



# A STUDY OF POST- SEPARATION/DIVORCE PARENTAL RELOCATION



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# **A Study of Post-Separation/Divorce Parental Relocation**

## **Prepared by:**

Nicholas Bala, L.S.M., B.A., J.D., LL.M.  
Lorne D. Bertrand, Ph.D.  
Andrea Wheeler, M.A., J.D. Candidate 2013, Queen's University  
Joanne J. Paetsch, B.A., and  
Erin Holder, B.A., J.D. Candidate 2013, Queen's University

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*The views expressed in this report are those of the authors  
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*Aussi disponible en français*



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## **EXECUTIVE SUMMARY**

### ***Purpose of the project***

Cases that raise the issue of whether parents can relocate with their children after separation or divorce are among the most contentious and difficult cases in the family justice system. The cases have a profound impact on the lives of parents and children. They are also very challenging for judges, lawyers and the justice system as the leading precedents and legislation provide little direction for many situations, the social science literature is limited and provides little real guidance for many of the issues faced by decision-makers and policy-makers, and very little statistical data are available.

In December 2010, the Department of Justice Canada issued a Request for Proposals for a small research project on parental relocation post separation or divorce. In March 2011, the Department of Justice contracted with the Canadian Research Institute for Law and the Family (CRILF) to undertake a review and report on Canadian and international research and literature on relocation, a search for any relevant data in Canadian government data banks, and an analysis of trends in reported Canadian judicial decisions.

### ***Methodology***

Several interrelated research tasks were completed for this study. They included: locating and reviewing social science literature on parental relocation; locating and undertaking an analysis of reported Canadian cases on parental relocation; and reporting any relevant information from existing Canadian government data banks. This material was analyzed, synthesized and organized into this report, which concludes by identifying gaps in the literature and suggesting research that could be undertaken to address those gaps.

### ***Summary of findings***

- There has been a slight increase in the number of reported Canadian relocation cases over the past decade, but the relocation “success rate” has remained essentially constant at just above 50 percent.
- Most researchers now accept that post-separation relocation is a “risk factor” for children, and recognize that on certain measures, in general, children who relocate after separation have more difficulties than children who do not relocate. There is, however, no research to establish that negative outcomes are caused by the relocation, or that the children who in fact relocated would have been better off had they not relocated. The studies of children and young adults who relocated did not assess whether there was an option of not relocating, let alone attempt to determine what the effects of not relocating would have been. Further, the existing research suggests that most children who relocate after separation adjust reasonably well and do not appear to suffer significant long-term negative effects.

- There is a very strong gendered element to relocation cases; the parent seeking to relocate is almost always the mother, though in the relatively small number of reported Canadian cases where fathers seek to relocate with a child, their success rate is not dissimilar to mothers.
- In the literature, the major reasons for wanting to move included wanting to be closer to family, to be with a new partner, for financial reasons, and to escape violence. The CRILF survey of Canadian family lawyers found that the most common reasons for relocation requests were to be with a new partner, for an employment opportunity, or to be closer to family/friends. The review of Canadian cases found that the most common reason for wanting to relocate was improved economic or job prospects, followed by the mother wanting to move for a new intimate relationship, and the custodial mother seeking social and emotional support from her family.
- Relationships with the “left behind” parent will be affected by relocation, though the nature and extent of the effect will depend on many factors, including the distances involved and resources of the parents for travel, and of course the nature of the pre-existing relationship between that parent and the child.
- For many separated and divorced parents, children may be “anchors,” keeping them living in relatively close proximity. According to the 2006 Canadian census, separated and divorced people who moved were considerably more likely to stay within the same municipality than were married people. Likewise, the 2001 General Social Survey data found that almost three-quarters of non-residential parents lived within 100 km of their children, and the 2006 General Social Survey data found that over one-half of non-residential parents reported that their child lived within 10 km, and another quarter said their child lived within 50 km. Only 8 percent of non-residential parents reported that their child lived 1000 km away or further.
- The analysis of Canadian cases found that 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 studies in other countries.
- The literature suggests that significant contact with the non-moving parent is likely to be disrupted if there is relocation and there has been a high conflict parental separation, or there is family violence, parental mental health or substance abuse issues. The review of Canadian cases found that custodial mothers have a greater chance of gaining permission for relocation if there are substantiated allegations of family violence.
- Custodial mothers had a greater chance of gaining judicial permission for relocation if they had sole physical custody. Conversely, in cases where there was joint physical custody (each parent has child at least 40 percent of the time), the court was significantly more likely to deny permission to relocate.
- 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.

- The courts frequently expressed condemnation of parents who took 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.

### ***The challenges of law reform for relocation cases***

Relocation cases represent a significant portion of all litigated family law cases, and as discussed in this report, they seem to be growing in number and are more difficult to settle without a trial than most other cases. Part of the challenge in settling is a reflection of the inherent difficulty in finding a “middle ground” in these situations. The high degree of discretion and lack of direction afforded to trial judges by the best interests of the child test of *Gordon v. Goertz* may also make outcomes less predictable and settlement more difficult.

There continue to be calls for reform of the laws governing relocation of children if one parent wants to move with the children. An important motivation for many reformers is to provide greater direction for judges, lawyers and parents to facilitate settlements and adjudication. Other reformers, however, want to see substantive changes in the law, typically seeking either to increase the rights of parents with primary care (mothers) to relocate, or to increase the rights of parents who do not have primary care (fathers) to prevent a move in order to maintain their relationships with their children.

It has been proposed by prominent Toronto family lawyer, Phil Epstein, that a process similar to that used for the development of *Spousal Support Advisory Guidelines* could be used to develop what might be called *Relocation Advisory Guidelines* (RAGs). He proposes that a committee of lawyers, judges, government policy makers and academics draft working papers and circulate them for consultation with the Bar, Bench and interested members of the public. Over time, this work might lead to the development of a set of RAGs to reflect existing jurisprudence and help to resolve cases. As with the SSAGs, this project would be an advisory codification of existing law rather than an effort to change the law.

The discretionary, individualized nature of the “best interests test” may appear to make relocation a “ruleless” area. However, the analysis of the Canadian case law in Chapter 3.0 of this report suggests that this is not in fact a totally unpredictable area. Although the failure of the courts to articulate clear rules can make it difficult to see the patterns in the jurisprudence, some broad trends are apparent. An awareness and understanding of the social science literature and of the patterns and trends in case law may help practitioners, including judges, lawyers, mediators and assessors, to more effectively and efficiently resolve relocation cases. This type of knowledge is also important for policy-makers and legislators who may seek to address these issues.

## *Suggestions for future research*

There is a growing body of social science research on the effects of parental relocation on children, but there is clearly a need for more and better social science research. The review of the literature and the examination of existing Canadian data on parental relocation for this project revealed limitations to the presently available information that leads to suggestions for future research. Such research could inform the work of judges, lawyers, mediators and assessors. This type of research could also be important for those involved in any policy development with respect to relocation, and for those responsible for the development of family justice services. Further, such research would be important for parents who may be facing the potential of relocation post-separation or divorce, and of course ultimately to their children.

The analysis of the reported Canadian case law in this report provides some valuable information, but it was limited to decisions written in English. Undertaking a similar study of cases written in French would complete a national picture of relocation case law.

While Canada has several national surveys that collect data on families, e.g., census, the General Social Survey, and the National Longitudinal Survey of Children and Youth (NLSCY), none of these large-scale surveys collect data directly on the issue of parental relocation. It is not known, for example, how frequently people move, nor can it be determined whether moves are directly related to relationship breakdown. While the census data provide information on both marital status and mobility, the data are correlational, and it is impossible to determine if a move was a result of a separation or divorce. Census data are available on individuals who immigrate to Canada, but not on individuals who move out of the country. One possibility for addressing this gap is to add questions to existing national surveys that would collect data specifically related to mobility following relationship breakdown.

Another major gap in the literature on parental relocation is the lack of information on the effects of mobility on children, especially in Canada. Ideally, research in this area should collect data from both parents and children, and should be longitudinal in design.

While relocation cases do not account for a substantial proportion of all family law disputes, they are difficult to settle and accordingly take up a disproportionately large amount of court time as well as private resources for lawyers and litigation expenses. Judges have little reliable social science research to rely on when making their decision and there are virtually no Canadian studies on the topic. The mobility data that are currently available in Canada provide general trends for the population but are inadequate for examining this topic in detail. Should Canada decide to conduct further research in this area, there are good international examples that could be adapted to the Canadian context.



## **1.0 INTRODUCTION**

### ***1.1 Purpose of the project***

Cases that raise the issue of whether parents can relocate with their children after separation or divorce are among the most contentious and difficult cases in the family justice system. The cases have a profound impact on the lives of parents and children. They are also very challenging for judges, lawyers and the justice system as the leading precedents and legislation provide little direction for many situations, the social science literature is limited and provides little real guidance for many of the issues faced by decision-makers and policy-makers, and very little statistical data are available.

In December 2010, the Department of Justice Canada issued a Request for Proposals for a small research project on parental relocation (or mobility) post separation or divorce. In March 2011, the Department of Justice contracted with the Canadian Research Institute for Law and the Family (CRILF) to undertake a review and report on Canadian and international research and literature on relocation, a search for any relevant data in Canadian government data banks, and an analysis of trends in reported Canadian judicial decisions.

The research team located general information on the extent to which Canadians move and patterns of relocation in Canada. The team focused on finding research studies that address the effects of relocation on children and factors that might moderate any potential negative effects for children. The specific focus was a more detailed examination of research on relocation post-separation and divorce – why people move, the effect of those moves on the parents and children, including implications for contact between parents and children, and particularly the effects on child adjustment.

This report presents the findings of the literature review, the analysis of reported cases, and available Canadian data. While the report does not make policy recommendations, it does identify policy, legal and research issues that might be addressed. Further, the report includes a review and discussion of gaps in the available Canadian data and makes suggestions for research that could be undertaken to fill those gaps.

The analysis of reported cases in this report provides a summary of the development of jurisprudence in Canada on relocation. It is not, however, intended to be a traditional legal analysis, but rather uses the reported cases as a data set that can be analyzed to ascertain whether there are patterns in the types of cases that are litigated and in how the courts deal with relocation cases.

### ***1.2 Methodology***

Several interrelated research tasks were completed for this study. They include: locating and reviewing social science literature on parental relocation; locating and undertaking a statistical analysis of reported Canadian case law on parental relocation; and reporting on relevant information from existing Canadian government data banks. This material was analyzed,

synthesized and organized in this report, which also identifies gaps in the literature and suggests research that could be undertaken to address those gaps.

### **1.2.1 Literature review**

The first major task for this project was a review of the Canadian and international social science literature on parental relocation after separation or divorce. While the existing child development literature and related research on the effects of parental relocation is important for the work of the courts and lawyers, it is often difficult to apply and sometimes not used appropriately. Further, most of the central questions related to the effects of parental relocation after separation have not yet been adequately addressed by methodologically sound research. The literature review includes a discussion of methodological limitations of the studies presented.

### **1.2.2 Analysis of reported Canadian cases**

The second major task was to locate and analyze the reported Canadian decisions on parental relocation rendered between January 1, 2001 and April 30, 2011. Searches were conducted using the Quicklaw and Westlaw data bases, and over 700 cases were found and analyzed. A traditional legal analysis and summary of the law was beyond the scope of this project; rather, the decisions were statistically analyzed to better understand the reasons for and nature of parental relocation after separation, and the factors that are significant for the courts in determining whether relocation is permitted.

### **1.2.3 Identifying existing Canadian data**

In consultation and with the support of the Project Authority, the research team explored the possibilities for accessing information related to parental relocation following separation or divorce in federal data banks. While the National Longitudinal Survey of Children and Youth (NLSCY) has data on post-separation parenting, there is no information on parental relocation. The General Social Survey (GSS) has a family cycle and collects data on post-separation child custody and contact, but it does not include questions on relocation. Some limited information on the distance non-custodial parents live from their children is collected in the GSS, and these data are included in this report. Some limited relocation data are collected in the census conducted by Statistics Canada every five years, and these data were examined to provide a general indication of overall trends in mobility.

The Survey of Maintenance Enforcement Programs (SMEP) collects some data on the residence of payors and recipients. It is possible that a secondary analysis of these data might provide some information on parental relocation, but the data could not be accessed within the timelines of this project.

Lastly, some limited data on this topic were collected by CRILF at the Federation of Law Societies of Canada's National Family Law Programs in La Malbaie in 2004 and Kananaskis in 2006 (Paetsch, Bertrand, & Bala, 2006), and are included in this report.

### ***1.3 Limitations***

The purpose of this project was to explore and report on the availability of Canadian research and data on familial relocation, particularly as it applies to post-separation or divorce situations. The Canadian literature is sparse and few social science research studies have been conducted in this area. Most of the information presented in the literature review is based on international studies.

Unfortunately, the large-scale Canadian surveys such as the census, the GSS, and the NLSCY do not collect data directly on parental relocation following separation and divorce. Some data are available on marital status and mobility, but it is not possible to link relocation directly with changes in marital status. Data were examined to the extent possible, but caution should be used when interpreting these data.

The case law analysis and literature review considered only material written in English.

### ***1.4 Organization of the report***

Chapter 2.0 contains the literature review, and Chapter 3.0 presents the results of the analysis of reported Canadian cases written in English on parental relocation. While limited, the available Canadian data on post-separation parental mobility were examined and are presented in Chapter 4.0. The results of this project are summarized and discussed in Chapter 5.0, along with conclusions and recommendations for future research.



## 2.0 LITERATURE REVIEW

One of the most frequently contested issues in the family courts is whether a parent may relocate with a child, moving away from the locale where both parents lived after their separation, thus affecting the child's relationship with the non-moving parent. In general, the issue that is litigated is a proposed move of a parent with a child to a new location some distance away from the non-moving parent. There is a growing international literature on the effects of relocation and litigation on children. This literature is helpful for policy makers, judges, lawyers and parents in providing a better understanding of the nature and dynamics of these cases. However, this literature reveals the complexity and fluidity of these cases rather than suggesting that simple rules can be developed for resolving these cases, and the literature can be very difficult to apply to individual cases.

In this chapter we identify themes and review the leading articles in the literature on relocation. Limitations of space (and time for carrying out this project) prevent this from being an exhaustive review of all literature on relocation; in particular we have not included discussion of some of the secondary literature that merely summarizes or critiques primary research studies. The chapter begins with a brief review of legal literature that identifies the major legal issues in relocation cases and the differing approaches to relocation in various countries. We then review some of the literature that describes the challenges in settling relocation disputes. The chapter then considers the most significant social science studies on relocation, considering first research on the effects of relocation on children and then recent studies on families involved in relocation litigation in different countries. We conclude by summarizing the key findings and trends in the literature, and commenting on the value and limitations of the existing social science literature on relocation.

### 2.1 *The nature of relocation disputes and differing legal approaches*

Parental relocation cases reflect the reality that after separation there are often very important economic and social reasons for former spouses to want to move away from the locale where they shared a residence (Bala & Harris, 2006). The increase in the number of relocation cases also reflects the gradual, but sustained, increase in the involvement of fathers in parenting in intact families, and their desire to maintain an active involvement in the lives of their children after separation (Parkinson, 2011). Technological changes have also had an interesting relationship to relocation issues, as inexpensive long distance telephone calls, email and webcams can facilitate contact between parents and children. In addition, the internet is playing a role in more individuals finding distant new partners and wanting to move to pursue these long distance relationships.

There are a number of very different legal approaches to the resolution of relocation disputes, all claiming to promote the welfare of children. Some argue that there should be a presumption in favour of allowing the custodial parent, usually the mother, to relocate, as that parent has the primary responsibility for the welfare of the child; promotion of her social or economic well-being will usually promote the welfare of the child (e.g., Wallerstein & Tanke, 1996). Some

jurisdictions have adopted this approach.<sup>1</sup> Others argue that a presumption against moving a child is most appropriate, since children will generally benefit from stability and maintaining relationships that will inevitably be affected if the custodial parent moves with the child (Braver, Ellman & Fabricius, 2003; Warshak, 2003), and a few jurisdictions have adopted this approach.<sup>2</sup>

Since the 1996 Supreme Court of Canada decision in *Gordon v. Goertz*,<sup>3</sup> Canadian judges have had to follow a “best interests of the child” approach that, at least in theory, requires an individualized assessment in each case, without any presumption or onus. Although far from universally accepted in the United States, the dominant trend in that country is also a best interests approach, without a presumption for or against relocation. This is also the approach in Australia and New Zealand.

The reality of relocation cases is that while the test that Canadian courts use in making the decision is intended to promote the best interests of the children involved, in individual cases judges are forced to choose between a small number of alternatives, each of which may result in the child being less well-off in some significant respect than before the litigation commenced. The options are usually stark, and all may have potential negative effects on the child (Waldron, 2005). The court is often faced with just two choices:

- If the custodial parent is permitted to move with the child, this will inevitably strain, and sometimes effectively sever, the child’s relationship with the parent left behind; or
- If the former custodial parent will move without the child if court approval for relocation is not obtained, the change in the child’s living arrangements will be emotionally disruptive to the child, and the relationship with the parent who moves away will suffer.

In some cases there are other, less common, options. A third option involves the custodial parent stating that if the court refuses permission for relocation, they will not move without the child. If this option is exercised, however, the child’s welfare may still be negatively affected. In some of these cases, the child’s welfare will be directly affected, as the child may, for example, be deprived of the opportunity of an increase in standard of living. This outcome may also indirectly negatively affect the child, since refusing to allow the custodial parent to move will very likely cause some unhappiness to that parent, and in some cases may contribute to clinical depression of the custodial parent (Henaghan, 2011). There is a concern that a parent in this situation may

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<sup>1</sup> These jurisdictions include Washington and Oklahoma. In England and Wales, a residential parent can undertake an “internal move,” within the jurisdiction, unless a court finds that there are “exceptional circumstances.” For international moves there is a presumption in favour of relocation by the residential parent. In *Payne v Payne*, [2001] EWCA 166, 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] Eng. C.A. 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.

<sup>2</sup> Alabama; see also e.g., *Stout v. Stout*, 560 NW 2d 903 (ND 1997). For a review of American law, see Atkinson (2010).

<sup>3</sup> (1996), 19 R.F.L. (4<sup>th</sup>) 177 (S.C.C.).

unconsciously “blame” the child for having deprived her<sup>4</sup> of some social or economic opportunity, and some Canadian decisions have held that it is inappropriate for a court to place weight on the response of an applicant parent to the question of what she will do if her application for relocation is denied.<sup>5</sup>

Other less common options are that both parents move to the new location, or the custodial parent’s new spouse moves to the custodial parent’s location.

