Relocation of Custodial Parents
Final Report

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- the accuracy, completeness and timeliness of the information presented;
- the extent to which the analysis and recommendations are supported by the methodology used and the data collected;
- the original contribution that the report would make to existing work on this subject, and its usefulness to equality-seeking organizations, advocacy communities, government policy-makers, researchers and other target audiences.

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Preface

Status of Women Canada's Policy Research Fund was instituted in 1996 to support independent, nationally relevant policy research on gender equality issues. Public consultations held in 1996 on the structure and priorities of the Policy Research Fund identified the need to fund both long-term emerging issues and urgent issues. Urgent issues are defined as those which are currently on the public policy agenda, where time is of the essence, the gender dimension may not be adequately debated, and there is an opportunity to effect change by participating in the policy process.

The issue of child custody and access was identified as an urgent issue in August 1997, in response to the decision of the Government of Canada to convene a Special Joint Committee on Child Custody and Access. The hearings of the Committee are scheduled to begin in late February 1998.

Given the potential of the Committee hearings to precipitate changes in programs and legislation relating to custody and access, and the need to ensure a gender perspective in the public debate, two areas were identified as requiring immediate research: spousal violence in custody and access disputes, and relocation rights of custodial parents.

Spousal Violence in Custody and Access Disputes: Recommendations for Reform was written by Nicholas M. C. Bala, Lorne D. Bertrand, Joanne J. Paetsch, Bartha M. Knoppers, Joseph P. Hornick, Jean-François Noel, Lorraine Boudreau and Susan W. Miklas. It considers many aspects of spousal and domestic violence, and discusses both legislative and social programming policy recommendations.

Relocation of Custodial Parents, by Martha Bailey and Michelle Giroux, examines the major issues surrounding the relocation rights of separated and divorced parents with children. The recommendations which flow from their analysis include those for legislative amendments, judicial guidance and desirable social program responses.

The objective of Status of Women Canada's Policy Research Fund is to enhance public debate on gender equality issues and contribute to the ability of individuals and organizations to participate more effectively in the policy development process. We believe that good policy research leads to good policies. We thank the authors for their contribution to this objective.

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Abstract

Attention to the issues that arise when a custodial parent plans to relocate with his or her child(ren) has increased in recent years. This is because high divorce rates and increased mobility have generated a significant number of these cases, patterns of post-divorce parenting have changed, and conflicting policy goals have left uncertainty as to the correct emphasis in relocation disputes. In the case of proposed relocations that will hinder access, a conflict arises between the goal of maintaining frequent and continuing contact with both parents and that of maintaining stability in the child's relationship with the custodial parent. Relocation disputes are governed by the best interests of the child test. Some have argued in favour of adopting a presumption that the custodial parent's relocation plans are in the best interests of the child. Any such presumption would undermine the best interests of the child standard and should not be adopted. However, in determining the best interests of the child, careful attention should be given to the negative effect on the child should the custodial parent be restricted from relocating. The relative importance of maintaining frequent and continuing contact with both parents should also not be overemphasized in relocation disputes. Social science evidence indicates that other factors — specifically, a well-functioning custodial parent and avoidance of parental conflict — are also linked with positive outcomes for children. There is no evidence to support giving priority to maintaining frequent and continuing contact with both parents in cases of conflict.

Relocation of Custodial Parents
Executive Summary

Attention to the issues that arise when a custodial parent plans to relocate with his or her child(ren) has increased in recent years. This is because high divorce rates and increased mobility have generated a significant number of these cases, patterns of post-divorce parenting have changed, and conflicting policy goals have left uncertainty as to the correct emphasis in relocation disputes. In the case of proposed relocations that will hinder access, a conflict arises between the goal of maintaining frequent and continuing contact with both parents and that of maintaining stability in the child's relationship with the custodial parent.

Some countries have abandoned the traditional custody/access model which has been maintained in all the Canadian provinces (except Quebec). They favour instead a continuing shared parental responsibility model, under which both parents remain involved in decision-making after separation. A similiar model has also been adopted in Quebec. In jurisdictions where a continuing shared parental responsibility model has been adopted, however, debate on the issue of relocation has been similar to that in Canada. Neither the traditional custody/access model maintained in Canada, nor any form of the continuing shared parental responsibility model adopted in Quebec or elsewhere, eliminates problems relating to relocation, or even provides obvious answers to them.

Relocation disputes are governed by the best interests of the child test. Some have argued in favour of adopting a presumption that the custodial parent's relocation plans are in the best interests of the child. Any such presumption would undermine the best interests of the child standard and should not be adopted. In determining the best interests of the child, however, careful attention should be given to the potential negative effect on the child should the custodial parent be restricted from relocating. The relative importance of maintaining frequent and continuing contact with both parents should also not be overemphasized in relocation disputes. Social science evidence indicates that other factors — specifically, a well-functioning custodial parent and avoidance of parental conflict — are also linked with positive outcomes for children. There is
no evidence to support giving priority to maintaining frequent and continuing contact with both parents in cases of conflict.

Canada's law on relocation is set out in the *Divorce Act* as interpreted by the Supreme Court of Canada's decision in *Gordon* v. *Goertz*. The basic rule that relocation disputes should be governed by the best interests of the child should be maintained. Aspects of the current law that should be maintained or emphasized, and recommendations for amendments that would clarify or improve the operation of the law, are outlined below.

Summary of Recommendations

1. Although the term "mobility rights" has been used widely in Canada, it is preferable to use the term "relocation" to refer to the issues that arise when custodial parents wish to relocate with their children. The mobility rights of each parent and the child are protected by the *Canadian Charter of Rights and Freedoms* and by international conventions. These rights, however, are subject to the best interests of the child. The term "relocation" better captures the broader issues at stake, including the rights and interests of the child, the custodial parent and the access parent.
2. Relocation disputes should continue to be governed by the best interests of the child; there should be no legal presumption either for or against relocations.
3. The wishes of the child should be given careful attention in determining the child's best interests, provided the child is old enough to express those wishes. The weight given to the wishes of the child should increase with the maturity of the child. It will normally be in the best interests of the child to give effect to the wishes of a mature adolescent.
4. In determining the best interests of the child, the following should be considered: the particular economic challenges faced by custodial parents, most of whom are women; the advantages to the child of supporting the decisions of the custodial parent; and the negative impact on the child of restricting relocation.
5. Subsections 16(10) and 17(9) of the *Divorce Act* should be amended to reflect the fact that continuing contact with each parent is only one factor associated with positive outcomes for children. Other factors — specifically, a well-functioning custodial parent and avoidance of parental conflict — are also associated with positive outcomes for children. No one factor should be given primacy in the legislation.
6. Social scientists should be supported in continuing research on the effect of various post-separation arrangements on children. Social science evidence that identifies factors generally associated with positive outcomes for children is helpful in determining the best interests of the child. It should not be used selectively, however, to support presumptions or "sub-rules" in determining the best interests of the child.
7. The rules governing which parent must commence proceedings should be clarified, specifically, whether the custodial parent should be obliged to obtain a variation of the terms of access prior to moving in the absence of a non-removal order. If there is no general requirement to this effect, Canada's law should be amended to require custodial parents to give notice of a proposed move to the other parent or to the court. The custodial parent should also be required to propose new arrangements for access. The notice requirement should provide for exceptions in cases where it would create a risk of domestic violence.
8. Courts have the option of a) allowing a custodial parent to move; b) transferring custody to the access parent; or c) issuing a non-removal order to preserve the *status quo*. Non-removal orders have a particularly negative impact on the rights and freedoms of the custodial parent. Such orders should not be granted lightly, but should remain an option for the exceptional cases where such an order will serve the best interests of the child.
9. The Supreme Court of Canada has said that the custodial parent's reasons for moving are a relevant consideration only in exceptional cases where the reasons go to the parent's ability to meet the needs of the child. In most cases, however, the reasons for the move will be relevant to the best interests of the child determination (e.g., when the move is to take a better job or to join a new spouse). While custodial parents should not be subject to

a special onus to prove that a move is necessary, the reasons behind the move should be considered as they affect the best interests of the child.

10. Education programs on the effects of parental divorce and separation and alternative dispute resolution mechanisms (particularly mediation) on children should be made available and encouraged in order to promote responsible agreements on child custody and access.

Relocation of Custodial Parents

> Relocation cases ... present some of the knottiest and most disturbing problems that our courts are called upon to resolve. In these cases, the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents.[1]
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> *Justice Titone*, Court of Appeals of New York, 1996

Introduction

Although disputes over a custodial parent's plan to relocate with a child are not a recent development,[2] the issue has received more attention recently. This is because high divorce rates and increased mobility have generated a significant number of these cases, patterns of post-divorce parenting have changed, and conflicting policy goals have left uncertainty as to the correct emphasis in relocation disputes. In the case of proposed relocations that will hinder access, a conflict arises between the goal of maintaining frequent and continuing contact with both parents, and that of maintaining stability in the child's relationship with the custodial parent. Other conflicts may arise between the custodial parent's wish to move and the rights and interests of the child, but loss of contact with the access parent is often the focus in relocation disputes. A child is likely to suffer less harm from a break in his or her relationship with the access parent than from a similar break with the custodial parent, but separation from the access parent may very well result in a significant loss. As well, relocation will disrupt the child's other relationships and community ties.

Courts in various countries have recently reassessed their relocation laws, and have attempted to reconcile competing policy goals and conflicting rights of the parties with the best interests of the child. The Supreme Court of Canada addressed the issue of relocation in 1996, and confirmed that the sole criterion in such cases is the best interests of the child. All relevant circumstances are to be considered in determining the best interests of the child, including the relationship between the child and each parent, and the views of the child.

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[1] *Tropea* v. *Tropea*, 665 N.E. 2d145 (N.Y. Ct. App. 1996).

[2] See, e.g., *De Manneville* v. *De Manneville*, [1804] 32 E.R. 762 (Ch.), where Lord Eldon denied that mother's request for custody but ordered the father not to remove the child from the jurisdiction.

The application of the best interests of the child test to relocation disputes has been criticized on the basis that it results in uncertainty and therefore increased levels of litigation. It may also result in unfair restrictions on custodial parents, most of whom are women. The Supreme Court rejected arguments that these problems should be addressed by applying a presumptive deference to the custodial parent's decision to move. The reasoning was that such a presumption would undermine the best interests of the child standard. The conclusion reached in this paper is that the general approach of the Supreme Court of Canada is correct, although some clarifications and modifications to Canada's law are needed, as discussed later. Presumptions in favour of or against relocation should not be adopted. However, the particular economic challenges faced
by custodial parents (most of whom are women), the advantages to the child of supporting the decisions of the custodial parent, and the negative impact on the child of restricting relocation should be taken into account when determining the best interests of the child.

This paper will first present the Canadian legal framework and a comparative analysis of law relating to relocation. It will then address the issue of relocation in terms of demographic data and empirical evidence. From this, it will introduce the principles that should govern relocation disputes.

A. The Canadian Legal Framework

This section reviews the relevant statutes and case law relating to relocation and presents statistics that have been gleaned from a review of reported Canadian relocation cases.

1. The Federal *Divorce Act* and the Common Law Provinces

The *Divorce Act*

In Canada, legislative jurisdiction over custody and access is divided between the federal government and the provinces. The federal government has exclusive jurisdiction over custody and access in cases of divorce. The pertinent rules are set out in the *Divorce Act*.[3] The provinces have exclusive jurisdiction over custody and access in non-divorce situations — that is, where the parties are unmarried, or are married but not seeking a divorce. Each province and territory has legislation addressing the issues of custody and access, and these rules in the common law provinces are broadly similar to the *Divorce Act* rules.

[3] *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3.

The test for custody and access decisions under both provincial legislation and the *Divorce Act* is the best interests of the child. Section 16 of the *Divorce Act*, which governs custody and access orders, provides:

(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all of the children of the marriage.
(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).
(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.
(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.
(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.
(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 under this section 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.
(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent
with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Custody and access orders may be made in respect of any "child of the marriage," defined in s. 2(1) of the *Divorce Act* as "a child of two spouses or former spouses who, at the material time, (a) is under the age of majority and has not withdrawn from their charge, or (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or

other cause, to withdraw from their charge or to obtain the necessaries of life." (The age of majority at common law was 21, but each province and territory has enacted legislation setting the age of majority at either 18 or 19.) Subsection 2(2) further provides that "a child of two spouses or former spouses includes (a) any child for whom they both stand in the place of parents; and (b) any child of whom one is the parent and for whom the other stands in the place of a parent." Thus, adopted children and step-children are included in the definition of "child of the marriage" and may be the subject of custody and access orders.

Custody and access orders may be varied under s. 17 of the *Divorce Act*. Subsection 17(5) provides:

> Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

Subsection 17(9) mirrors ss. 16(10) and provides:

> In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

Canada has maintained traditional definitions of custody and access in the common law provinces and in the *Divorce Act* (see later discussion on Quebec civil law). The traditional narrow definition of access was enunciated in 1955 as follows:

> The father's contact with his daughter must be that of a person who visits her, who spends some time with her, but who cannot change or alter her mode of life or have any general direction of the child's conduct. That is a matter of custody ... He is only to have the ordinary control of a child necessary for the well-being of the child during the hours they are together, and he is not to interfere in any way with the child's upbringing.[4]

For a period of time, there was an expansion of the rights of access parents in common law jurisdictions.[5] Legislative changes have given the access parent a right to information regarding the health, education and welfare of the child.[6] At one point, some Canadian courts adopted a broad interpretation of such legislation, ruling that it recognized the rights of an access parent to be involved in decision-making, at least in regard to important matters involving the child.[7] Following such decisions, there was some confusion and debate as to the respective rights and responsibilities of the custodial parent and the access parent.

The expansion of the rights of access parents and confusion in Canada as to the rights and responsibilities of each parent were diminished by *Young* v. *Young*.[8] Here, the Supreme Court of Canada ruled that the custodial parent had the sole decision-making authority without

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[4] *Gubody* v. *Gubody*, [1955] O.W.N. 548 at 550-52.

[5] For discussion of this trend see B. Hovius, "The Changing Role of the Access Parent" (1993-94), 10 Can. Fam. L.Q. 123.

[6] See, e.g., Ontario's *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 20(5) and, federally, the *Divorce Act*, s. 16(5).

[7] *Abbott* v. *Taylor* (1986), 2 R.F.L. (3d) 163 (Man.C.A.) at 169.

[8] *Young* v. *Young*, [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117 (S.C.C.).

an agreement or court order to the contrary, and was not required to consult with the access parent
on any matters of upbringing. This put a halt to the trend of increasing the authority of the access parent. Access parents now have the statutory right to health and education information, and they continue to have the right to challenge decisions taken by the custodial parent. Subject to any court order or agreement, however, the custodial parent has sole decision-making power and no duty to confer with the access parent. Thus, the traditional custody/access model remains firmly in place in Canada's common law jurisdictions.

