1. — Introduction — The Challenge of Relocation Cases

Relocation cases[FN1] are among the most significant that family courts address, with profound effects of the lives of both parents and children, and substantial challenges for family lawyers, assessors, mediators and judges. The economic and social dislocations of separation, and the possibility of new relationships, make relocation by a parent and children a pressing issue in a growing number of cases of separation and divorce.[FN2] The increase in relocation cases also reflects the gradual but sustained increase in the involvement of fathers in parenting, and the growing desire of fathers to maintain an active involvement in the lives of their children after separation. These cases are more difficult to settle than other family law cases, as there may be no middle ground for a compromise. The test which courts in Canada and many other jurisdictions use to decide whether to permit a parent to relocate with children — the "best interests of the child" — gives trial judges substantial discretion to examine and assess all of the circumstances of a case, making outcomes difficult to predict, and also making settlements harder to negotiate.

It is not only individual cases that are contentious. Relocation has been controversial in the broader public arena, with fathers' rights groups battling feminist groups about the appropriate legal rule to govern these cases as the issue of relocation raises questions about the nature of parenthood and divorce.[FN3] Are former spouses who cease to cohabit entitled to a "clean break," or are they linked together and required to live in close proximity to one another until their children reach adulthood? Is a woman who may have only had a brief sexual encounter with a man and never cohabited with him obliged to reside in close proximity to him, unless he chooses to move away, because they had a child together?

Social science researchers have also engaged in a sometimes vociferous debate over the effects of post-separation parental relocation on children. This research is important and has shed some light on the effects of relocation on children, establishing that relocation is a "risk factor" for children, though also recognizing potential benefits for some. There are, however, significant challenges in applying this research to individual cases. In individual cases, mental health experts may be asked to predict the effect of relocating, or not relocating, on parents and children — an inherently speculative exercise. Even after relocation has occurred, it will not be truly possible to know what would have
happened to the child on the "road not taken," making research into the effects of relocation on children very difficult. There are similar challenges in applying the social science research for developing public policies or general legal rules for relocation cases.

Internationally, there are widely divergent approaches to the resolution of relocation disputes in different jurisdictions, all premised on the promotion of the welfare of children.[FN4] In some jurisdictions there is a presumption in favor of allowing the custodial parent, usually the mother, to relocate, as she is the one who has had the primary responsibility for the welfare of the child, and promotion of her social or economic well-being is expected to promote the welfare of the child.[FN5] In other jurisdictions, there is a presumption against moving a child, as it is assumed that children generally benefit from stability and maintaining the relationships that will inevitably be affected if the custodial parent moves with the child.[FN6]

In the mid-1990s, a number of Canadian appeal courts accepted that since the "well-being of the child is fundamentally interrelated with the well-being of the custodial parent [and], that parent is the best person to make decisions affecting the child and the new family"[FN7] there should accordingly be a presumption in favor of allowing the custodial parent (also almost always, especially at that time, the mother) to move with the child.[FN8] However, in 1996 the Supreme Court of Canada ruled in Gordon v. Goertz[FN9] that judges must apply the "best interests of the child" test in making decisions about the relocation of a child, an approach that requires an individualized assessment in each case, without any presumptions or onus. Internationally, the dominant trend is also now the best interests approach, without any presumptions for or against relocation.[FN10] This approach has the advantage of allowing a focus on the welfare of the individual child before the court, and is neutral about the "rights" of custodial parents as opposed to non-custodial parents. However, the fact-driven nature of the application of the relocation test has been criticized by commentators as making this a "ruleless area,"[FN11] in which prediction of judicial outcomes is highly uncertain and hence settlements more difficult to achieve.[FN12]

It has been proposed by commentators in Canada (and other jurisdictions) that the appellate courts or legislatures should provide more guidance resolution for relocation cases. It is, however, apparent that these senior lawmaking bodies are reluctant to address this contentious issue: no legislature in Canada has enacted a law that deals with relocation,[FN13] and since Gordon v. Goertz the Supreme Court has repeatedly refused leave to appeal in relocation cases. While it would be preferable for this guidance to be provided by legislatures or appellate courts (top-down law reform), Canada's experience with the development of the Spousal Support Advisory Guidelines suggests that it may also be possible for the family justice stakeholders (judges, lawyers and legal academics) to collaborate in the development of Relocation Advisory Guidelines [RAGs] that reflect and codify current judicial approaches to these cases (bottom-up law reform.)

This article summarizes trends in the social science literature on relocation and provides an analysis of close to 750 reported Canadian relocation cases (all cases written in English from 2001 to 2011), and relates this analysis to the jurisprudence and social science literature. The central argument of this article is that there are clear patterns to how Canadian judges apply the "best interests of the child" test in relocation cases, and if lawyers and judges are aware of these patterns, they can be better prepared to deal with such cases. If lawyers have better guidance for understanding what Canadian courts are likely to do in a relocation case, they can provide better advice to their clients and
settle more relocation cases. Further, based on our analysis of Canadian precedents and the patterns in reported decisions, and consistent with the present social science research, we conclude this article by proposing the introduction of *Relocation Advisory Guidelines* [RAGs], suggesting differing presumptions for relocation applications in a range of situations where relocation is, or is not, in the best interests of a child. These guidelines only suggest presumptions that may assist in the resolution of cases; they are not intended to displace the existing best interests of the child test but rather to assist in its application.

While we hope that readers will find our effort to propose and articulate these RAGs useful, as we discuss in the conclusion, it would be desirable for a group of leading family justice professionals to be convened to further study, refine and endorse such guidelines. It would be best for the legislatures to undertake such a project, though apart from British Columbia, this seems unlikely to occur in the near term future.

2. — Social Science Research on Relocation

(a) — (a) *Research on the Effects of Relocation on Children*

Social science literature published in the 1990s considered the effects of relocation on children primarily in the context of more general studies on post-separation parenting. This research, including a significant longitudinal study by American psychologist Judith Wallerstein, was undertaken at a time when North American fathers generally had a significantly smaller role than at present in parenting, in both intact families and after separation. This research concluded that while some children suffer permanent negative effects from parental separation, a majority have reasonably good outcomes. This research found that the most significant predictor of the effects of divorce on children was the quality of the relationship with the child's mother, who was invariably the child's primary and often sole caregiver: the better the quality of the mother-child relationship and the better the parenting provided by the mother, the better the outcomes for children. Wallerstein's research led her and others to advocate for a presumption in favor of allowing a custodial parent to relocate with a child, if doing so would increase that parent's social or economic well-being, a position summarized in the slogan: "A happy mother makes for a happy child."[FN14] The application of this approach to relocation cases has been criticized for a number of reasons, including the fact that the research on which it was based did not directly compare outcomes for children who relocated with those who did not relocate.[FN15]

More recent social science research has more directly studied the effect of post-separation relocation on children. These more recent studies have been conducted in a social environment in which fathers have been more involved in parenting than in the past, in both separated and intact families, though, on average, still not to the same extent as mothers.

An interesting set of studies by American researchers Braver, Ellman and Fabricius surveyed over 600 American university students whose parents had divorced, 170 of whom had moved with one parent more than one hour's drive away from the former family home.[FN16] This retrospective research found generally worse outcomes for those children who had moved more than an hour away compared to those children whose separated parents remained in close proximity, based on a range of outcome measures, including hostility in their interpersonal relations, distress from their parents' di-
orce, and general health and life satisfaction. The reports of these young adults also revealed that parental conflict and violence was, on average, more frequent and severe in those situations where mothers had relocated with the children more than a one-hour drive away from the previous family home, compared with paternal relocation or neither parent relocating. These researchers concluded that either parent moving away is a risk factor for a child, independent of high conflict and domestic violence. Like all studies in this area, this research has significant limitations, including the fact that a correlation between moving away and worse outcomes does not establish a causal link. There may be other factors at play; for example, the difficult post-separation economic circumstances of custodial mothers are a plausible explanation for both relocations and the negative outcomes.

(b) — Studies of Relocation Disputes

There are some interesting recent longitudinal studies of children and parents involved in relocation disputes, some of which resulted in children moving with the custodial parent and others where the parent did not move with the children. One clear conclusion from these studies is that there is enormous variation in outcomes; further, the court process, while often highly stressful and expensive, does not necessarily result in a final resolution for the parents or children.

One retrospective Australian study included interviews with 38 parents (27 fathers and 11 mothers) involved in reported relocation cases decided by the courts.[FN17] It is notable that fathers who unsuccessfully opposed relocation were over-represented in this study, likely because, when contacted by the researchers, they were more willing to participate as they were more unhappy with the outcomes. The major themes that emerged from the in-depth interviews included:

• a high prevalence of high conflict and/or abusive relationships predating the relocation dispute, including a significant number of short, unhappy relationships with separation occurring during pregnancy or shortly after the birth of a single child;

• the relocation dispute was one of many sources of conflict and dispute between most parents;

• there were smoother paths after relocation for parents who were in less high conflict relationships, and for whom this was really a 'relocation only dispute'; the quality of the inter-parental relationship before relocation was often predictive of the quality of the relationship after relocation.

• relocation was a significant point of transition in parent-child relationships, with long-distance parenting usually falling into one of two patterns: 'Separate Homes, Separate Lives' or 'Parental Engagement in Both Locations.' In only a relatively small number of cases in this study (4/38) did non-moving parents totally lose contact with their children after relocation; these were cases with issues such as domestic violence, high conflict, substance abuse or mental illness.

There is another on-going longitudinal study in Australia that is following 80 parents (40 seeking to move (39 mothers and 1 father) and 40 who are the non-moving parent) and their children through the litigation process and studying the long term effects of the court's decision or the parties' settlement.[FN18] For about one third of the mothers, a desire to return to the place where her parents and relatives reside for social and emotional reasons is the dominant factor in her seeking to relocate, while about one quarter want to live with new partners. Domestic violence is a significant factor in
about one fifth of the cases. As noted by the study authors, other research in Australia has reported that only one in ten custody cases results in a judicial hearing, while this study found that well over half of the relocation cases went to trial. This clearly suggests that relocation cases are more difficult to settle than other custody cases: the cases were often very expensive to try and in many cases parents who did not go to trial reported that it was exhaustion of financial resources rather than a genuine compromise that resulted in a settlement.

Interestingly, this study also finds significant fluidity even after trial. In two cases of the twenty-six cases where a mother was permitted by the court to move with her children, she decided not to relocate, and in two other cases mothers relocated with their children and then returned. In a quarter of the cases fathers who were unsuccessful in opposing relocation followed the mothers and children, though in none of the cases where the mother wanted to relocate with her children for a new relationship and was denied permission did her new partner move to reside with her.

This Australian study also reports that if children relocate with their mother, it can be difficult to maintain a close relationship with the father, and contact with the father is often substantially reduced. As in Canada, a judge in Australia may impose significant conditions on the moving parent to ensure that the child maintains contact with the parent left behind, but in the cases in these studies these conditions are often not being followed; further, after the emotional tumult and expense of a trial, few fathers are able to seek legal recourse to enforce the conditions, and in cases of interstate and international relocation, there may be additional legal impediments to enforcement. Distance per se is not as much of a factor in the loss of contact as the economic resources of the parents and the attitude of the mother towards supporting (or undermining) the relationship with the father. In some cases, even relatively short moves can effectively sever the relationship with the father if he has limited means to travel or the mother has a negative attitude regarding paternal contact. In other cases involving significant parental resources, older children and a supportive mother, a father can maintain a strong relationship with his children even if there is an international move.

A qualitative English study of 36 parents involved in relocation disputes also found that there is often difficulty exercising contact after relocations, despite the fact that provisions in court orders were made for contact.[FN19] The study reported that the costs and disruptiveness of travel often made it difficult for fathers to maintain regular contact, and that arrangements made at the time of relocation were often not honoured after the relocation. Fathers whose children were allowed to relocate often reported the emotional devastation of themselves and their own parents due to the loss of regular contact with the children. Like in a number of other studies, however, fathers who unsuccessfully opposed the moves were more likely to participate in the study (25 fathers and 11 mothers), raising questions about the representativeness of the findings. The small number of mothers in this study who were not permitted to move reported feeling a diminution of their freedom of movement and their social and economic prospects; one characterized this as a feeling "akin to imprisonment."