Judges can and sometimes do impose conditions on the parents who are permitted to relocate in order to promote the welfare of the children involved. However, whatever the outcome, there is a significant likelihood that the children will in some way be worse off after the proceedings than before. While in theory the court is making a decision based on an assessment of the “best interests” of the children, in reality the judge is often choosing the “least detrimental alternative.”

It is important to appreciate that the law is only involved when the custodial parent (usually the mother) wants to move (and the other parent opposes the move). It is not uncommon for non-custodial parents (usually fathers) to move after separation, which often results in much less contact with their children, and sometimes in the virtual disappearance of these parents from the lives of their children. The unilateral decision of the non-custodial parent (usually the father) to move away often has a negative effect on the well-being of his children, but there is no legal regulation of such a move. On the other hand, if non-custodial parents want to maintain a relationship with their children, they too will be restricted in where they can live, and there is some evidence that for many separated parents their children are “anchors,” keeping them in relatively close proximity to the former family home and each other (Parkinson, 2011).

## **2.2 The challenge of settling relocation cases**

In one study that considered the difficulty in settling these cases, Parkinson and Cashmore (2009) reported that in Australia, approximately 6 percent of family law cases require a judicial disposition, while in contrast, the authors found that 59 percent of cases involving parental relocation required a determination by a judge. A New Zealand study found that 51 percent of the relocation cases required court intervention to be resolved (Taylor, Gollop, & Henaghan, 2010). Further, of the relocation cases that do settle prior to a judicial ruling, many are resolved after the litigation process is quite advanced or even after the start of the trial.

One major reason for the low rates of settlement of these cases without judicial determination is that there is typically no middle ground for reaching a compromise (Parkinson, Cashmore, & Single, 2010). In these cases, the two sides are very much at polar opposites – either the primary caregiver (usually the mother) who wishes to move will relocate or she will not, and the father

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<sup>4</sup> In this report we often refer to the parent seeking relocation as the mother, while assuming that the non-moving parent is the father, and use corresponding female and male adjectives and pronouns as appropriate. This is a common, though not universal, practice in the literature. As discussed in Chapter 3.0, in Canada more than 90 percent of relocation applications are made by mothers.

<sup>5</sup> See e.g., *Spencer v. Spencer*, 2005 ABCA 262, 15 R.F.L. (6<sup>th</sup>) 237; *B.(R).v. B.(E.)*, 2010 ABCA 229, 86 R.F.L. (6<sup>th</sup>) 266; *S.S.L. v. J.W.W.*, [2010] B.C.J. 180, 2010 BCCA 55, 81 R.F.L. (6<sup>th</sup>) 38.

will choose to move to the same location as the mother and child or he will not. When faced with such mutually exclusive options, there is frequently very little room for negotiation and compromise. Further, the appellate jurisprudence gives judges significant discretion, making it more difficult to predict the outcome if a matter does go to trial, further complicating the prospects for settlement.

Cases in which parents have separated and one parent seeks to relocate with the children pose great challenges for judges and lawyers, as well for the parents and children involved. Similar to the situation in Australia and New Zealand discussed above, in Canada these cases tend to be more bitterly contested than other family law cases, as there may be no middle ground for a compromise, and a significant portion of all family law cases that go to trial feature relocation as the central issue. Further, the test that Canadian courts 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 settlements harder to negotiate (Bala & Harris, 2006; Henaghan, 2011).

### **2.3 *Studies on the effects of relocation***

While disputes involving parental relocation are among the most frequently contested cases in family law, this area has not been the subject of very much social science research. There is a growing though still small body of social science literature on the effects of relocation on both intact and separated families. However, the bulk of this research looks at the impact of relocation on family members in a general context of changes in residence rather than specifically in the area of family breakdown (Taylor et al., 2010). There have been two broad methodological approaches to the more direct study of relocation: one is retrospective and focuses on children (or young adults) who experienced parental separation and/or relocation; the other is to focus more specifically on relocation cases that are contested (or that were contested). The remainder of this chapter reviews the available social science literature on parental relocation, grouping the studies by methodological approach.

Wallerstein and Tanke (1996) published one of the first reports examining the issue of parental relocation following separation. This study was based on a 1995 *amicus curiae* brief filed by Wallerstein in the California relocation case of *In re Marriage of Burgess*. Drawing on earlier theories of attachment suggesting that children need the benefit of a strong bond to one primary parent (e.g., Goldstein, Freud, & Solnit, 1973), Wallerstein and Tanke (1996) argued that in cases where the primary parent (typically the mother) wishes to relocate with her children, there should be a presumption to allow the move, since a disruption of this primary attachment bond would be detrimental to the children involved. Wallerstein and Tanke (1996) do note, however, that in cases where both parents have been closely involved in child rearing, the issues may be less straightforward.

Wallerstein and Tanke’s (1996) position has been criticized on both methodological and theoretical grounds (e.g., Pasahow, 2005; Warshak, 2000, 2003). Warshak (2000) pointed out that Wallerstein and Tanke’s (1996) position advocating allowing custodial parents to relocate was based on only ten references, seven of which were published by Wallerstein’s research team.

Further, Wallerstein's empirical research only included six families that experienced relocation during the study and thus data directly related to relocation were very limited. In contrast, Warshak (2000) asserts that his examination of over 75 social science studies suggests that it is in a child's best interests to remain within easy access of both parents. Warshak's review was based on studies of the effects of relocation on children in both intact and divorced families, as well as studies on the effects of parents on the psychological development of children, the effects of parental absence, the impact of divorce, the effects of different custodial arrangements, and the effects of remarriage. Warshak (2000) argues that Wallerstein's position "ignores the broad consensus of professional opinion, based on a large body of evidence, that children normally develop close attachments to both parents, and that they do best when they have the opportunity to establish and maintain such attachments" (p. 85).

Warshak further argues 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. As Warshak (2000) observes: "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" (p. 88). In addition, many of the studies collect data on how well the child is doing only from the mother, which "may inflate the correlations between mother and child adjustment because of the influence of the mother's own emotional state on her perceptions of her children" (p. 88).

A contrasting school of thought from that advanced by Wallerstein and her colleagues argues that, in most families, children form close attachments with both parents, not just the primary caregiver and, in order to ameliorate the risks associated with parental relationship breakdown, it is important to maintain ongoing and frequent contact with both parents following separation (Kelly, 2000, 2007; Kelly & Lamb, 2003; Stahl, 2006; Warshak, 2000, 2003). According to this perspective, the best interests of the individual child should be the paramount consideration in decisions regarding relocation, rather than a presumption that the primary caregiver should be allowed to relocate if she desires.

One of the strongest statements of concern about the effects of relocation on young children was articulated by the American mental health professionals Joan Kelly and Michael Lamb in a 2003 article. They raised concerns about whether a child who is not able to see a parent on a regular basis in the early years of life will be able 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 (p. 196).<sup>6</sup>

They further 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. Other mental health professionals raise similar concerns about relocation of young children disrupting attachment with the non-moving parent, and being distressing for a child if it results in the rupturing of a strong, positive bond with a parent figure. However, other writers also observe that if there is not a strong attachment to the non-moving parent, relocation at a young age is less disruptive to a child as community and peer attachments are not significant in this age group (Taylor et al., 2010; Waldron, 2005).

While Kelly and Lamb raise concerns about relocation somewhat more forcefully than some other mental health professionals, most researchers 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 a legal presumption against allowing relocation, but rather advocates a “child focused” approach (Austin, 2008; Stahl, 2006). Even Kelly and Lamb (2003) emphasize that both costs and benefits exist in any potential relocation case, 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. (p. 202)

Norford and Medway (2002) examined the social adjustment of a group of 408 American high school students who fell into one of three groups: frequent movers (6 to 13 relocations); moderate movers (3 to 5 relocations); and non-movers. The study also collected data on the primary reason for the move, and interviewed the mothers of 67 of the students in the frequent mover group. The findings indicated that students who had moved as a result of their parents’ separation or divorce participated in a significantly lower number of extracurricular activities as the number of moves they experienced increased. This effect was not significant for students who moved for reasons other than parental separation or divorce. However, they did not find a significant relationship between whether a student moved following parental relationship breakdown and negative social and emotional adjustment. Instead, it was found that maternal attitude towards relocation was related to students’ psychological adjustment: students who were frequent movers and whose mothers reported a negative attitude towards relocation were more likely to suffer from depression. It should be noted, however, that this study did not account for

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<sup>6</sup> J. Kelly & M. Lamb (2003) cited in *Prasad v. Lee*, [2008] O.J. No. 2072 (Ont. Sup. Ct.). per J.C. Murray J.; and *C.M.S. v. M.R.J.S.*, [2009] Y.J. 53, 2009 YKSC 32, per Gower J.

the distance involved in the relocation, changes in socioeconomic status as a result of relationship breakdown, or the nature of the students' relationship with the non-relocating parent, and thus could not examine the effects of changes in the nature of that relationship on students' social and emotional adjustment. Further, this study did not include students who experienced one or two moves, and thus no conclusions can be drawn about the effects of low frequency mobility.

A study by Braver, Ellman and Fabricius (2003) attempted to examine the long-term effects of relocation on children's adjustment, well-being, and long term relationship with their parents by surveying college students enrolled in an introductory psychology class whose parents had divorced at some point during their childhoods. In some cases, the parents remained in close proximity to each other following the divorce; the responses of students who reported these circumstances were compared with those of young adults who reported that at least one parent had moved more than one hour's drive from their prior residence following the divorce. The final sample consisted of 602 college students whose parents had divorced at some point during their childhood. Respondents were classified into one of five possible groups: (1) neither parent moved more than one hour from the family home following the divorce; (2) the mother moved more than one hour away and the child moved with her; (3) the mother moved more than one hour away and the child remained with the father; (4) the father moved more than one hour away and the child moved with him; or (5) the father moved more than one hour away and the child remained with the mother. In cases where both parents had moved more than one hour away from the family home, respondents were asked which parent moved first.

Braver et al. (2003) found that young people who reported that one parent had moved at least one hour away following their divorce (either with or without the child) fared worse on measures of their current financial, psychological, social and emotional well-being. Specifically, compared to respondents who reported that neither parent moved more than one hour away, students whose parents moved either with or without them received less financial support from their parents, experienced higher levels of hostility in their relationships with others, reported being more distressed by their parents' divorce, rated their parents more negatively as role models and sources of social support, indicated that the nature of their parents' relationships with each other was worse, and rated themselves more negatively on measures of physical health, life satisfaction and adjustment. Based on these findings, Braver et al. (2003) argued against a presumption that custodial parents should be allowed to relocate with their children.

While the data reported by Braver et al. (2003) provide evidence of a relationship between parental relocation following divorce and negative outcomes for children, it is important to note that these findings are correlational rather than causal. It is impossible to conclude that the relocation of one parent following divorce caused the subsequent negative outcomes for the children; the possibility of the existence of other factors that are responsible for both parental relocation and negative outcomes for children must be acknowledged. As Braver et al. (2003) observe, "preexisting factors that could plausibly play this role include a low level of functioning for one or both parents, the inability of one or both parents to put the child's needs ahead of his or her own, and high levels of pre-move conflict between the parents..." (pp. 214-215). A further limitation of this research concerns the use of college students as respondents in this study. A

sample of college students cannot be assumed to be representative of the population of young people who have experienced their parents' divorce. It is likely that college students, in general, represent a somewhat more affluent and better educated group than the population as a whole, and thus may include those individuals who are likely to be most resilient to adverse life events.

Austin (2008) argued that the early work of Wallerstein and her colleagues, focusing on attachment bonds between children and their caregivers, did not take account of research findings from large-scale and representative population studies that provided evidence that there can be negative effects from relocation on children, even in intact families, and that these effects are potentially exacerbated in non-intact families. According to Austin (2008), these negative effects of relocation include "school behavior problems, [lack of] academic success, [lower] school graduation...rates, [higher] teen pregnancy, [earlier] age of first sexual activity, [reduced] child well-being, and [greater] amount of idle time" (p. 140). These negative effects occurred even after controlling for family income. Austin based his review on the research literature relevant to understanding the complex issues surrounding relocation and custody decisions. He cited studies on relocation in general and the effects of mobility on children's adjustment, and examined the idea that mobility is one of many stressors following relationship breakdown. Children from separated and divorced families may be at a higher risk for adjustment and psychological difficulties and relocation represents another risk factor that may have a further negative impact on children's outcomes (Austin, 2008; Waldron, 2005). It is important to note that Austin acknowledged that the research in this area is just beginning, and he cautioned against over-interpreting the research findings that are available. He stated:

It would be unsound to use the research reviewed here as a basis for a presumption or bias against relocation of a child with a parent who aspires to relocate because of the salient social policy issues that surround relocation cases. Relocation disputes are inherently driven by the facts of the case and the particulars of the family context. (p. 147)

## **2.4 *Studies of relocation cases***

There have been a few recent studies from the United Kingdom, Australia and New Zealand that have focused on the experiences of parents and children with a history of direct involvement in relocation litigation.

A recent qualitative study conducted in the United Kingdom (Freeman, 2009) interviewed 36 parents who had been involved in relocation cases that had either been resolved by settlement by the parties or by judicial determination. Both parties were interviewed in two cases; thus, the sample consisted of 34 separate cases of which 33 involved international moves. Twenty-five of the interviews were conducted with fathers, 2 of whom wished to move with their children and 23 who were opposing proposed moves by their former partners. The 11 interviews conducted with mothers all involved cases where the mother wished to relocate with her children. In 22 of the 34 cases, the proposed relocation was allowed.

Freeman's (2009) small-scale study found that, even in cases where explicit provisions for ongoing contact with the non-residential parent were made at the time of relocation, there was frequently difficulty in exercising that contact. The costs and logistics of international travel frequently made it difficult for fathers to maintain contact, and arrangements that had been agreed upon at the time of relocation were often not honoured. Fathers whose children had relocated reported on the emotional turmoil the resulting loss of regular contact caused for themselves and their own parents. It should be noted that, in studies such as these, individuals who are satisfied with the outcome of their relocation cases may be less likely to volunteer to participate, thus calling into question the representativeness of the study sample. This potential bias is further suggested by the preponderance of fathers whose children had been allowed to relocate with their mothers, a group that is frequently dissatisfied with the outcome of their case.

Behrens, Smyth and Kaspiw (2009) conducted a retrospective qualitative study of a number of Australian parents who had been involved in relocation disputes. The study involved an analysis of all 200 contested relocation cases in the Family Court of Australia from 2002 to 2004, and in-depth interviews with a sample of 38 parents drawn from these cases (27 fathers and 11 mothers). The analysis of court decisions revealed the following findings:

- 90 percent of the individuals who wanted to relocate were female;
- in 57 percent of the cases, the move was allowed;
- 61 percent of the cases involved a move of 1000 kilometres or more;
- 70 percent of cases involved allegations of violence;
- the major reasons given for wanting to relocate were to be closer to family (33 percent), to be with a new partner (30 percent), and to escape violence (8 percent).

According to Behrens and Smyth (2010), the major themes that emerged from the in-depth interviews with the 38 parents included:

- a high prevalence of high conflict and/or abusive relationships predating the relocation dispute, including a significant minority 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;
  - smoother paths after relocation were reported for parents who were in less high conflict relationships, and for whom this was really a "relocation only dispute";
  - relocation as a significant point of transition in parent-child relationships, with long-distance parenting falling into one of two patterns: "Separate Homes, Separate Lives" or "Parental Engagement in Both Locations," and only a small number of parents losing contact with their children after relocation;
  - those applying to relocate giving complex, multiple reasons for their decision, often including the poor quality of their relationship with the other parent.
- (p. 19)

It should be noted that the sample, and thus the findings, from the interviews conducted for this study do not include child adjustment measures. Twice as many interviewees had been involved in cases which resulted in an order allowing relocation than not allowing the move, and the majority of respondents interviewed were fathers. Thus, the majority of the sample interviewed represented fathers who had unsuccessfully opposed a relocation application, suggesting that the sample studied should not be viewed as representative of relocation disputes in general. Further, the interview sample did not include both parents in any of the cases, so in all cases the researchers were only able to obtain information regarding one side of the dispute.

A recent study from New Zealand is one of the few research projects on parental relocation to examine the perspectives of both parents and children involved in relocation disputes. Taylor et al. (2010) studied 100 New Zealand families involved in relocations disputes. As with the other studies of families involved in relocation disputes, these parents were recruited through their lawyers, so the study sample is skewed towards relocation cases involving the legal process as opposed to cases in which parents made their plans without court involvement. Approximately one-half of the families had had their relocation dispute resolved by the courts, and the others settled the case, though sometimes after court proceedings were commenced but before trial. The researchers conducted in-depth interviews with 114 parents (73 mothers and 41 fathers) and 44 children ranging in age from 7 through 18 years. Follow-up interviews were conducted with 102 of the initial sample of parents 12 to 18 months after the initial interview to determine the longer term impact of the relocation and any changes in family and contact arrangements.

The objectives of this project were:

- to examine parents' and children's experiences of the outcomes of relocation disputes after an application to relocate has been allowed or refused (by a parent or the Family Court), and to then follow-up these families 12-18 months later;
- to explore the factors associated with the successful adaptation of children who are relocated away from their non-resident parent, and to identify any problems they encounter;
- to determine the short-term and medium-term patterns of contact which develop when children relocate away from their non-resident parent;
- to explore the effects of a decision not to approve a relocation on the relationship between the parents, and the relationship each of them has with their child(ren); and
- to examine (in the fully litigated cases) the accuracy of predictions made by the Family Court about the likely consequences for parents and children of approving or refusing the proposed relocation. (p. 84)

The report of Taylor et al. (2010) presented preliminary results of the study and focused primarily on the findings of the interviews with children. Subsequent reports are planned that will examine the parental data in detail.

The interviews conducted with the children generally indicated their acceptance of and satisfaction with a move. Factors that were found to assist children in adjusting to the move 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.

The New Zealand study reveals a fluid pattern of post-trial situations, including a couple of cases where mothers were permitted to relocate with their children by the courts, and did so, but then decided to return. Where mothers were not permitted by the court to move with their children, most of them did not move and 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.

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. This study included both domestic (62 percent) and international (38 percent) moves.

A significant number of children 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 of this study (Taylor & Freeman, 2010) offer a tentative conclusion:

For the most part, the children and young people were relatively happy, well-adjusted, and satisfied with how things had worked out for them and their families. This is not to say that the relocation experience was not difficult or traumatic for some, but rather there was the sense that they had adjusted and moved on. This was particularly true of those children and young people for whom the relocation issue had occurred some years previously. (p. 141)

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 involvement in their care prior to this change and quite often had a new family with other children. Although some of these reversals in custody were successful, almost half broke down in a fashion that was distressing or traumatic to the children, with children ultimately being sent by their fathers to live with their mothers.