Some Anglo-American jurisdictions have abandoned the traditional notions of "custody" and "access." Instead, they have adopted a scheme of continuing shared parental responsibility, under which both parents continue to have decision-making rights and responsibilities after separation (see later discussion of England and Wales, some U.S. states, and Australia). It is also the situation in Quebec and in other civil law jurisdictions (see later discussion). Although dissolving traditional distinctions between custody and access may have some impact on access problems, at this point it appears that each jurisdiction continues to be challenged by a similar set of access problems. These include problems related to the relocation of the custodial (or "residential") parent, regardless of the custody/access model adopted. In jurisdictions such as Quebec, where a continuing shared parental responsibility model has been adopted, debate on the issue of relocation has been similar to that in the rest of Canada. It is important to note that neither the traditional custody/access model maintained in the common law provinces of Canada, nor any form of the continuing shared parental responsibility model adopted in Quebec or elsewhere, eliminates problems related to relocation, or even provides obvious answers to them.

Gordon v. *Goertz*

With regard to relocation, *Gordon* v. *Goertz* is the leading case across Canada, including Quebec, because it was decided under the federal *Divorce Act*.[9] The *Goertz* case provided a particularly broad discussion of relocation. This is because in addition to the custodial mother and the access father, who were the parties to the dispute, the Women's Legal Education and Action Fund (LEAF) and the Children's Lawyer of Ontario appeared as intervenors. LEAF, a feminist organization that advocates on behalf of women in various legal proceedings, argued for a presumption in favour of the custodial parent (who is usually the mother) in relocation cases. The Children's Lawyer is a public official whose office represents children in child protection cases and in some private custody and access disputes. The Children's Lawyer was not acting for the child in the *Goertz* case, but intervened to argue that the test for deciding relocation cases generally should be the best interests of the child, without presumptions in favour of the custodial or access parent. The involvement of these intervenors highlighted both the gendered nature of relocation disputes — they usually involve a custodial mother whose

[9] *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27.

decision to move is challenged by an access father — and the tension between the interests of children and the rights of parents.

In *Goertz,* the issue was whether the custodial mother's move from Saskatchewan to Australia was grounds for varying the custody order by transferring custody to the father. By the time the father's appeal reached the Supreme Court, the mother and child had already moved to Australia, in accordance with the decisions of the lower courts. The mother, along with LEAF, as intervenor, advocated a "presumptive deference" approach, similar to that adopted by the Ontario Court of Appeal in *MacGyver* v. *Richards*.[10] There it was ruled that the custodial mother should not be restrained from relocating with her child in order to join her new partner in the state of Washington; although the test for determining issues relating to custody and access was the best interests of the child, there should be a presumptive deference to the decisions of the custodial parent.[11] The father and the Children's Lawyer, the second intervenor, argued in favour of the approach taken by the Ontario Court of Appeal in *Carter* v. *Brooks*,[12] which was the authoritative relocation case in Ontario prior to *MacGyver*. In *Carter* v. *Brooks,* the Ontario Court of Appeal stated that the sole governing principle was the best interests of the child, which should be determined by considering all relevant factors, without the application of any presumptions.
None of the parties or the intervenors in *Goertz* argued for a presumption or preference *against* relocation.

The Supreme Court of Canada ruled unanimously that the mother should retain custody in Australia, but that the terms of access should be modified to allow access in Canada as well as Australia. The Court was split, however, on the appropriate test to apply. Seven of the nine justices rejected the "presumptive deference" approach and endorsed the *Carter* v. *Brooks* approach. The majority stated that the custodial parent's views on the issue of relocation are entitled to a great deal of respect. However, the issue should be decided on the basis of the best interests of the child, taking into account all relevant factors, and not on the basis of any legal presumptions. Justice L'Heureux-Dubé J., with La Forest J. concurring, wrote a minority opinion that endorsed the "presumptive deference" approach and a substantial limitation on the discretion of judges to vary custody orders. The majority opinion was written by McLachlin J., who summarized the Canadian law as follows:

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[10] *MacGyver* v. *Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.).

[11] Justice Abella, for the majority, said in *MacGyve*r, at 444, that there should be "particular sensitivity and a presumptive deference to the needs of the responsible custodial parent who, in the final analysis, lives the reality, not the speculation, of decisions dealing with the incidents of custody."

[12] *Carter* v. *Brooks* (1990), 2 O.R. (3d) 321 (C.A.).

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold test is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. 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 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.

In the end, the importance of the child remaining with the parent in whose custody he or she has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: What is in the best interests of the child in all the circumstances, old as well as new?[13]

Material Change in Circumstances

In *Goertz*, the Court followed the "two-stage procedure" prescribed by the *Divorce Act* for determining applications for variation of custody and access orders (i.e., the parent applying for a variation must first meet the threshold condition of establishing a material change in the circumstances or needs of the child and the ability of the parents to meet them). If the applicant satisfies this requirement, there is then a fresh inquiry to determine the best interests of the child. McLachlin J. noted that the *Divorce Act* clearly provides that the best interests of the child are the "only relevant issue."

[13] *Goertz*, paras. 49-50.

In order to meet the material change test, the applicant must show: "(1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order."[14]

The Court stated that a relocation will always be a change, but not necessarily a change that materially affects the circumstances of the child and the ability of the parents to meet the child's needs. As an example, the Court stated, "A move to a neighbouring town might not affect the child or the parents' ability to meet its needs in any significant way." So, short moves that do not disrupt the access schedule or otherwise affect the children negatively will not be considered significant enough changes to require a reconsideration of the custody order.

The Court also said that a move might not be a material change in circumstances "if the child lacks a positive relationship with the access parent or extended family in the area."[15] Access parents who do not have a meaningful ongoing relationship with the child are unlikely to satisfy
the initial "material change" test. The initial requirement of a "material change" will eliminate most applications from access parents who do not have a relationship that will be affected significantly by a move.

[14] *Goertz*, para. 13.

[15] *Goertz*, para. 14.

Commencing Proceedings

Goertz left some confusion as to whether the access parent or the custodial parent must commence proceedings for a variation of an existing custody/access order where there is a relocation dispute.[16] It seems that if there is a non-removal clause in the initial custody order, the custodial parent would have to apply for a variation to eliminate that term from the custody order. The onus then would be on the custodial parent to prove that there has been a material change in circumstances. In the absence of a non-removal clause, the *Goertz* decision suggests that it would be up to the access parent to apply for a variation and to show that there has been a material change in circumstances. The custodial parent, however, would have to seek a variation if the proposed relocation would interfere with court-ordered access terms. If there is no custody order in place, neither parent would have to show a material change, and the judge would move directly to the question of what custody arrangements are in the best interests of the child.

The rules governing which parent must commence proceedings should be clarified, specifically, whether the custodial parent should be obliged to obtain a variation of the terms of access prior to moving, in the absence of a non-removal order. If the custodial parent's move would interfere with the terms of an access order, then arguably the custodial parent would be in contempt of the order unless a variation is obtained prior to the move. In many jurisdictions, custodial parents who wish to relocate must obtain the consent of the other parent or leave of the court before moving, or must obtain a variation of the terms of access before moving. In North Dakota, for example, the custodial parent must obtain the consent of the other parent or a court order before moving, unless the access parent has not exercised his or her rights of access for at least one year, or has moved to another state and is more than 50 miles from the custodial parent residence.[17] Such a requirement ensures that parenting arrangements will be addressed prior to a move.

An alternative would be to require the custodial parent to obtain a variation if the custody order includes a non-removal order. In the absence of a non-removal order, however, the custodial parent would be permitted to move, unless the access parent obtains a variation of the custody order to restrain the move or transfer custody. This is the approach that seems to be suggested
by *Goertz*. The problem with this approach is that, in the absence of a non-removal order, the custodial parent could legally remove the child without giving notice of the move, and without

[16] B. Hovius, "Mobility of the Custodial Parent: Guidance from the Supreme Court" (1996), 19 R.F.L. (4th) 292; C. Davies, "Mobility Rights and Child Custody: A Contradiction in Terms" (1997), 15 Can. Fam. L.Q. 115. This confusion was not alleviated by subsequent decisions. See B. Hovius, "Case Comment: *Woodhouse* v. *Woodhouse* and *Luckhurst* v. *Luckhurst*" (1996), 20 R.F.L. (4th) 376 at 383-84.

[17] N.D. Cent. Code s. 14-09-07 (1991).

providing a new address, settling new terms of access, or giving the access parent an opportunity to commence proceedings. Currently, a court order or agreement *may* require that notice of a proposed move be given (see s. 16(7) of the *Divorce Act*), but in the absence of such an order or agreement, no notice need be given (but see later discussion of Quebec civil law).

If there is no general requirement that the custodial parent obtain a variation of the terms of access prior to moving, Canada's law should be amended to require custodial parents to give notice of a proposed move to the other parent or to the court. As well, the custodial parent should be required to propose new arrangements for access. The notice requirement should provide for exceptions in cases where notice would create a risk of domestic violence. One model law to consider is that of Texas, under which notice of a proposed move and information on the new address and phone number must be given to every party who has access to the child 30 days before the proposed move, unless giving such notice would expose the child or custodial parent to the risk of abuse.[18]

Non-removal Orders

In *Goertz*, the father had applied initially for a transfer of custody, or alternatively, an order restraining the mother from moving the child. At the Supreme Court, however, he argued only for a transfer of custody, or alternatively, an order to vary access. The Court addressed itself primarily to the transfer of custody issue before it, but the test enunciated by the Court would apply as well if the issue were imposition of a non-removal order on the custodial parent. In her minority opinion, L'Heureux-Dubé J. stated that non-removal orders should be made only in exceptional cases.[19] Even McLachlin J.'s majority opinion seemed to suggest that the issue will generally be transfer
of custody,[20] but the language of the majority opinion on the whole does not suggest that a non-removal order should be considered only in exceptional cases.[21]

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[18] Tex. Fam. Code Ann. s. 14.045 (Vernon Supp. 1993).

[19] *Goertz*, para. 134 and 143.

[20] Justice McLachlin stated in *Goertz*, para. 25: "If the child's needs are likely to be best served by remaining with the custodial parent, and this consideration offsets the loss or reduction in contact with the access parent, then the judge should not vary custody and permit the move," and in para. 50: "In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community." These comments suggest that maintenance of the *status quo* is not a likely option.

[21] McLachlin J., in *Goertz*, para. 25 stated: "The reduction of beneficial contact between the child and the access parent does not always dictate a change of custody or an order which

The *Goertz* decision raises the issue of what "menu" of options should be available in relocation disputes. In some countries, the primary options available to the court in relocation cases are: 1) to allow the custodial parent to move with the child and alter the terms of access accordingly; or 2) to transfer custody to the access parent. In others, the primary options are: 1) to allow the custodial parent to move with the child and alter the terms of access accordingly; or 2) to refuse permission to move and issue a "non-removal order" (i.e., an order restraining the custodial parent from moving with the child). In still other countries, including Canada, the court may grant any of these forms of relief (i.e., may allow the move, may transfer custody, or may restrain the custodial parent from moving with the child, depending on the relief sought by the parties and the best interests of the child). The Supreme Court of Canada suggested in *obiter dicta* in *Goertz* that non-removal orders are permissible, at least in exceptional cases, but questioned whether Canada should continue to permit such orders.

The argument against non-removal orders is that they restrict the freedom of the custodial parent (who is usually the mother) and may violate the custodial parent's constitutional rights. The *Canadian Charter of Rights and Freedoms*, s. 6 provides that: "(1) Every citizen of Canada has the right to enter, remain in and leave Canada. (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province."[22] In addition, Canada is a party to various international agreements that provide for freedom of mobility.[23]

Although it could be argued that the custodial parent's mobility rights are not infringed upon by a non-removal order because she or he retains the freedom to move alone (without the children), the custodial parent's unwillingness to leave the child behind, or the inability or unwillingness of the access parent to take custody, may well mean that a non-removal order operates as a *de facto* restriction on the custodial parent's personal freedom.

The issue of whether the custodial parent's *Charter* rights of mobility would be infringed upon by a non-removal order was not addressed in *Goertz*, because that issue was not before the Court. It is not likely that such an argument would succeed, because of the Supreme Court of Canada's ruling in *Young* that the *Charter*'s guarantee of religious freedom does not protect

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restricts moving the child." The Ontario Court of Appeal in *Woodhouse* v. *Woodhouse* (1996), 29 O.R. (3d) 417 (C.A.) (application for leave to appeal to S.C.C. dismissed with costs), in para. 19, concluded that McLachlin J.'s opinion in *Goertz* holds open the option of maintaining the *status quo*.

[22] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982*, 1982 (U.K.), c. 11.

[23] See, for example, the International Covenant on Civil and Political Rights, art. 12, which provides in para. 2 that, "Everyone shall be free to leave any country, including his own."

behaviour that violates the best interests of the child test. This ruling is consistent with the provisions of the *Divorce Act*; it provides that the sole test for custody and access is the best interests of the child. The ruling is also consistent with Canada's obligations under the UN Convention on the Rights of the Child, which also sets the best interests of the child as the test for decisions concerning children.[24] Because the best interests of the child are given primacy over parental rights, non-removal orders that accord with the best interests of the child standard will probably withstand constitutional scrutiny. As McLachlin J. said in *Goertz*, "The rights and interests of the parents, except as they impact on the best interests of the child, are irrelevant."[25]

The other point to consider is that it is not just the custodial parent's mobility rights that are at stake in relocation cases, but also those of the child and the access parent. If the custodial parent was to move with the child, this might violate the child's right to remain in Canada or to take up residence in any province, and an access parent who is unwilling to give up frequent contact with his or her child might be forced effectively to relocate near the child and thereby suffer a *de facto* violation of his or her mobility rights. The futility of trying to resolve relocation disputes on the basis of reconciling competing mobility rights was addressed by the California Court of Appeals:

> [S]ince all parties have the same and equal constitutional right to travel, importation of the right to travel into these cases does not aid their resolution, because this analysis inevitably results in a deadlock; the parties have equal rights to travel, so any defensible disposition must be based primarily upon the best interests of the child ... More critically, those theories about the right to travel do not provide meaningful guidance to a trial court faced with the hard choices presented by these cases.[26]

Because of the various competing rights at stake, it is unlikely that rights analysis will result in clear solutions to relocation disputes (and for this reason, describing relocation disputes as "mobility rights" cases is inapt). Even if it was determined that the custodial parent's mobility rights "trump" other constitutional rights at stake, the best interests of the child would be given primacy over the custodial parent's constitutional rights, according to the *Young* ruling, the *Divorce Act*, and the UN Convention on the Rights of the Child.

Another argument against non-removal orders is that they are "one-sided" (i.e., the access parent is never restrained from moving), and it may therefore be unfair to restrain the

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[24] UN Convention on the Rights of the Child 1989, in G. Van Bueren, ed., *International Documents on Children* (Dordrecht: Martinus Nijhoff, 1993) 7-24.

[25] *Goertz*, para. 37.