A longitudinal New Zealand study of 100 families where a parent moved or sought to move with children also provides an interesting portrait of the complexity and range of effects in these cases. The report on the study includes the results of interviews with 44 children who moved, and attempts to assess the impact of decisions about relocation on the social, psychological and academic well-being of children.[FN20] The interviews with the children generally reveal acceptance of and satisfaction with their situation, whether or not they moved. Factors that were found to assist children in
adjusting to relocation included:

- making friends in the new location and getting involved in extracurricular and
  sports activities;
- moving closer to extended family members;
- moving at a younger age;
- being able to take personal belongings and pets with them to the new location; and
- having the support of their parents and siblings.

As with the Australian study, the English study reveals a fluid pattern of post-trial situations, including a couple of cases where mothers relocated with their children after litigation but then decided to return. Where mothers were not permitted by the court to move with their children, most of them did not move but stayed in their previous places of residence with their children; most reported that their children seemed reasonably content, though a number of these women planned to wait until their children were older and able to "decide for themselves" and then move, generally expecting that their children would want to move with them.

Further, as in the Australian study, relocation of children with their mothers often resulted in a significant weakening of relations with the father and his extended family, and in some cases contact effectively ceased. Some of the children who were seeing their fathers regularly complained of the dislocation of the travel and time away from their new communities in order to see their fathers. A significant number of children, however, continued to maintain contact with their fathers, and some even reported an improved relationship with their fathers as tensions between the parents were reduced by the relocation. The authors on this study offer a tentative conclusion:

For the most part, the New Zealand children were relatively happy, well-adjusted, and satisfied with how things had worked out for them and their families. This is not to say that the relocation experience was not difficult or traumatic for some, but rather there was the sense that they had 'gotten over it' and moved on. This was particularly true of those children for whom the relocation issue had occurred some years previously.[FN21]

In the New Zealand study, the worst outcomes were for a relatively small group of cases where a mother's relocation application was denied (or abandoned by her), and she moved anyway, leaving children in the custody of a father who may have had limited prior involvement in their care and quite often had a new family with other children. Although some of these reversals in custody were successful, they had a close to 50 per cent chance of breaking down in a fashion that was very distressing or traumatic to the children, with the fathers ultimately sending them to live with their mothers.

The authors of the Australian and New Zealand studies advocate "reality testing" of plans, both for the prospects for continuing contact between fathers and children if relocation with the mother is permitted, and for a decision that the children not be permitted to relocate. In these studies, for example, it was found that in most cases, computer based communications such as Skype and email were not used extensively to maintain a relationship, despite plans at the time of relocation to use them.[FN22]
Those making decisions about relocation need to consider not only the distance of a move, but also such factors as the child's age and the attitudes of the parents; further, it can be very difficult to predict how new partner relationships, the introduction of step and half siblings and the changing financial situation of one or both parents will affect the children and their relationships with their parents.

(c) — Relocation — Risks and Benefits

While there is only a limited amount of research on post-separation relocation, and there are significant limitations to each study that has been done, there seems to be a growing consensus among mental health experts that moving away from the community where the child lived before separation has both potential risks and benefits for a child.[FN23] Among the risks, with older children, in addition to straining the relationship with the parent left behind, and usually his extended family, relocation will disrupt the child's ties to community, school and peers, ties that are increasingly important as a child grows older. For younger children, there is a significant risk that if they relocate with their mother, they may never establish a strong relationship with their father.

Multiple moves create greater risk, but even only one post-separation move produces a negative "relocation effect," reflected in statistically significant differences in terms of worse outcomes for children who move post-separation.[FN24] Relocation then is a general risk factor for children of divorce, though of course the research only establishes a correlation between relocation and risk, not a causal link; in other words, it is, for example, quite possible in some cases that post-separation economic difficulties could be both the reason for a move and for dislocations that result in behavioural problems experienced by the child.

Mental health experts also recognize that children are resilient, and in the right circumstances, the risk factors can be muted. With relocation, the quality of the relationship of the non-moving parent and the child will change due to the distance and lower frequency of regular involvement, but there still can be adequate quality and a meaningful parent-child relationship. If the moving parent has good coping, life management, and parenting skills, there can be a "successful relocation" for the child. American psychologist William Austin hypothesizes that the most important factor to a child having a good adjustment to a post-separation relocation lies in the attitudes and actions of the moving, residential parent.[FN25] Important factors for the adjustment of the child to the relocation include:

(i) how well the moving parent adjusts to the move;

(ii) how well she copes with the stress involved with relocation (i.e., new housing, job, finding a school); and

(iii) how well she opens up new sources of "social capital" (i.e. social and familial supports) for herself and the child.

Austin further suggests that if the moving parent is supportive of the non-moving parent's relationship with the child, this can have a protective function as the child tries to adjust to the extended separation from the other parent and the relocation.

One of the stronger statements of concern about the effects of relocation on young children was artic-
ulated by the American mental health professionals Joan Kelly and Michael Lamb in a 2003 article. They raised concerns that a child who is not able to see a parent on a frequent basis in the early years of life will be unable to form a proper psychological attachment to that parent. In a passage cited by some Canadian judges, they wrote:

Because attachments are more fragile in the earliest phases of formation, it is likely that younger children are more vulnerable to disruptions in attachment formation and consolidation. In assessing the potential psychological risks associated with relocation . . . therefore, it is crucial to consider the child's age and phase of the attachment process when the non-moving parent has been involved in parenting, even if he or she has spent as little as a day or two each week with the child since the separation. It would be ideal if divorced parents wishing to relocate could be persuaded to wait until their children are at least 2 or 3 years old, because the children would then be better equipped with the cognitive and language skills necessary to maintain long-distance relationships, particularly when formidable distances separate them from one of their parents.[FN26]

They suggest that if parents are more than an hour's drive away from one another, it will be difficult to maintain frequent contact and a strong parent-child tie. While Kelly and Lamb raise concerns about relocation more starkly than some of the other mental health professionals, most experts emphasize that the risks of relocation for any child must be weighed against the benefits for the individual child, and most of the recent writing by mental health professionals does not advocate for a legal presumption against allowing relocation, but rather advocates for a "child focused" approach.[FN27] Even Kelly and Lamb emphasize that both costs and benefits exist in any potential relocation, and these must be compared and assessed in determining how the children's best interests should be met:

When relocations offer mentally healthy, competent, and committed custodial parents improved occupational, educational, or marital opportunities . . . their children are likely to benefit from the parents' enhanced psychological well-being, particularly if they are able to maintain meaningful relationships with involved and competent non-moving parents through regular contact. If the children concerned have tenuous, nonexistent, or deeply disturbed relationships with non-moving parents . . . the benefits of relocation likely outweigh the costs and relocation might be desirable.[FN28]

In a recent review of the mental health literature on the effects of parental relocation, Nicola Taylor and Marilyn Freeman similarly concluded:

the findings of the research are mixed, with some studies revealing beneficial effects from relocation, and others emphasizing detrimental or harmful outcomes for children and young people. Overall, however, the empirical research findings indicate "heightened risk" when a child relocates, particularly if there have been prior moves and multiple changes in family structure. More recent research on the impact of residential moves on children and adolescents has demonstrated consistent negative effects on youngsters across all family structures (i.e., single never-married, separated, and divorced, stepfamily, married) when compared to children in comparable groups of parents who did not move.[FN29]
(d) — Challenges in Applying the Social Science Research

It is important for all of those who are concerned about relocation cases to be familiar with the growing body of social science literature on this subject, but it is also necessary to be aware of its limitations and of the challenges of applying this research to individual cases. As noted, there are important methodological limitations to the existing research in terms of the small and often self-selecting populations being studied. There are also challenges in applying the research to any individual case because of the complexity of interacting factors, and the inherent unpredictability of the effects of relocation (or non-relocation) on children and their parents. Almost a decade ago a prominent American psychologist observed:

Relocation brings potential benefits to children along with the hazards. . . . Weighing and integrating all of these factors is a tall order. Even decisions that appear at first glance to be easy may carry unexpected consequences.[FN30]

A recent article by a leading New Zealand legal scholar, Mark Henaghan reached a similar conclusion:

Social science can report the experiences of children and parents after separation, and measure how children cope. The difficulty lies in deciding which variables should be given weight in determining outcomes for each particular child. The variables range from the child's own particular internal resources, to the physical and economic surroundings they live in, through to their relationships with parents, peers and others in their life. Determining which one, or combination of these variables, leads to which outcomes is not a precise task. We simply cannot know how life would have been different if a child had, or had not, relocated with a parent.[FN31]

The difficulty of applying existing social science research to individual cases led this New Zealand scholar to propose the adoption of a framework for presumptive decision-making. In our conclusion we return to this issue, agreeing with the value of a presumptive framework for decision-making, though disagreeing with Prof. Henaghan on some aspects of his proposal as unsuitable, at least for Canada.[FN32]

3. — Canada’s Legal Framework

(a) — The History of Parental Relocation Law

In the mid-1990s a number of Canadian appellate courts recognized a presumptive right of a custodial parent (invariably the mother) to relocate following separation, at least in the absence of a specific provision in a separation agreement or court order to the contrary.[FN33] This approach was consistent with the then prevailing “tender years doctrine,” which gave mothers a presumptive right to custody after separation and with social science research of that period that recognized the significance of a child’s relationship to the primary caregiver for post-separation outcomes.[FN34] For example in 1995 the Ontario Court of Appeal in MacGyver v. Richards[FN35] concluded that, if a custodial parent was “acting responsibly,”[FN36] the burden of proof rested with the non-custodial parent to show that the move would not be in the child’s best interest. In the year after the MacGyver decision, the Ontario courts approved the vast majority of relocation applications,[FN37] though the decision was cast not in terms of parental “rights,” but rather as “presumptive deference” to the decision of a cus-
todial parent, as the welfare of the child was considered to be "predominantly attached" to the welfare of the custodial parent.

(b) — Statutory Provision — The Best Interests Test

As discussed more fully below, the leading precedent in Canada is now the 1996 Supreme Court ruling in Gordon v. Goertz,[FN38] a decision that requires judges to make individualized determinations of a child's best interests, without any presumption in favor of either parent.

The federal Parliament has jurisdiction over custody and access in the context of divorce, as provided for in the Divorce Act,[FN39] while provincial legislation like Ontario's Children's Law Reform Act [FN40] applies to parents who were never married, or who are separated but not seeking a divorce. The federal Divorce Act and the provincial legislation are both premised on making decisions based on the "best interests of the child." Section 16 of the Divorce Act includes a number of provisions that may be applicable to relocation cases:[FN41]

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(7) Without limiting the generality of subsection (6), the court may include in an order . . . a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child. . . .

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Pursuant to subsection 16(7) of the Divorce Act, an order of the court granting one parent custody of a child may require that parent to give notice to the other parent of any planned change of residence of the child.[FN42] The statutory notice period is "at least" 30 days, and it is common in orders and agreements to specify a 60 day notice period. The access parent, upon receipt of notice, may apply to the court to challenge the proposed change of residence, or seek a variation of the custody or access arrangements. This notice period may also allow for an opportunity for parents to attempt to negotiate acceptable terms for relocation prior to it occurring, though it is not a long period for such negotiations to be completed.

Gordon v. Goertz, though decided under the federal Divorce Act, also applies to cases decided under provincial legislation.[FN43] When dealing with relocation cases, the courts interpret and apply the
federal and provincial legislation in the same way, even though most provincial legislation like Ontario's *Children's Law Reform Act* does not have explicit equivalents to the relocation notification provision in s.16(7) or the "friendly parent" provision of s.16(10) of the *Divorce Act*, which is sometimes cited in relocation decisions to support claims about the importance of the child's relationship with both parents and as a reason for not allowing relocation.[FN44]

(c) — The Best Interests Approach of *Gordon v. Goertz*

In its 1996 decision in *Gordon v. Goertz*, the Supreme Court rejected the argument that there should be a presumption in favour of allowing a custodial parent to move with a child, although the Court held that the views of the custodial parent remain "entitled to great respect and the most serious consideration."[FN45] Thus, the Supreme Court rejected the approach of *MacGyver v. Richards*.[FN46] where the Ontario Court of Appeal held that the non-custodial parent does not have an evidentiary burden of proving that the move is in the child's best interest. Instead, the Supreme Court held that the courts should resolve each case after a "full and sensitive inquiry"[FN47] without any presumptions.