While the New Zealand project is one of the largest scale studies of parental relocation conducted to date and a great deal of information was collected regarding the perspectives of parents and children involved in relocation disputes, a couple of limitations to the data should be noted. First, the majority of the families included in the study were recruited through private lawyers, meaning that parties with legal aid staff lawyers and self-represented individuals were not included. Thus, the sample of parents included in the study cannot be viewed as necessarily representative of the population of individuals dealing with relocation disputes. Second, parents of children who had a particularly difficult or traumatic experience surrounding the relocation tended to not consent to their children's participation in the project; therefore, the children who were included cannot be viewed as representative of all children involved in relocation cases.

A prospective longitudinal quantitative and qualitative study on relocation is currently underway at the University of Sydney in Australia (Parkinson et al., 2010). The main sample in this study includes 80 parents (40 fathers, 39 mothers, and 1 grandmother who is the primary caregiver). The sample also contains nine former couples; thus this study includes 71 discrete cases. Respondents were located through family lawyers in Australia who were asked to identify relocation cases in their practice that had been resolved within the previous six months. The researchers conducted initial interviews with the participants and follow-up interviews 18 months later. Interviews have also been conducted with 19 children involved in these cases.

Of the 40 female participants, 39 wished to relocate with the children, while one non-custodial mother disputed a proposed move by the father with the children. All 40 fathers involved in the study were disputing a proposed move by their ex-partners. When asked why they sought permission to relocate, most women interviewed provided multiple reasons. The most common reasons given were: (1) to return to their original home or move closer to extended family or friends (63 percent); (2) for lifestyle reasons (including financial) (37 percent); (3) to have a fresh start in a new location (29 percent); (4) to escape violence (11 percent); (5) for work or to start a new job (11 percent); and (6) to pursue educational opportunities for their children (8 percent). Interestingly, when fathers were asked why they thought their former partners wanted to move, the most commonly provided reasons were for lifestyle or financial reasons, to be with a new partner, or to begin a new job; moving to be closer to family and friends was mentioned less frequently by fathers than mothers. None of the fathers mentioned escaping violence as a reason for the relocation application (Parkinson et al., 2010).

Of the 71 cases included in this study, 42 were ultimately settled through a judicial disposition. The remaining 29 cases were settled by consent, although Parkinson et al. (2010) point out that the term "consent" in these cases is often misleading. In few of these cases was a mutually acceptable solution reached; a much more common outcome was that one party simply "gave up." In 21 of the 29 cases resolved without a court decision, the father reluctantly agreed to the move, rather than the mother giving up on her plans to relocate. Some of the fathers who ultimately agreed to the move stated that they decided to give up on their own wishes in favour of what they felt were the best interests of their children. Other fathers stated that they abandoned their case when they came to the realization that they were unlikely to win or could not afford to continue with the litigation. In seven cases, the matter was settled by the mothers

giving up their plans to move with the children; in two of these cases, the mother did move but left the children with their fathers.

## **2.5 Summary: *The challenges of application of research and prediction***

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 it to individual cases.

Research on relocation cases in the courts indicates that these are difficult cases to settle and more likely to require judicial resolution than other types of custody, access and child-related disputes between parents (Parkinson et al., 2010; Taylor et al., 2010). This also can be very expensive litigation; many parents are financially unable to take these cases to trial, and reach agreements that they would rather not have made in order to avoid taking the case to court.

Some mental health professionals in the 1990s focused on the importance of the child's relationship with the primary caregiver and argued in favour of a presumptive right of primary caregivers to move with their children (Wallerstein & Tanke, 1996). However, most researchers now accept that post-separation relocation is a "risk factor" for children, and recognize that on certain measures, *in general*, children who relocate after separation have more difficulties than children who do not relocate (Austin, 2008; Kelly & Lamb, 2003; Kelly, 2007; Stahl, 2006; Waldron, 2005). There is, however, no research to establish that negative outcomes are *caused by* the relocation, or that the children who in fact relocated would have been better off had they not relocated. There are many factors involved in relocation after separation, and there are often economic and social factors that make the populations who relocate different from those who do not relocate. The studies of children and young adults who relocated did not assess whether there was an option of not relocating, let alone attempt to determine what the effects of not relocating would have been.

Further, the existing research suggests that *most children* who relocate after separation adjust reasonably well and do not appear to suffer significant long-term negative effects (Taylor et al., 2010). *Some* children involved in relocation litigation suffer long-term negative effects, whether they move or they stay. One of the only longitudinal studies of relocation suggests that the worst outcomes may be for children who do not move with the primary care parent but are left in their original place of residence in the care of the parent who did not previously have primary care (Taylor et al., 2010).

Mental health professionals recognize that any decision about a child is affected by developmental factors, and recommend that, if relocation occurs, plans for continuing contact with the "left behind" parent take account of the child's age and developmental needs. For younger children, relocation may disrupt psychological attachment with a parent who will not be seen on a frequent basis, but the transition to a new home will be easier because the child will not have strong peer, school or community ties (Taylor et al., 2010). For older children, disruption of peer, community and school relationships as a result of relocation are important factors to consider.

Relationships with the “left behind” parent will be affected by relocation, though the nature and extent of the effect will depend on many factors, including the age of the child, the distances involved and resources of the parents for travel, as well as the nature of the pre-existing relationship between that parent and the child. If a strong, positive relationship with the non-moving parent is disrupted, this will affect the child; if the non-moving parent has had little or no involvement with the child before the move, the child may be little affected by relocation. If the child had a poor relationship with that parent, for example because of issues of violence or abuse, the child may benefit from seeing that parent less (or not all) because of the move.

Significant contact with the non-moving parent is likely to be disrupted by relocation and the relationship may possibly wither away if there is relocation and there has been a high conflict parental separation, or there are family violence, parental mental health or substance abuse issues (Behrens & Smyth, 2010; Taylor et al., 2010). The cost of travel relative to parental means is also a significant factor resulting in a loss of contact with the non-moving parent.

Most recent writing by mental health researchers recognizes that there are both potential risks and potential benefits for children from relocation, and consequently recommends case-by-case weighing of risks and benefits (Austin, 2008; Kelly & Lamb, 2003; Kelly, 2007; Stahl, 2006; Waldron, 2005). These authors also recognize the importance of canvassing the perspectives and views of older children in making relocation decisions.

As discussed in this chapter, there are important methodological limitations to all of the existing research on relocation and its effects on children due to the small, and often unrepresentative, populations being studied. Further, for ethical, practical and methodological reasons, it has never been possible to do randomized control trial research on the outcomes for a group of children who were relocated compared to the outcomes for a similar group of children who were not relocated. There are challenges in applying the research to any individual case because of the complexity of interacting factors, and the inherent unpredictability of the relocation (or non-relocation) on children and their parents.

Almost a decade ago, psychologist Richard Warshak, one of the most prominent American writers on the effects of separation on children, acknowledged:

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. (Warshak, 2003, p. 381)

A recent article on relocation by a leading New Zealand legal scholar, Mark Henaghan, commented on the limits of social science research in this area:

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. (Henaghan, 2011, p. 235)

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 Chapter 5.0, we discuss the issue of whether there is value to presumptive frameworks for relocation decision-making.<sup>7</sup>

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<sup>7</sup> Prof. Henaghan proposes a framework similar to that in the 2010 British Columbia White Paper, 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 percent of time (presumption of move) and cases of "shared care" (50 percent each) where there is a presumption in favor of the status quo.



### 3.0 ANALYSIS OF REPORTED CANADIAN CASES

In this chapter we present an analysis of reported Canadian court cases dealing with relocation. This is a study of factors and outcomes, and an attempt to determine whether there are patterns that may be significant for policy makers or practitioners. This is not a traditional analysis of jurisprudential trends and precedents, but in order to help readers understand the significance of the data, it is helpful to begin with a review of the general principles of Canadian law governing parental relocation, and some illustrative examples from the case law are included in the discussion of the data.

#### 3.1 *The legal framework*

##### 3.1.1 Statutory provisions in the *Divorce Act* – The best interests test

The federal Parliament has jurisdiction over custody and access issues that arise in the context of divorce, as provided for in the *Divorce Act*,<sup>8</sup> while provincial/territorial legislation like Ontario's *Children's Law Reform Act*<sup>9</sup> [C.L.R.A.] applies to parents who were never married, or who are separated but not seeking a divorce. The federal *Divorce Act* and the provincial legislation like the C.L.R.A. 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:<sup>10</sup>

16 (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,

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<sup>8</sup> *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3.

<sup>9</sup> R.S.O. 1990, c. C.12, s. 24 (1). [C.L.R.A.]

<sup>10</sup> *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3. Emphasis added.

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.<sup>11</sup> 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 other 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.

### 3.1.2 The “bests interests” approach of *Gordon v. Goertz*

In the mid-1990s, a number of Canadian decisions recognized a presumptive right of a custodial parent to relocate following separation, at least in the absence of a specific provision in a separation agreement or court order to the contrary.<sup>12</sup> This approach was consistent with the “tender years doctrine,” which gave mothers a presumptive right to custody after separation and with social science research of that period, which emphasized the significance of a child’s relationship to the primary caregiver for post-separation outcomes.<sup>13</sup> For example, in its 1995 decision, the Ontario Court of Appeal in *MacGyver v. Richards*<sup>14</sup> adopted this presumptive approach, ruling that, if a custodial parent was “acting responsibly,”<sup>15</sup> 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 (Thompson, 2004), though the decision was cast not in terms of parental “rights,” but rather as “presumptive deference” to the decision of a custodial parent, as the welfare of the child was considered to be “predominantly attached” to the welfare of the custodial parent.

Relocation decisions in Canada are now governed by the 1996 Supreme Court of Canada decision in *Gordon v. Goertz*,<sup>16</sup> a decision that requires judges to make individualized determinations of a child’s best interests, without any presumption in favour of either parent. *Gordon v. Goertz*, though decided under the federal *Divorce Act*, also applies to cases decided under provincial legislation.<sup>17</sup> The courts interpret and apply the federal and provincial/territorial

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<sup>11</sup> See also Saskatchewan *Children’s Law Act*, 1997, s. 6(6) (30 days notice period may be included in custody order) and Alberta *Family Law Act*, s. 33(2) (60 days notice period may be included).

<sup>12</sup> See e.g., *Wright v. Wright* (1973), 1 O.R. 2d 337 (C.A.).

<sup>13</sup> See e.g., discussion in Chapter 2 of work of Wallerstein and Tanke (1996).

<sup>14</sup> (1995) 22 O.R. 3d 481 (Ont. C.A.). Other decisions from this period which supported the presumptive right of the custodial parent to move with the child included: *Lapointe v. Lapointe* (1995), 17 R.F.L. (4<sup>th</sup>) 1 (Man. C.A.); and *Levesque v. Lapointe* (1993), 44 R.F.L. (3rd) 316 (B.C.C.A.). However, in 1990, *Carter v. Brooks*, (1990) 2 O.R. 3d 321 (Ont. C.A.), the Ontario Court of Appeal had 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 percent of moves were permitted by the Canadian courts, usually based on a judicial assessment of the reasons for the move (Thompson, 2004).

<sup>15</sup> *Ibid.* per Abella J.A.

<sup>16</sup> [1996] 2 S.C.R. 27.

<sup>17</sup> See e.g., *Woodhouse v. Woodhouse* (1996) 20 R.F.L. (4th) 337 (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.

legislation in the same way when dealing with relocation cases, even though most provincial/territorial legislation does not have an equivalent to the “friendly parent” provision of s.16(10) of the *Divorce Act*; although s. 16(10) 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,<sup>18</sup> the absence of this provision from provincial/territorial statutes does not affect how the law is applied.

The Supreme Court in *Gordon v. Goertz* held that the *Divorce Act* requires the merits of any relocation application be decided based on an assessment of the best interests of the specific children involved, without a presumption or onus in favour of either parent. Justice McLachlin summarized the law in 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.<sup>19</sup>

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 improper motive reflecting adversely on the custodial parent’s parenting ability,” the reasons for the move should not be considered by a court.<sup>20</sup> Notwithstanding this statement, as is discussed more fully below, this direction is now generally disregarded by the lower courts, which regularly consider and assess the reasons for a proposed move.<sup>21</sup> 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 this rule.

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<sup>18</sup> [1996] 2 S.C.R. 27, at para. 24.

<sup>19</sup> [1996] 2 S.C.R. 27, at para. 49. Emphasis added

<sup>20</sup> [1996] 2 S.C.R. 27, at para. 48.

<sup>21</sup> 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.

One of the challenges faced by the courts in dealing with relocation cases is that they inevitably require the judges to make assessments about an inherently unpredictable future. In the 2010 British Columbia case of *S.L.C. v. K.G.C.*, a case in which the court refused to allow the mother of two children aged 6 and 12 to relocate, Rogers J. observed:

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. It would, I think, be unreasonable to require the moving parent to prove on the balance of probabilities that after the proposed move is made a certain thing will happen for the children’s benefit. The British Columbia Court of Appeal 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....<sup>22</sup>

Although *Gordon v. Goertz* has been criticized for a number of reasons, in particular for the unpredictability that it creates, the Supreme Court is apparently not inclined to revisit this issue, dismissing leave to appeal in a number of relocation cases from across Canada over the past decade and a half.

### **3.2 Methodology**

The research team undertook an analysis of all reported Canadian relocation court decisions written in English from January 1, 2001 to April 30, 2011.<sup>23</sup> During this period there were over 700 Canadian cases, with the largest numbers in British Columbia and Ontario. Table 3.1 sets out the number in each jurisdiction, and the “success rate” (percentage permitted to move).<sup>24</sup>

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<sup>22</sup> *S.L.C. v. K.G.C.*, 2010 BCSC 349, at para. 97.

<sup>23</sup> Searches were conducted using both the 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.”

<sup>24</sup> 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.

**Table 3.1 Relocation cases and success rates: Canada**

<b>Jurisdiction</b>	<b>Number of relocation cases</b>	<b>Number of moves allowed</b>	<b>Percentage of moves allowed</b>
British Columbia	195	105	54
Ontario	193	107	55
Saskatchewan	88	42	48
Alberta	70	32	46
Nova Scotia	56	22	39
Newfoundland	29	11	38
Manitoba	27	16	59
New Brunswick	27	13	48
Quebec	26	16	62
Territories	17	8	47
Prince Edward Island	10	7	70
<b>Total</b>	<b>738</b>	<b>379</b>	<b>51</b>

### **3.3 Trends and factors in relocation cases**

#### **3.3.1 An increase in the number of cases, while relocation success rate constant**

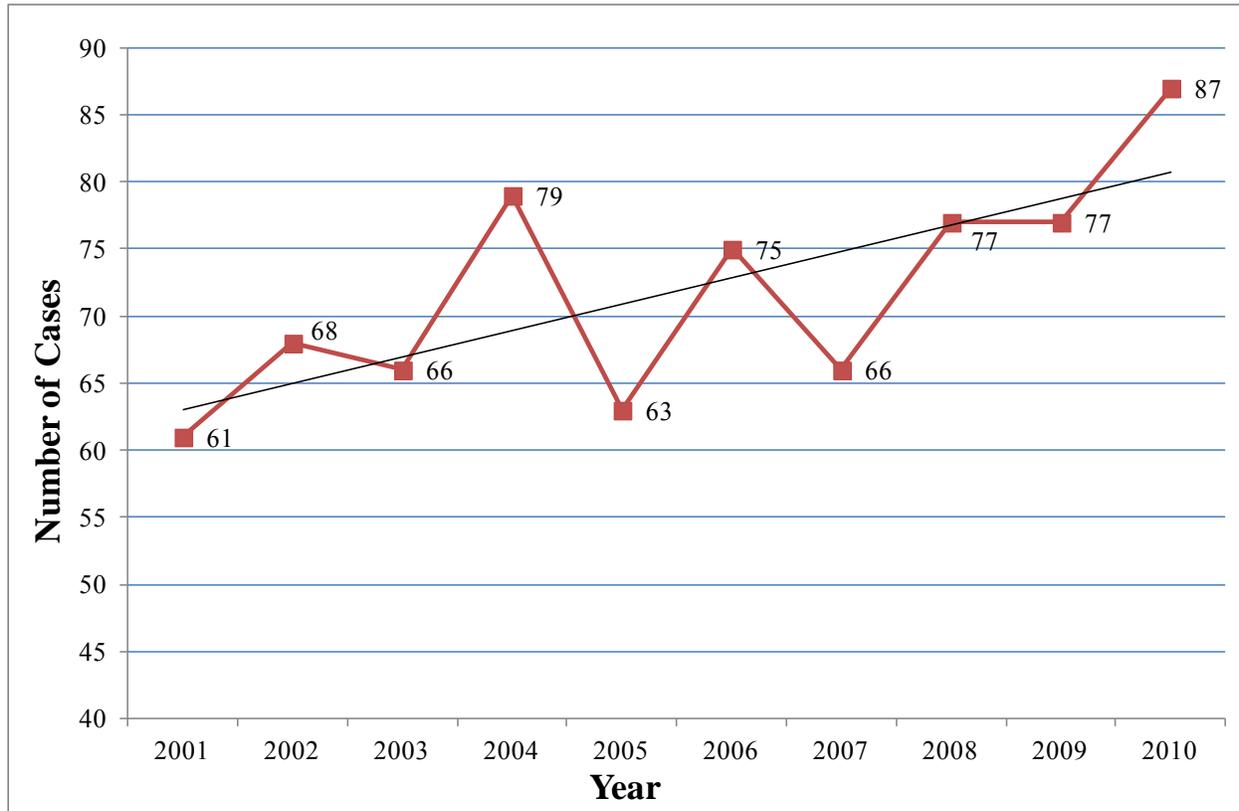
Professor Rollie Thompson of Dalhousie Law School reported that in the period between when the Supreme Court decision in *Gordon* was rendered in May 1996 and early 2004, about 60 percent of Canadian decisions permitted the relocation, but he also observed a “gentle but noticeable decline in the proportion of ‘yes’ cases starting around the year 2000” (Thompson, 2004, p. 404).

While there are fluctuations in the number of cases reported in each year and the trend is not uniform across the country, in Canada there was a trend towards an increase in the number of cases between 2001 and 2010. Figure 3.1 presents the number of cases by year and the associated trend line.

In Canada as a whole, there were 738 cases in the study period, with a success rate for relocation applications of 51 percent from 2001 to 2010.<sup>25</sup> 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 percent, suggesting that there was neither significant geographical variation in approach across the country nor has there been variation over time during the past decade.

<sup>25</sup> 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.