[26] *In re Marriage of Selzer*, 29 Cal.Rep. 2d 824 at 827 (Ct.App. 4th 1994).

custodial parent. Ruth Deech, commenting on the English case of *Tyler* v. *Tyler*,[27] where a custodial mother was denied permission to move with her children to Australia, suggested that the decision breached art. 15 of the UN Convention on the Elimination of All Forms of Discrimination Against Women. Paragraph 4 of this provides that men and women shall have the same rights with regard to freedom of movement and choice of residence. Although the court made clear that the mother
could move without the children if she chose to do so, Deech argued:

> The court was upholding the absent father's wish to see the children, but his visits were not enforceable had they ceased or if they were to cease at a future time. Again, had the father himself decided to emigrate to Australia there is no way the mother could have succeeded
> in preventing him in order to sustain his contact with his children. Finally, it may be noted that, in *Anna Karenina* fashion, she, but not he, was faced with the difficult choice of going away alone or staying in the U.K. At no stage in *Tyler* did it seem that the father would be offering his two children a home. The mother's right to choose a residence for herself and for her children was therefore blocked in unreciprocal fashion.[28]

In *Goertz*, LEAF made a similar argument about the unreciprocal nature of non-removal orders. One justice of the Supreme Court of Canada suggested during oral argument that an application to prevent an access parent from moving away could be made and might be successful.[29]

An order restraining an access parent from moving would not likely meet the best interests of the child test. In contrast with a move by the custodial parent, a move by the access parent would not require the child to move also. Therefore, the child's interest in remaining at a familiar school, with friends, relatives, activities, etc., would not be at stake. As well, restraining the access parent from moving would not necessarily result in continuing contact that was beneficial
to the child. It has proved impossible to force a parent to exercise access, and any attempt to enforce access that was beneficial to the child would be even more futile. It is unlikely that the access parent's mobility rights would be outweighed by the best interests of the child; therefore, an application to restrain the access parent from moving would probably be unsuccessful. Non-

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[27] *Tyler* v. *Tyler* [1989] 2 FLR 158.

[28] R. Deech, "The Rights of Fathers: Social and Biological Concepts of Parenthood" in J. Eekelaar & P. Sarcevic, eds., *Parenthood in Modern Society* (Dordrecht: Martinius Nijhoff, 1993) 19 at 31.

[29] C. Schmitz, "Enforcing Children's 'Right' to Visits from the Non-custodial Parent: S.C.C. Willing to Hear Application" (23 February 1996), *Lawyers Weekly*.

removal orders against the custodial parent will probably continue to be "unreciprocal." This may be unfair, but fairness to parents does not take priority over the best interests of the child.

Christine Davies has said that, where the issue is whether to restrict removal of the children, and where there is no question of a transfer of custody, the proposed move will not constitute a material change with respect to custody, only a material change with respect to access. In such a case, it does not make sense to have a "full-blown custody hearing."[30] Although it is
true that the nature of the inquiry will be different, and presumably narrower, if the only issue is whether to grant a non-removal order, it can be argued that many proposed moves would meet the test of a material change of circumstances with respect to custody and could, in some cases, justify a modification of the terms of custody by imposing a non-removal order. Subsection 16(6) of the *Divorce Act* permits a court to impose "terms, conditions or restrictions" on a custody or access order, and s. 17 implicitly allows the same in the case of variation applications.

A final point about non-removal orders is that the same arguments that are made against non-removal orders could be made against transfers of custody that are based on a proposed move by the custodial parent. Bruch and Bowermaster have pointed out that some California courts effectively restrain the custodial parent from moving, by ordering a transfer of custody that will take place only if the custodial parent moves:

> The Constitution does not permit a court to restrict the custodial parent's travel. In practice, then, a restraint on the child's relocation can only occur through an order transferring custody to the "stay-behind" nonprimary caretaker. In California, courts have typically ordered such a custody transfer to take place only if the primary caretaker goes through with the move. Often these orders are totally disingenuous, being entered when there is simply no basis for believing that the noncustodial parent is, in fact, the better person to provide primary care for the children ... What is really occurring in these

[30] C. Davies, "Mobility Rights and Child Custody: A Contradiction in Terms?" (1997), 15 Can. Fam. L.Q. 115 at 128.

> cases is a kind of unseemly judicial blackmail. Courts that enter a contingent custody-transfer order fully expect the custodial parent to forgo relocation in order to retain custody, sometimes speaking off the record about "calling the custodial parent's bluff."[31]

The problem identified here could be addressed by restricting courts from making "disingenuous" orders to transfer custody without a full analysis of the best interests of the child. But even if disingenuous orders were eliminated, the problem might remain. In some cases, if the only options are to move with the custodial parent or to transfer custody, it might be in the best interests of the child to order the transfer of custody. If, however, the option of maintaining the *status quo* was available, that might be in the best interests of the child. In such cases, a transfer of custody might operate effectively as a non-removal order to restrain the custodial parent from moving. Therefore, removing non-removal orders from the menu of available options in relocation cases would not fully address the problem of the custodial parent's freedom being restricted.

Both transfers of custody and non-removal orders interfere with the freedom, rights, and interests of the custodial parent. This interference should be avoided to the extent possible, and the impact on the child of preventing the custodial parent from moving should be *fully* considered when determining the best interests of the child. Inevitably, however, there will be cases of conflict between the plans of the custodial parent and the best interests of the child. The rights and interests of the parent should give way to the best interests of the child in these cases — even at the cost of unfairness to the custodial parent and lack of any reciprocal obligation on the access parent. Non-removal orders should not be granted lightly, but should remain an option for the exceptional cases where such an order will serve the best interests of the child.

Reasons for Moving

In determining the best interests of the child, McLachlin J. stated in *Goertz* that the custodial parent's reason for moving will not be relevant, unless it reflects adversely on the party's ability to parent. If the move is aimed at frustrating a positive access relationship, the custodial parent's regard for the best interests of the child will be called into question. Generally, however, the custodial parent's reasons for moving will not be relevant. The Court tied its reasoning on this point to ss. 16(9) and 17(6) of the *Divorce Act*. These provide that a judge "shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child." Reasons for a proposed move are not "past conduct," however; the question of whether the reasons for the move are relevant to the best interests of the child determination should be considered more fully.

[31] C.S. Bruch & J.M. Bowermaster, "The Relocation of Children and Custodial Parents: Public Policy, Past and Present" (1996), 30 Fam. L.Q. 245 at 260-261.

In most cases, the reasons for the move will be relevant. Most custodial parents plan to move in order to obtain employment or education, to join a new partner, or to return to an established support network of friends and family. Most jurisdictions consider the reasons for the proposed move, at least to the extent of ensuring that the move is in good faith and not intended to thwart access. Recently, many American courts have reduced their scrutiny of the reasons for a move. The California Supreme Court recently rejected the notion that a parent must prove that a proposed move is "necessary" in order to succeed in obtaining custody. [32] In 1988, the Supreme Court of New Jersey eliminated the requirement that the custodial parent show a "real advantage" to a proposed move, and ruled that all the custodial parent need establish is that he or she has a "good-faith reason" for making the move.[33] This reduced scrutiny was a positive development because it reduced an onus on the custodial parent that was inconsistent with the best interests of the child test. If the proposed move meets the best interests of the child test it should be permitted whether or not the custodial parent is able to show that the move was "necessary," or that it would create a "real advantage." In most cases, however, the reasons for the move will be at least indirectly relevant to the best interests of the child. As Christine Davies pointed out:

> [I]f the custodial parent is moving for a better job or educational opportunity, it will weigh in favour of the economic stability of the children. If she is moving to accompany a new husband or partner to his place of employment, the move may well mean economic stability for the children, a two-parent family, and a relaxed and happy mother. Where, however, the mother proposed to move for no good reason and has vague and ill thought-out plans, the move could indicate poor prospects of stability for the children.[34]

The relevancy of reasons for a move should be acknowledged and considered fully in relocation cases.

2. The Federal *Divorce Act* and Quebec Civil Law [35]

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[32] *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996).

[33] *Holder* v. *Polanski*, 544 A.2d 852 (N.J. 1988).

[34] C. Davies, "Mobility Rights and Child Custody: A Contradiction in Terms?" (1997), 15 Can. Fam. L.Q. 115 at 124. With regard to moving with a new husband or partner, Davies adds in footnote 48: "Of course, if the mother's new relationship is untried or unstable, the move could mean the converse of all these things."

[35] To avoid repetition, this section will discuss only the general principle of the Quebec civil law, the specificities of the application of the *Divorce Act* in Quebec, and how relocation is addressed in the judgments of Quebec courts.

Quebec civil law has a scheme of continuing shared parental responsibility. The understanding of the notion of parental authority is central to the comprehension of the sharing of parental rights and responsibilities and to the question of relocation. The civilian notion of parental authority should receive application even in the divorce context.[36] In fact, in that situation, the custody order made under Quebec civil law does not necessarily have the same effect as one rendered in common law.

Parental authority can be defined as the rights and duties of the parents toward their minor child. As stated in art. 599 Q.C.C., the notion of parental authority includes for the parents "the rights and duties of custody, supervision and education of their children" and their maintenance.
In principle, it is together that parents exercise parental authority.[37] Article 603 Q.C.C. makes provision for a presumption in favour of the third person in good faith; when one parent acts alone, therefore, he or she is presumed to decide with the consent of the other. This is applicable to all children and all parents, whether married or not.[38] The most important point to remember

[36] It is generally recognized that the definitions of custody and access in s. 2 and ss. 16(5) of the *Divorce Act* allow the application of both legal systems in Canada. As mentioned by M. Pratte, « La garde conjointe des familles désunies » (1988), 19 R.G.D. 525 at 566 to 572, more precisely at 571, « … la version française de la *Loi de 1985 sur le divorce* ne s'oppose pas au concept civiliste de la garde. … Même prononcée dans le cadre d'un divorce, l'ordonnance de garde a donc au Québec les effets prévus par le *Code civil du Québec* ». See also P.- A. Côté, « La *Loi de 1985 sur le divorce* et le droit civil » (1987), 47 *R. du B.* 1181 & A. Mayrand, « La garde conjointe (autorité parentale conjointe) envisagée dans le contexte social et juridique actuel », in *Droit et enfant* (Cowansville: Yvon Blais, 1990) 19 at 29 to 31; R. Joyal, *Précis de droit des jeunes*, t. 1 - Le Code civil, 2e éd. (Cowansville: Yvon Blais, 1994) at 76, para. 267. D. Goubau,
« L'intérêt de l'enfant et les pouvoirs résiduels du parent non gardien » (1996), 13 C.R.F.L. 11 at 23-25. *Contra:* M. Castelli & E.-O. Dallard, *Le nouveau droit de la famille au Québec. Projet de Code civil du Québec et Loi sur le divorce*, 2e éd. (Sainte-Foy: P.U.L., 1993) at 233-234.

[37] Art. 600 Q.C.C. Exceptionally, the parental authority can be exercised by only one parent. It is the case when one parent dies or is deprived of the parental authority for a grave reason and in the interest of the child (art. 606 Q.C.C.).

[38] Art. 522 Q.C.C.

in Quebec civil law is that the notion of custody is only one of the attributes of parental authority,[39] whereas in the common law jurisdictions, custody equals parental authority.

In the event of family breakdown, the Quebec *Civil Code* allows different possibilities in terms of reorganization of the family. Custody can be shared between the parents or, more commonly, custody of the child can be awarded to the mother with access to the father. In the latter situation, despite the fact that one parent has what common law calls physical custody, the other parent still has legal custody of the child (or, more correctly, parental authority is exercised jointly by both parents). Article 605 Q.C.C. states as follows: "Whether custody is entrusted to one parent or to a third person, and whatever the reasons may be, the father and mother retain the right to supervise the maintenance and education of the children, and are bound to contribute thereto in proportion to their means."

In 1987, art. 605 Q.C.C. was interpreted in *C.(G.)* v. *V.-F. (T.).*[40] In this decision, the Supreme Court of Canada enunciated a restrictive notion of custody contrary to the prevailing interpretation in common law. Hence, daily decisions are the responsibility of the custodial parent,[41] whereas the important decisions, such as choice of religion and school, come under the responsibility of both parents.[42] Nevertheless, it is always possible for the court to decide

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[39] For more details on this notion, see M. Pratte, « Le droit d'un tiers à la garde d'un enfant : l'affaire *Vignault-Fines* c. *Chardon*, [1987] 2 R.C.S. 244 » (1988) 19 R.G.D. 171 at 182-189, para. 26 to 43.

[40] [1987] 2 R.C.S. 244. Although the decision concerned the attribution of the custody to a third party, it is applicable in custody disputes between parents: see *P.(D.)* v. *S.(C.)*, [1993] 4 R.C.S. 141 at 163 (L'Heureux-Dubé J.).

[41] The non-custodial parent has the responsibility to oversee the child's upbringing: "It is true that the award of custody to a third person means that a part of parental authority, for the purposes of the exercise of that part, is lost to the access parent. The person who has custody has control over the child's outings, recreation and associations. That person must also, as a consequence of his or her privileged position, make the day-to-day decisions affecting the life of the child. Nevertheless, the access parent who is deprived of the physical presence of his or her child most of the time enjoys a right to watch over the decisions made by the person who has custody. He or she has the remedy specified in art. 653 Q.C.C. (1980) (now art. 604 Q.C.C.) if a decision by the person who has custody appears to be contrary to the child's interest," *Id.,* at 282.

[42] The non-custodial has the responsibility to participate in the important decisions concerning the child: "The non-custodial parent also has, pursuant to his or her status of person having parental authority, the right to decide as to the major choices affecting the direction of the child's life. Thus it is the right of the father or mother to consent to the marriage of a child who is a minor and the right of the person having parental authority to give his or her opinion as to proposed matrimonial agreements (art. 119 C.C.L.C. and 466 C.C.Q.) The person having

otherwise, should the interests of the child be better served.[43] More recently, while the confusion in Canadian common law as to the rights and responsibilities of each parent was diminished by *Young,* it was unfortunately increased in Quebec civil law as a result of *P.(D.)* v. *S.(C.).*[44] In this case, despite the fact that the Quebec *Civil Code* provides for a narrower definition of custody, L'Heureux-Dubé J. applied a much broader definition of custody. According to this wider definition, the custodial parent has the right and responsibility to make all decisions concerning the child. The non-custodial parent has the limited responsibility to oversee the child's upbringing and the right to be informed, namely of school reports.[45]

Under the Quebec *Civil Code*, the choice of the child's residence is considered the responsibility of the custodial parent.[46] It is an attribute of custody. The custodial right to decide the child's residence can be limited in exceptional cases by a court order,[47] or by a

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parental authority must also consent to the care or treatment required by his or her child if the latter is under 14 years old and, if the child is 14 or over, the person having parental authority must be informed in certain circumstances," *Id.*, at 282. The prevailing opinion agrees on this interpretation, see namely M. Castelli & E.-O. Dallard**,** *Le nouveau droit de la famille au Québec. Projet de Code civil du Québec et Loi sur le divorce*, 2e éd., (Sainte-Foy: P.U.L., 1993) at 233; M. Pratte, « Le droit d'un tiers à la garde d'un enfant: l'affaire *Vignault-Fines* c. *Chardon*, [1987] 2 R.C.S. 244 » (1988) 19 R.G.D. 171 at 196-197, para. 59; M. Pratte, « La garde conjointe des enfants de famille désunies » (1988), 19 R.G.D. 525, at 564-565, para. 61-65; R. Joyal, *Précis de droit des jeunes*, t. 1 - Le Code civil, 2e éd. (Cowansville: Yvon Blais, 1994) at 75, para. 266. See *contra* the opinion of Madam Justice L'Heureux-Dubé, namely in *Young*, at 38-39 and in *P.(D.)* v. *S.(C.),* [1993] 4 S.C.R. 141, at 162.