As is common in relocation cases, the litigation in *Gordon v. Goertz* involved an application to vary an existing custody and access order.[FN48] As the Court noted, in such cases a party seeking relief on a variation application must satisfy a "threshold requirement" of establishing a "material change in circumstances:"

Relocation will always be a "change". Often, but not always, it will amount to a change which materially affects the circumstances of the child and the ability of the parent to meet them. A move to a neighbouring town might not affect the child or the parents' ability to meet its needs in any significant way. Similarly, if the child lacks a positive relationship with the access parent or extended family in the area, a move might not affect the child sufficiently to constitute a material change in its situation. Where . . . the child enjoyed frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child.[FN49]

Satisfying this threshold requirement is usually not difficult in a contested relocation case, but it is significant to note that in this passage the Supreme Court in fact articulated a rule for dealing with relocation cases. If a child "lacks a positive relationship with the access parent or extended family", there may not even be need for a full hearing.

After addressing the threshold requirement, McLachlin J. went on to hold that a relocation application is to be decided based on an assessment of the best interests of the specific child involved, without a presumption or onus in favor of either party, summarizing the Court's position an oft-quoted passage:

The focus is on the best interests of the child, not the interests and rights of the parents.

More particularly the judge should consider, *inter alia*:

a) the existing custody arrangement and relationship between the child and the custodial parent;
b) the existing access arrangement and the relationship between the child and the access parent;

c) the desirability of maximizing contact between the child and both parents;

d) the views of the child;

e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to
that parent's ability to meet the needs of the child;

f) disruption to the child of a change in custody;

g) disruption to the child consequent on removal from family, schools, and the community he or
she has come to know.[FN50]

One of the most controversial statements in the judgement is that the custodial parent's reasons for
moving are relevant only in "the exceptional case." The Court reasoned that since "the views of the
custodial parent, who lives with the child and is charged with making decisions in its interest on a
day-to-day basis, are entitled to great respect and the most serious consideration . . . barring an im-
proper motive reflecting adversely on the custodial parent's parenting ability," the reasons for the
move should generally not be considered by a court dealing with a relocation application.[FN51] Not-
withstanding this statement, this direction is now often disregarded by Canadian courts at both the tri-
al and appellate levels, where judges regularly consider and assess the reasons for a proposed
move.[FN52] The malleability of the overall approach adopted by the Supreme Court gives lower
courts the flexibility to disregard some of the Court's specific statements, and the development of a
greater focus on the "needs of the child" has resulted in the exception effectively swallowing the
"rule" that the custodial parent's reasons for the move are to be ignored. However, as discussed more
fully below, while courts invariably consider the reasons for the proposed move, the success rate on
relocation applications does not vary much by the reasons for the move, unless a parent is moving to
get away from abusive partner, in which case the child's needs are directly affected by the move and
the application is much more likely to be granted or the court concludes that the relocation is motiv-
ated primarily by a desire to thwart access, in which the application to move will be denied.

Although Gordon v. Goertz has been criticized for a number of reasons, including the unpredictabil-
ity that it created, the Supreme Court is clearly not inclined to revisit this issue, consistently refusing
to grant leave to appeal relocation cases over the decade and a half since it rendered this decision.

4. — An Analysis of Canadian Relocation Cases

(a) — Methodology of Study

The authors located and analyzed all Canadian relocation court decisions written in English and
rendered between January 1, 2001 to April 30, 2011, using the Westlaw and Lexis-Nexis Canadian
databases.[FN53]

(b) — Number of Cases and Relocation "Success Rate"

During this period there were close to 750 cases, with the largest numbers in British Columbia and
Ontario. Table 4.1 sets out the number of relocation cases and the "success rate" (percentage permit-
ted to move) in each jurisdiction.[FN54]

Table 4.1 Relocation cases and success rates: Canada

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<th>Jurisdiction</th>
<th>Number of relocation cases</th>
<th>Number of moves allowed</th>
<th>Percentage of moves allowed</th>
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<td><strong>379</strong></td>
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In Canada as a whole, there were 738 cases in the study period, with the success rate for relocation applications being 51 per cent both from 2001 to 2005, and in the 2006 to 2010 period.[FN55] In all jurisdictions with 60 or more cases over the decade (i.e., an average of at least six a year), the success rate is in a fairly narrow range from 46 to 55 per cent, suggesting that there was neither significant geographical variation in approach across the country nor has there been variation over time during the past decade.

(c) — Increase in the Number of Cases While Success Rate Constant

Professor Rollie Thompson of Dalhousie Law School reported that in the period between when the decision in *Gordon* was rendered in May 1996 and early 2004, about 60 per cent of Canadian decisions permitted the relocation, but he also observed a "gentle but noticeable decline in the proportion of 'yes' cases starting around the year 2000."[FN56] While there are fluctuations in the number of cases reported in each year and the trend is not uniform across the country, in Canada as a whole there was a trend towards an increase in the number of cases between 2001 and 2010. Figure 4.1 presents the number of cases by year and the associated trend line.

(d) — Mainly Mothers who Apply to Relocate

Consistent with studies from other jurisdictions, the vast majority of applicants for relocation in Canada were mothers, though interestingly the success rates were similar regardless of whether the
applicant was the mother or the father. In the study period, in 92 per cent of cases the mother was the parent seeking to relocate with the child. There were 55 cases where the father was the moving parent. Fathers had a success rate of 55 per cent while mothers had a similar 51 per cent rate of success in their applications for relocation.

The decisions indicated parents had cohabited or been married in 80 per cent of the cases; in 5 per cent of the cases, the parties had not cohabited or been married to each other, and the remainder of the decisions did not provide a clear indication about whether the parties and child had ever resided together. In cases where the mother was seeking to relocate and there was no prior history of cohabitation, the mother was successful in 60 per cent of the cases. Further, if the mother did not cohabit with the father and had sole custody (either legal or de facto), she was allowed to relocate in 65 per cent of cases.

Those who had cohabited or married had been separated an average of 3.4 years before the final court decision on relocation. An analysis did not show that time since separation had a significant effect on outcomes.

The parent seeking relocation had a lawyer in 93 per cent of the cases, and the parent opposing the move had a lawyer in 89 per cent of the cases.[FN57] Moving parents had an average annual income of $38,756 and non-moving parents had an average annual income of about $62,217, although in many cases no income figures were provided.

**(e) — Reasons for Seeking to Relocate**

In *Gordon v. Goertz*, Justice McLachlin stated that "barring an improper motive," such as a desire to disrupt the relationship with the other parent, "the custodial parent's reason for moving, [is to be considered] only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child."[FN58] Despite this general statement, judges in both the appeal and trial courts almost invariably consider the reasons for the move, as the reasons will inevitably have at least an indirect impact on the welfare of the child.

While there is often more than one reason for wanting to move with a child, it is usually possible to identify what the court and moving parent consider to be the primary reason for the parent seeking to relocate with the child.[FN59] In the decade of the study, the most frequently cited reason for wanting to move was economic, principally because of a job transfer of the applicant or to obtain a better employment opportunity (or get a job after being unemployed). This was the primary reason in 33 per cent of cases; applicants were successful in 52 per cent of these cases (126/241). The second most common reason was a new relationship, in particular to reside with a new spouse, or common law or intimate partner; this was the primary reason in 29 per cent of cases, with a success rate of 48 per cent (103/216). The third most common reason was to have better family support, especially for a custodial parent who wanted to move "back home." Family support was the primary reason in 19 per cent of cases, with a success rate of 53 per cent (73/138).

For mothers the most common reason was economic/employment (32 per cent), followed closely by new relationship (31 per cent) and seeking better family support (19 per cent). For fathers, the most common reason was also economic or employment (36 per cent), followed by a request for change in custody/primary residence that entailed relocating the child (20 per cent).
There were a range of other primary reasons that were less common. For example, perhaps not surprisingly, in 15 of the 18 cases where the reason for the move was that the primary caregiver (i.e., the mother in 17 of the 18 cases) was facing deportation or lacked immigration status in Canada, the court permitted relocation with the child.

(f) — Substantiated Familial Abuse — A Significant Factor

While at one time Canadian courts did not seem to consider spousal abuse as a significant factor in relocation cases,[FN60] more recent decisions recognize that spousal abuse may be an important factor that affects the welfare of a child and should be taken into account in making relocation decisions.

The courts have long accepted that child abuse may justify terminating contact between parent and child, and hence a legitimate factor in a relocation case. There is now also a substantial body of Canadian case law where spousal violence was cited by the court as a reason for allowing the move, especially if children witness it or directly suffer its effects, with the expectation that allowing the move will afford the mother and children some physical and emotional protection, and promote the welfare of the children.[FN61]

The court will be concerned with the seriousness of the allegations, whether they are proven in court, and whether the abuse has continued after separation. Thus, even if the court is satisfied that the husband forced his wife to have intercourse during the marriage, if the court is not satisfied that other acts of violence occurred, it may not grant her request to relocate with the children after separation as this brutal (and criminal) conduct has no direct effect on the children.[FN62] Further if the judge believes that the person making the allegations, invariably the woman, has significantly exaggerated or fabricated her claims about spousal or child abuse and the court concludes that there are no serious safety concerns, it is likely to dismiss a request to move that is primarily based on this ground.[FN63]

It is undoubtedly necessary for courts to require that allegations of abuse are proven if they are to be taken into account in a relocation case, or any other family law matter. Clearly, however, in a relocation case abuse allegations do not have to be substantiated by a criminal conviction or on the criminal standard of proof, for the issue is not whether one parent is abusive and needs to be punished, but rather what child care arrangements are in the best interests of the child.

A 2010 Nova Scotia decision adopted a nuanced approach to the effect of spousal violence in a relocation case, noting that account must be taken of both the nature of the violence and its effect on the child. In N.D.L. v. M.S.L, Beryl MacDonald J. permitted the unemployed mother of a six year old child to move from Nova Scotia to Missouri to pursue a professional education and have the support of her family, even though this would significantly curtail the father's relationship to his daughter. The court placed much weight on the fact that the father had seriously abused the mother, and that she would only feel safe if she moved. The father broke his wife's wrist during one argument, and would commonly hold her down, spit in her face, call her names and throw things at her. The husband disagreed with the wife's parenting methods and sometimes would physically remove the wife from the daughter's room. The judge observed that witnessing some of these acts of violence was a "frightening experience to the child." The court also ordered that the father would only have access if he completed a program that would teach him about the effects of spousal violence on his child. The
judge observed:

In order to understand whether domestic violence exists within a family, its definition and effect must be stated clearly and comprehensively. The words "domestic violence" . . . define . . . a number of behaviors, including isolated or rare incidents in a relationship — a push, a shove, rudeness, disrespect, and name calling all of which are unpleasant to those on the receiving end of these behaviors but which should not necessarily be accepted as an indication that the relationship requires judicial intervention. If these behaviors have no pattern of repetition and leave little if any lasting impact upon the recipient they need not be monitored with the same vigilance as will be the case when coercive control is involved. . . . Differentiation must be made between these two dynamics when both may be and frequently are referred to as "domestic violence". In this decision I use the term only to refer to violence against an intimate partner which has as its purpose coercive control over that partner.[FN64]

The judge concluded that this case clearly fit the pattern of coercive, controlling domestic violence that warranted giving the mother and child permission to relocate.

In cases where at least one important reason for the move is the abusive behavior of the father, and the mother fears for her safety if she lives in close proximity, it is necessary for the woman to establish, on the balance or probabilities, that there has been abusive behavior and that it is likely to recur. If abuse is proven, however, it may be appropriate to allow a move out of the jurisdiction, with the expectation that there will only be limited contact between the child and the access parent, and then only if the child's safety and emotional well-being during visits can be assured.

Our analysis of the outcomes of cases indicates that if a judge is satisfied that familial abuse has occurred, it is likely that a move will be permitted to allow the mother and children to escape from an abusive situation. However, if the judge concludes that a mother is significantly exaggerating or fabricating allegations of violence, this may make the court less willing to allow the move. Some might view this as "punishing" a mother who has suffered abuse and is unable to prove that this has occurred to the satisfaction of a judge. A more likely explanation, however, is that a mother who makes an unfounded claim has a distorted perception of her relationship with the father of her children (or is prepared to lie about it) and so is likely to undermine that man's relationship with the children if she is permitted to relocate with them.