**Figure 3.1 Number of cases per year across Canada from 2001 to 2010**



### **3.3.2 Mainly mothers who apply**

Consistent with studies from other jurisdictions, the vast majority of applicants for relocation were mothers, though interestingly in Canada the success rates were similar regardless of whether the applicant was the mother or the father. In the study period, in 92 percent 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 percent while mothers had a similar 51 percent rate of success in their applications for relocation.

The case reports indicated that the parents had cohabited or been married in 80 percent of the cases; in 5 percent of the cases, the judgement indicated that the parties had not cohabited or been married to each other, and the remainder did not provide a clear indication about whether the parties and child 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 percent of cases. Further, if the mother did not cohabit with the father and had sole custody (either official or de facto), she was allowed to relocate in 65 percent of cases.

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

The parent seeking relocation had a lawyer in 93 percent of the cases, and the parent opposing the move had a lawyer in 89 percent of the cases.<sup>26</sup> Applicants had an average annual income of \$38,756 and responding parents an average annual income of about \$62,217 although in many cases no income figures were provided.

### 3.3.3 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.”<sup>27</sup> Despite this general statement, judges in both the appeal and trial courts 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, in most cases it is possible to identify what the court and moving parent consider to be the primary reason for the application of the parent to relocate with the child.<sup>28</sup> In the decade of the study, the most frequently cited primary reason for wanting to move was economic, usually 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 percent of cases; applicants were successful in 52 percent of these cases (126/241). The second most common primary reason was a new relationship, in particular to reside with a new spouse, common law or intimate partner; this was the primary reason in 29 percent of cases, with a success rate of 48 percent (103/216). The third most common primary 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 percent of cases, with a success rate of 53 percent (73/138).

For mothers, the most common primary reason for relocation was economic/employment (32 percent), followed very closely by a new relationship (31 percent) and seeking better family support (19 percent). For fathers, the most common primary reason was also economic or employment (36 percent), followed by a request for change in custody/primary residence that entailed relocating the child (20 percent).

There were a range of other reasons. Perhaps not surprisingly, in 15 of the 18 cases where the reason for the move was that the primary caregiver (i.e., the mother) was facing deportation or lacked immigration status in Canada, the court permitted relocation with the child.

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<sup>26</sup> The rate of litigants without lawyers in reported relocation cases (under 10 percent) is substantially lower than the rate in family cases in general, where 50 percent or more of litigants are without representation (see Bala & Birnbaum, 2011).

<sup>27</sup> [1996] 2 S.C.R. 27 at para. 48 - 49.

<sup>28</sup> 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 (Parkinson et al., forthcoming). 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).

### 3.3.4 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 (McLeod, 2004), more recent cases recognize that any kind of familial 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 are now clearly willing to accept spousal violence as an important factor in allowing relocation, especially if children witness it or directly suffer its effects, and it continues after separation. There is now a substantial body of Canadian jurisprudence where spousal violence was cited by the court as a reason for allowing the move, with the expectation that this will afford the mother and children some protection, and promote the welfare of the children.<sup>29</sup>

Our review indicates that in cases where there has been a substantiated allegation of spousal or child abuse, a move is significantly more likely to be allowed than in other cases. However, the mere fact that there are allegations that there was spousal or child abuse during the marriage or cohabitation is not sufficient to justify a relocation order. 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. Further, if the court concludes that the person making the allegations, usually the mother, has significantly exaggerated or fabricated concerns about spousal or child abuse and concludes that there are not serious safety issues, it is likely to dismiss a request to move.<sup>30</sup>

In the study period there were 170 cases (23 percent of all relocation cases) in Canada in which there were allegations of family violence. Of the 170 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 3.2, 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 percent (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 percent (n=7) of these cases. The judge did not make a finding

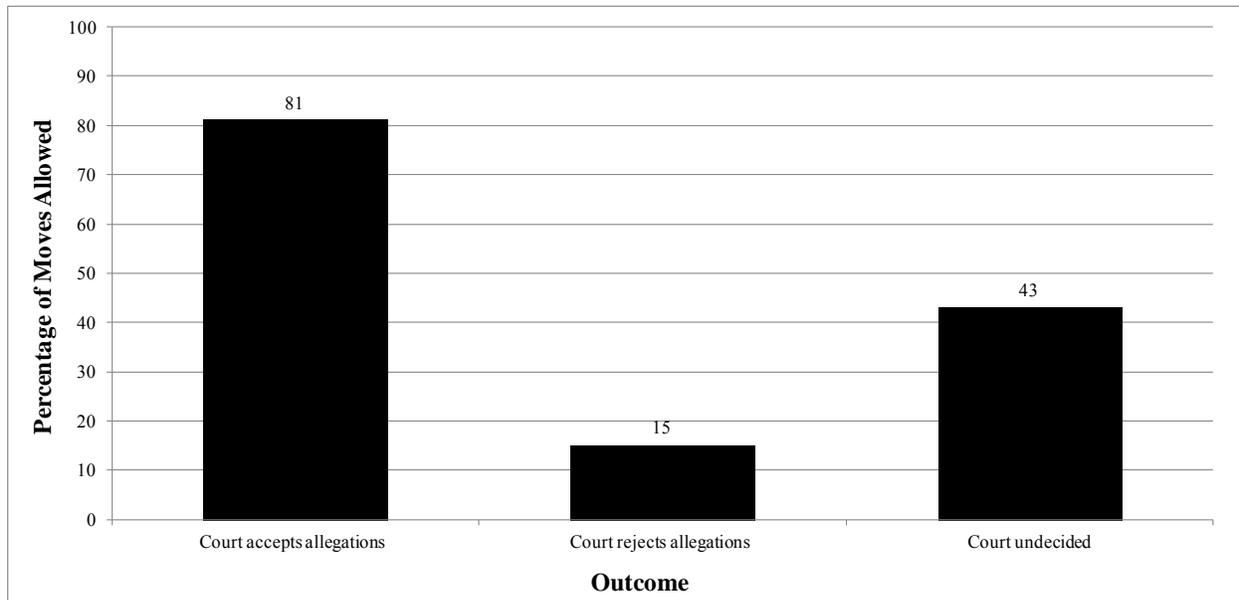
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<sup>29</sup> See e.g., *Prokopchuk v. Borowski*, [2010] O.J. No. 2947, 2010 ONSC 3833, 88 R.F.L. (6th) 140 where Quinlan J. permitted a mother to move from Ontario to Alberta to live with her new boyfriend, in part because the father had a history of domestic violence and alcohol abuse; *Lawless v. Lawless*, 2003 CarswellAlta 1409, 2003 ABQB 800 (Q.B.) where the court refused to order the return of the children because the mother had left to escape an abusive relationship. In the Manitoba case of *Cameron v. Cameron*, [2003] M.J. 234, 41 R.F.L. (5th) 30 (Man. Q.B. – Fam. Div.) the mother was permitted to move with the children from Manitoba to Alberta, though the father was granted significant periods of unsupervised access. The move was allowed in large measure because of the mother’s “justified fears” of her former husband because of his history of assaultive behaviour toward her. See also *Abbott-Ewen v. Ewen*, 2010 ONSC 2121, 86 R.F.L. (6th) 428 where the mother of a three and 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.

<sup>30</sup> See e.g., *Stead v. Stead*, [2005] O.J. 5203 (Ont. Sup. Ct.), per C.F. Graham J.

about the validity of the allegations in 49 cases, and a move was allowed in 43 percent (n=21) of these cases.

**Figure 3.2 Effect of domestic violence allegations on relocation cases**



Most of the cases where allegations of familial violence 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 percent success), 19 where the claim of spousal violence was rejected (2 moves allowed, 11 percent success) and 39 where the court was undecided about the validity of the allegations (15 moves allowed, 38 percent success).

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 had been alleged but not substantiated.<sup>31</sup>

The mother made the family violence allegations in the vast majority of cases (96 percent) in which the issue was raised. With regard to violence alleged by fathers, there were seven cases where the father was the parent seeking relocation and made allegations of child abuse or spousal violence, five involved allegations of child abuse and two involved allegations of spousal abuse. The court accepted evidence of child abuse in two cases (moves were allowed in both) and was undecided about the father's child abuse accusations in three cases (move allowed in all three).

<sup>31</sup> 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.  $\chi^2(2, N = 169) = 52.13, p = .000$ . There was also a significant effect for substantiated claims of spousal violence alone:  $\chi^2(2, N = 119) = 35.49, p = .000$ . 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.

The court accepted the father's evidence of spousal abuse by the mother in two cases, and allowed the move in one of them. So fathers who made family violence allegations were permitted to relocate with their children in six of seven cases.

### **3.3.5 Intra-provincial vs. national vs. international moves**

Social science research suggests that distance 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, research from Australia and New Zealand (Taylor et al., 2010; Parkinson & Cashmore, 2010) as well as Canada suggests that there may be a higher success rate in the courts for international as opposed to domestic moves. In Canada, Prof. Thompson (2011) reported that moves were allowed in 47 out of 72 international relocation cases decided between January 2005 and May 2010, a 65 percent 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 80 percent of cases involved moves within Canada and just under 30 percent of cases involved moves within the province. As in the studies from other countries, the success rate was substantially higher for the international moves (62 percent) than for moves within Canada (49 percent). Within the province, 52 percent 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 likely less frequent contact with the non-moving parent, it seems like a relatively robust finding across countries and may be explained by a number of factors. Many of these cases involve "primary caregivers" (mothers), often with younger children, who are having difficulty after separation adjusting to life as an isolated single parent in Canada. They are moving "back home" for family support and economic reasons. Our review of cases suggests that in the international cases, the applicants also tend to have more solid reasons for wanting to move and clearer plans. 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.

### 3.3.6 Relationship of children with the moving and other parent: Custody status

The relocation jurisprudence indicates that one of the most important factors in relocation cases is the judicial 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 legal custody does not necessarily mean that the court will allow the move.<sup>32</sup> However, if the child has only limited involvement with an "access parent," the court is much more likely to allow the child to move.<sup>33</sup> 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 not determinative of a relocation case, and indeed 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.<sup>34</sup> However, if there is joint physical custody (each parent has the child at least 40 percent of the time) courts are less likely to permit a move, because this would have a more disruptive effect on the child.<sup>35</sup>

For analytical purposes, we divided the 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).<sup>36</sup> Overall, our analysis suggests that the custodial arrangement has a significant effect on whether or not a move will be permitted (see Figure 3.3).<sup>37</sup>

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.

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<sup>32</sup> See e.g., *Wilkinson v. Edward*, [2004] O.J. 3796 (Sup. Ct.); and *Zunti v. McIntosh*, [2004] O.J. 473 (Ont. Sup. Ct.), per Howden J.

<sup>33</sup> See e.g., *Roberts v. Young*, [2004] O.J. 1786 (Sup. Ct.), per Wildman J.; and *Nitkin v. Nitkin*, [2004] O.J. 3295 (Sup. Ct. – Fam. Ct.), per Wilson J.

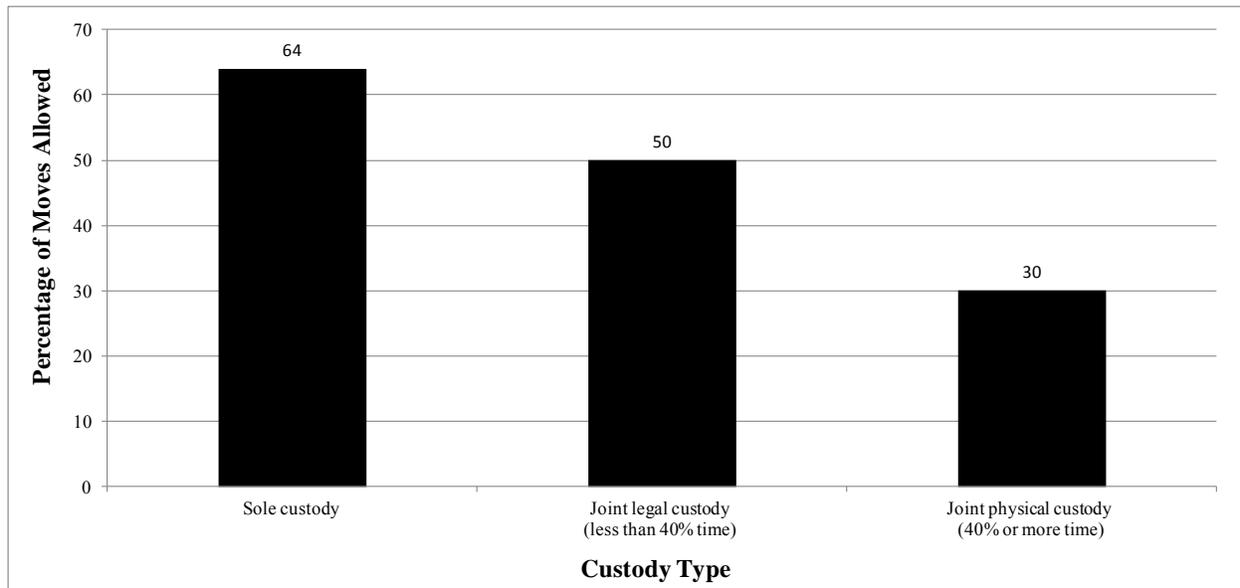
<sup>34</sup> *Rockel v. Kent*, 2011 ONSC 4034, [2011] O.J. 3742; *Johnstone v. Brighton*, [2004] O.J. 3477 (Sup. Ct., Fam. Ct.) per Campbell J.; *Johnson v. Cleroux* (2002), 23 RFL (5<sup>th</sup>) 176 (Sup. Ct. J.); *Luckhurst v. Luckhurst* (1996) 20 RFL (4<sup>th</sup>) 379 (C.A.); *Burgin v. Howells*, 2004 CarswellNS 59, {2004} N.S.J. No. 54, 2004 NSSC 31 (Sup. Ct.).

<sup>35</sup> *Young v. Young* (2003), 34 R.F.L. (5<sup>th</sup>) 214 (Ont. C.A.); *Rotzetter v. Rotzetter*, 2003 BCSC 1962 (S.C.).

<sup>36</sup> 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; again these cases were not included. In addition, only cases in which a decision was made with respect to relocation are included in this analysis and description.

<sup>37</sup> 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,  $\chi^2(2, N = 699) = 44.18, p = .000$ . 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.

**Figure 3.3 Effect of custody arrangement on relocation cases**



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.<sup>38</sup> There were 240 joint legal custody cases; the move was allowed 50 percent of the time in these cases. In the joint physical custody (or shared parenting) cases, each parent had the child at least 40 percent of the time. There were 135 joint physical custody cases; the move was only allowed in 30 percent of these cases.

These data clearly suggest that the likelihood of relocation being allowed decreases as the involvement of the non-moving parent increases, and suggest 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. There is a range of cases in which there is no real difference between joint *legal* custody and sole custody with generous access, and the terminology used to characterize the parenting arrangement is a reflection of local practice or professional preferences rather than differences in parent-child relationships. However, in many cases 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.

<sup>38</sup> In Canada, the 40 percent 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 percent threshold allows for a different child support arrangement means that in most judicial decisions it is clear whether or not the 40 percent threshold was reached, and not infrequently there is litigation or negotiation about this issue.

### 3.3.7 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 in Chapter 2.0, 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 may also 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 discussed in Chapter 2.0 and reported cases<sup>39</sup> 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 from 1996 to 2003, 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.<sup>40</sup> However, a review of Canadian cases from 2003 to 2008 by Jollimore and Sladic (2008) found no difference in success rates for relocation cases for children between birth and 5 years and between 6 through 11 years. Although they found a

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<sup>39</sup> *Karpodinis v. Kantas*, [2006] B.C.J. No. 1209; 2006 BCCA 272, leave to appeal dismissed [2006] S.C.C.A. No. 318. See also *Bjornson v. Creighton*, [2002] O.J. 4364 (C.A.).

<sup>40</sup> Professor Rolie Thompson (2004 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.

See also discussion in Thompson (1999). In a study of British Columbia cases from 2003 to 2008, El Fateh (2009) found the highest rate of relocation decisions permitted for children under 2 years of age (71 percent compared to an overall rate of 59 percent).

distinct rise in the percentage 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<sup>41</sup> to determine if there was a significant age effect.

For Canada, there were over 1,000 children in the 738 cases with 55 percent of cases involving single children and 45 percent involving multiple children. The mean age of the children was 7.5 years. There were 300 cases where the only/youngest child was aged 0 to 5; of those the move was permitted in 151 cases (50 percent). No significant age effects were found for younger or older children for Canada as a whole.<sup>42</sup>

### 3.3.8 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 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.<sup>43</sup> 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 express their views, the courts tend to give significant weight to the wishes of children about relocation. 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

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<sup>41</sup> Age was analyzed 3 ways (Analysis #1: 0-2 years, 3-5 years, 6-11 years, and 12 years and older. 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.

<sup>42</sup> We did find a significant age effect for Ontario alone. There were 295 children in the 193 Ontario cases; 55 percent of the cases involved a single child, and 45 percent 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 percent) 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 percent 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 percent of the time (21/28 cases). In Ontario in general then it seems that moves are more likely to be allowed if the youngest child is 10 years or older ( $\chi^2(1, N = 185) = 4.99, p = .025$ ).