[43] Art. 604 Q.C.C.

[44] *P.(D.)* v. *S.(C.)*, [1993] 4 R.C.S. 141.

[45] *Id.,* at 162, Gonthier J. concurring. These comments are *obiter dicta*.

[46] Art. 80 and 602 Q.C.C.; *Gordon*, at 75-76 (L'Heureux-Dubé J.); *W.(V.)* v. *S.(D.)*, [1996] 2 R.C.S. 108 at 149 (L'Heureux-Dubé J.). *Droit de la famille 7*, [1984] R.J.Q. 351 (C.A.); *Droit de la famille 120*, [1984] C.A. 101; Droit de la famille 190, [1985] C.A. 201; *Droit de la famille 1826*, [1993] R.J.Q. 1728 (C.A.), [1993] R.D.F. 544 (C.A.); *Droit de la famille 2380*, [1996] R.D.F. 274 (C.S.) at 278. See also M. Pratte, « La garde conjointe des enfants de famille désunies » (1988), 19 R.G.D. 525 at 561, para. 56.

[47] It is particularly important to specify the residence of the child in the context of joint or shared custody to avoid uncertainty on that question. Art. 80 Q.C.C. states that, "the minor is presumed to be domiciled with the parent with whom he usually resides unless the court has fixed the domicile of the child elsewhere." Thus, when it is not specified in the judgment, the residence of the child would be where he or she spend the most part of his or her time.

relocation clause.[48] However, if the move is far enough away to limit access, it becomes an important question for the life of the child. The custodial parent should then advise the access parent and make suggestions as to the alternatives in terms of access.[49]

The custodial parent will not necessarily be permitted to move with the child, if the move is contested by the access parent. As stated in *Goertz*, the court will consider the move a material change in circumstances if it will disrupt an ongoing access relationship. As mentioned, the relocation of the custodial parent is an important change — a new situation that can justify a modification of a custody order.[50] In that context, the court will examine whether it is in the best interests of the child to allow the move or to change the terms of access.[51]

Best Interests of the Child

The most important and delicate issue is to decide the best interests of the child. Article 33 Q.C.C. states: "Every decision concerning a child shall be taken in light of the child's interests and the respect of his rights. Consideration is given, in addition to the moral, intellectual, emotional and material needs of the child, to the child's age, health, personality and family environment, and to the other aspects of his situation." The interpretation of the best interests of the child has been articulated in case law. On one hand, it is the interests of the child, and not the interests of the parents, that will have priority.[52] The following criteria have been put forward in the case law to help determine the best interests of the child: the stability of the child;[53] the conduct of the parents;[54] the parental capacity;[55] the availability of the parent;[56] each

[48] Which could be ordered in accordance with the general discretionary power of the tribunal, art. 604 Q.C.C. In the divorce context, see s. 16(7) of the *Divorce Act*.

[49] D. Goubau, « L'intérêt de l'enfant et les pouvoirs résiduels du parent non gardien » (1996), 13 C.R.F.L. 11 at 18-21.

[50] This is generally recognized in *Goertz* and in most of the case law, namely in *Droit de la famille 190,* [1985] C.A. 201*; Droit de la famille 7,* [1984] R.J.Q. 351 (C.A.); *Droit de la famille 120,* [1984] C.A. 101; *Droit de la famille 1826,* [1993] R.J.Q. 1728 (C.A.); *Droit de la famille 2380*, [1996] R.D.F. 274 (C.S.) at 278.

[51] Art. 33 Q.C.C., s. 17(5) *Divorce Act.* The case law recognized the application of this principle. See *Goertz*; *P.(M.)* v. *L.B.(G.)*, [1995] 4 R.C.S. 592.

[52] *Droit de la famille 2471*, [1996] R.D.F. 556 (C.S.) at 559.

[53] *Droit de la famille 1826*, [1993] R.J.Q. 1728 (C.A.) at 1738-1740. In this decision, the appeal was granted and the custody was thus transferred to the father after the mother moved to France. The Court emphasized the fact that the mother did not respect a non-removal clause and was not co-operative at all, giving no news of the child to the father. Here the stability of the

parent's environment and the age of the child;[57] the sex of the child;[58] and the distance of the proposed relocation.[59]

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child was interpreted as stability of the environment rather than as stability in the relationship with the primary caregiver. The Court of Appeal decision was confirmed by the Supreme Court in *P.(M.)* v. *L.B.(G.),* [1995] 4 R.C.S. 592, where the Court stated at 595: "Although the awarding of custody clearly should not be a means of punishing a parent for a failure to observe an agreement and, in the case at bar, a court judgment, the fact remains that the Quebec courts could not add to insufficient evidence and so could only decide on the basis of the evidence they had. This is what the Court of Appeal did and this Court cannot conclude that it erred in so doing. In seeking to place herself beyond the reach of the law in both Quebec and France, the appellant has flaunted [sic] the authority of the courts and prevented them from properly exercising their protective function in respect of the child. As this Court only has the evidence presented by the father, which tends to show that he is able to care for the child properly, and has before it the mother's conduct, it has
no alternative but to dismiss the appeal." *Droit de la famille 2380,* [1996] R.D.F. 274 (C.S.) at 279, states that this factor requires in some cases that children should not be separated. In *Droit de la famille 120*, the Quebec Court of Appeal dismissed the appeal of a Superior Court judgment granting custody of a nine-year-old child to the father. After the mother had moved to Smiths Falls with the child without informing the father, the father had sought a transfer of custody. Stability of environment was a factor that supported the father's application. The ability to acclimate in a new city, province, or country was also considered. The child's ability to speak the language has been mentioned as an important factor in determining the capacity to adjust to a new environment. See *Droit de la famille 1322*, [1990] R.D.F. 409 (C.S.) and *Droit de la famille 2473*, [1996] R.D.F. 580 (C.S.).

[54] *Droit de la famille 1826*, [1993] R.J.Q. 1728 (C.A.) at 1738-1740.

[55] *Droit de la famille 2380,* [1996] R.D.F. 274 (C.S.) at 279.

[56] *Id.*

[57]*Droit de la famille 2471*, [1996] R.D.F. 556 (C.S.) at 560. In this decision the mother was authorized to move to Toronto for career purposes, and to improve her quality of life in terms of challenge and salary. The eleven-year-old child wished to move with her mother. The mother agreed to allow generous access. She had not moved the first time she had an opportunity to do so, mainly for the sake of the child. Because the relationship between the parents had deteriorated, joint custody was not maintained. The mother was ordered to keep the father informed in regard to the education and health of the child and to advise the father of any change of residence.

[58] *Droit de la famille 1826*, [1993] R.J.Q. 1728 (C.A.) at 1738-1740.

[59] See *Droit de la famille 2471*, [1996] R.D.F. 556 (C.S.) at 560.

Maximum Contact

Another important criterion in the determination of the best interests of the child is the principle of maximum contact with both parents, especially in the divorce context where s. 16(10) of the *Divorce Act* identifies this factor explicitly. The interpretation given to this principle varies.[60] In *Droit de la famille 2241*,[61] the Superior Court granted the motion of the mother to move to the U.S. with a five-year-old child, emphasizing the fact that the good relationship between the child and the father was not the only factor to consider in deciding the best interests of the child. The Court was convinced that the move was not intended to frustrate the access rights of the father. However, it is sometimes difficult to reconcile the decisions from which the interpretations given of s. 16(10) of the *Divorce Act* differ. In *Droit de la famille 2246*,[62] the Superior Court decided
that regular contact of the children with both parents was very important. This factor probably influenced the mother to withdraw her permission to move to Northern Ontario. In *Droit de la famille 2283*,[63] a mother was allowed to move with her child to Greece, with generous access awarded to the father. The court reasoned that the best interests of the child were tied to the self-fulfillment and happiness of the mother.

Wishes of the Child

The wishes of the child are also of great importance in determining his or her best interests.[64] Article 34 Q.C.C. states: "The court shall, in every application brought before it

[60] In *Droit de la famille 2473*, [1996] R.D.F. 580 (C.S.) at 587-589, Justice Carole Julien of the Quebec Superior Court said this does not prevent the relocation of the child with the custodial parent. In this case, the Court permitted the move to Greece, but gave large access rights to the noncustodial parent as far as the distance permits it. According to the judgment, the access, as far as possible should also be exercised inside and outside Greece (in Montreal) to allow the child to keep contact with where she used to live.

[61] [1995] R.D.F. 507 (C.S.).

[62] [1995] R.D.F. 530 (C.S.).

[63] [1995] R.D.F. 706 (C.S.).

[64] *Droit de la famille 2380,* [1996] R.D.F. 274 (C.S.) at 279; *Droit de la famille 1826*, [1993] R.J.Q. 1728 (C.A.) at 1738-1740.

affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it." As mentioned in *Droit de la famille 2381*:[65]

> The wishes expressed by a child over 12 are very important when it comes to his guardianship. While the choice of a custodial parent will not be determined solely based on the child's wishes, they are a determining factor that must be examined in the larger context — that of the best interests of the child. In this case, the parents' decision not to separate the children, and all of the other factors discussed earlier, must also be taken into account. The child's wishes must also be viewed in the context of the current dispute, in which the distance separating the parents is considerable and will make contact between the children and the noncustodial parent more difficult. [translation]

The wishes of the child were taken into account in other decisions as well.[66] It is interesting to note, however, that despite art. 34 Q.C.C., very few decisions mentioned the fact that the child was consulted. There seems to be a gap between the text and its application.

There is no presumption in favour of the primary caregiver in relocation cases, and the case law after *Goertz* recognizes this. But it also recognizes that one should respect the opinion of the custodial parent in the context of relocation. It also observes that the reason for the move is not relevant, except when the move is intended to limit access rights or is otherwise in bad faith.[67] It is interesting to note that in some cases, the judge emphasized that the great distance caused by the relocation is not a reason to limit the exercise of parental authority. From a distance, an access parent can pursue his involvement in the education and upbringing of his or her son.[68]

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[65] [1996] R.D.F. 274 (C.S.) at 280. In this decision, there was evidence that the younger child would have some adaptation problems if he moved to California. Despite the fact that the father's relationship with the children could have been better, it was not a bad relationship and was capable of improvement. For these reasons, the Court did not allow the move.

[66] In *Droit de la famille 2473*, [1996] R.D.F. 580 (C.S.), the eight-year-old girl refused to establish contact with her father and apparently blamed her father for the breakdown of the marriage. The court decided that the relationship between child and mother was too exclusive and that in the best interests of the child, the contact between the father and daughter ought to be encouraged. In *Droit de la famille 1322*, [1990] R.D.F. 409 (C.S.), the mother was allowed to move to Denmark with her two daughters who had expressed the wish to move with their mother.

[67] See *Droit de la famille 2655*, [1997] R.D.F. 271 at 273 (C.S.).

[68] In *Droit de la famille 2380*, [1996] R.D.F. 274 (C.S.), the mother moved from the Ottawa region to California, and Justice Johanne Trudel ruled in favour of a joint custody. In *Droit de*

Non-removal

The Quebec Court of Appeal stated in 1984 in *Droit de la famille 7* that one cannot waive the mobility rights guaranteed by s. 6 of the *Charter*.[69] But if there is a non-removal clause in a judgment, the parent should ask the court in order to be able to move.[70] Otherwise, the parent could be found in contempt of court if unable to justify his or her decision to move with the child.[71] Generally, however, the case law states that one should not punish the custodial parent for his or her move by automatically allowing a change of custody.[72]

In the majority of the Quebec relocation decisions, the custodial parent was allowed to move with his or her child. The courts are influenced especially in favour of the move when the custodial parent's incentive to move is reasonable. In 13 cases, permission to move was denied; of these cases, nine had a non-removal order in place, and in two, the custodial parent had agreed not to move if the court decided it was not in the best interests of the child. In the 11 cases where the custodial parent was denied permission to move with the child, eight resulted in a transfer of custody to the father. In one, custody was transferred to the father for the year the mother was away in Africa. In another, the mother kept custody but the child stayed with his father for the year the mother was away. In the last decision, the mother kept custody of her child but was not permitted to move. Seven of these 11 cases were decided before 1990, one in 1990, one in 1993, and two in 1996. Since 1990, the Court of Appeal has rendered five relocation decisions and has reversed four judgments of the Superior Court that did not allow the custodial parent to relocate. In the only decision where the Court of Appeal refused to allow a proposed move of the custodial parent,[73] the judgment was confirmed by the Supreme Court of Canada in *P.(M.)* v.

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la famille 2473, [1996] R.D.F. 580 (C.S.), Justice Carole Julien also ruled in favour of joint custody, despite the fact that the mother was allowed to move from Montreal to Greece with the child, because each parent had the ability to engage in constructive communication to ensure the best interests of their daughter. See also *Droit de la famille 2655*, [1997] R.D.F. 271 (C.S.) at 273-274.

[69] *Droit de la famille 7*, [1984] R.J.Q. 351 (C.A.) at 354 (Mayrand, J.).

[70] *Id.*

[71] *Id.,* at 352 (Bernier, J., dissenting).

[72] *Droit de la famille 1826*, [1993] R.J.Q. 1728 (C.A.); *Droit de la famille 7*, [1984] R.J.Q. 351 (C.A.); *Beaudoin* v. *Stankevicius*, (1972) C.A. 604; *Droit de la famille 2232*, [1995] R.J.Q. 1704, [1995] R.D.F. 408 (C.A.); *Droit de la famille 2518*, [1996] R.D.F. 725 (C.A.).

[73] *Droit de la famille 1826*, [1993] R.J.Q. 1728, [1993] R.D.F. 544.

L.B.(G.).[74] Generally, when a move is allowed, the terms of access are modified to allow continuity of the access as much as possible.

3. Statistical Breakdown of 198 Canadian Relocation Cases (see Table of Cases)

The review of 198 reported Canadian relocation decisions revealed that mothers had custody in about 65 per cent of relocation cases. There was joint custody in 25 per cent, and fathers had custody in 10 per cent. Parents were restricted from relocating in 42 per cent of the cases. In the cases where the parent was restricted from relocating, about 63 per cent were cases of mother custody, 29 per cent were joint custody, and seven per cent were father custody. In the large majority of joint custody cases, the mother was the primary residential parent. Mothers are far more likely to have custody or be the primary residential parent than fathers, and more likely to have relocation restrictions imposed on them.

B. How Other Jurisdictions Address the Issue of Relocation

This section provides a summary of current statutes and case law in other Anglo-American jurisdictions and the civil law jurisdictions of France and Belgium. Included is an analysis of general trends in the western world. The section addresses the research question: Do the solutions adopted by other jurisdictions provide models that Canada should adopt?

Recently, many western countries have addressed the issue of relocation. The solutions adopted by other countries provide a range of models for Canadian law-makers. Following is a brief description of the custody and access law of other countries, and an overview of recent legislative amendments and important court rulings on relocation.