In the study period, there were 170 cases (23 per cent) in Canada in which there were allegations of familial abuse or violence. This is consistent with research from Australia which also reported a relatively high frequency of spousal abuse and high conflict situations in relocation cases.[FN65] Of the 170 Canadian cases involving allegations of familial abuse, the judge made a determination of the validity of the allegations in 121 cases, and found the evidence inconclusive in 49 cases. As illustrated in Figure 4.2, of the 121 cases with a finding about familial abuse, the judge concluded that the allegations of family abuse were supported by the evidence in 75 cases, and a move was allowed in 81 per cent (n=61) of these cases. The judge concluded that the evidence suggested that the allegations were unfounded or significantly exaggerated in 46 cases, and a move was allowed in only 15 per cent (n=7) of these cases. The judge did not make a finding about the validity of the allegations in 49 cases, and a move was allowed in 43 per cent (n=21) of these cases.
In the vast majority of relocation cases (96 per cent) in which family abuse was raised, the mother made the allegations. Most of the cases where allegations of familial abuse were made involved mothers claiming spousal violence, though some involved child abuse only or both child abuse and spousal violence. Of the 120 cases where only spousal violence was claimed, there were 62 cases where the court found that the claim was substantiated (50 moves allowed, 81 per cent success), 19 where the claim of spousal violence was rejected (2 moves allowed, 11 per cent success) and 39 where the court was undecided about the validity of the allegations (15 moves allowed, 39 per cent success).

There were 7 cases where the father was the parent seeking relocation and made allegations of child abuse or spousal violence, 5 involved allegations of child abuse and 2 involved allegations of spousal abuse. The court accepted evidence of child abuse in 2 cases (moves were allowed in both) and was undecided about the father’s child abuse accusations in 2 cases (move allowed in both). The court accepted the father’s evidence of spousal abuse by the mother in 2 cases, and allowed the move in one of them. So fathers who made family violence allegations were permitted to relocate with their children in 6 of 7 cases.

In general then, in cases where there was a finding as to whether or not familial abuse had occurred, Canadian judges were significantly more likely to allow a move if abuse had been substantiated as compared to cases where abuse has been alleged but not substantiated.[FN66]

(g) — Distance: Intra-provincial vs. National vs. International Moves

Social science research clearly suggests that the distance involved in a relocation case is an important factor in assessing the impact of a move on the relationship between children and the left-behind parent. More accurately, the time that it takes to travel between the old and new location is an important factor, which is moderated or exacerbated by the resources that can be devoted to the travel and the willingness of the moving parent to support the relationship despite the distance.

Interestingly, studies of case law of Australia and New Zealand[FN67] as well as Canada reveal a higher success rate in court for international as opposed to shorter domestic moves. In Canada, in a 2010 paper Prof. Thompson[FN68] reported that moves were allowed in 47 out of 72 international relocation cases reported between 2005 and 2010, a 65 per cent success rate (15/25 to the USA and 32/47 overseas), a somewhat higher rate than for moves within Canada.

In our study of relocation cases over a decade, almost exactly 80 per cent of cases involved moves within Canada and 30 per cent of cases involved moves within the province. Consistent with the finding of Prof. Thompson and with studies from other countries, the success rate was substantially higher for the international moves (62 per cent) than for moves within Canada (49 per cent). Within the province, 52 per cent of moves were permitted.

Although the higher success rate in applications for international moves may seem counterintuitive, since these moves will typically involve larger distances and less frequent contact with the non-moving parent, it is a relatively robust finding across countries and may be explained by a number of factors. Many of these cases involve primary caregiver mothers, often with young children, who are
having significant difficulty after separation adjusting to life as an isolated single parent. They are moving "back home" for family support and economic reasons. Our review of cases suggests that in the international cases the applicants tend to have clearer plans and more compelling reasons for relocation. For example, international relocation for a new intimate relationship almost always involves a new marriage, while domestic cases more frequently involve common law relationships or even new boyfriends but no cohabitation, suggesting a lesser degree of commitment and stability for the new relationship. Many of the cases where international moves were permitted also involved clear economic advantages and an improved living standard for the child.

(h) — Relationship of Children with the Moving and Other Parent: Custody Status

It is clear from the case law that one of the most important factors in relocation decisions is the judge's assessment of the comparative importance of the children's relationships with the two parents. The fact that the parent who wants to move is characterized by the court as the "primary caregiver" or has sole custody does not mean that the court will necessarily allow the move.[FN69] However, if the child has only limited involvement with the "access parent," the court is more likely to allow the child to move.[FN70] If the child was born to a single mother and the father never lived with the child, the mother is more likely to have sole custody, in which case she will also be more likely to be permitted to relocate.

The fact that a joint legal custody arrangement exists between the parties is clearly not determinative of a relocation case; indeed it is generally given little weight by judges. Joint legal custody does not prevent a primary caregiver from obtaining approval for a move, and a court may even order a joint legal custody regime to continue after the move, to signal that both parents are to have a continuing say in decisions about the child.[FN71] However, in cases where there is joint physical custody, courts are significantly less likely to permit a move because this would have a more disruptive effect on the child.[FN72]

For analytical purposes, we divided the Canadian cases into three mutually exclusive categories:

- ones where the parent seeking relocation had sole custody;
- ones where there was joint legal custody but the child had a primary residence; and
- ones with joint physical custody (joint legal custody with each parent having the child at least 40 percent of the time — also called "shared custody" in Canada).[FN73]

Overall, our analysis suggests that the custodial arrangement has a significant effect on whether or not a move will be permitted (see Figure 4.3).[FN74]

Tabular or graphic material set at this point is not displayable.

There were 324 cases with the applicant having sole legal custody (as established by separation agreement, court order or on a de facto basis); in these sole custody cases, relocation was permitted in 64 percent of cases, considerably higher than in the other two categories. In the joint legal custody cases, there was a joint legal custody regime, but the non-moving parent had the child less than 40 percent of the parenting time.[FN75] There were 240 joint legal custody cases; the move was al-
lowed 50 per cent of the time in these cases. In the joint physical custody (or shared parenting) cases, each parent had the child at least 40 per cent of the time. There were 135 joint physical custody cases; the move was only allowed in 30 per cent of these cases.

These data clearly suggest that the likelihood of the move being permitted decreases as the involvement of the non-moving parent increases, and indicate that the nature of the relationship that the non-moving parent has with the child is a significant factor in judicial decision-making. The difference is most apparent in comparing the outcomes for sole custody as opposed to joint physical custody cases. The line between joint legal custody and sole custody is not always bright, and the terminology used to characterize the parenting arrangement may be more a reflection of local practice or professional preferences rather than real differences in parent-child contact or relationships. However, there are also many cases where there is a real difference between sole custody and joint legal custody in terms of engagement of non-primary residence parents in the lives of their children, and some of the difference in outcomes in these two situations very likely reflects these real differences.

(i) — Age of Child

One of the most controversial issues in the mental health literature in regard to relocation is the effect that the age of the child should have on judicial decisions. As discussed above, mental health professionals like Kelly and Lamb have expressed particular concern about relocations involving preschool children (under 6 years) and especially those involving infants (3 years and under), as relocation during this stage of a child's life may result in a child losing, or never forming, a psychological attachment to an absent parent. Further, long distance visits with children in this age range are more difficult, both because they cannot travel alone and because relatively long "compensating blocks of time" with a parent who may effectively be a stranger to the child may be disruptive. On the other hand, younger children will have weak ties to their communities, and a move early in life may be less disruptive to a child. While relocation will significantly affect the child's ties to the non-moving parent, young children may not have significant psychological ties to the father if they have not lived with him or spent significant time with him, and they will be less likely to be immediately affected by a move than an older child who is more likely to miss the relationship with an absent parent.

As children grow towards adolescence, their wishes become more important, and their ties to schools, community and peers may also become significant anchors on a move. Older children, however, may be able to spend relatively large blocks of time with a parent who lives at some distance, and may more easily maintain a relationship with a distant parent, for example by phone and email, so that living farther from a parent will be less disruptive to the relationship of parent and child.

While some of the social science literature and reported cases[FN76] express concerns about children aged three and under relocating, the social science research suggests that as children move towards school age (6-11 years), they are better able to maintain a relationship with the parent from whom they are separated. Professor Thompson reported that in 1996-2003 period Canadian judges were more willing to permit a move for children aged 6 to 11 years, than for children less than 6 years of age.[FN77] However, a review of Canadian cases from 2003 to 2008 by Jollimore and Sladic found no difference in success rates for relocation cases for children between birth and 5 years and between
6 through 11 years: [FN78] although they found a rise in the per centage of cases allowing moves for children aged 10 to 14 years, it was not statistically significant.

Doing an age-based analysis of relocation cases is challenging because there is more than one child in many cases; in relocation studies, the common convention for dealing with cases involving more than one child is to use the age of the youngest child for that case, based on the assumption that that child is the one whose relationship with the non-moving parent will be most affected by the move. Using this convention, we considered various age ranges [FN79] to determine if there was a significant age effect.

There were over 1,000 children in the 738 cases in our study, with 55 per cent of cases involving one child, and 45 per cent involving multiple children. The mean age of the children was 7.5 yrs. There were 300 cases where the only or youngest child was aged 0 to 5; of those the move was permitted in 151 cases (49 per cent). No significant age effects were found for younger or older children for Canada as a whole. [FN80]

(j) — Wishes of the Child

The wishes of children who are the subject of a relocation dispute will often be an important factor in determining the outcome of negotiation or litigation, though many relocation cases involve younger children who are unable to express preferences, or older children who are unwilling to "take sides" and express their views. [FN81] There are good reasons for children not wanting to express their views about such a clearly dichotomous question as relocation, and an expression of preference by a child in a relocation case will often require the child to speculate about future living arrangements that have not been experienced. However, when children do express their views about relocation, the courts tend to give significant weight to their wishes. One might expect that when the views of children are clear, especially if the children are approaching or in adolescence, parents also give significant weight to these views resulting in settlements rather than litigation.

Commonly in cases involving older children for whom friendships and peer groups are becoming important, the children are reluctant to move, make new friends and attend a new school, and these are cases in which the courts will refuse to allow relocation, or will change custody to the parent who will remain in the community where the children were raised. [FN82] There are, however, also cases in which older children have a strong attachment to the parent who is moving and express a desire to relocate with that parent; these views are also given significant respect by courts. [FN83]

The expressed wishes of children are not determinative of relocation decisions, however, especially in cases in which there is expert evidence to indicate that a child's preference is clearly not in accord with his or her interests, or in cases in which there are multiple siblings who may be expressing different views. [FN84]

In our study of Canadian court decisions, we only found a clear indication of the children's views or attitudes towards the relocation in 124 cases (17 per cent), and in another 55 cases (7 per cent) the judgement reported that there was evidence before the court that the child/children were either neutral, or that the evidence did not indicate a clear preference either way. In some cases the children were clearly too young to have views, and in a few, the parents specifically stated that they jointly agreed that the children should not be asked their views. In many of the cases, it is apparent that the
children did not want to express a preference.

Children's views were typically put before the court through expert testimony, with very few cases where judges met with the children. Testimony from parents regarding their children's wishes was often conflicting and typically afforded little or no weight by the courts.

Of the 124 cases where the children had clear views, the children favoured the move in 87 cases; the move was allowed in 66 of these cases (76 per cent). In 37 cases the children opposed the move; in only 9 of these cases was the move allowed (24 per cent) (see Figure 4.4). Thus in 94 of the 124 cases (76 per cent) in which the children expressed clear views, the court's decision accorded with those views. This is a statistically significant effect.[FN85]

Tabular or graphic material set at this point is not displayable.

(k) — Conduct of the Applicant: The "Co-operative Parent" vs. "Badly Behaved Parent"

Social science research suggests that one of most important factors in predicting whether a child will have a strong relationship with the "left behind" parent after a move is the attitude of the relocating parent.[FN86] If the moving parent is emotionally and practically supportive, a strong relationship can be maintained despite long distances and less frequent contact. Conversely, without those supports, it will be difficult for a non-moving parent to maintain a strong relationship with a child when the separations are of longer durations or the visits more difficult to arrange.

Canadian jurisprudence indicates that if the court is satisfied that the parent who wants to relocate is "co-operative" and likely to support the relationship of the children with the other parent after the move, the court is more likely to allow the relocation.[FN87] A co-operative attitude can be demonstrated by conduct after separation, as well as by presenting the court with a detailed parenting plan that has generous provisions for maintaining the relationship between the other parent and the child. If the mother has "demonstrated a worrying indifference but not an enmity to that relationship," that will clearly be a negative factor in a judicial relocation decision.[FN88] If the court is satisfied that a parent wants to move in order to undermine the relationship with the other parent, this will be viewed as "bad faith" and the move very likely will not be permitted.

The reality is that it is difficult to enforce access orders even if both parents live in the same jurisdiction; it is often practically impossible for a parent to enforce an access order if a custodial parent is permitted to relocate to another jurisdiction. It is therefore appropriate for courts to take account of how co-operative a parent who wants to relocate is likely to be.