<sup>43</sup> For an English Court of Appeal decision emphasizing the importance of the wishes of children in relocation cases, see *W (Children)*, [2008] EWCA 538.

parent who will remain in the community where the children were raised.<sup>44</sup> There are, however, also litigated 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.<sup>45</sup> 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 may not accord with his or her best interests, or in cases in which there are multiple siblings who may be expressing different views.<sup>46</sup>

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 percent), and in another 55 cases (7 percent) the judgement reported that there was evidence before the court that the child/children were either neutral, or that they did not express 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, as judges were often reluctant to interview children directly citing concerns over "forcing them to take sides." Furthermore, testimony from parents regarding their children's wishes was often conflicting and typically afforded little 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 percent). In 37 cases, the children opposed the move; in only 9 of these cases was the move allowed (24 percent) (see Figure 3.4). Thus in 94 of the 124 cases (76 percent) in which the children expressed clear views, the court's decision accorded with those views. This is a statistically significant effect.<sup>47</sup>

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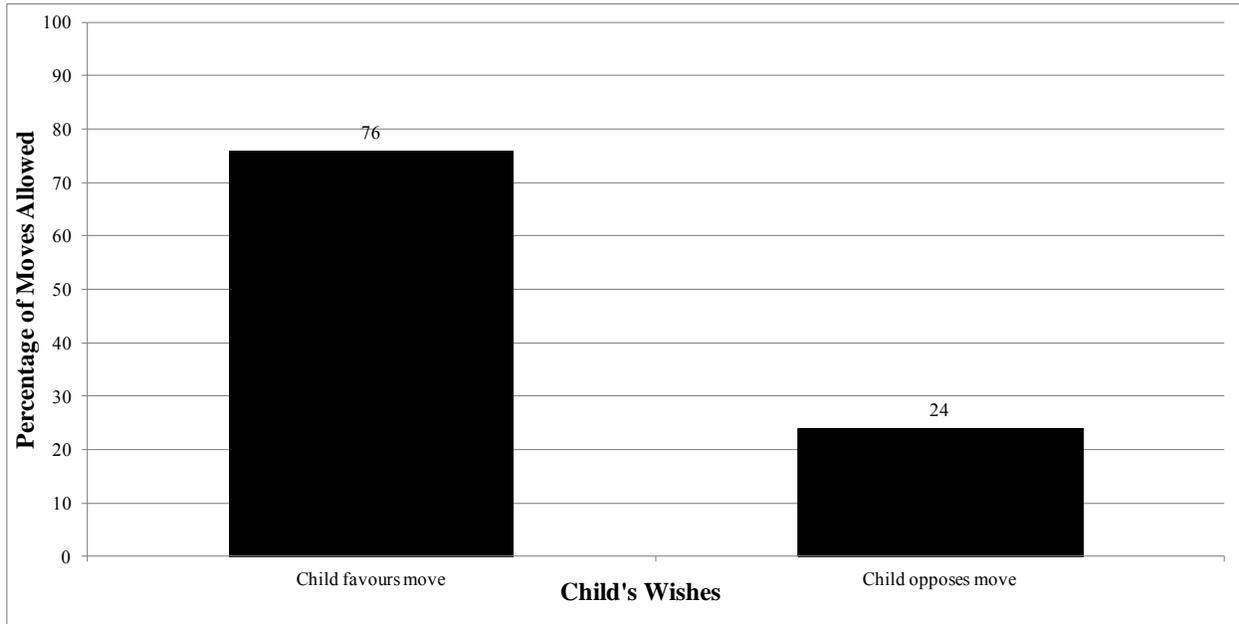
<sup>44</sup> See e.g., *Wilkinson v. Edward*, [2004 O.J. 3796 (Ont. Sup. Ct.).

<sup>45</sup> See e.g., *Rushinko v. Rushinko*, [2002] O.J. 2477 (C.A.).

<sup>46</sup> *Sloss v. Forget*, [2004] O.J. 3960 (Sup. Ct.), per Linares de Sousa J.; see also *Myketiak v. Myketiak*, [2001] S.J. 85 (Sask C.A.).

<sup>47</sup> 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,  $\chi^2(1, N = 123) = 27.68, p = .000$ .

**Figure 3.4 Effect of children's wishes on relocation success rate**



### **3.3.9 Conduct of the applicant: The “co-operative parent” vs. “badly behaved parent”**

A number of studies suggest that one of the 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 (Behrens & Smyth, 2010; Parkinson et al., 2010). 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 to maintain a strong relationship with a child when the separations are of longer durations, and the visits more difficult to arrange.

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),<sup>48</sup> in our study applicants were successful in 70 out of 144 cases where they “moved first and asked permission later” (49 percent). While judges condemned such unilateral action, they also 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 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 percent). Perhaps due to the smaller number of these cases, this is not a statistically significant difference,

<sup>48</sup> See e.g., *Pike v. Cook*, [2005] O.J. 248 (Sup. Ct.), per C.T. Hackland J.; *Johnstone v. Brighton*, [2004] O.J. 3477 (Sup. Ct., Fam. Ct.) per Campbell J.; and *Abbott-Ewen v. Ewen*, [2010] ONSC 2121, per Gareau J. (mother who was successful on interim motion to allow move, but no costs because of her unilateral conduct and discussion of possibility of awarding costs against her despite her success.)

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.

### **3.3.10 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 city 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.<sup>49</sup> 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 requires that a custodial parent who wishes to move seek approval from a court for that move, but it does not create a special onus of proof in the relocation proceedings. If a proposed move would interfere with specified access provisions of a court order or agreement, the parent seeking to move should bring an application for judicial approval and proper notice to the other parent.<sup>50</sup> In our study of relocation cases, these clauses seem to have no effect on the final outcomes; there were restrictions on relocation clauses in 143 cases, with moves allowed in 73 of them (51 percent), exactly the same rate as for cases without such clauses.

## **3.4 *The role of experts and children's lawyers***

### **3.4.1 Limited role for mental health professionals**

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, also often making recommendations.

Compared to other types of child-related litigation, however, these expert reports are prepared in relatively few relocation cases and, if prepared, seem to be given less weight in relocation cases 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 percent). 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, with the recommendation followed in 38 of these cases. In 91 cases, no recommendation about relocation was made in the report.

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<sup>49</sup> *Ligate v. Richardson* (1997), 34 O.R. 3d 423 (Ont CA); *Krebs v. Yarmel* (2003), 2003 CarswellOnt 2909 (S.C.J.); and *Johnstone v. Brighton*, [2004] O.J. No. 3477 (Sup. Ct.).

<sup>50</sup> *Archibald v. Archibald*, 2004 CarswellAlta 127, 2004 ABQB 116 (Q.B.). The court refused to approve an interim move where the mother did not give notice as required under the agreement.

Thus the assessor's recommendations regarding relocation were followed by the judge in 72 out of 108 cases, a somewhat lower rate (67%) than reported in most other studies on the role of experts in child related cases.<sup>51</sup>

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,<sup>52</sup> though not infrequently in relocation cases in which there is a court ordered assessment, judges have disregarded the recommendations – in particular to allow a child to be relocated despite the expert's recommendations that the move not be permitted.<sup>53</sup> The late Professor James McLeod argued (2004): "courts finally seem to accept that mobility is a legal issue, not a mental health issue."

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. 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 (Parkinson, 2011).

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 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

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<sup>51</sup> 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 percent - 90 percent of cases; see Bala and Leschied, 2008 and Bala, Hunt & McCarney, 2010. 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 (Semple, 2011).

<sup>52</sup> See e.g., *Young v. Young* (2003), 34 R.F.L. (5th) 214 (Ont. C.A.); and *Stead v. Stead*, [2005] O.J. 5203 (Sup. Ct.), per Graham J. See, however, *W. (K.M.) v. W. (L.J.)* 2010 CarswellBC 3417, 2010 BCCA 572 where the evidence of two court-appointed experts about the effect of the mother's alienating conduct on the children was decisive in allowing the father to relocate the children from British Columbia to Saskatchewan.

<sup>53</sup> See e.g., *Cade v. Rotstein* (2004), 50 RFL (5th) 280 (Ont. C.A.); *Singer v. Davila-Singer*, [2003] O.J. 3231 (C.A.); *Coyle v. Danylkiw*, [2004] O.J. 916; and *Droit de la famille 091332*, [2009] J.Q. 5287, 2009 QCCA 1068.

relocation cases in which an assessment and testimony by a psychologist or social worker will be valuable.

### 3.4.2 Lawyers for children - Ontario

Ontario has an extensive program for the representation of children involved in parental disputes over custody, access or relocation, and 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 percent), with 26 of those cases in Ontario and 4 in Quebec.<sup>54</sup>

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.<sup>55</sup> 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 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.<sup>56</sup>

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 often seems influential with the Ontario courts in relocation cases.<sup>57</sup> In our study of a decade of Ontario relocation cases, we found that in 7 of 10 cases in which 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). 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,<sup>58</sup> as well as the credibility of the Office<sup>59</sup> and the difficulty that judges face in determining what is truly in the "best interests" of children.

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<sup>54</sup> 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.

<sup>55</sup> See e.g., *Rushinko v. Rushinko*, [2002] O.J. 2477 (C.A.)

<sup>56</sup> See e.g., *Boukema v. Boukema*, [1997] O.J. 2903 (Gen. Div.)

<sup>57</sup> See e.g., *Rushinko v. Rushinko*, [2002] O.J. 2477 (C.A.); *Wilkinson v. Edward*, [2004] O.J. 3796 (Sup. Ct.); *Pike v. Cook*, [2005] O.J. 248 (Sup. Ct.), per C.T. Hackland J, affirmed [2005] O.J. 4529 (C.A.); and *Noble .v. Boutilier*, [2005] O.J. 3825 (Ct.J.), per McSorley J.

<sup>58</sup> *Prokopchuk v. Borowski*, [2010] O.J. No. 2947, 2010 ONSC 3833, 88 R.F.L. (6th) 140 Quinlan J. Tatyana was 6 years old and her sister Daniella was the mother's daughter from a previous relationship. Tatyana told the OCL clinical investigator that she wanted to live with her mother and sister in "the west." The mother was permitted to move the child from Ontario to Alberta.

<sup>59</sup> See e.g., *Boukema v. Boukema*, [1997] O.J. 2903 (Ont. Gen. Div.)

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,<sup>60</sup> 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 percent), 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.

### **3.5 Stage of the proceedings**

#### **3.5.1 Interim orders**

The reported jurisprudence 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 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 permitting relocation at an interim hearing 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.<sup>61</sup> 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<sup>62</sup> or has been abusive of the child, then relocation may 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

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<sup>60</sup> See e.g., *Fair v. Rutherford- Fair*, [2004] O.J. 1774 (Ont. Sup. Ct.), per Fragomeni J.

<sup>61</sup> *White v. Richardson*, [2005] O.J. 1715, at para. 41 (Sup. Ct.), per Gordon J.; *Kennedy v. Hull*, [2005] O.J. 4719 (Ct.J.), per McSorley J. See e.g., *Plumley v. Plumley*, [1999] 1OJ 3234 ( Fam. Ct.), where Marshman J. discussed the factors that are important in deciding relocation on an interim basis (at para. 7):

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.

<sup>62</sup> See e.g., *Roberts v. Young*, [2004] O.J. 1786 (Sup. Ct.), per Wildman J.; *Braun v. Cousins*, [2004] O.J. 3163 (Sup. Ct.), per Aitken J.

allow the primary caregiver for the child to relocate in order to reduce the stress on the child.<sup>63</sup> However, if there are conflicting affidavits and a lack of independent evidence,<sup>64</sup> or if the case for relocation does not seem very 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 relationship with a parent.<sup>65</sup>

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 percent) that is only slightly below the rate in cases after a trial. In the successful interim cases, the judges were clearly advertent to the higher burden of proof and explaining why the cases were "exceptional." It seems likely that counsel bringing interim motions for relocation are aware of the test that they have to meet, and tend to bring these motions only when they have strong evidence in support.

### 3.5.2 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 his father and leaving behind his previously custodial mother, the Supreme Court of Canada established a "deference standard" for the decisions of trial courts in family law cases.<sup>66</sup> 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." Justice Bastarache highlighted the importance of finality in custody cases and the fact-specific nature of each case.<sup>67</sup>

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*:

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.<sup>68</sup>

If the 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.<sup>69</sup>

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<sup>63</sup> *Elliot v. Elliot*, [1998] O.J. 4827 (Gen. Div. – Fam. Ct.), per Wood J.; and *Cox .v. Darling*, [2008] OJ 824

<sup>64</sup> *T.K.M. v. P.S.M.*, [1999] A.J. 284 (Alta Q.B.); *Zunti v. McIntosh*, [2004] O.J. 473 (Ont. Sup. Ct.), per Howden J.

<sup>65</sup> *Fair v. Rutherford-Fair*, [2004] O.J. 1774 (Sup. Ct.), per Fragomeni J.

<sup>66</sup> *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014.

<sup>67</sup> *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 at para. 13.

<sup>68</sup> [2001] O.J. 4908 (C.A.), at para. 1.

<sup>69</sup> *Appiah v. Appiah*, [1999] O.J. 500 (C.A.).

In our study, there were 83 appellate decisions, resulting in 59 trial decisions being affirmed (71 percent), 15 being reversed and 9 ordering for a new trial. This was an appellate “success rate” of 29 percent; 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 percent (Stribopoulos & Yahya, 2007).<sup>70</sup>

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 of 83 cases (57 percent), which is roughly the same rate as trial decisions.

### **3.6 Summary**

This chapter provided an analysis of Canadian relocation cases decided between 2001 and 2011. 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 revealed some clear trends:

- 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 about 50 percent.
- These cases have a very strong gendered element; the parent seeking to relocate is almost always the mother, though in the small number of cases in which fathers seek to relocate with a child, their success rate is not dissimilar to mothers.
- Custodial mothers have the greatest chance of gaining permission for relocation if they have sole physical custody, or there are substantiated allegations of family violence. Conversely, in cases where there has been joint physical custody (each parent has child at least 40 percent of the time), a court is significantly more likely to deny permission to relocate.
- The most common reason for wanting to relocate is improved economic or job prospects (about one third of cases), followed by the mother wanting to move for a new intimate relationship (just under one 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. There are no significant differences in the success rate in these three categories of reasons for wanting 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.

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<sup>70</sup> The lower success rate in relocation cases may reflect the greater deference of appellate courts to custody and access cases in general.

- 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.



## 4.0 REVIEW OF EXISTING CANADIAN DATA

This chapter examines the existing Canadian data from large-scale population surveys on parental relocation following separation or divorce. Examination of the data was guided by the following questions contained in the RFP issued by Justice Canada referring to both the general population in Canada as well as to separated/divorced families:

- How many people relocate (as a population as a whole and separated/divorced parents)?
- How many people make frequent moves?
- How far do they go (i.e., within the same city, within the same province, to another Canadian jurisdiction, outside the country)?
- Who is more likely to move?
- Who is more likely to move more frequently (i.e., the factors associated with relocation in general, and for separated/divorced parents in particular)?
- Why do people move (i.e., income-related, work-related, neighbourhood-related)?

### 4.1 *Census data*

The Canadian census, conducted every five years, collects basic socio-demographic information on all residents of Canada. While data specifically related to parental relocation following relationship breakdown is not collected, information is available regarding legal marital status, i.e., never legally married (single), currently living in a common-law relationship, legally married (and not separated), separated but still legally married, divorced, and widowed. Information is also available on whether residents have moved in the previous one or five years, and the extent of the move, i.e., within the same census subdivision (municipality), to a different census subdivision but within the same province, or to a different province. The census also captures data on individuals who have moved to Canada from a different country, but obviously cannot report on individuals who have moved from Canada. In addition, information on the presence of children is available.

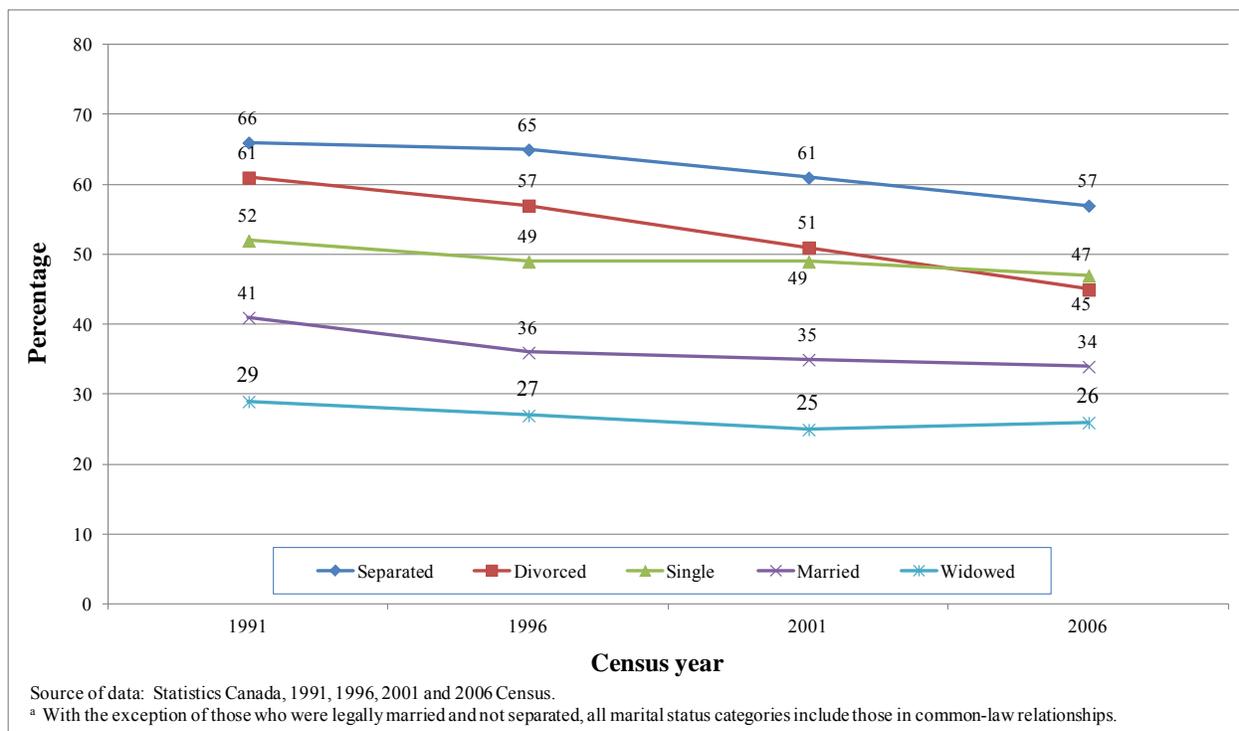
It should be noted that because the census data were not collected specifically to provide information on parental relocation, there are a number of limitations to the data. While data on legal marital status are available, it is not possible to determine when changes in marital status occurred. Thus, for example, while it is possible to determine that a person is divorced and that they changed residence in the past five years, it is not known when the divorce occurred and consequently whether the relocation was related to a change in marital status. Further, an individual may have experienced more than one change in marital status in the past five years, e.g., a person could have divorced and remarried in the past five years, but would be classified as legally married in the data. The second limitation to using census data to examine relocation issues is that it is impossible to determine how many times a person has moved in the past five years. A third limitation is that the single category for legal marital status only includes children aged five and older and thus data pertaining to this category should be interpreted with caution.

A fourth limitation is that it was only possible to isolate people living in common-law relationships in the 2001 and 2006 census data; thus the 1991 and 1996 data include common-law in all subsets except legally married. Finally, it should be noted that census data are cross-sectional, and thus cannot be used to infer causal relationships between variables.

#### 4.1.1 Mobility trends

Figure 4.1 presents the proportion of individuals who moved at least once at some time within the previous five years by marital status for the past four census periods. Across all marital statuses, there is a consistent trend for mobility to decrease over time. Further, in most instances, separated and divorced individuals were more likely to move than single, married, or widowed individuals. For example, two-thirds (66 percent) of separated people had moved within the past five years in 1991 compared to one-half of single people (52 percent) and two-fifths of married individuals (41 percent). While overall the percentages of individuals who moved were lower in 2006, the pattern remained the same, i.e., 57 percent of separated people had moved compared to 47 percent of singles and 34 percent of married people.

