a single operative presumption in its s. 7. The new s. 16.93(1) would read "If… a child of the marriage spends the majority of their time in the care of the party who intends to relocate", there is a presumption in favour of allowing the relocation.

There is no basis in our empirical or clinical knowledge or our legal experience for this presumption about what is in the best interests of children.

In fact, there is much to suggest it would be harmful to children. Under our current three-way split, where a child spends "substantially equal" time with both parents, i.e. 40 to 50%, there is a presumption *against* relocation, as the child has two good parents and thus can maintain continuity of care *and* continuity of community. That was also the long-standing pattern of judicial decisions before the 2021 amendments. Under Bill C-223, the "substantially equal" parent would face a presumption in favour of the move, if the relocating parent has 51% of the time.

A side note here: since there are 365 days or overnights in most years (apart from leap years), then there will always be 50% plus one, even if parents have an "equal time" arrangement. The substantial impact of that critical one day or overnight or few hours will inevitably feed litigation about parenting by some opportunistic parents. Such litigation is hardly in the best interests of children.

Even if the left-behind parent had 25 to 40% of the time, a significant parenting role, there would still be a presumption under the Bill that it is in the best interests of the child to move. Under the 2021 amendments, however, *both* parents in this situation would bear the burden of proof, with no presumption operating. That's because we can't say with any assurance that it is better in general for children in this setting to relocate. Again, Bill C-223's single presumption would make many children worse off in relocation cases.

There is more to the Bill's proposed "majority of time" presumption. The opposing party must first rebut the presumption by showing it is not in this child's best interests to relocate. But that's not enough. The parent opposing the move must *also* prove that "it is in the best interests of the child to reside primarily with the person opposing the relocation". No such requirement exists in the current *Divorce Act* or in any Canadian relocation law. It is a requirement that would often be *against* the best interests of the child. If a child is currently in a shared parenting arrangement that is accepted to be the best interests of the child, whether by court order or agreement, why should the opposing parent have to prove that their primary care is in the child's best interests?

Is there any pressing need for major changes in the current relocation presumptions? No evidence is offered by the proponents of Bill C-223.

We now have five years' experience with the 2021 amendments. The three-way presumptions have worked well. If a parent has the "vast majority" of parenting time, most moves (86%) are allowed, unless they propose very poor parenting plans. If parents have "substantially equal" time, then only about a quarter (23%) of moves are allowed. For all other cases, where both parents bear the burden and there are no presumptions, about 60% (62%) of relocations are allowed by the courts.

In general, from March 2021 to December 2024, about 60% of relocations have been allowed, a noticeable increase from the 50% of moves allowed from 2000 to 2021. It is still early, but it appears that much of that increase reflects the impact of the "vast majority" presumption for primary caregiving parents. We will need to see how some of the current trends hold up over a longer period of time.

It is important to keep in mind that 90% of relocating parents are mothers, so that there are gender implications for relocation policy, including family violence. Of the 20 reported 2021-2024 relocation cases where there was a finding of family violence, 18 relocations were allowed (90%). In all of these cases, the mothers had the "vast majority" of time or were primary caregivers or had primary care of the children.

3. The "Double Bind" Issue

Section 16.92(2) of the current *Divorce Act* responds to the "double bind" issue in relocation law. Relocating parents were previously asked the difficult question: "Will you move without your child?" There is no good answer to this hypothetical question: "yes" means you are a selfish parent prepared to abandon your child, while "no" means a court can readily default to the current status quo and deny the relocation. Starting with the Alberta Court of Appeal in 2005, appeal courts across the country saw the problem and ruled that a court couldn't consider the answer. This view was written into the Act in s. 16.92(2), which reads:

> In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate with the child or not relocate.

If the court can't "consider" the answer, then it is equally true that a party or a judge can't ask the question. A relocating parent's post-decision plans will not be known. In most cases, this means that a court will have to make the relocation decision and then do one of two things: adjourn for the parents to consider and present their parenting plans as a result of the relocation decision; or make what's called a "conditional order", setting out alternative parenting plans depending upon whether the relocating parent does or doesn't move without the children.

Bill C-223 would replace this with the following (in its s. 6(4)). It tells a court what it "shall" consider:

> In deciding whether to authorize a relocation of the child, the court shall presume that the person who intends to relocate will relocate regardless of whether the child's relocation is prohibited.