Sometimes a custodial mother undertakes some form of "self-help," in particular taking the child to a new locale without court permission or permission of the other parent. Sometimes this conduct is combined with dishonesty towards the other parent, and in some cases towards the children, for example by not telling them about her remarriage. This type of "bad conduct" may result in the court not permitting the custodial parent to relocate with the child.[FN89] The stated reason for refusing to allow the move was not a desire to punish the custodial mother for dishonesty, but rather a concern that a custodial mother who engaged in this type of conduct demonstrated a lack of commitment to the welfare of her children, and will be unreliable in carrying out commitments to support a relationship between the children and their distant father after a move.
In some cases it is established that the custodial mother has been misleading or dishonest with the court about her plans or circumstances, or has disregarded pending proceedings. This type of conduct is always condemned by the courts, and sometimes influences the decision to not allow the mother to relocate.[FN90] In other cases, the dishonesty of the mother results in her being penalized with court costs, but in assessing all of the circumstances the court allows her to move, because the court is satisfied that she would continue to support a relationship with the father.[FN91]

Although court decisions frequently condemn mothers who take unilateral action (relocate with their children without the approval of the other parent or permission of the court),[FN92] in our study, applicants were successful in 70 out of 144 cases where they "moved first and asked permission later" (49 per cent). While judges condemned such unilateral action, they also took account of all of the circumstances of the case, including issues of familial violence and whether it was in the best interests of the children to face the instability of another move, this one a return to their prior place of residence. So taking unilateral action, while a negative factor, did not always have a determinative effect on outcomes.

In an additional 53 cases the applicant moved without the children but made an application to allow the children to relocate; the applicant was successful in 22 of these cases (42 per cent). Perhaps due to the smaller number of these cases, this is not a statistically significant difference, but it does suggest that from a strategic perspective, moving without the children and then making an application to relocate them may weaken the applicant's case.

(l) — Residence Restrictions Clauses

It is not uncommon for separation agreements and court orders dealing with the custody of children to specify that the parties will both continue to reside in the same locale as they lived in at the time of separation, unless the parties later agree or a court allows a move, or to require the custodial parent to provide the other parent with notification of any proposed move. While these clauses may affect the process by which a relocation case is brought before the courts, at least in Canada, they do not create a presumption against removal or change the onus which would otherwise apply in a relocation case.[FN93] The issue in a relocation proceeding is making a decision based on the best interests of the child at the time of the application, and it is accepted that parents cannot make a binding separation agreement about what will, after a change in circumstances (i.e., when a move is contemplated), be in the best interests of the child.

A clause preventing relocation may require that a custodial parent who wishes to move seek approval from a court for that move, but it does not create an onus of proof in the relocation proceedings. In our study of relocation cases, these clauses seem to have no effect on the final outcomes; there were restriction on relocation clauses in 143 cases, with moves allowed in 73 of them (51 per cent), exactly the same rate as for cases without such clauses.

(m) — Role of Expert Evidence

Assessment reports by psychologists or social workers are a significant feature of most types of child-related litigation, including child protection, custody and access cases. These reports provide the court with information and observations from an independent mental health professional who has conducted an investigation and prepared a report, often also making recommendations.
Compared to other types of child-related litigation, these expert reports seem to be prepared in relatively few relocation cases and, if prepared, seem to be given less weight than in other cases. In our study, there was evidence from a court-appointed mental health professional in only 199 out of 738 cases (27 per cent). In 45 cases the assessor recommended that the move should be permitted, with the court allowing the move in 34 of these cases; in 63 cases the assessor made a recommendation against the move, a recommendation followed in 38 of these cases. In 91 cases, no recommendation about relocation was made in the report. Thus the assessor's recommendations regarding relocation were followed by the judge in 72 out of 108 cases, a somewhat lower rate (67 per cent) than reported in most other studies on the role of experts in child related cases.[FN94]

There are relocation cases in which judges have cited the evidence of a court-appointed expert as being influential in making a decision against a move,[FN95] though not infrequently relocation cases in which there is a court ordered assessment, judges disregard the recommendations — in particular to allow a child relocate despite the expert's recommendations that the move not be permitted.[FN96] The late Professor James McLeod argued: "Courts . . . seem to accept that mobility is a legal issue, not a mental health issue."[FN97]

There are actually some relocation cases in which the judges took the trouble to make written rulings taking a conservative approach to even involving a mental health professional in a relocation case. In Shiekh v. Sheikh Flynn J. refused to order an assessment in a case in which the mother of a 25-month old child wanted to relocate to England. Justice Flynn expressed concern about the delay in the resolution of the case that would occur if an assessment were ordered, since this application was not made until the eve of the trial, but also commented that there was no evidence of a "clinical issue" that would justify preparation of a psychologist's report.[FN98] In Johnstone v. Brighton, Campbell J. refused to permit a psychologist with extensive experience in conducting court-ordered assessments, but in this case retained by the father, to testify as an expert witness regarding attachment and the effects of relocation on a 5-year old child from Ontario to Pennsylvania.[FN99] Justice Campbell ruled that this evidence was not "necessary," and would have made the trial longer and more expensive.

There are important practical concerns of expense and delay that make assessments less common in relocation cases. An assessment takes at least 3 months to complete, and can take as long as 9 or 10 months. The child's interests often require that a relocation case be resolved within a few months, so that a decision can be made before the start of the school year, making it impractical to obtain an assessment. Beyond the important practical questions of expense and delay, evidence from mental health professionals may have less value in relocation cases than in other child related cases. As discussed above, there is only limited psychological research about the effects of relocation on individual children, and there are questions about how much an assessment will add to this type of case. The evidence of a mental health professional is likely to be relatively predictable and quite speculative: if the child relocates, the relationship with the parent who remains behind will suffer, especially if the child is younger. The issue that the judge must resolve is whether this cost to the non-moving parent and child is worth the benefit of relocation to the custodial parent and child. This balancing is a legal and value-based decision issue on which a mental health professional can usually only shed limited light.

While the test for relocation articulated by Gordon v. Goertz is an assessment of the "best interests" of the child, the application of this test is quite different from that which applies in other custody and
access disputes. In ordinary custody and access disputes, the legal and the psychological conceptions of the "best interests" of a child are likely to be similar, and the evidence of a psychologist about the children involved may be of genuine value to a court. In a relocation case, the immediate psychological well-being of a child will rarely improve, no matter what decision is made by the court. The reality is that applications for relocation generally do not arise because of a genuine desire by the custodial parent to promote the interests of the children involved, except indirectly, insofar as the children's welfare is enhanced if the custodial parent has enhanced social or emotional satisfaction or improved economic prospects. The court is generally faced with a limited range of alternatives, each of which poses potential risks and benefits, and requires speculation about the future. In most cases there is no psychological research that casts direct light on the making of this type of decision.

Despite the limited use made of the evidence of mental health experts in relocation cases in Canada, psychological concepts are frequently used by counsel in making submissions and by experienced family law judges in making decisions. The rhetoric and analysis of legal professionals in these cases is generally not based on a protection of parental rights, but on promotion of the welfare of children. Judges frequently refer to the importance of "attachment" and "stability" in a child's life, even if no expert evidence is called. There are certainly legitimate concerns about the expense and potential delay in a trial from ordering an assessment, especially in a relocation case, as there is often need for a quick resolution. However, given the frequent references to psychological concepts by judges and lawyers in relocation cases, there are clearly relocation cases in which an assessment and testimony by a psychologist or social worker will be valuable.

(n) — Lawyers for Children — Ontario

Ontario has the most extensive program in Canada for the representation of children involved in parental disputes over custody, access or relocation, though even in Ontario children only have a lawyer in a small portion of cases. Overall in this study, children had a lawyer in only 34 out of 738 cases (just under 5 per cent), with 26 of those cases in Ontario and 4 in Quebec.

While mental health professionals would seem to have only a limited influence on outcomes of relocation cases in Ontario, the lawyers for children from the Ontario Office of the Children's Lawyer, when involved in a relocation case, seem to have a more influential role at trial or appeal.[FN100] The Children's Lawyer is most commonly involved in relocation cases only where children are old enough to express their views.

If counsel from the Office of the Children's Lawyer (OCL) is involved in a relocation case, typically counsel will be advocating for a position based on the wishes of the child. There are, however, relocation cases in which counsel from the Office of the Children's Lawyer concludes that the child has been improperly influenced by one parent, and may decide to advocate for a different outcome than the expressed preference of the child, albeit ensuring that the child's views are also put before the court.[FN101]

Although judges have made it clear that they are not bound by the wishes of the child in a relocation case, nor are they bound to adopt the position advocated by counsel for the child, as discussed above, the wishes of children, when expressed, are often influential. The position taken by this Office also often seems influential with the Ontario courts in relocation cases.[FN102] In our study of a decade
of Ontario relocation cases, we found that in 7 of 10 cases in which the judge's decision indicated that OCL counsel made a recommendation, the court followed the recommendation (5 of 6 where the move was recommended, and 2 out of 4 where OCL counsel recommended against the move).[FN103] The influential nature of the recommendations of OCL counsel may in part reflect the importance placed by judges on the wishes of children in these cases,[FN104] as well as the credibility of the Office[FN105] and the difficulty that judges face in determining what is truly in the "best interests" of children.

It is not uncommon in relocation cases, in which the parties have not already contacted the Office of the Children's Lawyer and there are older children involved, for a judge dealing with the case on an interim basis to request the involvement of that Office,[FN106] in the hope that there can be an independent investigation by a social worker or counsel appointed to advocate for the child. The Office, however, may decline to become involved and is not regularly involved in relocation cases; in the 193 Ontario cases in our study, counsel for the OCL appeared in only 26 cases (13 per cent), and in 16 out of these 26 cases with counsel for the child, the court's decision did not reveal that counsel for the child advocated a position.

(o) — Interim Orders

The reported case law establishes that there is clearly a higher persuasive burden on a custodial parent who wants an order permitting relocation to obtain court permission on an interim motion, which is usually based exclusively on affidavit evidence, rather than after a full hearing or trial at which all of the evidence can be presented and tested through cross-examination. There is much less opportunity to present and test evidence on an interim motion, and judges are aware that, if an interim order is made and the child permitted to move, this is very likely to establish a status quo that will be very difficult to change at a later date. Accordingly, judges recognize that this is analogous to the parent seeking relocation making an application for summary judgement, and it is said that there must be "exceptional" or "compelling circumstances" if a court is to permit relocation on an interim motion.[FN107]

If an interim motion for relocation is denied, this should, in theory, have no impact on the outcome of the trial. However, in many cases the dismissal of an interim relocation motion also results in a settlement because of a combination of financial and emotional exhaustion, disclosure of information and an indication of judicial thinking about the case.

While it is difficult for a party seeking relocation to succeed on an interim motion, if the judge is satisfied that the outcome of any possible trial would be "inevitable," because the non-custodial parent has had a limited relationship with the child[FN108] or has been abusive of the child, then relocation will be permitted on an interim application. If there is a high conflict separation or domestic violence which is clearly affecting the child's emotional well-being, the court may allow the primary caregiver for the child to relocate in order to reduce the stress on the child.[FN109] However, if there has been a unilateral removal of a child, even with allegations of spousal abuse, the court may require the parent who removed the child to return with the child pending a full hearing.[FN110] If there are conflicting affidavits and a lack of independent evidence,[FN111] or if the case for relocation does not seem strong, then the court may not allow the move on an interim motion, even if the move is only an hour and half's drive, as even this relatively short distance can have a serious effect on a child's rela-
Despite the high persuasive burden on interim applications for relocation, in our study interim orders were sought in 158 cases and succeeded in 74, a rate (47 per cent) that is only slightly below the rate in cases after a trial. In the successful interim cases, the judges clearly adverted to the higher burden of proof and explained why the cases were "exceptional." Counsel who bring interim motions for relocation are undoubtedly generally aware of the test that they have to meet, and tend to bring these motions only when they have strong evidence in support.

(p) — Appellate Decisions: Deference to Trial Courts

In Van de Perre v. Edwards, an ultimately unsuccessful custody variation that, if granted, would have resulted in the child moving from British Columbia to North Carolina with the previously non-custodial father, the Supreme Court of Canada established a "deference standard" for the decisions of trial courts in family law cases.[FN113] In family law cases an appeal court should only reverse a trial decision if satisfied that the trial judge made a "material error," specifically that the judge misapprehended the evidence, erred in law, or reached a conclusion that was so perverse on the evidence and law as to exceed the "generous ambit within which reasonable disagreement is possible." In Van de Perre Justice Bastarache particularly highlighted the importance of finality in custody cases and the fact-specific nature of each case.[FN114]

As observed by Justice Laskin of the Ontario Court of Appeal in dismissing an appeal by the custodial mother in the relocation case of Wolf v. Wales:[FN115]

> We recognize that mobility cases are among the most difficult cases a court has to decide. But these cases inevitably turn on their particular facts. The trial judge, who sees and hears all the witnesses, is in the best position to decide the child’s best interests. This court cannot retry the case but must instead give deference to the trial judge’s factual and credibility findings. Only if the trial judge erred in law or made findings of fact or credibility that were unreasonable are we entitled to intervene.