**Figure 4.1 Percentage of population who moved by marital status and census year<sup>a</sup>**



The four periods of census data were also examined to determine how the presence of children was related to mobility. While the single category includes some never married with children, this group was omitted from these analyses. The percentage of the population with no children who moved in the previous five years by marital status is presented in Figure 4.2. While this analysis is somewhat peripheral to parental relocation, it does provide an interesting comparison to cases where children are present. As with the overall mobility trends, mobility in all marital status groups without children decreased over time. Across all time periods, separated and

divorced people without children are considerably more likely to have moved than married or widowed people without children. For example, in 2006, 59 percent of separated and 44 percent of divorced individuals had moved within the past five years compared to 36 percent and 25 percent of married and widowed people respectively.

**Figure 4.2 Percentage of population with no children who moved by marital status and census year<sup>a</sup>**

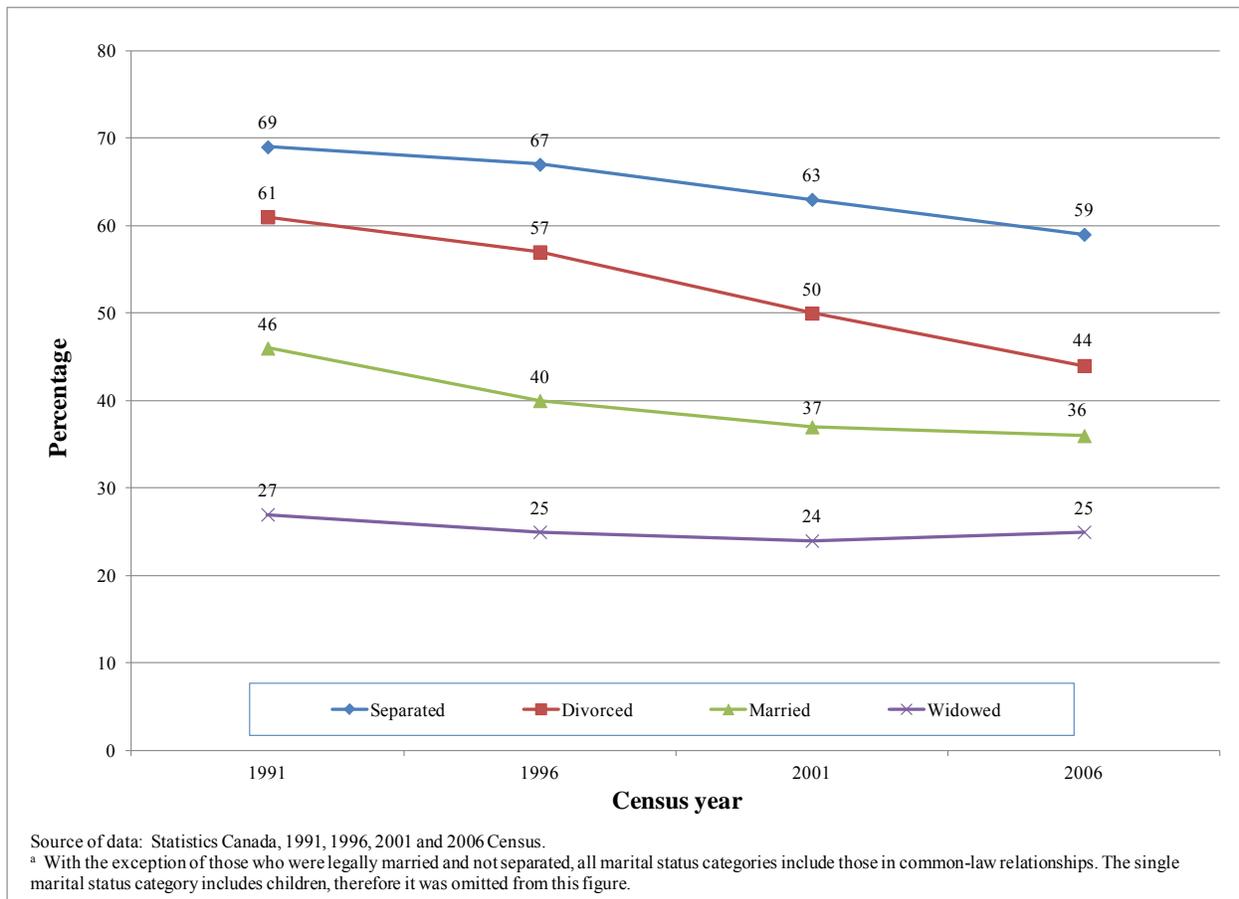
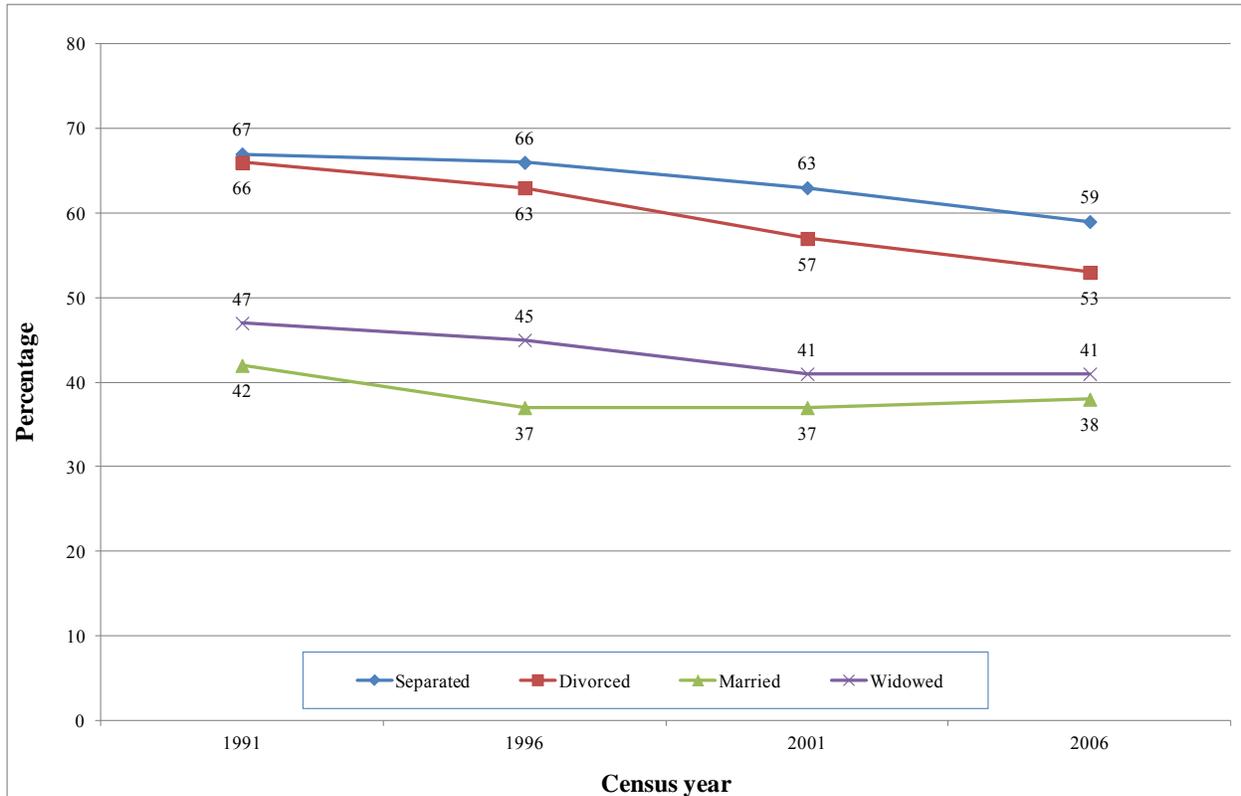


Figure 4.3 indicates the percentage of the population with children aged 5-18 who moved within the previous five years. Again, overall mobility decreased over time across all marital statuses. As was found for those with no minor children, separated and divorced people with children were more likely to have moved than either married or widowed people with children. In 2006, 59 percent of separated and 53 percent of divorced people with children moved, compared to 38 percent of the married with children and 41 percent of widowed people with children. Interestingly, widowed parents with children were also more likely to have moved than were married couples with children. It is probable that widowed people with children under the age of 18 represent a younger group than widowed people with adult children or no children.

**Figure 4.3 Percentage of population with children aged 5-18 who moved by marital status and census year<sup>1</sup>**



Source of data: Statistics Canada, 1991, 1996, 2001 and 2006 Census.

<sup>1</sup> With the exception of those who were legally married and not separated, all marital status categories include those in common-law relationships. The single marital status category includes children, therefore it was omitted from this figure.

#### 4.1.2 Current profile

This section presents data from the 2001 and 2006 census periods, for which separate data for individuals living in common-law relationships could be determined. Unfortunately, data were not available on the presence or absence of children, nor were data available on common-law status prior to 2001. According to the 2006 census data, 41 percent of Canadians moved at least once in the previous five years (see Table 4.1). This is similar to the 2001 data, which indicated that 42 percent of Canadians moved in the previous five years. In contrast, 48 percent of separated and divorced individuals had moved within the past five years in 2006, and 53 percent of separated and divorced individuals had moved within the past five years in 2001.

**Table 4.1 Mobility status five years ago by legal marital status for 2001 and 2006 census<sup>a</sup>**

Mobility Status 5 Years Ago	Legal Marital Status						Total <sup>c</sup>
	Single <sup>b</sup>	Common-law	Legally Married	Separated	Divorced	Widowed	
<b>2001 CENSUS</b>							
Non-movers	5,736,815	805,480	7,802,165	241,090	645,030	991,685	16,222,260
Movers	4,731,095	1,514,975	4,154,350	357,670	632,220	320,020	11,710,330
Same Municipality	2,563,520	788,815	2,105,125	216,610	388,640	188,885	6,251,595
Same Province	1,380,400	584,700	1,233,895	100,935	183,580	93,595	3,577,105
Different Province	388,195	114,320	320,665	23,900	39,690	18,895	905,670
Different Country	398,975	27,135	494,675	16,220	20,310	18,645	975,960
Total <sup>c</sup>	10,467,910	2,320,450	11,956,515	598,760	1,277,245	1,311,705	27,932,585
<b>2006 CENSUS</b>							
Non-movers	6,095,365	1,097,840	8,152,025	280,195	801,560	1,030,175	17,457,170
Movers	4,820,640	1,661,155	4,260,555	355,565	639,455	349,940	12,087,315
Same Municipality	2,679,930	883,070	2,127,960	215,870	391,620	209,450	6,507,905
Same Province	1,326,420	609,025	1,247,745	97,460	182,405	103,730	3,566,790
Different Province	353,145	121,675	297,825	21,630	39,545	18,750	852,580
Different Country	461,135	47,380	587,025	20,600	25,885	18,010	1,160,035
Total <sup>c</sup>	10,916,005	2,758,995	12,412,585	635,765	1,441,015	1,380,115	29,544,485

Source of data: Statistics Canada, 2006 Census

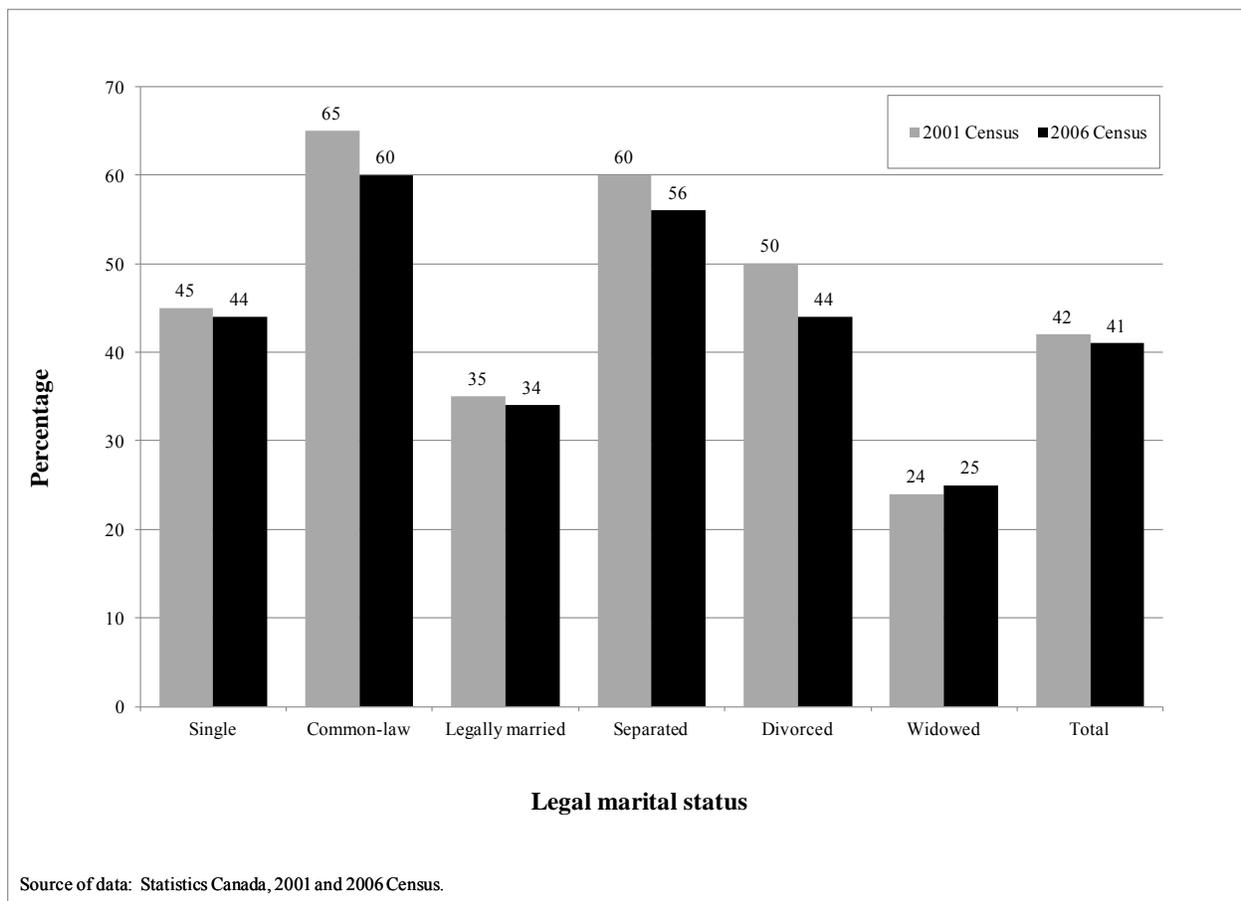
<sup>a</sup> Five-year mobility data include Canadian residents aged five and older.

<sup>b</sup> Single refers to never married individuals including children aged five and older.

<sup>c</sup> Minor differences in sums of categories existed in original data.

Figure 4.4 presents the percentage of the population who moved within the past five years by marital status for 2001 and 2006. In general, mobility rates have decreased over time for all categories of marital status except widowed, which increased from 24 percent in 2001 to 25 percent in 2006. The most mobile group was common-law families, with mobility rates of 65 percent in 2001 and 60 percent in 2006. Separated individuals had the second highest mobility rates (60 percent in 2001 and 56 percent in 2006), followed by divorced people (50 percent in 2001 and 44 percent in 2006). It may be that separated people experienced their relationship breakdown more recently than divorced people, and thus are more likely to have moved within the past five years.

**Figure 4.4 Percentage of population who moved within five years by legal marital status**



When looking at mobility rates by gender and marital status, Figure 4.5 shows that in all cases, females are slightly more likely to have moved within the previous five years than males. This pattern holds for both the 2001 and 2006 census years. For example, when looking at separated and divorced individuals, in 2001, 53 percent of females had moved in the past five years compared to 52 percent of males. Similarly, in 2006, 48 percent of females had moved in the past five years compared to 47 percent of males. While the gender difference is small, it is consistent. It may be related to economic circumstances, but we do not have the data to determine this. In

line with the overall mobility findings, mobility of both male and female separated and divorced people was down in 2006.