If the court "shall presume" the answer, this is a shift in a long-standing policy. It does not work in the interests of children or relocating parents, mostly mothers. It will assume mothers will move without their children, forcing courts to choose primary care with one parent or the other. The result: many courts will not allow the children to move and will more frequently order primary care with the left-behind parent, often the father. Even if the mother doesn't plan to move without the children. Even if shared care is in the best interests of the child, rather than primary care.

No question, there have been problems with the interpretation and use of the current s. 16.92(2). I personally am not a fan of this provision, as can be seen from my attached paper. But the proposed "double bind" provision in Bill C-233 would make things even worse.

4. Relocation-Specific Best Interests Factors

The 2021 amendments created seven new relocation-specific best interests factors in s. 16.92(1), to be considered in relocation cases "in addition to" the general factors in s. 16 that guide

the best interests of the child in all parenting cases. Bill C-223 proposes to change some of these.

Since 2021, a court can consider "the reasons for the relocation" in para. 16.92(1)(a), reversing the old judge-made law of *Gordon v. Goertz*, [1996] 2 S.C.R. 27. Bill C-223 proposes to add "including whether the reasons relate to family violence". The courts are already required to do so, thanks to the factors in ss. 16(2), 16(3)(j) and 16(4).

Bill C-223 proposes to add a new para. (b.1), an eighth factor to the list:

> (b.1) the impact on the child of prohibiting the relocation, in particular in respect of the child's relationship with the person who intends to relocate the child.

Once again, this impact is already required to be considered by s. 16.92(1)(b), "the impact of the relocation on the child". Under this provision, courts consider the impact on the child, whether the relocation is or isn't allowed.

There are slight changes proposed in the Bill to another factor, s. 16.92(1)(g), with the changes underlined here:

> (g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order <u>is likely to comply</u> with their obligations under family law legislation, an order, arbitral award, or agreement, <u>taking into account the impact of family violence on their ability to comply with their obligations</u>.

The current section requires consideration whether a person "has complied" with their family law obligations. The new language would appear to look only to the future, not past compliance, which might be problematic. In practice, a court can only assess a parent's future compliance based upon their past record. The purpose and scope of the added reference to the impact of family violence is unclear, both for the perpetrator and the person subjected to family violence. Again, it would appear that ss. 16(3)(j) and 16(4) would suffice to address this family violence issue.

In short, there is no need for these changes.

5. Some Things Bill C-223 Says Relocation Courts Can and Can't Consider

There is a remarkable provision found in s. 6 of the Bill, which proposes to add the following sub-section (3) in section 16.92(2):

> (3) In making a decision under subsection (1), the court shall not take into consideration any arrangement regarding the exercise of parenting time by the parties in their current places of residence.

I have no idea what this sub-section means or is intended to mean.

Read literally, it would mean a court couldn't consider which parent did or didn't have "the majority of the time" and thus the Bill's proposed presumptions would be unable to work. It would also mean a court would be required to ignore the best interests factors in s. 16(3)(d)("the history of care of the child") and s. 16.92(1)(c)("the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons"). How this odd provision would serve the best interests of the child is baffling.

There are some other provisions in Bill C-223 that would affect relocation cases, even if they are not found in sections 6 and 7 of the Bill.

Bill C-223 proposes to repeal the current s. 16(5) of the *Divorce Act*, a critical section in all parenting cases, including relocations. Section 16(5) reads:

> (5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.

This section is intended to stop parents from slinging mud at each other, and to focus only on past conduct that is relevant to parenting. Family violence is an often-mentioned example of past conduct that *is* relevant to parenting, made eminently clear by the 2021 amendments, notably ss. 16(2), 16(3)(j) and 16(4). So why the repeal of s. 16(5)? How is it in the interests of children to permit mud-slinging and character attacks by parents?

6. A Final Word About Legislative Drafting

I have focussed on the parts of Bill C-223 that are relevant to relocation. But I can't conclude without commenting on the very poor drafting of Bill C-223.

Legislative drafting is hard, having done a fair bit of it myself. It is important to be precise in the use of language in any statute. This is all the more true in a public statute like the *Divorce Act*, which will be read and applied by parents, lawyers and courts. Divorce is one of the most common ways for Canadians to interact with the law and the justice system. Yet, in section after section, I am simply unable to determine what the drafter intends or how the provision might be interpreted. Even if some of the aims of Bill C-223 might be laudable, the drafting of the Bill will not achieve those aims and will have many unfortunate side-effects, for parents and children.

Sincerely,

D.A. Rollie Thompson, K.C.