If an appeal court concludes that the trial court did not "err in principle," it will affirm the trial judgement in a relocation case, even if the effect of the decision is to make it more difficult for a parent to continue to have frequent contact with his children.[FN116]

In our study, there were 83 appellate decisions, resulting in 59 trial decisions being affirmed (71 per cent), 15 being reversed and 9 ordering for a new trial. This was an appellate "success rate" of 29 per cent; this is somewhat lower than the overall success rate in family appeals found in a study of Ontario Court of Appeal decisions from the 1990-2003 period, which was over 40 per cent.[FN117]

Appeal courts allowed the applicant to relocate in 14 of the 15 cases in which trial decisions were reversed without a new trial being ordered. Thus appellate courts allowed relocation in 47 out 83 cases (57 per cent), which is roughly the same rate as trial decisions.

(q) — Summary of Factors

While each case is unique and trial judges have significant discretion in applying the "best interests
of the child” test to relocation cases, the analysis of Canadian relocation cases decided between 2001 and 2011 reveals some trends and patterns:

• There has been a slight increase in the number of reported relocation cases over the past decade, but the relocation "success rate" has remained essentially constant at just above 50 per cent.

• Relocation cases have a very strongly gendered element; the parent seeking to relocate is almost always the mother, though in the relatively small number of cases in which fathers seek to relocate with a child, their success rate is not dissimilar to mothers.

• The most common reasons for wanting to relocate are improved economic or job prospects (about one third of cases), followed by the mother wanting to move for a new intimate relationship (just under a third of cases); the custodial mother seeking social and emotional support from her family was the primary reason for the move in about one fifth of cases.

• Custodial mothers have the greatest chance of gaining permission for relocation if they have sole custody, or there are substantiated allegations of family abuse. Conversely, in cases where there has been joint physical custody (each parent has child at least 40 per cent of the time), a court is significantly more likely to deny permission to relocate.

• Expert evidence from mental health professionals is sought less frequently and given less weight in relocation cases than in other types of child-related cases.

• The wishes of children were only mentioned in about one-quarter of the reported cases, although in about one-third of these cases, the children were ambivalent or did not express clear views. When children express clear views, judges tend to give considerable weight to their wishes regarding relocation, though they are not always followed.

• There does not appear to be a significant age effect in relocation cases.

• Restrictions on relocation in separation agreements or custody orders are not significant factors in preventing a court from permitting a move.

• Although international moves are more disruptive to a child than relocation within the province or country, the rate of successful applications for international moves is actually higher than for national moves; this may be explained by the differences in the nature of the international cases and is consistent with findings from other countries.

• Judges frequently state that interim applications for relocation will only succeed in "exceptional circumstances" and where an interim motion is argued, few cases proceed to trial. However, perhaps because those who bring interim applications self-select and have strong cases, those who bring these applications have a fair degree of success.

• Courts frequently express condemnation of parents who take unilateral action to move a child without the agreement of the other parent or approval of a court. However, custodial parents (usually mothers) were successful in almost half of the cases where they "moved first and asked permission later," as judges took account of all of the circumstances of the case, including whether it was in the best interests of the children to face the instability of another move, this
one a return to their place of previous residence.

- Appellate courts give "significant deference" to the decisions of trial judges about relocation, recognizing their discretionary and factual nature. Only slightly more than a quarter of appellate relocation decisions resulted in a reversal or new trial being ordered.

5. — The Problematical Nature of the Present Approach

The present approach to relocation cases in Canada, and many other jurisdictions, is highly problematic. There is no empirical evidence that it advances the interests of children involved in these cases, and the uncertainty and litigation that result have high costs for children and parents in general as well as for the justice system.

The lack of clear evidence from social science research about outcomes for children in relocation cases means that the application of the open-ended, unprioritized list of best interests factors requires trial judges to make inherently speculative decisions about the future, and make assessments as to what is "best" for individual children that inevitably require use of their own experiences and values.[FN118] While the value-based and predictive nature of the best interests test creates challenges in any situation where it is being applied, relocation cases have a greater impact on children and parents than most other custody and access situations, and offer less opportunity for subtle adjustments or future variations.[FN119]

Judges in Canada (and elsewhere) understandably find relocation cases extremely challenging, and recognize that in these cases they are not carrying out the traditional judicial function of applying a known legal rule to facts that they are responsible for determining. An example of the judicial recognition of the challenge of these cases is the 2010 British Columbia decision in C. (S.L.) v. C. (K.G.), where Rogers J. commented:

The party advocating relocation will, in most cases, be "rolling the dice" . . . she cannot know with precision how things will turn out for the children in the new location . . . The BCCA in S.S.L. recognized this when it observed:

In cases like this where courts are called upon to make what one judge has called an "educated prediction" as to the best interests of the children, based not only on evidence of their old life, but also evidence of what parents believe will transpire in their new life . . . [FN120]

The British Columbia Court of Appeal has recently complained that Gordon v. Goertz provides "insufficient guidance" to judges and lawyers.[FN121] Having clearer guidance would help to reduce the volume of emotionally and financially expensive litigation. In the leading English relocation decision of Payne v. Payne, the prominent family jurist Thorpe J.A. observed:

The opportunity for practitioners to give clear and confident advice as to outcome helps to limit the volume of contested litigation. Of the cases that do proceed to a hearing, clear guidance from this court simplifies the task of the trial judge and helps to limit the volume of appeals.[FN122]

6. — Proposals for Reform
In response to the concerns about the lack of guidance of the dominant best interests approach, commentators and organizations in a number of jurisdictions have made various proposals for presumptive rules (or onuses) for relocation cases. An important motivation for many reformers is to provide greater direction for judges, lawyers and parents to facilitate settlements and adjudication.

Some of these proposals are part of a broader law reform agenda intended to either increase the rights of primary care parents (i.e. mothers) or the rights of parents without primary care (i.e. fathers), and are modeled on the few jurisdictions that already have blanket rules in favor of or against relocation. A number of commentators have a feminist perspective, arguing that it would be best to have a presumption in all relocation cases in favor of the decision of the parent with whom the child primarily resides, usually the mother. These advocates argue: "This would recognize that the child and parent are closely related . . . [and allow the primary care] parents to meet the needs of their children without undue hindrance by the courts" or the non-moving parents.[FN123] Other commentators, more sympathetic to fathers, focus on the importance of children's relationships with both parents and the risks of relocation and propose a general presumption against relocation.[FN124]

A slightly more balanced set of proposals for reform was put forward in a White Paper of the government of British Columbia in the summer of 2010, and is now reflected in amendments to the Family Law Act that were enacted in late 2011 but are not yet in force.[FN125] The White Paper noted that that there is a broad support for "making relocation law more certain," but there is a "split as to which presumption to use." The Paper takes the position that where the day-to-day care of the child is "substantially equal," the burden of proof should be on the parent who wants to move with the child to show that the proposed move is in good faith and is in the child's best interests. If the care of the child is not substantially equal, the burden would be on the parent opposing a move to show that it would not be in the child's best interests to move with the parent with primary care. A parent seeking to relocate with children would, however, generally be required to put forward a plan to show that "reasonable efforts" will be made to find ways to preserve the child's relationship with the other parent.

The White Paper proposals have a "child-focused rhetoric," and the reason offered for placing an onus on parents who do not have day-to-day care of the child to establish that the best interests of the child are not served by relocation is that relocation applications should not evolve into an "unintended re-examination of the entire parenting arrangement." The concern is that previous agreements or court orders regarding which guardian is to exercise particular responsibilities should not be re-examined simply because the residence of one of the adults and child is to be different.[FN126]

The discussion in the White Paper of the reasons for this presumption (or onus) is very brief, and makes no reference to either social science research or case law, or to how it will promote the interests of children. The rationale is that this rule will reduce the amount of litigation by assuming that once a child care arrangement is made, whether as a result of an agreement of the parents or a court order, that provides for anything other than "substantially equal sharing of time" (a relatively uncommon arrangement), then that arrangement does not require that both parents will have the frequent and substantial involvement in the lives of their children that living in close proximity would allow. This set of proposals has been controversial, especially with father's groups,[FN127] but in November 2011 it was enacted by the British Columbia legislature in the form proposed, though not yet proclaimed in force. That legislation will only apply to applications under provincial law (i.e. where parents were not married), not to applications under the Divorce Act.[FN128] There are currently no oth-
er government sponsored proposals for legislative reform in other Canadian jurisdictions.

There has been a growing interest internationally to reform the law governing parental relocation, and if possible to develop a degree of consistency in the approaches in different jurisdictions, though there is still a lack of consensus about how to proceed. In the United States, an effort by the American Law Institute's Uniform Law Conference to draft a *Model Act* to govern relocation was abandoned in 2009, as the drafting committee concluded that the pressure from different advocacy groups would make it impossible to gain significant legislative support for any reforms. Nevertheless in 2010 the American Bar Association Family Law Section appointed a committee to start to work on the development of a *Model Act on Relocation.*[FN129]

In 2010 there were international conferences in Washington and London that addressed parental relocation, especially in the context of cross-border cases. In March 2010, over 50 judges and family law experts attended at the International Judicial Conference on Cross-Border Family Relocation and adopted the *Washington Declaration on International Family Relocation.*[FN130] The *Washington Declaration* makes some important proposals about the international recognition and enforcement of relocation decisions, as well as procedural proposals for national laws, but endorsed the use of a "best interests" test, without any presumptions for or against relocation. The *Declaration* begins with two child-focused factors to be considered in making best interests decisions about relocation:

1. The right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest; and

2. The views of the child, having regard to the child's age and maturity.

The *Washington Declaration* provides a list of other factors to be considered in making "best interests" relocation decisions. Although a little more detailed than the list in *Gordon v. Goertz,* the rest of the factors resemble those articulated by the Supreme Court of Canada, except that there is specific reference to domestic violence and there is a statement that "where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation" are to be considered.

In July 2010, about 150 lawyers, judges and scholars from 18 developed countries attended the International Conference on Child Abduction, Relocation and Forced Marriage in London. The London Conference adopted relocation resolutions similar to those in the *Washington Declaration.* One of the *London Resolutions* also advocated that the Special Commission of the Hague Conference on Private International Law should work towards the "introduction by international instrument or otherwise of a common framework for resolving disputes relating to the international relocation of children."[FN131]

In Canada the prominent Toronto family lawyer, Phil Epstein,[FN132] has proposed that a process similar to that used for the development of *Spousal Support Advisory Guidelines* should be used to develop what could be called *Relocation Advisory Guidelines* (RAGs). He proposes the establishment of a committee of lawyers, judges, government officials and academics to draft working papers and circulate them for consultation with the Bar, Bench and interested members of the public. It is hoped that this work would lead to the development of the RAGs to help to resolve cases. As with the SSAGs, this project would be an advisory codification of existing law rather than an effort to change...
7. — A Proposal for Relocation Advisory Guidelines for Canada

The highly discretionary nature of the best interests approach to relocation promotes uncertainty and litigation, and results in the criticism that this is a "ruleless" area. Our central argument is that a careful analysis of the Canadian case law allows one to discern patterns and principles that are in fact influencing the courts in this country. Based on these patterns and on some judicial statements of principle, it is possible to articulate presumptions that appear to be operative in relocation cases. Further, these presumptions are supported by the social science literature or reference to broader principles of public policy. An awareness of these presumptions can help judges, lawyers and parents to more effectively and efficiently resolve many cases. In setting out these presumptions, we are not proposing our views of what we think that the law should be, but rather are trying to more clearly articulate what we believe Canadian courts are doing.[FN133]

It would seem that Canadian courts are operating based on certain presumptions about the "best interests of the child" in relocation cases. These are only presumptions, and can always be rebutted based on a multi-factoral best interests finding in an individual case:

- There is a presumption in favor of relocation if
  - the parent opposing relocation has perpetrated acts of familial abuse;
  - the parent seeking relocation has sole custody (legal or de facto); or
  - the child wishes to move.