**Figure 4.5 Percentage of population who moved within five years by gender and legal marital status**

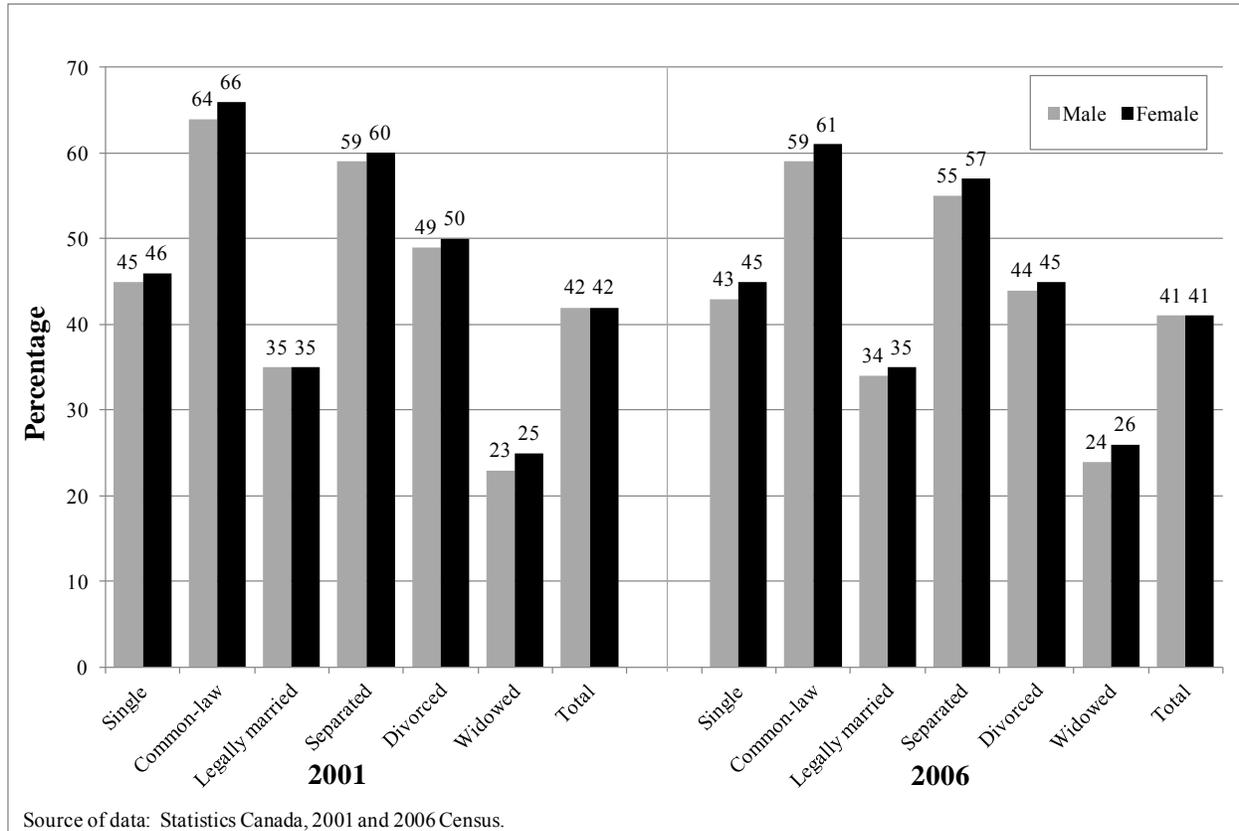
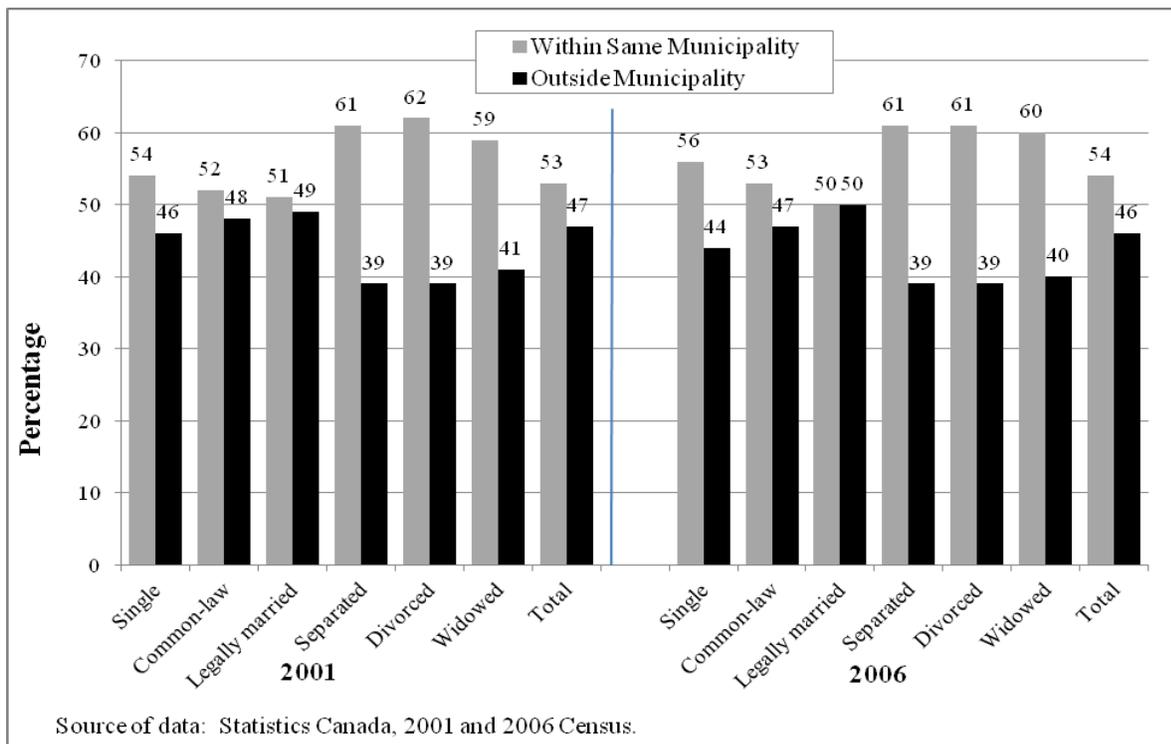


Table 4.1 (see page 49) also presents data on the extent of the move by marital status. For both census years and across all marital status categories, individuals who move are most likely to stay within the same municipality. For example, in 2006, of the married people who moved within the past five years, 50 percent stayed within the same municipality, 29 percent moved to a different municipality but stayed in the same province, 7 percent moved to a different province, and 14 percent moved from a different country. Of the separated and divorced people who moved within the past five years in 2006, 61 percent stayed within the same municipality, 28 percent moved to a different municipality but stayed in the same province, 6 percent moved to a different province, and 5 percent moved from a different country. It is interesting to note that separated and divorced people who move are considerably more likely to stay within the same municipality than are married people.

To simplify the analyses presented above, the census data were further analyzed by comparing moves within the same municipality to moves outside the municipality (this includes moves outside the municipality but in the same province, moves to a different province, and moves to Canada from another country). As indicated in Figure 4.6, the overall patterns are almost

identical from 2001 to 2006. Separated, divorced and widowed people who moved were substantially more likely to move within their municipality than outside it. For example, in 2006, 61 percent of divorced people who moved did so within their municipality compared to 39 percent who moved outside their municipality. In contrast, in 2006, legally married people who moved were equally likely to move within their municipality (50 percent) as outside their municipality (50 percent).

**Figure 4.6 Percentage of population who moved within five years by location of move and legal marital status**



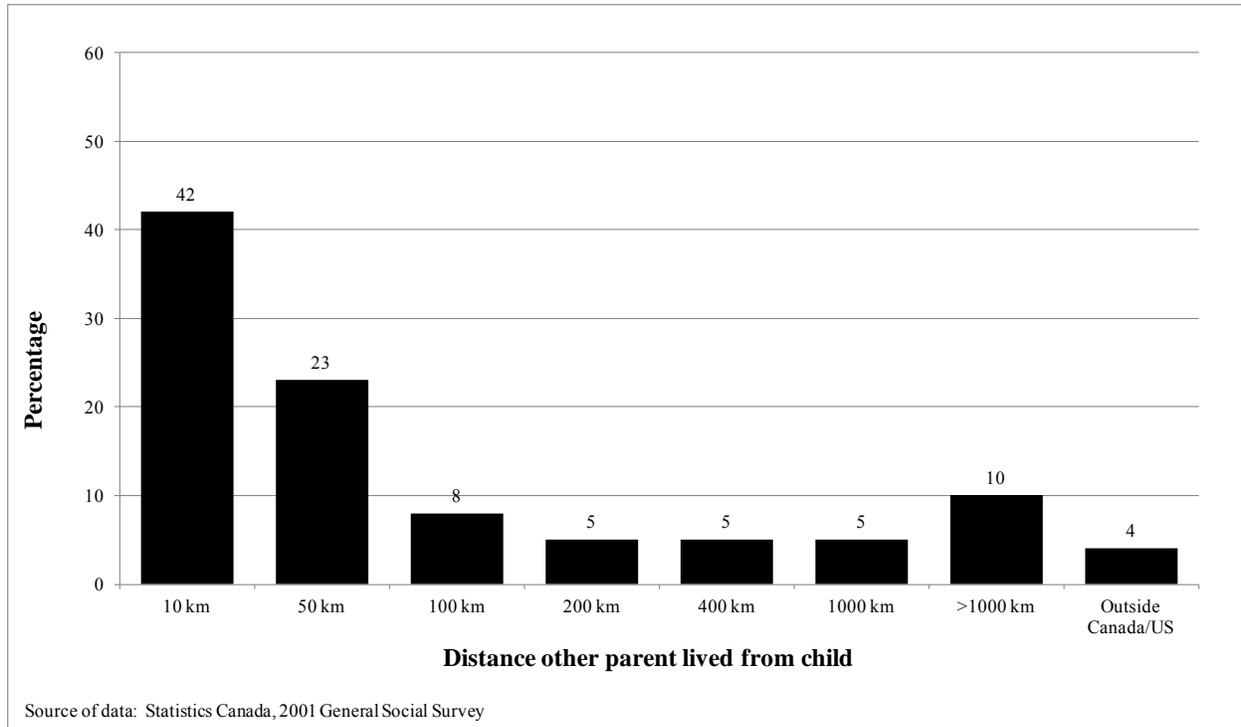
## 4.2 General Social Survey data

The General Social Survey (GSS) is designed to gather data on social trends in order to monitor changes in the living conditions and well being of Canadians over time. The target population for the GSS is all persons 15 years of age and older in Canada, excluding residents of the Yukon, Northwest Territories, and Nunavut, and full-time residents of institutions. Every five years key topics are revisited. For key data on families, including post-separation and divorce arrangements for children, the relevant cycles are Cycle 5 (1990), Cycle 10 (1995), Cycle 15 (2001), Cycle 20 (2006) and the upcoming Cycle 25 (2011). While the family cycles of the GSS do not collect data directly on the issue of post-separation/divorce mobility, there is some limited information available on the distance a child lives from a non-residential parent.

In 2001, residential parents were asked how far away the other parent lived from the child/children (see Figure 4.7). Over two-fifths of non-residential parents (42 percent) lived

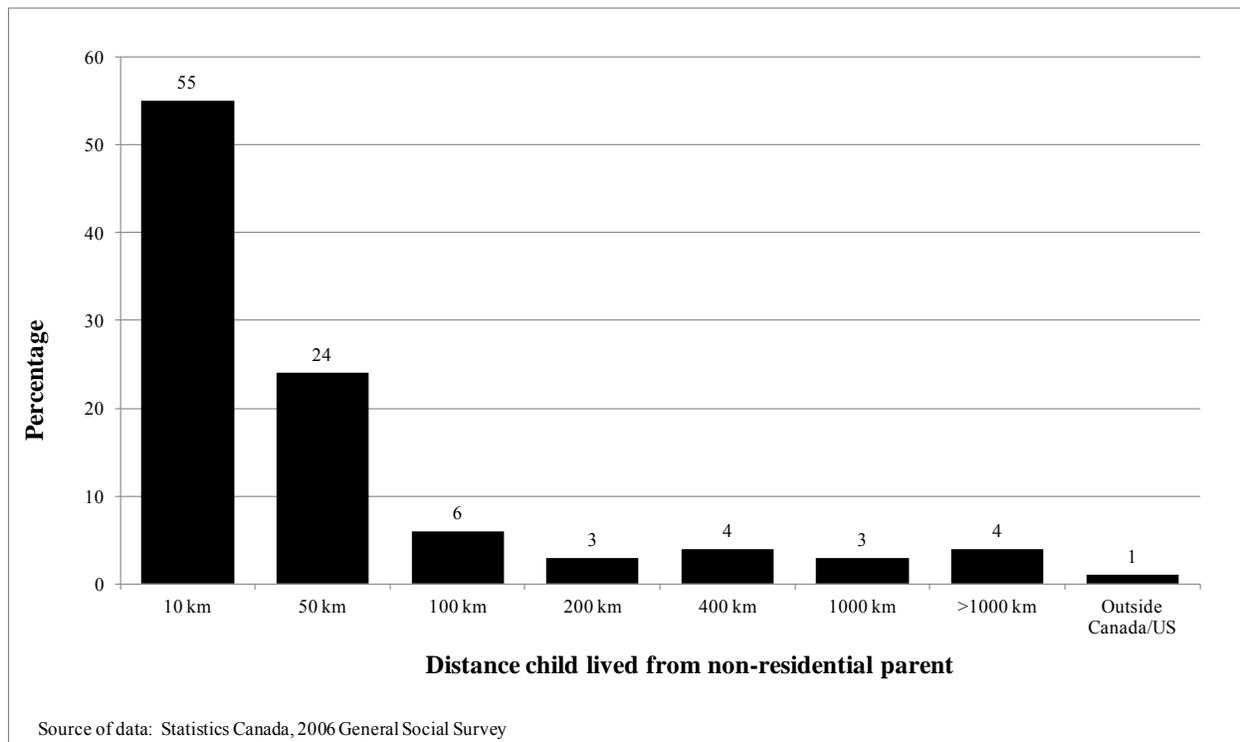
within 10 km of their children, and an additional 23 percent lived within 50 km. Almost three-quarters of non-residential parents lived within 100 km of their children, or one hour by car, which is a reasonable distance to allow frequent visitation (for those who can afford a car). However, almost one-fifth of non-residential parents (18 percent) had a child living 1000 km away or further, including those with children outside Canada or the United States.

**Figure 4.7 Distance non-residential parent lived from child in 2001, according to residential parent**



In 2006, the question regarding distance from birth parent was changed in the GSS. Respondents who did not live with their children were asked: How far away does this child/do these children live from your residence? Figure 4.8 presents the distance the child lived from the non-residential parent in 2006. Over one-half of non-residential parents reported that their child lived within 10 km (55 percent), and another quarter (24 percent) said their child lived within 50 km. Only 8 percent of non-residential parents reported that their child lived 1000 km away or further, including those outside Canada or the United States. While the results are similar, direct comparisons to the 2001 data cannot be made because the question was asked differently in 2006 (i.e., to the non-residential parent.)

**Figure 4.8 Distance child lived from non-residential parent in 2006, according to non-residential parent**



### **4.3 Survey of professionals**

In 2004 and 2006, CRILF conducted consultations on family law issues at the National Family Law Programs of the Federation of Law Societies of Canada (Paetsch et al., 2006). The purpose of the consultations was threefold:

- (1) to obtain information on the characteristics of cases handled by family law lawyers;
- (2) to obtain feedback from both lawyers and judges concerning family law issues based on their knowledge and experience; and
- (3) to examine trends in family law cases and practice over a two-year period from 2004 to 2006.

One component of the project was a survey that was distributed to conference participants and included questions on parental relocation. Specifically, the survey asked professionals the extent to which parental relocation was an issue in their caseload, the reasons parents gave for requesting relocation, and the circumstances regarding the request (i.e., whether it was the custodial or access parent wanting to move, and the distances involved).

It should be noted that the respondents to the survey do not represent a random sample of individuals in the Canadian legal community. Attendees at the Federation of Law Societies of Canada's National Family Law Program tend to be lawyers and judges who are among the most

engaged in and knowledgeable of family law. Therefore, the responses obtained cannot be generalized to all Canadian legal professionals. Further, respondents were asked about their perceptions of their caseload, rather than being requested to provide actual numbers. In addition, the sample was not geographically representative of lawyers and judges across Canada.

The survey asked respondents in what proportion of their cases with children involved was parental relocation (mobility) an issue. While the range was wide (0 to 75 percent in 2006 and 0 to 65 percent in 2004), the average was not high (13 percent in 2006 and 12 percent in 2004). In cases where parental relocation was an issue, respondents were asked what reasons were given for the move, and how frequently they occurred. As indicated in Table 4.2, the most common reasons in both surveys was to be with a new partner, which 69 percent of the respondents in the 2006 survey reported occurred often or almost always (68 percent in 2004), an employment opportunity (73 percent in 2006 and 67 percent in 2004), or to be closer to family/friends (63 percent in 2006 and 62 percent in 2004).

**Table 4.2 Respondents' perceptions of how often specific reasons are given in parental relocation cases, 2006 and 2004**

Reason	Rarely		Occasionally		Often		Almost always		Missing	
	n	%	n	%	n	%	n	%	n	%
<b>2006</b>										
Employment opportunity	2	1.2	26	15.9	91	55.5	28	17.1	17	10.4
Educational opportunity	38	23.2	63	38.4	37	22.6	2	1.2	24	14.6
To be closer to family/friends	8	4.9	35	21.3	86	52.4	18	11.0	17	10.4
To be with new partner	7	4.3	25	15.2	95	57.9	18	11.0	19	11.6
No particular reason	84	51.2	15	9.1	6	3.7	0	0.0	59	36.0
<b>2004</b>										
Employment opportunity	7	6.0	23	19.7	57	48.7	21	17.9	9	7.7
Educational opportunity	25	21.4	43	36.8	23	19.7	1	0.9	25	21.4
To be closer to family/friends	2	1.7	28	23.9	60	51.3	13	11.1	14	12.0
To be with new partner	7	6.0	20	17.1	67	57.3	13	11.1	10	8.5
No particular reason	38	32.5	19	16.2	7	6.0	0	0.0	53	45.0

Source of data: Survey on the Practice of Family Law in Canada, 2006 and 2004 (Paetsch et al., 2006).  
2006 Total N=164; 2004 Total N=117.

Respondents were then asked what the circumstances were in cases of parental relocation, and how frequently they occurred (see Table 4.3). The most common circumstances cited in both the 2006 and 2004 surveys were when the custodial parent wished to move within the province/territory (in the 2006 survey, 37 percent said this occurred often, and 42 percent said it occurred occasionally), and when the custodial parent wished to move to a different province/territory (38 percent said this occurred often, and 38 percent said it occurred occasionally). The respondents' parental relocation cases rarely involved custodial parents wishing to move within the city (54 percent in 2006) or outside the country (60 percent). Not surprisingly, parental relocation was rarely an issue when the access parent wished to move.

**Table 4.3 Respondents' perceptions of what the circumstances are in parental relocation cases and how frequently it occurs, 2006 and 2004**

Circumstance	Rarely		Occasionally		Often		Almost always		Missing	
	n	%	n	%	n	%	n	%	n	%
<b>2006</b>										
Custodial parent wishes to move within the city	88	53.7	37	22.6	18	11.0	0	0.0	21	12.8
Custodial parent wishes to move within the province/territory	12	7.3	68	41.5	61	37.2	8	4.9	15	9.1
Custodial parent wishes to move to a different province/territory	10	6.1	63	38.4	63	38.4	14	8.5	14	8.5
Custodial parent wishes to move outside the country	98	59.8	34	20.7	10	6.1	7	4.3	15	9.1
Access parent wishes to move within the city	115	70.1	12	7.3	15	9.1	0	0.0	22	13.4
Access parent wishes to move within the province/territory	101	61.6	36	22.0	7	4.3	0	0.0	20	12.2
Access parent wishes to move to a different province/territory	92	56.1	41	25.0	12	7.3	0	0.0	19	11.6
Access parent wishes to move outside the country	127	77.4	15	9.1	2	1.2	1	0.6	19	11.6
<b>2004</b>										
Custodial parent wishes to move within the city	65	55.6	21	17.9	17	14.5	2	1.7	12	10.3
Custodial parent wishes to move within the province/territory	8	6.8	52	44.4	42	35.9	7	6.0	8	6.8
Custodial parent wishes to move to a different province/territory	7	6.0	44	37.6	42	35.9	16	13.7	8	6.8
Custodial parent wishes to move outside the country	71	60.7	24	20.5	6	5.1	7	6.0	9	7.7
Access parent wishes to move within the city	79	67.5	12	10.3	10	8.5	0	0.0	16	13.7
Access parent wishes to move within the province/territory	54	46.2	32	27.4	16	13.7	0	0.0	15	12.8
Access parent wishes to move to a different province/territory	56	47.9	34	29.1	10	8.5	1	0.9	16	13.7
Access parent wishes to move outside the country	84	71.8	14	12.0	1	0.9	1	0.9	17	14.5

Source of data: Survey on the Practice of Family Law in Canada, 2006 and 2004 (Paetsch et al., 2006).  
2006 Total N=164; 2004 Total N=117.