1. England and Wales

England and Wales (which is one legal unit for the purpose of family law) have abandoned
the use of the terms "custody" and "access" and have moved to a continuing shared parental responsibility model. Under this model, married parents are entitled presumptively to share parental responsibility after divorce or separation.[75] "Residence" and "contact" (the functional equivalents of "custody" and "access") are governed by the *Children Act, 1989*,[76] which gives

[74] [1995] 4 R.C.S. 592.

[75] (U.K.) *Children Act, 1989* (1989, c. 41).

[76] *Ibid.*

both parents continuing "parental responsibility" after divorce. (In the case of unmarried parents, the father does not automatically have parental responsibility, but may obtain it by agreement or court order pursuant to s. 4(1) of the *Act.*)[77]

Parental responsibility is defined in s. 3(1) as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property." Under s. 8(1), a residence order is defined as "an order settling the arrangements to be made as to the person with whom a child is to live." A contact order is defined as "an order requiring the person with whom a child lives ... to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other."[78] Pursuant to ss. 2(7) and (8), each parent may exercise his or her parental responsibility alone, unless the consent of another person is required or the act is incompatible with a court order. There is no duty of consultation with the other parent under the *Act*. A parent who objects to a decision taken by the other may seek a court order under s. 8 of the *Act* to overrule the other parent.

Relocation issues are governed in England and Wales by the *Children Act* and the *Child Abduction Act*.[79] In England and Wales, a parent must obtain the other parent's consent or leave of the court for a move outside of the United Kingdom. The exception is that an unmarried mother may make a unilateral move, unless the father has obtained "parental responsibility." Some objecting parents seek "prohibited steps" orders to prevent a move outside the country pursuant
to s. 8 of the *Children Act, 1989*.[80] For moves within the United Kingdom, the objecting parent

[77] For a review of the arguments as to whether all fathers, whether married or not, should automatically have parental responsibility, see N.V. Lowe, "The Meaning and Allocation of Parental Responsibility — A Common Lawyer's Perspective" (1997), Int'l J. L. Policy & Fam.

[78] The drafters of the *Children Act* hoped that in many cases parties would not require residence or contact orders, and s. 1(5) sets out a "no order presumption." That is, a judge is only to make an order if it is thought that making an order is better for the child's welfare than not. The Lord Chancellor's Department commented on this provision: "It is always preferable that agreement between the parents about arrangements for the children be reached rather than an order having to be imposed." Lord Chancellor's Department, *Judicial Statistics: Annual Report 1991* (London: HMSO, 1992) 48.

[79] *Children Act*, s. 13, and the *Child Abduction Act, 1984* (1984, c. 37).

[80] See, e.g., *Re L (A Minor) (Removal from Jurisdiction)*, [1993] 23 Family Law 280 (Fam. Div.).

would have to seek a prohibited steps order to prevent a proposed move, or a residence order in order to become the "residential parent."[81]

In England and Wales, relocation is viewed as an issue of whether to permit the proposed move. Maintaining the *status quo* is seen as a real option. The issue becomes, therefore, whether to permit the custodial parent to move with the child or maintain the *status quo*. A transfer of custody may be requested, but is not expected as a matter of course in relocation disputes. For example, in *Tyler* v. *Tyler*, a case decided before the *Children Act, 1989* came into force, a custodial mother wished to move with her children to Australia. The court, however, on the application of the access father, did not grant her permission to do so.[82] She was free to move to Australia by herself, but could not remove the children from the jurisdiction.

In England and Wales, the test for relocation cases favours the custodial parent: "if the proposal of the custodial parent to move with the children to another country is a reasonable one, leave should only be refused if it is clearly shown that the move would be against the interests of the child."[83] Recent decisions, however, have shown a greater willingness on the part of judges to prohibit moves that would interfere with ongoing, positive access.

In *M* v. *M*, for example, the Court of Appeal would not authorize a move; it ordered a new hearing. At this hearing, the custodial parent's hostility to the access parent was communicated to the children; the proposed move would have likely ended the children's relationship with the access parent. In another 1992 case, permission to move with the child was also refused. The court found the move to be against the interests of the child, because it would have reduced an established relationship with the access parent to annual visits. Also the custodial parent's proposal for the move was not prepared carefully.[84]

In a more recent case, *Re T*, the Court of Appeal stated clearly that "the parent with primary care is entitled to select the place and country of residence of the child unless that selection is shown to be plainly incompatible with welfare."[85] The mother did not succeed in her appeal, however, because the Court of Appeal ruled that in denying the mother's application to remove

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[81] The latter course is recommended by A. Bainham in *Children — The Modern Law* (Bristol: Jordon, 1993) at 602.

[82] *Tyler* v. *Tyler*, [1989] 2 FLR 158.

[83] *M.* v. *M.*, [1992] 2 FLR 303 (C.A.).

[84] *Re K (A Minor) (Removal From Jurisdiction)*, [1992] 2 FLR 98 (Fam. Div.).

[85] *Re T (Removal From Jurisdiction)*, [1996] 2 FLR 352 (C.A.) at 355.

the child to France, the judge had acted "on the unchallengeable basis that he found it to be ill-considered, ill-prepared, and contrary to the interests of [the child]."

In *MH* v. *GP*, Thorpe J. denied a custodial mother's application for leave to move to New Zealand with the child. The judge stated that the crucial factor of the case was the child's relationship with the father, through which the child was also connected to members of his extended family.[86] Although in England and Wales the custodial parent is favoured, recent cases suggest a somewhat broader consideration of the best interests of the child. The greater emphasis put on not disrupting a positive access relationship reflects the philosophy behind the continuing shared parental responsibility model of the *Children Act, 1989*.

A member of England's judiciary, Butler-Sloss L.J., offered a different interpretation of recent developments in England and Wales in a speech given in Canada in 1996. Her Ladyship said:

> The circumstances in which an applicant parent has not been given leave have related to the inadequacy of the proposed plans, rather than the need to keep in touch with the other parent. Lack of a job or adequate finances, lack of accommodation, no arrangements for schooling, doubts as to the motivation for moving or the suitability of the custodial parent have been the main reasons for refusing leave to remove permanently from the jurisdiction. Other possible reasons might be special medical needs of the child unavailable in the proposed country, the genuine opposition of the child concerned or perhaps an unusually close relationship with the other parent which might lead to a change of primary carer by a change of residence order. On making the order, where there has been sufficient money, conditions have been imposed requiring the return of the child to return to England for holidays or provision of funds to enable the other parent to fly out, at the expense of the custodial parent, to visit the child. An undertaking to return the child if called upon by the court is usually required. An applicant who is the obvious primary carer with well-thought out and viable plans is likely to obtain leave, even if the move is to the other side of the world and even if there is no money available for return visits ... This approach might be thought to be at odds with the increased importance attached in the *Children Act* to contact with the non-custodial parent but the alternative would be to deprive the parent with whom the child lives from making a new life by for instance a new job or a new marriage. The welfare of the child remains paramount but is seen to be best placed by allowing the child to go with the custodial parent and this is in my view a pragmatic resolution of irreconcilable interests.[87]

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[86] *MH* v. *GP* (Child: Emigration), [1995] 2 FLR 106 (Fam. Div.).

[87] L.J. Butler-Sloss, "Crossing Frontiers — The Perspective of the English Courts" (Address to the 11th Commonwealth Law Conference, Vancouver, Canada, August 1996) (unpublished).

Professor Chris Barton, however, reviewed recent English relocation cases and concluded that "current English law, whilst notionally retaining a traditional presumption in favour of the resident parent, now favours the more even-handed (and thus less certain) Canadian approach."[88]

[88] C. Barton, "When Did You Next See Your Father? Immigration and the One-parent Family — *Re T (Removal from Jurisdiction)*; *Goertz* v. *Gordon (formerly Goertz)*" (1997) 9 Child and Fam. L.Q. 73 at 75.

2. The United States of America

In the U.S., divorce and child custody are, for the most part, matters of state rather than federal jurisdiction.[89] Some American states have also adopted a continuing shared parental responsibility model. In contrast to the *Children Act, 1989* of England and Wales, these models include a duty to confer with the other parent on decisions regarding the child.[90] The state of Washington has adopted a "parenting plan" model. The Washington Supreme Court reviewed the legislative history and reasoning behind that state's abandonment of the custody/access model, explaining that:

> Washington's *Parenting Act* represents a unique legislative attempt to reduce the conflict between parents who are in the throes of a marriage dissolution by focusing on continued "parenting" responsibilities, rather than on winning custody/visitation battles. The *Act* replaced the terms "custody" and "visitation" with the concepts of "parenting plans" and "parental functions."[91]

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[89] The Constitution of the United States, Amendment X, provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, [which powers include divorce and child custody] are reserved to the States respectively, or to the people."

[90] Florida has a very detailed statutory framework. Fla. Stat. Ann. s. 61.406 (11) defines "shared parental responsibility" as "a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly." Fla. Stat. Ann. s. 61.13(2)(b)(2) provides that the "court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child." The statute requires the court to consider evidence of spousal
or child abuse as evidence of detriment. In Maine, the court may order "shared parental rights and responsibilities," which are defined as an order under which "most or all aspects of a child's welfare remain the joint responsibility and right of both parents, so that both parents retain equal parental rights and responsibilities and both parents must confer and make joint decisions regarding the child's welfare": Me. St. tit. 19, s. 214.2C. There is no presumption in favour of shared parental rights and responsibilities unless the parents agree: Me. St. tit. 19, s. 214.6.

[91] *In re Marriage of Kovacs*, 121 Wash. 2d 795 (1993) at 800-801 (footnotes omitted). The relevant statute, Wa. 1987 *Parenting Act*, c. 460, provides for allocating decision-making authority between the parents, but does not have a presumption in favour of shared decision-making.

Most American jurisdictions retain the terminology of custody and "visitation," (i.e., access). Generally, custody is defined as "the rights and duty to care for a child on a day-to-day basis and to make major decisions about the child;" visitation is generally defined as "a right to be with the child including for overnight visits and vacation periods."[92] In many American jurisdictions, the access parent has a statutory right to the child's school and medical records.[93] In jurisdictions where the access parent does not have decision-making authority, that parent can seek court orders to challenge the custodial parent's decisions.

Some American states encourage or have a presumption in favour of joint custody. This means that "both parents share in making major decisions, and both parents also might spend substantial amount of time with the child."[94] "Joint custody" is really just another name for "shared parental responsibility." Some American states now have a presumption that joint custody is *not*
in the best interests of the child when there is evidence of domestic abuse.[95] Generally, American statutes contain many more explicit presumptions and far more detail on the factors to consider in determining custody and access arrangements than do Canadian statutes.

Within the last couple of years, the issue of relocation has been addressed by the highest court in several states, and has been a lively issue in other states. Some important U.S. rulings have abandoned established presumptions that a move is not in the best interests of the child where there is an ongoing access relationship that would be disrupted by the move. Instead, they have favoured a best interests of the child analysis that requires consideration of all relevant factors. Other states have resisted arguments that presumptions or preferences should be introduced; they have retained an individualized, best interests of the child approach. Some states continue to favour presumptive rules for or against removal. The general trend in the U.S., however, is toward an individualized, best interests of the child test, a rejection of presumptions, and a recognition of

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[92] American Bar Association, *Guide to Family Law* (New York: Times Books, 1996) at 127.

[93] Colorado, Florida, Idaho and Montana are examples: Colo. Rev. Stat. s. 14-10-123.5(7) (1987); Fla. Stat. Ann. s. 61.13(2)(b)(3); Idaho Code s. 32-717A (1983); Mont. Code Ann. s. 40-4-225 (1993).

[94] In American Bar Association, *Guide to Family Law* (New York: Times Books, 1996) at 127, and at 139 it is reported that in 1995 eleven states had a statutory preference in favour of joint custody. Connecticut, e.g., has a statutory presumption that joint custody is in the best interests of the child: Conn. Gen. Stat. s. 46b-56a-(b).

[95] This is the case in North Dakota, Oklahoma, and Louisiana: N.D. Cent. Code s. 14-05-22.3 (1993); Okla. Stat. Ann. tit. 43 s. 112.2 (1994); La. Rev. Stat. Ann. s. 9: 364A (West 1994). Texas bars joint custody in cases of domestic abuse: Tex. Fam. Code Ann. s. 14.021(h) (1994).

the importance of the views of the custodial parent. In 1996, the Connecticut Superior Court summarized recent American decisions, stating that the cases showed "a recognition of the necessity for a case-by-case factual approach to determine the best interest issue raised by relocation," but also "a definite move to reduce or remove the burden on the relocating parent or presumptions as to the impact of moves," and more emphasis on "the interest of the primary custodial family."[96] The following are excerpts from important rulings in states where the issue has been addressed recently by the highest court.

a) Alaska

Alaska is one of the states that has refused to adopt presumptions or preferences in relation to relocation disputes. It has retained an individualized, best interests of the child approach. Recently, the Supreme Court of Alaska rejected a father's argument that there should be a presumption against removal, stating:

> We have consistently avoided mandating rigid rules for making custody determinations ... And, unlike New Jersey, Alaska has not adopted an anti-removal policy. Rather, in the circumstance where the custodial parent desires to move out of Alaska, we consider the best interests of the child so that such determinations are based upon the facts and circumstances of each particular case. [97]

b) California

California views relocation primarily as a transfer of custody issue; generally, it is reluctant
to restrain the custodial parent from relocating. In relocation disputes, the choice is often between allowing the custodial parent to move with the child and altering the terms of access accordingly,
or transferring custody to the access parent. California's Family Code, s. 7501, provides that the custodial parent "has the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." Generally, however, the issue has been treated as a question of whether to transfer custody, unless the move is intended to thwart access. The Supreme Court of California cast the issue in those terms in its 1996 decision *In re Marriage of Burgess.*[98]

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[96] *Miggins* v. *Senofonte*, WL 456332 (Conn. Super. Ct. 1996).

[97] *McQuade* v. *McQuade*, 901 P.2d 421 (Alaska 1995).

[98] *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996).

Restrictions on a custodial parent's right to move were ruled unconstitutional by the California Court of Appeal on the basis that the right to intrastate travel is a basic human right protected by the constitutions of the United States and California. It also stated that a custodial parent "cannot be ordered to choose between her right to resettle, find new employment, start a new life and retain custody of her child." [99] A more recent appeal court decision, however, has stated that the "right to travel" was subject to the best interests of the child, reasoning:

> [A]ll parties to these disputes, including the children, have a constitutional right to travel; someone by the very nature of the case, will have to travel or not, in order to achieve visitation with children residing in another home. In the collisions of these rights, it should be the best interests of the child, not overly broad abstractions derived from travel through constitutional theories, which should be the courts' paramount concern.[100]

Although constitutionally permissible, generally, California courts do not consider restraining a move a realistic option, unless the move is intended to frustrate access. In 1996, the California Court of Appeal said:

> As a practical matter, a hearing on a request for a so-called move-away order necessarily involves issues of custody and visitation. The issue is not whether the custodial parent will be permitted to move since both the federal and California Constitutions preclude the court from prohibiting a move.[101]

Because loss of the custodial parent will in many cases be detrimental to the child, California favours the custodial parent in relocation disputes. California will give a full review on the merits — even in the case of short moves — but favours the custodial parent who wishes to relocate. This means an access parent will be entitled to a full review on the merits, but is unlikely to obtain a transfer of custody simply because the custodial parent is going to move 40 miles away.[102] In California, the material change and best interest tests are combined.The issue is

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[99] *In re Marriage of Fingert*, 221 Cal.App.3d 1575, 271 Cal.Rptr. 389 (1990).