- There is a presumption against relocation if
  - the parent seeking relocation has made clearly unfounded allegations of familial abuse;
  - there is shared physical custody (each parent has child at least 40 per cent of the time); or
  - the parent seeking relocation has unilaterally moved the child; or
  - the child does not wish to move; or
  - the case is at an interim stage.

The basis for articulating these presumptions is the analysis of Canadian case law and social science literature set out above in this article, though a brief explanation of each presumption is also appropriate here.

**Familial Abuse:** The analysis of the outcomes of Canadian cases and the statements of judges make clear that the substantiation of an allegation of familial abuse, either child abuse or spousal violence, makes a court significantly more likely to allow a parent to relocate. Although the abuse is only one factor, courts understandably place significant weight on this factor, expecting that allowing relocation in these cases will afford a parent and child some physical or emotional protection, and promote the welfare of the child. These are cases where the mother's decision to
relocate is influenced by a desire to escape from an abusive and controlling man, whose abuse is having a negative effect on the children, though economic and social support factors are also significant in many of these cases.\[FN134]\ Further, the perpetration of violence or abuse, especially if it occurs after separation, may justify terminating or curtailing the rights of the access parent to enjoy ongoing contact with the child.

Since violence and abuse often occur without being witnessed by a third party, there are cases where an allegation is made, and the court is unable to determine the validity of the allegation. In such uncertain situations, there is neither a presumption for nor against relocation; a possible victim who is unable to prove abuse should not be penalized for raising the allegation in court.

There are also cases where the court concludes that the person making the allegations has significantly exaggerated or completely fabricated the allegations, raising concerns about distorted perceptions of the alleging parent (or a willingness to fabricate) and hence concerns about whether the parent making those unfounded allegations will support the child's relationship with the other parent if a move is permitted. This justifies a presumption against relocation if the parent seeking relocation makes clearly unfounded allegations of spousal violence or child abuse.

**Custody Arrangement:** The analysis of outcomes of Canadian cases reveals that if the relocating parent has sole custody, this has predictive significance, making it more likely that court will permit a move. Conversely in a situation of shared physical custody (each parent has the child at least 40 per cent of the time), a move is much less likely to be permitted. This is consistent with the social science research literature which recognizes that the greater the involvement of the non-moving parent in the child's life, the greater the disruption from the move and the greater the risk of emotional loss from relocation. Recognizing the amount of time spent with each parent as creating a presumption for or against relocation is also consistent with the statements in *Gordon v. Goertz* about the "threshold requirement" for relocation and the statements in that case that where the child lacks a positive relationship with the non-moving parent, there might not even need to be a hearing because the "material change" threshold has not been reached."\[FN135]\]

The cases of sole custody and shared physical custody are at two ends of the spectrum and usually relatively easy to identify; they have generally have very different patterns of parent-child interaction that merit different presumptions. The joint legal custody cases, however, cover a broad middle spectrum, which at one end may be essentially the same as sole custody, and at the other end may be very similar to joint physical custody. Having a midrange of cases where there is no presumption is a more nuanced approach than proposals like the *British Columbia White Paper*, which have only two dichotomous situations, one with a presumption against relocation ("substantially equal care") and all others having a presumption in favour of relocation.

**Unilateral Acts of Relocating Parent:** Canadian courts regularly condemn custodial parents who take unilateral action to relocate, in particular by relocating without the approval of the other parent or permission of the court. While this is not the only factor in a case, and relocating parents in these situations have about the same success rates as in other cases, there are sound policy reasons for the courts having effectively placed an onus on a parent who "moved first and asked permission later" to justify this action. Clearly this type of self-help is to be discouraged.
by having an explicit presumption against relocation in such cases and placing an onus on the moving parent to justify the relocation.

Wishes of Children: The analysis of the outcomes of Canadian cases and the statements of judges make clear that the wishes of children, whether in favour or against relocation, will have a significant effect on the courts, and there is in effect an onus on a parent who wants the court to disregard the wishes of the child. Hearing the views of the child is mandated by the Convention on the Rights of the Child and the 2010 Washington Declaration. Of course, in many cases children are too young to express their views, or they are unwilling to "take sides." Children should never be pressured by the justice system (or parents) to express an opinion. If a child seems to be manipulated, threatened or pressured by a parent, this may be a good reason to disregard the child's views.

Interim Orders: Canadian case law makes clear that allowing relocation at interim hearing requires "exceptional" or "compelling circumstances." As noted, the fact that the courts have clearly articulated this presumption has not resulted in courts automatically dismissing these applications, as almost half of interim applications for relocation are successful, but the clarity of this particular presumption in the case law has doubtless made counsel selective in seeking interim relief. While parents wanting to relocate will inevitably want a fast decision, good counsel will advise that an interim application will only succeed if there is a very strong case.

These presumptions are more nuanced than those proposed by some other reformers, in that different presumptions, for or against relocation, apply to different situations, rather than having a uniform presumption for all cases (in favor of or against relocation). Further, there are also cases where there will be no presumption, or there are conflicting presumptions, resulting in no operative presumption. An analysis of the case law (and social science literature) generally does not clearly indicate how to deal with cases where there are conflicting presumptions. However, it would appear from the jurisprudence that judges give greater weight to founded allegations of familial violence than the nature of the custody arrangement, which is consistent with the principle of placing a priority on the safety of victims of family violence.

Awareness and application of these presumptions should help to resolve many cases, but unlike with some of the reform proposals discussed above, such as that of the British Columbia White Paper, there will be some cases where there is no presumption. In particular, these are cases where there is a trial concerning relocation of a child who is in the joint legal custody of both parents, but does not spend at least 40 per cent of the time with each parent, and there is no familial violence and the child has not expressed any wishes about relocation.[FN136] While some may complain about the lack of a presumption in these cases, this reflects the reality that there is significant variability in these cases, and further an acceptance that there are some situations for which the courts have not established patterns or principles.

We hope that our discussion and the presumptions articulated in this article are useful for judges, lawyers, mediators and parents presently dealing with relocation issues. However, it would be preferable to have the type of group proposed by Phil Epstein established to further refine and endorse Relocation Advisory Guidelines. It would be best for legislatures to enact laws to provide clearer guidance for these most important and challenging cases. If either of these larger projects is undertaken, it
is hoped that the analysis in this article will provide a useful basis for further work on these more formal law reform efforts.

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FN1. This article uses the term "parental relocation," which is the most widely used term internationally and in the literature, but Canadian judges and lawyers often refer to these as "mobility cases."

FN2. According to the 2006 Canadian Census, the likelihood of moving homes at least once in the previous five years was significantly higher for children living with a divorced parent than for those living with both parents. Rates of relocation at least once were significantly higher for family units with children under the age of 19 and headed by a divorced parent (55 per cent) than for families with children under 19 years living with two legally married parents (38 per cent): Vanier Institute for the Family, Profiling Canada's Families IV (Ottawa, 2010), at 24-25. There is, however, no data available on the reasons for these moves or the distances involved. There is a need for better data and research about relocation and its effect on children.


FN4. For a discussion of varying approaches, see e.g. Linda Elrod, "National and International Momentum Builds for More of a Child Focus in Relocation Disputes" (2010) 43 Fam. L.Q. 341.

FN5. The jurisdictions with a presumption in favor of relocation include the states of Washington and Oklahoma. In England, a residential parent has the right to undertake an "internal move" (within the country), unless a court finds that there are "exceptional circumstances." For international moves, the English courts have a presumption in favour of relocation by the residential parent. In Payne v. Payne, [2001] EWCA Civ 166 (Eng. C.A.), Thorpe LJ explained this presumption:

   In most relocation cases, the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional status.

   More recently, in M.K. v. C.K., [2011] EWCA Civ 793 the English Court of Appeal held that for international moves, if there is a "practical sharing of the burden of care" (in that case a 43/57 split), there was no presumption in favour of relocation. See discussion in Deborah Eaton & Madeleine Reardon, "Relocation after K. v. K., [2011] Fam.L. 1093.


FN10. See e.g. LaMusga v. Lamusga, 32 Cal. 4th 1072 (2004).


FN12. For studies finding that relocation cases are harder to settle and more likely to be go to trial than other child-related disputes, see Parkinson et al, "The Need for Reality Testing in Relocation Cases" (2010) 44 Fam. L.Q. 1; and Taylor & Freeman, "International Research Evidence on Relocation: Past, Present, and Future" (2010) 44 Fam. L.Q. 317.

FN13. As discussed later in this article, British Columbia has enacted legislation regarding relocation applications under provincial law in that province (Family Law Act, S.B.C. 2011, c. 25, ss. 65-71), but this law has not been proclaimed in force.

FN14. See e.g. J.S. Wallerstein & T.J. Tanke, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce" (1996) 30 Fam. L.Q. 305; and Carol Bruch & Jane Bowmaster, "The Relocation of Children and Custodial Parents: Past, Present and Future" (1996), 30 Fam. L. Q. 245. Some Canadian case law in this period explicitly reflected this view. For example, in Lapointe v. Lapointe, 17 R.F.L. (4th) 1, 1995 CarswellMan 214 (Man. C.A.), the Manitoba Court of Appeal held that there was an onus on an access parent to establish why a custodial parent should not be permitted to relocate with a child. Twaddle J.A. commented: "the present access arrangements are certainly desirable, but not if they only can be maintained at the price of an unhappy custodial parent" (at para. 65).

FN15. For example, American psychologist Richard Warshak pointed out that the position of Wallerstein and Tanke, advocating a presumption that custodial parents should be permitted to relocate, was based on the findings of only ten studies, seven of which were conducted by Wallerstein's research team. In contrast, Warshak asserted that an examination of over 75 social science studies suggested that it is in a child's best interests to remain within easy access of both parents. Warshak argued that Wallerstein's position "ignores the broad consensus of professional opinion, based on a large body of evidence, that children normally develop close attachments with both parents, and that they do best when they have the opportunity to establish and maintain such attachments." Warshak further pointed out that most of the studies that are used in support of the importance of the attachment bond between
primary caregivers and children report correlational, rather than causal, relationships. Warshak observed: "when parent and child adjustment go together, we must also consider the possibility that it is the child's adjustment that influences the parent's adjustment, or that a third factor is the causal agent linking the two factors together." See Richard Warshak, "Payoffs and pitfalls of listening to children" (2003) 52 Family Relations 373-384.


FN27. Some writers, however, have used their research to suggest that there should be greater caution in allowing custodial parents to relocate; see e.g., Sanford L. Braver, Ira M. Ellman, & William V. Fabricius, "Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations" (2003) 17 J. Fam. Psychol. 206 (2003).


FN30. Richard Warshak, "Payoffs and pitfalls of listening to children" (2003) 52 Family Relations 373, at 381.


FN32. Prof. Henaghan proposes a framework similar to that in the 2010 British Columbia Ministry of the Attorney General, White Paper on Family Law Reform (2010), with an important distinction drawn between cases where an application is made by a parent who takes responsibility for the care of a child more than 50 per cent of time (presumption of move) and cases of "shared care" (50 per cent each) where there is presumption in favor of the status quo. Our proposal is more nuanced, and reflects patterns of Canadian decision-making.

FN33. See e.g. Wright v. Wright, 1 O.R. (2d) 337, 1973 CarswellOnt 148 (Ont. C.A.).

FN34. See discussion above of J.S. Wallerstein & T.J. Tanke, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce" (1996) 30 Fam. L.Q. 305.

FN35. 22 O.R. (3d) 481, 1995 CarswellOnt 90 (Ont. C.A.). A similar approach was taken in Lapointe v. Lapointe, 1995 CarswellMan 214, 17 R.F.L. (4th) 1 (Man. C.A.); and Levesque v. Lapointe, 1993 CarswellBC 6, 44 R.F.L. (3d) 316 (B.C. C.A.). However, in its earlier decision in Carter v. Brooks, 2 O.R. (3d) 321, 1990 CarswellOnt 317 (Ont. C.A.) the Ontario Court of Appeal adopted a broad "best interest of the child" test for relocation cases, rejecting the notion that custodial parents have the presumptive right to move with their children. In subsequent applications of Carter v. Brooks in the 1990s, approximately 60 per cent of moves were permitted by the Canadian courts, usually based on a judicial assessment that there were not compelling reasons for the move: According to D.A. Rollie


FN40. R.S.O. 1990, c. C.12, s. 24(1). [C.L.R.A.]


FN42. See also Saskatchewan Children's Law Act, 1997, s. 6(6) (30 days notice period may be included in a custody order) and Alberta Family Law Act, s. 33(2) (60 days notice period may be included).