#### **4.4 Summary**

This chapter examined the available Canadian data from large-scale population surveys on parental relocation following separation or divorce. Unfortunately, neither the Canadian census nor the General Social Survey asked questions directly related to this issue. The analyses were guided by questions contained in the RFP issued by Justice Canada, and are summarized below by question.

*How many people relocate (as a population as a whole and separated/divorced parents)?*

- According to the 2006 census:
  - 41 percent of the population moved within the previous five years; and
  - 48 percent of separated or divorced individuals moved within the previous five years.
- Census data indicated that mobility in general decreased from 1991 to 2006 (from 47 percent to 41 percent).
- According to a CRILF survey of family lawyers, respondents reported that parental relocation was an issue in an average of 13 percent of their cases in 2006, but the range of responses was wide, from 0 to 75 percent.

*How many people make frequent moves?*

- Data were not available from the large-scale Canadian surveys on the frequency of moves.

*How far do they go (i.e., within the same city, within the province, outside the province, outside the country)?*

- According to the 2006 census:
  - in the general population, 54 percent of the movers stayed within the same municipality, 30 percent moved to a different municipality but stayed in the same province, 7 percent moved to a different province, and 10 percent moved to Canada from another country;
  - of the separated or divorced movers, 61 percent stayed within the same municipality, 28 percent moved to a different municipality but stayed in the same province, 6 percent moved to a different province, and 5 percent moved to Canada from another country;
  - separated and divorced people who moved were considerably more likely to stay within the same municipality than were married people; and
  - separated, divorced and widowed people who moved were substantially more likely to move within their municipality than outside it. In contrast, legally married people who moved were equally likely to move within their municipality as outside their municipality.
- According to the General Social Survey data, in 2001, over two-fifths of non-residential parents lived within 10 km of their children. Almost three-quarters of non-residential parents lived within 100 km of their children, or one hour by car, which is a reasonable distance to allow frequent visitation. Almost one-fifth of non-residential parents had a child living more than 1000 km away or more, including those outside Canada or the United States.
- According to the General Social Survey data, in 2006, over one-half of non-residential parents reported that their child lived within 10 km, and another quarter said their child lived

within 50 km. Only 8 percent of non-residential parents reported that their child lived 1000 km away or more, or outside Canada or the United States.

*Who is more likely to move?*

- According to the census data:
  - mobility was higher for separated and divorced individuals than for married people, and separated individuals had higher mobility rates than divorced people;
  - mobility rates were highest for people in common-law relationships and lowest for widowed individuals; and
  - across all marital status categories and both 2001 and 2006 census years, females were slightly more likely to have moved in the past five years than males.

*Who is more likely to move more frequently (i.e., the factors associated with relocation in general, and for separated/divorced parents in particular)?*

- Data were not available from the large-scale Canadian surveys on the frequency of moves.

*Why do people move (i.e., income-related, work-related, neighbourhood-related)?*

- According to the CRILF survey of family lawyers:
  - the most common reasons for post-separation relocation applications were to be with a new partner, for an employment opportunity, or to be closer to family/friends. The most common circumstances in parental relocation cases were when the custodial parent wished to move within the province/territory, and when the custodial parent wished to move to a different province/territory;
  - parental relocation cases involving custodial parents wishing to move within the city or outside the country occurred rarely; and
  - parental relocation was rarely an issue when the access parent wished to move.

## 5.0 DISCUSSION AND CONCLUSIONS

### 5.1 *Summary of parental relocation literature and Canadian data*

Parental relocation is one of the most bitterly contested issues in family law. A study from Australia (Parkinson & Cashmore, 2009) found that, while approximately 6 percent of family law cases require a judicial disposition, 59 percent of relocation cases are decided in court. Similarly, in New Zealand, 51 percent of relocation cases were litigated (Taylor et al., 2010). According to a CRILF survey of family lawyers in Canada, respondents reported that parental relocation was an issue in an average of 13 percent of their cases in 2006, but the range of responses was wide, from 0 to 75 percent. According to the review of Canadian cases, 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 percent.

While the social science literature on relocation is growing, the quality of the research varies considerably and the conclusions are not totally consistent; as a result, the research is difficult to apply in individual cases or use for policy development. Some mental health professionals in the 1990s focused on the importance of the child’s relationship with the primary caregiver and argued in favour of a presumptive right of primary caregivers to move with their children (Wallerstein & Tanke, 1996). However, many researchers now accept that post-separation relocation is a “risk factor” for children, and recognize that on certain measures, in general, children who relocate after separation have more difficulties than children who do not relocate (Austin, 2008; Kelly & Lamb, 2003; Kelly, 2007; Stahl, 2006; Waldron, 2005). There is, however no research to establish that negative outcomes are caused by the relocation, or that the children who in fact relocated would have been better off had they not relocated.

There are many factors involved in relocation after separation, and there are often economic and social factors that make the populations who relocate different from those who do not relocate. The studies of children and young adults who relocated did not assess whether there was an option of not relocating, let alone attempt to determine what the effects of not relocating would have been. Further, the existing research suggests that most children who relocate after separation adjust reasonably well and do not appear to suffer significant long-term negative effects (Taylor et al., 2010).

There is a very strong gendered element to Canadian relocation cases; the parent seeking to relocate is almost always the mother, though in the relatively small number of Canadian cases in which fathers have sought to relocate with a child, their success rate was not dissimilar to mothers. This finding is consistent with recent research from Australia reporting that the vast majority of parents wishing to relocate with the children after separation were mothers (Behrens, Smyth & Kaspiew, 2009; Parkinson et al., 2010).

According to the Australian studies, the primary reasons for wanting to move included mothers wanting to be closer to their families, to be with a new partner, for economic reasons, and to escape violence. A survey of Canadian family lawyers also found that the most common reasons

for relocation requests were to be with a new partner, for an employment opportunity, or to be closer to family/friends (Paetsch et al., 2006). The review of Canadian cases undertaken for this report found that the most common reason for wanting to relocate was improved economic or job prospects, followed by the mother wanting to move for a new intimate relationship, and the custodial mother seeking social and emotional support from her family.

Researchers recognize that any decision about a child is affected by developmental factors, and recommend that, if relocation occurs, plans for continuing contact with the “left behind” parent take account of the child’s age and developmental needs. For younger children, relocation may disrupt psychological attachment with a parent who will not be seen on a frequent basis, but the transition to a new home will be easier because the child will not have strong peer, school or community ties. For older children, disruption of peer, community and school relationships as a result of relocation are important factors to consider. However, the review of Canadian cases did not find that age of the child was significantly related to the success rate of parental relocation applications.

Relationships with the “left behind” parent will be affected by relocation, though the nature and extent of the effect will depend on many factors, including the distances involved and resources of the parents for travel, and of course the nature of the pre-existing relationship between that parent and the child. According to the 2006 Canadian census, separated and divorced people who moved were considerably more likely to stay within the same municipality than were married people. Separated, divorced or widowed people who moved were substantially more likely to move within their municipality than outside it. In contrast, legally married people who moved were equally likely to move within their municipality as outside their municipality. Similarly, the 2001 General Social Survey data found that almost three-quarters of non-residential parents lived within 100 km of their children, which is a reasonable distance to allow frequent visitation. The 2006 General Social Survey data found that over one-half of non-residential parents reported that their child lived within 10 km, and another quarter said their child lived within 50 km. Only 8 percent of non-residential parents reported that their child lived 1000 km away or more, or outside Canada or the United States. Although international moves are more disruptive to a child than relocation within the province or country, the review of Canadian cases found that 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.

The literature found that significant contact with the non-moving parent is likely to be disrupted and the relationship may possibly wither away if there is relocation and there has been a high conflict parental separation, or there are family violence, parental mental health or substance abuse issues (Behrens & Smyth, 2010; Taylor et al., 2010). The relationship of the child with the non-moving parent prior to relocation and the degree of support of the moving parent are also significant factors in whether a strong relationship will be maintained with the child. Further, the financial resources of the parents and potential changes in their intimate relationships and circumstances make it advisable to “reality test” plans for continued contact between children and the non-moving parent.

The review of Canadian cases found that custodial mothers have a greater chance of gaining permission for relocation if there are substantiated allegations of family violence. Custodial mothers also have a greater likelihood of gaining permission for relocation if they had sole physical custody. Conversely, in cases where there was joint physical custody (each parent has the child at least 40 percent of the time), the court was significantly more likely to deny permission to relocate. 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.

Another interesting factor from the review of Canadian cases was that courts frequently expressed condemnation of parents who took 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.

Most recent writing by mental health researchers recognizes that there are both potential risks and potential benefits for children from relocation, and consequently recommends case-by-case weighing of risks and benefits (Austin, 2008; Kelly & Lamb, 2003; Kelly, 2007; Stahl, 2006; Waldron, 2005). These authors also recognize the importance of canvassing the perspectives and views of older children in making relocation decisions.

## ***5.2 The challenges of law reform for relocation cases***

Relocation cases represent a significant portion of all litigated family law cases, and as discussed in this report, they seem to be growing in number and are more difficult to settle without a trial than most other cases. Part of the challenge in settling is a reflection of the inherent difficulty in finding a “middle ground” in these situations. The high degree of discretion and lack of direction afforded to trial judges by the best interests of the child test of *Gordon v. Goertz* may also make settlement more difficult.

There continue to be calls for reform of the laws governing relocation of children if one parent wants to move with the children. An important motivation for many reformers is to provide greater direction for judges, lawyers and parents to facilitate settlements and adjudication. Other reformers, however, want to see substantive changes in the law, typically seeking to increase the rights of parents with primary care (mothers) to relocate (Boyd, 2011), or to increase the rights of parents who do not have primary care (fathers) to prevent a move in order to maintain their relationships with their children (Warshak, 2003).

One set of proposals for reform was put forward in a *White Paper* of the government of British Columbia in the summer of 2010 and includes provisions that would deal with the onus of proof in relocation cases. Where the day-to-day care of the child is substantially equal, the burden would 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. Further, judges would be prohibited from considering whether a parent proposing a move with a child would relocate without the child in any event. 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. Although these proposals have a child-focused rhetoric, 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 controversial, especially with father's groups.<sup>71</sup> It is uncertain at this time whether British Columbia will enact these proposals, and there are presently no other government sponsored proposals for legislative reform in other Canadian jurisdictions.

As discussed in Chapter 2.0, most countries have relocation laws that are similar to the best interests approach set for Canada by the Supreme Court in *Gordon v. Goertz*. There has been a growing interest internationally to reform the law governing parental relocation, and if possible develop a degree of consistency in the approaches in different jurisdictions, though there is still a lack of consensus about how to proceed (Elrod, 2010). 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 work on the development of a *Model Act on Relocation* (Elrod, 2010).

In 2010 there were international conferences in Washington and London that addressed family relocation, especially in the context of cross-border cases. In March 2010, the more than 50 judges and family law experts attending the International Judicial Conference on Cross-Border Family Relocation adopted the *Washington Declaration on International Family Relocation*.<sup>72</sup> The *Washington Declaration* makes some important proposals about the international recognition and enforcement of relocation decisions, as well as procedural proposals for national laws. The *Declaration* 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.

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<sup>71</sup> See e.g., Interviews with Steve S. from Equal Parenting and Ken Wiebe, from BC Fathers on Roadkill Radio, Nov. 30, 2010 <<http://roadkillradio.com/2010/11/30/bc-family-law-reform/>>

<sup>72</sup> International Judicial Conference on Cross-Border Family Relocation was held on March 23-25, 2010, in Washington, D.C. For full text of the Declaration, see <[http://www.icmec.org/en\\_XI/icmec\\_publications/Washington\\_Declaration\\_English\\_.pdf](http://www.icmec.org/en_XI/icmec_publications/Washington_Declaration_English_.pdf)>.

The *Washington Declaration* provides a list of other factors to be considered in making “best interests” relocation decisions. Although a little more detailed than *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 (p. 2). The *Washington Declaration* also included a statement that:

The Hague Conference on Private International Law... is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes. (p. 5)

The *Washington Declaration* received approval by the Canadian Network of Contact Judges in February 2011.

In July 2010, a group of 150 lawyers, judges and scholars from 18 developed countries attended the International Conference on Child Abduction, Relocation and Forced Marriage in London. Some of those at the London Conference also attended the Washington Conference, and 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” (p. 3).<sup>73</sup> The second half of the Sixth Special Commission on the 1990 and 1996 Conventions will be held in The Hague commencing January 24, 2012. A major agenda item at that time will be the issue of relocation. These international developments suggest that there is real interest in the development of standards to make the treatment of parental relocation decisions more uniform, if not more predictable.

In Canada it has been proposed by prominent Toronto family lawyer, Phil Epstein,<sup>74</sup> that a process similar to that used for the development of *Spousal Support Advisory Guidelines* could be used to develop what might be called *Relocation Advisory Guidelines* (RAGs). He proposes that a committee of lawyers, judges, government policy makers and academics draft working papers and circulate them for consultation with the Bar, Bench and interested members of the public. Over time, this work might lead to the development of a set of RAGs to reflect existing jurisprudence and help to resolve cases. As with the SSAGs, this project would be an advisory codification of existing law rather than an effort to change the law.

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<sup>73</sup> The London Conference Resolutions are available at <[http://www.londonmet.ac.uk/depts/lgir/research-centres/centre-for-family-law-and-practice/inaugural-conference-2010/inaugural-conference\\_home.cfm](http://www.londonmet.ac.uk/depts/lgir/research-centres/centre-for-family-law-and-practice/inaugural-conference-2010/inaugural-conference_home.cfm)>

<sup>74</sup> He made this proposal, among other places, at a panel discussion at the National Family Law Program in Victoria, British Columbia, July 15, 2010.

The discretionary, individualized nature of the “best interests test” may appear to make relocation a “ruleless” area. However, the analysis of the Canadian case law in Chapter 3.0 of this report suggests that this is not in fact a totally unpredictable area. Although the failure of the courts to articulate clear rules can make it difficult to see the patterns in the jurisprudence, some broad trends are apparent. An awareness and understanding of the social science literature and of the patterns and trends in case law may help practitioners, including judges, lawyers, mediators and assessors, to more effectively and efficiently resolve relocation cases. This type of knowledge is also important for policy-makers and legislators who may seek to address these issues.

Despite the difficulty in settling relocation cases, a negotiated resolution to these cases is often best for the children and parents involved. Litigation is embittering and expensive, and often exacerbates relations between the parents, thereby causing suffering to the children involved. A supportive relationship between the parents is important if the children are to maintain a positive relationship with both parents if there is any significant distance between the residences of the parents; litigation will inevitably strain the relationship between the parents making it more difficult for the children to have positive relationships with both parents. Further, this type of litigation is especially likely to find children “caught in the middle,” and be stressful for them, regardless of the outcome. While it is beyond the scope of this paper to discuss the many practical issues involved in negotiation of settlements in relocation cases (e.g., Mamo, 2007), knowledge of the social science research and case law discussed in this paper are essential for lawyers, judges and mediators involved in such negotiations.

### ***5.3 Suggestions for future research***

As discussed in this paper, there is a growing body of social science research on the effects of parental relocation on children, but there is clearly a need for more and better social science research. The review of the literature and the examination of existing Canadian data on parental relocation for this project revealed limitations to the presently available information that leads to suggestions for future research. Such research could inform the work of judges, lawyers, mediators and assessors. This type of research could also be important for those involved in any policy development with respect to relocation, and for those responsible for the development of family justice services. Further, such research would be important for parents who may be facing the potential of relocation post-separation or divorce, and of course ultimately to their children.

While Canada has several national surveys that collect data on families, e.g., census, the General Social Survey, and the National Longitudinal Survey of Children and Youth (NLSCY), none of these large-scale surveys were designed to collect data directly on the issue of parental relocation. It is not known, for example, how frequently people move, nor can it be determined whether moves are directly related to relationship breakdown. While the census data provide information on both marital status and mobility, the data are correlational, and it is impossible to determine if a move was a result of a separation or divorce. Census data are available on individuals who immigrate to Canada, but not on individuals who move out of the country. One possibility for addressing this gap is to add questions to existing national surveys that would collect data specifically related to mobility following relationship breakdown.

Another major gap in the literature on parental relocation is the lack of information on the effects of relocation on children, especially in Canada. Ideally, research in this area should collect data from both parents and children, and should be longitudinal in design. Some of the international studies presented in Chapter 2.0 provide good examples of social science research and highlight factors that should be considered when conducting research in this area. Norford and Medway's (2002) study of American high school students, for example, accounted for the frequency of moves, the primary reason for the moves, and collected data from both students and a sample of their mothers. However, the study did not account for the distance of the moves or the nature of the students' relationship with the non-moving parent.

The analysis of the reported Canadian case law in this report provides some valuable information, but it was limited to decisions written in English. Undertaking a similar study of decisions written in French would provide a more complete national picture of patterns and outcomes of relocation cases.<sup>75</sup>

Two ongoing studies from New Zealand and Australia are providing important insights into this topic. Taylor et al.'s (2010) longitudinal study is one of the first to collect data from both parents and children involved in relocation disputes. In addition to examining parents' and children's experiences with relocation case outcomes, the study explored the factors associated with positive and negative outcomes for children, patterns of contact with the non-custodial parent following the move, the relationship between the parents, and the relationships the children had with each parent. Interestingly, the study will also examine the accuracy of the predictions made by judges about the consequences for parents and children of the decision regarding relocation. Parkinson et al. (2010) are currently conducting a prospective longitudinal quantitative and qualitative study on relocation in Australia. This study involves collecting data from both parents and children, and examines both successful and unsuccessful court cases.

While relocation cases do not account for a substantial proportion of all family law cases, they are difficult to settle and accordingly take up a disproportionately large amount of court time as well as private resources for lawyers and litigation expenses. Judges have little reliable social science research to rely on when making their decision and virtually no Canadian studies on the

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<sup>75</sup> 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 in regard to 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 percent in Quebec versus 92 percent in the rest of Canada); success rate on international relocation (62 percent in Quebec versus 64 percent in the rest of Canada); following the wishes of children (80 percent in Quebec versus 75 percent in the rest of Canada); and the significance of founded familial abuse (100 percent in Quebec [only two cases] versus 81 percent in the rest of Canada).

The only variable where there was a notable difference was in outcomes where there was shared custody (40 percent or more of the time). In these cases, in Quebec the applicant was permitted to relocate in 80 percent of cases versus only 28 percent 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 were not markedly similar in Quebec (56 percent) to the rest of Canada (64 percent).

topic. The mobility data that are currently available in Canada provide general trends for the population but are inadequate for examining this topic in detail. Should Canada decide to conduct further research in this area, there are good international examples that could be adapted to the Canadian context.

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