[100] See *In re Marriage of Selzer*, 29 Cal.App.4th 637, 34 Cal.Rptr. 2d 824 (1994).

[101] *Brody* v. *Kroll*, 45 Cal.App.4th 1732, 53 Cal.Rptr. 2d 280 (1996) at 281-282. But see *Cassady* v. *Signorelli*, 49 Cal.App.4th 55, 56 Cal.Rptr. 2d 545 (1996), where the custodial mother was restrained from moving with the child to Florida on the grounds that the move was not in the child's best interests, and would frustrate the child's interest in a continuing relationship with her father and seemed intended to have this effect.

[102] *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996).

whether there has been a change in circumstances substantial enough to require a change of custody.[103]

Recently the Supreme Court of California rejected a presumption against relocation. It stated that "bright line rules in this area are inappropriate," and that each case must be evaluated on its own unique facts, taking into account "the continuity and permanency of custodial placement with the primary caretaker" (which the court said would most often prevail), "the nature of the child's existing contact with both parents," the child's age, community ties, health, educational needs, and, where appropriate, the preferences of the child.[104]

c) Florida

In *Mize* v. *Mize*, the Florida Supreme Court set guidelines to assist a court in deciding when a custodial parent may relocate with minor children from the jurisdiction of the court that entered the judgment.[105] In *Mize*, Florida adopted a general rule that the primary custodial parent may relocate as long as the request is made in good faith and as long as relocation is in the best interest of the child. Because no bright line test could be developed that would apply to all cases, *Mize* requires trial courts to consider the following six factors: whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children; whether the motive for seeking the move is for the express purpose of defeating access; whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements; whether the substitute access will be adequate to foster a continuing meaningful relationship between the child or children and the access parent; whether the cost of transportation is financially affordable by one or both of the parents; and whether the move is in the best interests of the child. The court, having considered these six factors, is to approve the relocation, as long as the relocation is well-intentioned and based on a founded belief that it is in the best interests of the custodial parent and the children, rather than a vindictive desire to interfere with access.

In *Russenberger* v. *Russenberger*, the Supreme Court of Florida ruled that, upon a showing of good faith, the custodial parent is entitled to a rebuttable presumption in favour of relocation and that, in considering opposition to relocation, the trial court should weigh the six

[103] *Ibid*.

[104] *Ibid*.

[105] *Mize* v. *Mize*, 621 So.2d 417 (Fla. 1993).

factors set out above.[106] Access parents seeking to prevent the move could offer evidence to rebut the presumption and the trial court must weigh the evidence on a case-by-case basis.

Subsequent to the *Russenberger* decision, s. 61.13(d) of the *Laws of Florida* was amended, and it now provides that "[n]o presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent."[107]

Florida does not treat short, non-disruptive moves as grounds for a full-scale consideration on the merits.[108]

d) New Jersey

In New Jersey, relocation is viewed as an issue of whether to permit the proposed move. Maintaining the *status quo* is seen as a real option, and the issue is whether to permit the custodial parent to move with the child or maintain the *status quo*.[109] A transfer of custody may be requested, but is not expected as a matter of course in relocation disputes.[110] Many American states have adopted the same "anti-removal" approach to relocation.[111]

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[106] *Russenberger* v. *Russenberger*, 669 So.2d 1044, 1046 (Fla. 1996).

[107] Ch. 97-242, s. 2, Laws of Fla. (amending s. 61.13, effective 1 July 1997).

[108] *Dobbins* v. *Dobbins*, 584 So.2d 1113 (Fla.1st DCA 1991) (relocation from Tallahassee to Jacksonville did not constitute a material change in circumstances). The same is true of Iowa. See *In re Marriage of Howe*, 471 N.W.2d 902 (IowaCt.App. 1991) (father's move of 42 miles from where children lived at time of divorce was not a material change in circumstances).

[109] New Jersey: N.J.S.A. 9:2-2.

[110] See *Cerminara* v. *Cerminara*, 286 N.J. Super. 448, 669 A.2d 837 (N.J. Super. Ct. App. Div. 1996).

[111] See, e.g., Illinois, *Marriage and Dissolution of Marriage Act*, 750 ILCS 5/609(a) (West 1992); Massachusetts: Mass. Gen. Laws Ann. ch. 208, s. 30 (West 1987); Michigan: Mich. St. R. s. 3.209 (1985); Minnesota: Minn. Stat. s. 518.175 Subd. 3 (Supp. 1989); Missouri: MO, Rev. Stat. s. 452.377 (Vernon, 1984); Nev.Rev.Stat. s. 125A.350 (1991).

Nevada's Supreme Court has said that Nevada's "anti-removal" statute is designed to "preserve the rights and familial relationship of the noncustodial parent with respect to his or her child."

In determining the issue of removal, the court must first find whether the custodial parent has

In 1988, the Supreme Court of New Jersey, whose rulings on relocation have been highly influential in the U.S., eliminated New Jersey's requirement that the custodial parent show a "real advantage" to a proposed move. It ruled that all the custodial parent need establish is that he or she has a "good-faith reason" for making the move, stating:

> Motives are relevant, but if the custodial parent is acting in good faith and not to frustrate the noncustodial parent's visitation rights, that should suffice. Maintenance of a reasonable visitation schedule by the noncustodial parent remains a critical concern, but in our mobile society, it may be possible to honor that schedule and still recognize the right of a custodial parent to move. In resolving the tension between a custodial parent's right to move and
> a noncustodial parent's visitation rights, the beacon remains the best interests of the children.[112]

e) New Mexico

The Supreme Court of New Mexico has rejected the adoption of presumptions for or against relocation, on the grounds that such presumptions undermine the best interests of the child standard, stating:

> In the typical bipolar model of adversary litigation — in which one party's interests are pitted against those of the opposing party — the use of presumptions and the assignment of burdens of proof probably effectuate, in most instances, the relevant policy goals involved in determining who wins and who loses. When, however, the interests of a third party (or parties — the children) are not only significantly affected by the outcome of the litigation but indeed are paramount in determining that outcome, placing on one party the burden of establishing that his or her interests are the ones that should be vindicated can subordinate the interests of the third party — who may be absent and may not even be represented — in the clash over the other two parties' competing hopes and desires.[113]

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demonstrated that an actual advantage will be realized by both the children and the custodial parent in moving to a location so far removed from the current residence that weekly visitation by the access parent is virtually precluded: *Schwartz* v. *Schwartz*, 812 P.2d 1268 (Nev. 1991).

In Arizona, another "anti-removal" state, the Court of Appeals concluded that the custodial parent should bear the burden of proof in relocation cases but added that, "the interests of the parties and the child are best safeguarded by clear and careful fact finding, rather than heightened burdens of proof or the inequitable application of constitutional rights for or against one party or the other": *Pollock* v. *Pollock*, 889 P.2d 633 (Ct. App. Ariz. 1995).

[112] *Holder* v. *Polanski*, 544 A.2d 852 (N.J. 1988).

[113] *Jaramillo* v. *Jaramillo*, 823 P.2d 299 (N.M. 1992) at 308.

f) New York State

New York is equally prepared to consider relocation as a question of whether to restrain a move or to transfer custody, depending on the relief sought by the applicant and the circumstances of the case.[114]

Recently, the Court of Appeals of New York rejected the state's existing formal, presumptive approach, which favoured the access parent, stating:

> In reality, cases in which a custodial parent's desire to relocate conflicts with the desire of a noncustodial parent to maximize visitation opportunity are simply too complex to be satisfactorily handled within any mechanical, tiered analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances. Although we have recognized and continue to appreciate both the need of the child and the right of the noncustodial parent to have regular and meaningful contact ... we also believe that no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome.[115]

However, the Court of Appeals indicated that the burden of proof remains on the custodial parent: "In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests."[116]

The Court of Appeals of New York stated that all relevant factors should be considered, including:

> each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements.[117]

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[114] See *Tropea* v. *Tropea*, 665 N.E.2d 145 (N.Y. Ct. App. 1996).

[115] *Ibid.*

[116] *Ibid.*

[117] *Ibid.*

g) North Dakota

In North Dakota, a custodial parent may not change the residence of the child to another state unless she or he obtains an order of the court or the consent of the access parent. A court order is not required if the access parent has not exercised his or her rights of access for at least one year, or has moved to another state and is more than 50 miles from the residence of the custodial parent.[118]

The Supreme Court of North Dakota addressed the issue of relocation twice in 1997. The second of these cases summarized North Dakota's law as follows.[119]

When a custodial parent seeks to remove the child from the state, he or she must obtain the consent of the access parent, or, when consent is not granted, a court order. The primary concern with removing a child is whether the move is in the child's best interest. Often, when a motion to remove a child from the jurisdiction is filed, the other spouse seeks a change in custody.

A motion brought under North Dakota's removal statute must be analyzed under the following four factors, with the paramount concern the best interests of the child:

1. the prospective advantages of the move in improving the custodial parent's and child's quality of life;
2. the integrity of the custodial parent's motive for relocation, considering whether it is to defeat or deter visitation by the noncustodial parent;
3. the integrity of the noncustodial parent's motives for opposing the move;
4. whether there is a realistic opportunity for visitation, which can provide an adequate basis for preserving and fostering the noncustodial parent's relationship with the child if relocation is allowed.

A motion for change of custody is approached differently in North Dakota than a motion for relocation. In determining if a change of custody is necessary, a court must apply a two-step process. The court must consider if there is a significant change of circumstances since the original custody decree. If there is a significant change, the court must determine if this change compels the court to change custody to serve the best interests of the child.

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[118] N.D. Cent. Code s. 14-09-07 (1991).

[119] *In the Matter of B.E.M.*, 566 N.W.2d 414 (N.D. 1997) at paras. 10-15. The other decision was *Stout* v. *Stout*, 560 N.W.2d 903 (N.D. 1997).

If the trial court grants the motion to remove the child from the state, any motion for change of custody is effectively denied, provided the only basis for the motion was the planned move. This is because the best interests of the child have already been considered in the context of the move.

If the trial court denies the motion to remove the child, the court must ask the custodial parent whether she or he will move without the child. If the custodial parent will move even if the motion to relocate is denied, there exists as a matter of law a significant change in circumstances. Under those facts, the custodial parent's move away from the child compels a change of custody in the best interests of the child. If the custodial parent will not move if the motion to remove the child is denied, there is no significant change of circumstances justifying a change of custody, unless other reasons are alleged. If there are other reasons, the trial court must first determine if those reasons provide a significant change of circumstances and, second, if they compel a change of custody in the best interests of the child.

h) Tennessee

Tennessee has an explicit policy of giving priority to maintaining stability in the child's relationship with the custodial parent. In that state, an access parent seeking to obtain custody because of the custodial parent's proposed move must overcome the presumption or preference in favour of the custodial parent. For example, the Tennessee Supreme Court stated recently that:

> a custodial parent will be allowed to remove the child from the jurisdiction unless the non-custodial parent can show, by a preponderance of the evidence, that the custodial parent's motives for moving are vindictive — that is, intended to defeat or deter the visitation rights of the non-custodial parent.[120]

The custodial parent, however, must obtain a variation of the access order prior to the move, if the move will interfere with court-ordered access. The Supreme Court of Tennessee said "[w]ith regard to procedure, we conclude that if the parties cannot agree on an acceptable visitation schedule, the custodial parent seeking to remove must file a petition with the court to reapprove or revise, as the case may require, the existing visitation schedule."[121]

i) Vermont

In Vermont, relocation disputes are framed as applications to vary a custody order by transferring custody. The Supreme Court of Vermont, in its most recent relocation decision, ruled that where the family court determines that the move would be detrimental to the children, its only option is to order a change in custody. The family court may not prohibit the move.[122] The applicant must show that there has been a material change in circumstances and that the order requested is in the best interests of the child. An applicant may succeed in meeting the material change test, but not succeed in showing that the order requested is in the best interests of the child.[123] Thus, in Vermont — which has the same two-step process as Canada — the access parent bears a "double burden." The Supreme Court of Vermont, interpreting Vermont's custody statute in the context of a relocation,[124] has said:

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[120] *Auby* v. *Strange*, WL 189801 (Tenn. 1996).

[121] *Ibid.*

[122] *McCart* v. *McCart*, 8 Vt. L. W. 165 (1997).

[123] *deBeaumont* v. *Goodrich*, 644 A.2d 843 (Vt. 1994).

[124] Vt.Stat.Ann. tit. 15 s. 668.

> In order to modify a custody determination, a moving party must traverse two hurdles. First, the moving party must make "a showing of real, substantial and unanticipated change of circumstances"... Once that threshold is met, the moving party must then show that annulling, varying or modifying a prior parental rights and responsibilities determination is in the best interests of the child.[125]

The Vermont Supreme Court stated in 1992 that the place of residence for a family is central to child-rearing; the decision of a custodial parent to relocate should not be second-guessed by the family court.[126] Nevertheless, there continued to be many applications by access parents to prevent custodial parents from relocating.[127] Despite the preference in favour of custodial parents who want to move, courts continued to evince a willingness to restrain moves in order to protect the best interests of the child.[128] In 1997, however, the Supreme Court of Vermont reversed a lower court ruling prohibiting a move. It stated that a court may not prohibit a move and that the only option was to transfer custody if it was in the best interests of the child:

> However much one may sympathize with the court's desire to maintain the family unit, it could not substitute its judgment for that of the custodial parent. Having found, on balance, that the children's best interests lay with maintaining custody in the mother, the court abused its discretion in prohibiting the move rather than denying the motion.[129]

Despite this clear ruling by the Vermont Supreme Court,[130] lawyers predicted that judges would continue to try to limit some moves. One lawyer said, "These judges are genuinely concerned for

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[125] *deBeaumont* v. *Goodrich*, 644 A.2d 843 (Vt. 1994) at 845-46.

[126] *Lane* v. *Schenck*, 158 Vt. 489 (1992).

[127] "Family Courts Struggle With Relocation Issues" (24 June 1997), *Vermont Lawyer and Trial Court Reporter* 1.

[128] *deBeaumont* v. *Goodrich*, 162 Vt. 91, 644 A.2d 843 (Vt. 1994).

[129] *McCart* v. *McCart*, 8 Vt. L. W. 165 (1997).