FN43. See e.g. Woodhouse v. Woodhouse, 20 R.F.L. (4th) 337, 1996 CarswellOnt 1906 (Ont. C.A.). One significant practical difference is that it is easier to enforce and vary an order made under the Divorce Act in another province.


FN48. In Bjornson v. Creighton, [2002] O.J. No. 4364, 2002 CarswellOnt 3866 (Ont. C.A.); leave to appeal refused 2003 CarswellOnt 1388, 2003 CarswellOnt 1387 (S.C.C.), the Ontario Court of Appeal held that in cases where one parent wants to move with the child and there is no existing order, the court should first decide the issue of which parent should have custody, and then decide whether to allow that parent to relocate with the child applying the principles of Gordon v. Goertz. However, in cases where there is no prior order, courts consider the de facto arrangements since separation, and often seem to combine consideration of relocation and general custody factors: see e.g. Terris v. Marcoux, [2003] O.J. No. 2829, 2003 CarswellOnt 2685 (Ont. S.C.J.); and Droit de la famille — 091332, [2009] J.Q. No. 5287, 2009 CarswellQue 14316 (Que. C.A.); leave to appeal refused 2009 CarswellQue 11121, 2009 CarswellQue 11122 (S.C.C.).


FN52. Further, while courts in many jurisdictions internationally have also adopted a "best interests" of the child approach to relocation cases, in no other jurisdiction is there this type of suggestion that the reasons for the proposed move are not to be considered in making decisions.

FN53. Searches were conducted using both the Lexis-Nexis (Quicklaw) and Westlaw databases. The search terms entered were "Gordon v. Goertz", "Removal of child from jurisdiction", "Mobility", "relocat* & parent*/child*", "mobility & parent*/child*" and "move* & parent*/child*". Relevant cases were then coded for 60 variables of interest. Where a case did not make reference to a specific variable of interest that variable was coded as "unreported."

FN54. Cases that were appealed and reported at different levels, or had an interim and a trial decision reported, were counted as a single case. If there was an appeal decision, the "success rate" is based on the decision at the highest level of appeal; where a new trial was ordered, there was no coding for success rate. Of the 632 cases resolved at the trial level, in 81 of them (13 per cent) the trial judgments include reference to an interim order in regard to relocation.

FN55. For purposes of comparisons over time, only whole years are reported, but other data in this report includes cases reported January 1, 2011 to April 30, 2011.


FN57. The rate of litigants without lawyers in reported relocation cases (about 10 per cent) is substantially lower than the rate in family cases in general, where 50 per cent or more of family litigants are without representation (see Bala & Birnbaum, "Family litigants without lawyers: Study documents growing challenges for the justice system," Lawyers Weekly, August 5, 2011.).


FN59. Often there is some mixture of reasons for seeking to relocate, and in some cases the mother will articulate her primary reason in one way, while the father will view her as having a different motivation; see Patrick Parkinson, Judy Cashmore & Judi Single, "Reasons for Relocation" (forthcoming), Can J. Fam. L. In some cases the mother put forward a primary reason for relocation (e.g. economic), but the court suspected a different primary motivation (e.g. new relationship).


where the mother of a three and a half year old child was permitted to move from Ontario to Alberta, the court gave consideration to the father's conduct in making continued residence in Ontario "intolerable for both herself" and her daughter, noting his relentless pursuit of her through numerous calls, emails, text messages, often of a "vulgar, abusive and demeaning nature," and the involvement of the police and Children's Aid Society.


FN66. A chi-square test of independence was performed. Of cases where familial violence (child abuse and/or spousal violence) was alleged, and a decision was made with respect to relocation, relocation was significantly more likely to be allowed if that abuse was substantiated, \( X^2 (2, N = 169) = 52.13, p = .000 \). There was also a significant effect for substantiated claims of spousal violence alone, \( X^2 (2, N = 119) = 35.49, p = .000 \). Examination of the standardized residuals for both analyses revealed that when abuse allegations were supported, significantly more moves were allowed than would be statistically expected, and when abuse allegations were rejected significantly fewer moves were allowed than would be statistically expected.


FN72. *Young v. Young,* 34 R.F.L. (5th) 214, 2003 CarswellOnt 63 (Ont. C.A.); *Rotzetter v. Rotzetter,*

FN73. In a few cases it was not possible to classify the custody regime based on the information in the report; these cases were not analyzed for this variable. There were also a few cases in which the access parent (usually the father) was seeking a variation in custody which also involved relocation; these cases were also excluded from this analysis.

FN74. A chi-square test of independence was performed to examine the effect of custody arrangement on whether the move was permitted. The effect was significant, $X^2 (2, N = 699) = 44.18$, $p = .000$. Examination of the standardized residuals revealed that in sole custody cases significantly more relocations were allowed than would be statistically expected, and in joint physical custody cases significantly fewer relocations were allowed than would be statistically expected.

FN75. In Canada, the 40 per cent threshold is very significant for child support purposes, as it allows an order to be made under the Child Support Guidelines s. 9, the "shared custody" provision. The fact that the 40 per cent threshold allows for a different child support arrangement means that in most judicial decisions it is clear whether or not the 40 per cent threshold was reached, and not infrequently there is litigation or negotiation about this issue.


FN77. D.A. Rollie Thompson, "Movin' on: Parental relocation in Canada" (2004) 42 Fam Ct Rev 398, at 406, offers an assessment of cases decided 1996-2003 throughout Canada, concluding that for children aged 6 to 11 years, a move is more often permitted than for children less than 6 years of age. For children 12 or older the child's preferences strongly influence the decision. Professor Thompson provides a number of suggestions why these findings exist:

- younger children involve more recent separations and interim moves;
- shared parenting is showing up more often amongst the younger age group;
- the older children are more capable of adjusting to longer periods of block access, or at least judges seem to think so; and
- the older group may involve more distance from separation, more drift toward increased maternal caregiving, and reduced access, thereby easing the relocation decision.

In a study of British Columbia cases from 2003 to 2008, El Fateh found the highest rate of relocation decisions permitted for children under 2 years of age (71 per cent compared to an overall rate of 59 per cent): Eiad El Fateh, "A presumption for the best" (2009) 25 Can J Fam L 73.


FN79. Age was analyzed 3 ways (Analysis #1: 0-2 years, 3-5 years, 6-11 years, and 12 years and
Analysis #2: 0-5 years, 6-11 years, and 12 years and older. Analysis #3: 0-9 years and 10 years and older. None of these analyses found a significant age effect.

FN80. We did find a significant age effect for Ontario alone. There were 295 children in the 193 Ontario cases; 55 per cent of the cases involved a single child, and 45 per cent involved two or more children. The mean age of all of the children was 7.0 years. There were 82 cases with one or more children under 6 years of age; a move was permitted in 43 cases (52 per cent) and denied in 39, so for preschool children age did not appear to have an effect on judicial decision-making. However, similar to Jollimore and Sadic (2008), we found a significant age effect when we used the age of 10 years as a dividing line, separating the preschool and early school age children from the pre-adolescent and adolescent children. When the only or youngest child was 0-9 years of age, a move was allowed 52 per cent of the time (82/157 cases), but in cases where the only or youngest child was 10 years or older, a move was allowed 75 per cent of the time (21/28 cases). In Ontario in general then there is a significant effect of age on whether or not moves are allowed ($X^2(1, N = 185) = 4.99, p = .025$) with moves more likely to be allowed if the youngest child is 10 years or older.

FN81. For an English Court of Appeal decision emphasizing the importance of the wishes of children in relocation cases, see *W (Children)*, [2008] EWCA 538.


FN85. A chi-square test of independence was performed to examine the effect of children's wishes on whether or not the move was permitted in cases where they expressed a clear view and there was a decision made with respect to relocation. The effect was significant, $X^2(1, N = 123) = 27.68.7, p = .000$.


FN90. See e.g. *Pike v. Cook*, [2005] O.J. No. 248, 2005 CarswellOnt 297 (Ont. S.C.J.); additional
reasons at 2005 CarswellOnt 1103 (Ont. S.C.J.); affirmed 2005 CarswellOnt 5195 (Ont. C.A.), per C.T. Hackland J.


FN94. In child protection and ordinary custody and access cases in Ontario, a number of studies have found that the recommendations of a court-appointed assessor are followed in 75-90 per cent of cases; see N. Bala, S. Hunt & C. McCarney, "Parental Alienation: Canadian Court Cases 1989-2008" (2010) 48 Fam Ct Rev 162; and N. Bala & A. Leschied "Court-ordered Assessments in Ontario Child Welfare Cases: Review and Recommendations for Reform" (2008) 24 Can J Fam L 1. However, a recent study of the use of reports from OCL clinical investigators by Ontario courts found that the recommendations were followed in only about half of the cases: Noel Semple, "The eye of the beholder: Professional opinions about the best interests of a child" (2011) 46 Fam. Ct. Rev. 760-775.


FN99. [2004] O.J. No. 3267, 2004 CarswellOnt 3229 (Ont. S.C.J.). See also Stead v. Stead, [2005] O.J. No. 5203, 2005 CarswellOnt 7064 (Ont. S.C.J.), per Graham J. where the same prominent psychologist and assessor, Dr. Peter Jaffe, was initially retained by the mother and eventually did an assessment; he was permitted to testify, but his evidence was discounted.


FN103. In the 4 Quebec cases where the child had a lawyer, counsel for the child did not make independent recommendation but only but forward the child's views to the court.


1. A court will be more reluctant to upset the status quo on an interim basis and permit the move when there is a genuine issue for trial.

2. There can be compelling circumstances that might dictate that a judge 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 or the best interests of the children might dictate that they commence school at a new location.
3. Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong probability that the custodial parent's position will prevail at a trial.


FN114. Ibid. at para. 13.


FN117. James Stribopoulos & Moin A. Yahya, "Does a judge's party of appointment or gender matter to case outcomes? An empirical study of the Court of Appeal for Ontario" (2007), 45 Osgoode Hall Law Journal 315, at 344. The lower success rate in relocation cases may reflect the greater deference of appellate courts to custody and access cases in general.

FN118. See e.g. Mark Henaghan, "Relocation cases — the rhetoric and the reality of a child's best interests — a view from the bottom of the world" (2011) 23 Child & Fam. L.Q. 226.

FN119. In child protection cases, the application of the best interests of the child test also results in often irrevocable decisions being made; it is significant that in this context courts in many countries, including Canada, recognize legal presumptions, with the onus typically on the state child welfare agency to justify separation of the child from parents and termination of parental rights.


FN123. Eiad El Fateh, "A Presumption For the Best" (2009) Can J. Fam. L. 73, at 113; see also Susan


FN126. Ibid. p. 72.


FN132. He made this proposal, among other places, at a panel discussion at the National Family Law Program in Victoria, British Columbia, July 15, 2010.

FN133. This article only analyzed English decisions. Although decisions written in English from Quebec were included, completing a study of decisions written in French would provide a more complete national picture of patterns and outcomes of relocation cases. Given the relatively small number of English language decisions from Quebec (26), it was not possible to undertake a meaningful statistical comparison of those cases from decisions in the rest of Canada. However, the principles articulated in the Quebec jurisprudence are the same as those articulated in the rest of Canada regarding the approach to relocation, the importance of children's wishes, when known and, the non-determinative effect of expert evidence. Further, the patterns of cases and outcomes were similar in most respects, such as: mother applicants (85 per cent in Quebec versus 92 per cent in the rest of Canada); success rate on international relocation (62 per cent in Quebec versus 64 per cent in the rest of Canada); following the wishes of children (80 per cent in Quebec versus 75 per cent in the rest of Canada); and the significance of founded familial abuse (100 per cent in Quebec [only two cases] versus 81 per cent in the rest of Canada).

The only variable where there was a notable difference was in outcomes where there was shared custody (40 per cent or more of the time). In these cases, in Quebec the applicant was permitted to relocate in 80 per cent of cases versus only 28 per cent in the rest of Canada. While this difference merits
further investigation, there were only five such cases from Quebec. Further, and importantly, the outcomes where applicant had sole custody where not markedly similar in Quebec (56 per cent) to the rest of Canada (64 per cent).

FN134. Of the 75 cases with substantiated familial allegations, the most common primary reason for relocation was still economic or employment, followed closely by seeking better family support and by seeking to escape abuse. New relationships were a much less common as a primary reason for wanting to relocate in cases where there was substantiated familial violence.


FN136. At least one presumption was applicable in 601 of the 738 cases in this study (81 per cent).

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