[130] See also *Gazo* v. *Gazo*, 697 A.2d 342 (Vt. 1997), where the Supreme Court of Vermont stated that it is not appropriate for the court to direct where the custodial parent and children shall reside, although an unanticipated relocation will be a material change of circumstances that will support a review of the custody decision.

the kids. When they see parents making what they think are stupid choices that will hurt kids, they want to try to stop them from doing it, no matter what the Supreme Court may say."[131]

j) Washington

Washington's legislature has given substantial attention to post-separation parenting issues, and has, by statute, abandoned the categories "custody" and "access" and adopted the use of "parenting plans." Law-makers in Washington have demonstrated a depth of knowledge on custody and access issues. For this reason, Washington's laws are worthy of careful study. Recently, the Supreme Court of Washington reviewed the issue of relocation and provided an extensive discussion of Washington's new legislative scheme and its implications for relocation disputes.[132] In *Littlefield*, the Court clarified that the law of Washington permits restrictions on a parent only if the judge finds that the parent's involvement or conduct may have adverse effects on the child's best interests. Also, the normal distress suffered by a child because of travel, infrequent contact with a parent, or other hardships that predictably result from the dissolution of marriage, does not justify such restrictions. In its judgment, the Court outlined some important aspects of Washington's custody and access law:

> Our state Legislature has repeatedly refused to enact a "joint custody" law, and year after year has declined to determine that, as a matter of public policy, frequent and continuing contact with both parents is in the best interests of the child. Further, the Legislature has not placed a statutory restriction on the ability of either parent to move and has not even required notification before a change of residence ...
>
> The *Parenting Act* represents a unique legislative attempt to reduce the conflict between parents who are in the midst of dissolving their marriage by focusing on continued "parenting" responsibilities, rather than on winning custody/visitation battles. In this state even the terms "custody" and "visitation" have been replaced with the concepts of "parenting plans" and "parental functions." The concept of a working "parenting plan" is the primary focus of the *Parenting Act*. The *Act* sets out a guide for parents to develop proposed and agreed plans for the continued parenting of their children. The key advantage of the parenting plan concept over the former law's custody concept is the parenting plan's ability to accommodate widely differing factual patterns and to allocate parental responsibility accordingly.
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> The plan must contain provisions for (1) the resolution of future disputes between the parents, (2) allocation of decision-making authority, and (3) residential provisions for the child. It is only the residential provision which is at issue in this appeal.

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[131] "Family Courts Struggle With Relocation Issues" (24 June 1997), *Vermont Lawyer and Trial Court Reporter* 1 at 9.

[132] *Littlefield* v. *Littlefield*, 133 Wash.2d 39, 940 P.2d 1362 (1997).

> The statute encourages the parents to work together to develop a plan for the post-decree parenting of the child. However, if the parents are unable to agree to a plan that is in the child's best interests, then the responsibility for developing the parenting plan falls upon the trial court. In developing and ordering a permanent parenting plan, the court is given broad discretion. That discretion must be exercised according to the [legislative] guidelines ...
>
> There is nothing in this state's *Parenting Act* that gives a trial court the authority to alter the physical circumstances of the parties in order to create an environment that is, in the trial court's opinion, more desirable for the child than that which exists. Nor is there anything in the statute that gives the trial court the authority to restrict a parent from moving away from the child, or away from the other parent, unless a limiting factor exists, under RCW 26.09.191, which warrants the restriction. A parenting plan's provisions are subject to modification as the circumstances of the parents and of the children change. In order to make sure that parents are able to take advantage of that opportunity, a trial court is encouraged to require, as part of the parenting plan, that either parent notify the other of significant changes, such as an anticipated change of residence, sufficiently in advance of the change to facilitate a modification in the residential schedule of the child.
>
> The *Parenting Act* attempts to afford parents the opportunity to continue parenting their children after dissolution of the marriage. However, the practical result of a marriage dissolution is that parenting and family life will not be the same after dissolution. This is so even though a trial court may believe it is in the "best interests of the child' to continue to live in the same family unit. A child cannot escape the reality that his or her family is no longer the same. The trial court does not have the responsibility or the authority or the ability to create ideal circumstances for the family. Instead, it must make parenting plan decisions which are based on the actual circumstances of the parents and of the children as they exist at the time of trial.[133]

3. Australia

Recently, Australia has revised its custody and access laws and has moved to a continuing shared parental responsibility model similar to that of England and Wales. Under the *Family Law Reform Act 1995*,[134] both parents have continuing shared parental responsibility following separation, unless a court orders otherwise. The issue of relocation is addressed in sections 65Y and 65Z of the *Act*. If a residence, contact or care order is in place, a court order or consent in writing from each person in whose favour an order has been made is required to remove the child

[133] *Littlefield*, at 1367-68 (footnotes omitted).

[134] *Family Law Reform Act 1995* (Cth) (in force on 11 June 1996), s. 61C.

from the jurisdiction. The same applies when proceedings to obtain a residence, contact, or care order are pending. When no order is in place and no applications for orders are pending, it is not clear whether either parent may unilaterally remove the child from the jurisdiction. Such unilateral moves would seem to be contrary to the policy of the *Act*, which is to encourage cooperative parenting.

The most important Australian case on relocation is *B* v. *B*,[135] which was the first relocation decision of the Full Court since the *Family Law Reform Act* came into effect. *B* v. *B* provides a full discussion of Australia's new legislative scheme, and a thoughtful review of the relocation issue that takes into account recent English, New Zealand, and Canadian authorities.

The Court in *B* v. *B* pointed out that Australia's *Family Law Reform Act* emphasizes parental responsibilities rather than rights. It removes the terms "guardianship," "custody," and "access," and replaces them with the concepts of residence and contact. The new law is intended to encourage cooperative post-separation parenting, rather than the ownership and control of children. It enables parents to enter into an agreement about their responsibilities for their children by means of "parenting plans," which can be registered with the court (although, according to the Court in
B v. *B*, parenting plans are not yet in wide use).

The Court reviewed international precedents on relocation, in particular the Supreme Court of Canada decision in *Goertz*. The Court rejected the adoption of a presumption in favour of relocation, saying that the analysis by McLachlin J. in *Goertz* on this point "is compelling." The Court stated that Australia's *Family Law Reform Act*:

> contemplates individual justice. Any question of presumption or onus has the potential to impair the inquiry as to what is in the best interests of the particular children. It may render the case more technical and adversarial, and may divert the inquiry from the facts relating
> to the children's best interests to legal issues relating to burdens of proof.[136]

Having rejected the adoption of presumptions, the Court stated that the following considerations are likely to be relevant to the determination of the best interests of the child:

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[135] *B* v. *B,* (9 July 1997) Full Court of Family Court of Australia at Brisbane. Two subsequent Australian decisions on relocation are *Farrow* v. *Farrow* (30 July 1997) Family Court of Australia, and *R* v. *R* (16 October 1997) Family Court of Australia, both of which apply the principles enunciated in *B* v. *B*.

[136] *B* v. *B*, para. 9.59.

1) the degree and quality of the existing relationship between the children and the "residence parent";
2) the degree and quality of the existing contact between the children and the "contact parent";
3) the reason for relocating ("If a parent, by relocating, is able to improve the economic position of that family unit, then this is an important consideration, since it will usually reflect upon the well-being of all members of that family. In particular, where the residence parent is able to change from being dependent upon welfare to earning a more substantial income, that is an important matter. Relocation for the purposes of re-partnering can be of equal importance. Many divorced parents remarry. Sometimes that requires a change in residence ... The marriage will usually make a significant difference to both the social and economic circumstances of the parent and that will usually reflect directly upon the best interests of the children ... It is important for the Court to consider whether the reasons to relocate are genuine, whether they are optional or whether they are seen as important or essential for the orderly life of that parent.");
4) the distance and permanency of the proposed change;
5) dislocation from other aspects of the children's former environment such as schools, friends, extended family;
6) the wishes of the children;
7) the ages of the children;
8) the feasibility and costs of travel; and
9) alternate forms of contact.[137]

The Court noted that the interests of the child might be affected in two ways by a proposed relocation:

> Firstly, the relocation may be of benefit not only to the parent but also to the children in a direct way. That is, the lifestyle of that family unit and those children may be enhanced by the move. Secondly, in some cases the inability of the residence parent to relocate will impose significant pressures upon that parent and diminish his or her capacity to cope and so diminish the quality of the lifestyle in that home. A very important aspect of a child's bests interests is to live in a happy family environment. That may be significantly impacted upon where the residence parent is required to live in circumstances which diminish his or her future life either in an economic or a social sense, perhaps in a long-term way. If that had an adverse impact upon the children's best interests, that may be an important matter
> to consider. Similarly, the prospect that the lifestyle of members of that family will be

[137] *B* v. *B*, para. 9.62.

enhanced by the move is a positive factor to be considered as part of an assessment of the children's best interests.[138]

Although the Court stressed that the issue was the best interests of the child and not the wishes of the parent, it noted the link between the two: "Ordinary common experience indicates that long-term unhappiness by a residence parent is likely to impinge in a negative way upon the happiness and therefore the best interests of children who are part of that household. Similarly, where the parent is able to live a more fulfilling life this may reflect in a positive way on the children."[139]

The Court said that parental mobility rights do not prevail over the best interests of the child. The Court also commented that the right of women to live their lives free of discrimination might be violated if a "doctrinaire approach" to relocation disputes were adopted. More favourable is a reasonable approach under which relocation of one or both parents for good reason is seen as potentially important, not only to the parent, but also to other members of that family unit. The Court further commented that the economic challenges faced by single mothers are relevant and should be considered in assessing a child's best interests. The Court stressed, however, that parental rights must give way to the best interests of the child.[140]

4. New Zealand

New Zealand has retained a traditional custody and access model similar to Canada's. The law on relocation was reviewed recently by the Court of Appeal in *Stadniczenko* v. *Stadniczenko*.[141] In that case, the mother sought a custody order and an order allowing her to move with the two children of the marriage from Wellington to Auckland. The judge granted her custody, with a condition allowing her to move. The husband appealed to the High Court, which reversed the decision, granting custody to the mother on the condition that the children were not to be removed from Wellington without the consent of the father or an order of the Court. The wife sought unsuccessfully leave to appeal to the Court of Appeal. In its judgment refusing leave to appeal, the Court of Appeal discussed the law to be applied in such cases.

The Court of Appeal cited with approval the Ontario Court of Appeal decision in *Carter* v. *Brooks*, and concluded that:

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[138] *B* v. *B*, para. 9.66.

[139] *B* v. *B*, para. 9.67.

[140] *B* v. *B*, paras. 10.44-10.46.

[141] *Stadniczenko* v. *Stadniczenko*, [1995] N.Z.F.L.R. 493 (CA).

> the rights of the custodial parent to pursue his or her own life or career and the rights of the non-custodial parent to access can be taken into account. Choice of residence and rights of access are not solely a matter of the rights of the parents, however. As is shown by the cases cited, they may also be important considerations in their impact on the welfare of the child.[142]

The Court of Appeal stated that the proper approach in relocation cases was for the judge to reach
a decision "on the basis of the welfare of the children, looking at all relevant factors including the need of the particular children for a continuing relationship with their father."

5. France

France, like Quebec, is a civil law jurisdiction. Since 1987, and even more clearly since 1993, France has moved to a joint parental authority model.[143] Except for some situations described in s. 374 of the French *Civil Code* dealing with children born out of wedlock, under s. 372 and 287, the decisions concerning the child must be made jointly by both parents. This principle is applicable whether the parents are divorced or not. It also extends to children born out of wedlock if both parents recognized the child before the age of one and were living together at the time of the recognition,[144] or if they presented a joint declaration that they both exercise parental authority.[145] The decisions concerning a child must be taken in accordance with his or her interests.[146] As in Quebec, the French *Code* provides that a third party may presume the decision made by one parent has the assent of the other parent.[147]

Despite the fact that joint parental authority is the rule, a court has discretion, pursuant to s. 287 and 288 of the French *Civil Code*, to modify the exercise of parental authority in order to

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[142] *Stadniczenko*, at 500.

[143] L. n. 87-570, 22 July 1987; L. n. 93-22, 8 January 1993. The modifications brought by these laws have been incorporated in the French *Civil Code*.

[144] s. 372 French *Civil Code*.

[145] s. 374 French *Civil Code*.

[146] s. 372-1-1 and 287 French *Civil Code*.

[147] s. 372-2 French *Civil Code*. The presumption is narrower than the one provided by s. 603 Q.C.C. and as we will see, s. 373, 2 Belgium *Civil Code*. The wording of the section limits the application of the presumption to the *acte usuel de l'autorité parentale*.

protect the interests of the child. The court can decide in favour of a sole exercise of parental authority.[148] In this case, the child resides with the parent to whom the exercise is attributed, but access can be refused only for grave reasons.[149] The access parent may challenge in court decisions taken by the other parent.[150] The parent with parental authority and with whom the child resides
is referred to as *le parent chez lequel l'enfant a sa résidence habituelle*.[151] Agreement between the parents is encouraged, and the burden of proof required to modify a court order with agreement is more onerous than for a simple court order.[152]

A French judge can hear the testimony of the child according to s. 388-1 of the French *Civil Code*. The wishes of a minor child that are capable of discernment *(les sentiments exprimés par les enfants mineurs*) should be taken into account in decisions concerning the exercise of parental authority.[153]

Relocation is not a special issue in French civil law. When a court has to decide a relocation case, it is treated like all other decisions concerning the child. However, the *Cour de cassation* stated that relocation is a grave reason that justifies the revision of a court order under s. 292 of the French *Civil Code*.[154] The general principle that decisions should be in accordance with the best interests of the child is applied to the specific question of relocation; there are no special rules. The general law as set out in the *Civil Code* applies; there is no "judge-made law" on this issue, as there is in common law jurisdictions.

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[148] Pursuant to s. 288 French *Civil Code*, the other parent has the right and responsibility to oversee the maintenance and the education of the child and a corollary right to be informed of the important decisions concerning the life of the child (e.g., education), or a move to another region. For more details, see G. Cornu, *Droit civil. La famille*, coll. Domat Droit Privé, 5^{e} édition (Paris: Montchrestien, 1996) at 578.

[149] s. 288, 2 French *Civil Code*.

[150] Paris 25 octobre 1991, R.T.D.C. 1992. 379. Chron. Hauser, citée par G. Cornu.

[151] s. 288 French *Civil Code*.

[152] s. 287, 290 and 292 French *Civil Code*. To modify a court order with agreement, according to s. 292, one must prove that there are grave reasons.

[153] s. 290 French *Civil Code*.

[154] See, e.g., Civ. 2^{e}, 17 décembre 1984: *Bull. civ.* II, n^{o} 197, at 139.

In the case of joint exercise of parental authority, the judge designates the child's residence.[155] An access parent who does not have parental authority does have the right and responsibility to oversee the upbringing of the child. Accordingly, the residential parent should inform the access parent of important decisions concerning the child, including any decision to move a distance for which arrangement for access will be disrupted.[156]

In France, some authors see a paradox in the joint exercise of the parental authority model. Irène Théry, for example, sees a paradox in starting from the premise that the parental relationship should continue the same way as it was when the marital relationship was intact.[157]

6. Belgium

Belgium is also a civil law jurisdiction. Like France and several other jurisdictions in the world, in 1995, Belgium adopted a joint parental authority model.[158] Pursuant to s. 302 and 374 of the Belgium *Civil Code*, the decisions concerning the child must be taken jointly by both parents. This principle is applicable to all parents — married or not, divorced or not. The interest of the child is also the applicable criterion for all the decisions taken concerning a child.[159] As in Quebec and France, to protect third parties (such as doctors who are treating a child), the *Code* provides for a rebuttable presumption that the parents have agreed on decisions taken by one parent.[160]

Belgium's law does not address the issue of terminology directly, but tends to use *hébergement principal* to refer to the custodial or residential parent, and the term *hébergement secondaire ou subsidiaire* to refer to the access or non-residential parent.[161]

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[155] s. 287 French *Civil Code*.

[156] s. 288 French *Civil Code*.

[157] I. Théry, *Le démariage. Justice et vie privée*, coll. opus (Paris: Odile Jacob, 1996).

[158] L.13 April 1995, in force since 3 June 1995. The modifications brought by these laws have been incorporated in the Belgium *Civil Code*.

[159] s. 374 Belgium *Civil Code*.

[160] s. 373, 2 Belgium *Civil Code*.

[161] For more details and critique of the change in the terminology, see J. Sosson, « L'autorité parentale conjointe. Des vœux du législateur à la réalité » (1996) 1 Annales de droit de Louvain

When the parents are not living together any more, the court, in exceptional cases, has a discretion pursuant to s. 374 of the Belgium *Civil Code* to modify the joint parental authority scheme in order to protect the interests of the child.[162] This discretion provides the flexibility to order sole exercise of parental authority or a modified form of joint exercise of the parental authority.[163]

As a matter of principle, the law reformers presumed the agreement of the parents for the important decisions concerning the child, such as the one enumerated in the first paragraph of s. 374 (e.g., health, education, religion, etc.). Despite the fact that the breakdown of the marital relationship would make cooperation in daily decisions concerning the child difficult, they thought that a presumption of parental consent would encourage consultation and cooperation. In the situations where this is not possible, enough flexibility is allowed for the judge to modify the terms of the exercise of parental authority.

Even when the court orders exclusive parental authority to one parent, Belgium law tries to maintain, as far as possible, maximum contact between both parents and the child after family breakdown. In this situation, the access rights (i.e., "the right to have personal relations with the child") cannot be refused except for serious reasons.[164] Furthermore, the parent who has his or her exercise of parental authority withdrawn maintains the right to oversee the child's upbringing and to receive information about the child's education, health care, etc. The right to oversee the

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115 at 148. It seems to be very difficult to find the good terminology and the previous one, despite some negative effects that it could have, is neither better nor worse than the new one.

[162] s. 374 of the Belgium *Civil Code* states: "When the parents cannot agree on living arrangements, or on important decisions concerning health care, education, upbringing, recreation, religious or philosophical orientation, or if agreement appears to reflect adversely on the best interests of the child, the presiding judge may place the child in the custody of the mother or the father. The judge may also identify those decisions concerning education that must be agreed to
by both parents, and set parameters within which the noncustodial parent will maintain contact with the child. The custodial parent must have valid reasons to deny access. The noncustodial parent maintains the right to watch over decisions made regarding the child's education, and to be informed by the custodial parent or a third party. The noncustodial parent may also contest decisions in court in the best interests of the child. In all cases, the judge determines where the child will live, and the principal address of the child as listed in the population registry." [translation]

[163] See also J. Sosson, « L'autorité parentale conjointe. Des vœux du législateur à la réalité » (1996) 1 Annales de droit de Louvain 115 at 152-154.

[164] J. Sosson, « L'autorité parentale conjointe. Des vœux du législateur à la réalité » (1996), 1 Annales de droit de Louvain 115 at 151.

child's upbringing includes the right to contest in court decisions made by the other parent concerning the education of the child.

Relocation cases are dealt with in the same manner as any case related to parental authority. Hence, no specific rules exist concerning relocation, no case law has developed around that issue, and authors barely mention it. In the spirit of the recent Belgian reform, one could think that a parent who wants to move with a child should obtain the consent of, or at least inform, the other parent. If the residence of the child has been specified in a court order, each parent is bound by the decision. Thus, if a parent contravenes the order by moving the child elsewhere, the other parent could invoke the abduction laws or ask for a modification of the court order. In the latter situation, the only criterion that will guide the court is the interests of the child, as in any case involving the child. Nevertheless, it should be noted that whenever there is a court order, the judge will specify the residence of the child, according to the last paragraph of s. 374. Interestingly, a population registry exists where the child's residence must be registered.[165] In the case of a *de facto* separation, where there is no court order in place, s. 108 is not specific as to where the residence of the child should be.[166]

In summary, although some jurisdictions continue to favour presumptive rules for or against removal, the general trend in western countries is towards an individualized, best interests of the child test, a rejection of presumptions, and a recognition of the importance of the views of the custodial parent.

[165] This registry is useful in the context of social security.

[166] Which states as follows: "The dependent minor will reside with his parents or, if his parents live apart, he will live with his mother or his father." [translation]

C. Demographic Data and Empirical Evidence

This section will provide a summary of relevant current demographic data and a review of relevant current empirical evidence. It will address the research question: Does existing empirical evidence on the effect of various patterns of post-separation parenting on children support the adoption of particular principles or rules in relation to relocation disputes?

There is a large amount of literature on the consequences for children of parental separation and divorce.[167] Early research tended to trace links between "broken homes" and behaviours such as juvenile delinquency or poor school performance. Subsequently, attention was given to specific factors related to divorce that were associated with negative outcomes for children; corollary to
this was the identification of factors connected to positive outcomes for children of divorce. More recently, researchers have pointed out that there is a high degree of complexity in the project of identifying the implications of divorce for children; research results on some issues are increasingly mixed or inconclusive.[168]

Social science research on the effects of separation on children does indicate a connection between a more positive adjustment on the part of children and a) a well-functioning custodial parent; b) absence of parental conflict; and c) a continuing relationship with both parents. The factors associated with positive outcomes for children may come into conflict (for example, where a continuing relationship with the access parent gives rise to parental conflict and undermines the ability of the custodial parent to function well). The research is not conclusive on which objectives should be given priority when they come into conflict. Some law makers and judges, however, explicitly or implicitly give priority to one of these objectives. For example, research showing the value of a continuing relationship with both parents has supported the policy of expanding the role of the access parent and strengthening the presumption in favour of parental access. With the growing sense among researchers of the

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[167] For discussion of recent studies see J. Kunz, "The Effects of Divorce on Children" in S.J. Bahr, ed., *Family Research: A Sixty-Year Review, 1930-1990* (New York: Lexington, 1992) 325 at 341-335; J. McCord, "Long-term Perspectives on Parental Absence" in L. Robins & M. Rutter, eds., *Straight and Devious Pathways From Childhood to Adulthood* (Cambridge: Cambridge University Press, 1990) 116; and F.F. Furstenberg, Jr. & A.J. Cherlin, *Divided Families: What Happens to Children When Parents Part* (Cambridge: Harvard University Press, 1991).

[168] J.S. Wallerstein, "The Long-Term Effects of Divorce on Children: A Review" (1991) 30 J. Am. Academy Child & Adolescent Psych. 349; J.B. Kelly, "Current Research on Children's Postdivorce Adjustment: No Simple Answers" (1993) 31 Fam. & Conciliation Cts. Rev. 29.

complexity of the project and the indeterminacy of the results, the policy implications have become less clear. Overemphasis on a particular policy goal (for example, promoting a continuing relationship with the access parent) may undermine the best interests of the child principle.

1. A Well-functioning Custodial Parent

In Canada, most custodial parents are mothers, and most access parents are fathers. In Canadian divorce cases, men are awarded sole custody in about 15 per cent of all cases, women obtain sole custody in about 72 per cent, and the remainder are awards of joint custody.[169]

Divorce is one cause of lone-parent families. Lone-parent families are also caused by separation, never-married mothers, and the death of one parent. According to Canada's 1996 census, there were 1,137,505 lone-parent families in 1996, about 85 per cent of which were headed by mothers.[170] About one-third of lone-parent families are caused by divorce, 22 per cent by never-married mothers, 20 per cent by separation, and 20 per cent by the death of one spouse. In 1996, there were 1.8 million children living in a lone-parent family; about 84 per cent of those children were living in a female lone-parent family.

There is a link between child poverty and family type. Lone-parent families headed by women have much lower incomes than other families — 56 per cent of such families live in poverty. In 1994, the average income of lone-parent families headed by males was $34,869, while the average income of those headed by females was $24,057. Two-parent families have higher incomes than lone-parent families.[171] Children of lone-parent families headed by women are at increased risk of emotional and behavioural problems and academic and social difficulties. It should be stressed, however, that most children of lone-parent families headed by women do not experience these problems. In fact, the majority of children who do experience these problems are from two-parent families (because over 80 per cent of children live in two-parent families).[172]

The large-scale Statistics Canada survey of 1994-95 revealed that 8.6 per cent of Canadian children were living in step-families. Of those children who lived with one biological

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[169] Department of Justice Canada, *Evaluation of the Divorce Act: Phase II: Monitoring and Evaluation* (Ottawa: Ministry of Supply and Services, 1990), reporting on statistics for 1987-88.

[170] The information on the 1996 census is from the Statistics Canada Web page, http://www.statcan.ca

[171] The information on family incomes is taken from the Web page of the Canadian Council on Social Development, http://www.gdsourcing.com/works/CCSD.htm

[172] Human Resources Development Canada/Statistics Canada, *Growing Up in Canada: National Longitudinal Survey of Children and Youth* (Ottawa: Statistics Canada, 1996) at 83-91.

parent and one step-parent, a much higher percentage lived with their biological mother and a step-father.[173]

In summary, the demographic data reveal that in the large majority of cases where a child's biological or adoptive parents do not live together, the mother has custody. Further, the data reveal that lone-parent families headed by women are more likely to live in poverty; children of lone-parent families headed by women are also at increased risk of emotional and behavioural problems and academic and social difficulties.

The reasons for the predominance of mother custody are complex. The "tender years doctrine," or maternal preference, was accepted by the Supreme Court of Canada as a "rule of common sense" in 1976.[174] Since then, it has been replaced by a more direct best interests of the child test.[175] Almost all custody and access arrangements are settled by agreement of the parties rather than by court order.[176] Parents may agree on mother custody because in most families, mothers assume the primary responsibility for child care. Social science researchers have noted the enduring sexual division of labour with regard to child-rearing, and most attribute this allocation of responsibility to ingrained social practices rather than to the inherent natures of men and women.[177]

Custodial parents have a different view of access from that of access parents. A random sample was taken from five representative communities in Alberta. Those who identified themselves as being involved in a child access situation were separated from the general sample. The responses of the 30 custodial and 26 access parents were compared. Most custodial parents (74 per cent) reported that their experiences with access were relaxed, informal, or somewhat difficult but manageable, compared to just under half (48 per cent) of access parents. Close to

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[173] Human Resources Development Canada/Statistics Canada, *Growing Up in Canada: National Longitudinal Survey of Children and Youth* (Ottawa: Statistics Canada, 1996) at 29-30 and at 95.

[174] *Talsky* v. *Talsky*, [1976] 2 S.C.R. 292.

[175] *Young* v. *Young*, [1993] 4 S.C.R. 3.

[176] Department of Justice Canada, *Evaluation of the Divorce Act: Phase II: Monitoring and Evaluation* (Ottawa: Ministry of Supply and Services, 1990), reporting on statistics for 1987-88.

[177] M.E. Lamb, ed., *The Father's Role: Cross-cultural Perspectives* (Hillsdale: Lawrence Erlbaum, 1987).

half (45 per cent) of access parents reported that their experiences were very difficult and strained, whereas only 19 per cent of custodial parents did so.[178]

In the Alberta study, custodial parents were more likely than access parents to report that child support was not paid on time and in full. They reported discussing their children's lives with the other parent more frequently than did access parents. Access parents reported missing visits because their children were too busy, the visit was inconvenient for the custodial parent, or the visit was inconvenient for them. Custodial parents, on the other hand, had a wider range of explanations for missed visits. Custodial parents said that the most frequent reason for missed visits was that it was inconvenient for the access parent; other reasons cited were that the children

[178] D. Perry *et al., Access to Children Following Parental Relationship Breakdown in Alberta* (Calgary: Canadian Research Institute for Law and the Family, 1992) xiii. Of 2,500 general questionnaires sent, there were 890 usable responses. A follow-up survey was sent to those who identified themselves as having been involved in an access situation. Of 182 follow-up questionnaires, there were 80 usable responses, 30 from custodial parents, 26 from access parents, 19 from grandparents, and five from aunts or uncles.

were sick or busy, that their children refused to go on a visit, that it was inconvenient for the custodial parent, and that the access parent had a drug or alcohol problem that interfered with visits.[179]

The Alberta study found that over half of custodial (54.5 per cent) and access parents (57.9 per cent) considered the amount of access time reasonable. More custodial parents (45 per cent) than access parents (36.8 per cent) would have liked there to be more access. Some (38.5 per cent) custodial parents reported denying access at some time or other. The reasons given for the denial were that the children were busy or sick, that the other parent had a drug or alcohol problem that affected the visits, that it was inconvenient, or that the family was away on holiday. Some (9.1 per cent) custodial parents expressed concerns of physical abuse by the access parent, and one parent reported concerns of sexual abuse by the access parent. Over half (57.1 per cent) of the access parents said they had been denied access at some time. The reasons for denial reported by them were that it was inconvenient for the custodial parent, the children were away on holiday, the children were busy or sick, or the custodial parent did not want the relationship to continue. Almost all (92 per cent) custodial parents said they wanted the other parent to maintain contact
with their children.

Other studies also have found that custodial parents wish that there was more access. Based on his empirical study of divorce mediation services in four Canadian cities, C. James Richardson commented that, "many custodial parents express concern about the effects on their children of fathers' absence and the most commonly voiced complaint concerning access is that such rights are not exercised, or are exercised irregularly."[180] Although many custodial parents express the wish for more access, this does not necessarily mean that they are satisfied with their current terms of access, or want more access on any terms. Their wish for more access may in part be due to a sense of inequality in bearing the burdens of child-rearing, and an expression of blame toward the other parent for an inadequate contribution.

There is some evidence that custodial mothers become less close with their children following divorce. Wallerstein and Blakeslee report that of the mother-child relationships that were close when the family was intact, only half continued to be close during the decade following the divorce.[181]

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[179] D. Perry *et al.*, *Access to Children*, *ibid.*, at 71.

[180] C.J. Richardson, *Court-based Divorce Mediation in Four Canadian Cities: Overview of Research Results* (Ottawa: Minister of Justice, 1988) 36.

[181] J.S. Wallerstein & S. Blakeslee, *Second Chances* (New York: Ticknor & Fields, 1989).

Many researchers agree that parental separation creates a major crisis in the lives of most children,[182] and that the problem is exacerbated by the diminished parenting that tends to follow separation. In the year following separation, the parenting capacity of the custodial parent tends to deteriorate, probably because of the psychological and financial stresses that many separated parents experience.[183] At the time of separation, the parents may be so burdened by their own needs that they are temporarily unable to perceive or respond to their children's needs.[184] Parents who are newly employed may have to leave children alone after school or for long periods with baby-sitters or in day care for the first time. There is often a diminished level of communication between parents and children, as well as less affectionate contact. Discipline also becomes less consistent.[185] A custodial parent who is overburdened by new demands of juggling child care and work may require that even very young children make their own lunches, prepare themselves for school, and put themselves to bed.[186] Wallerstein concluded that as a result of these conditions, "there is mounting disorder, less discipline, less caretaking, and the anxiety driven sense among the children that the divorce has led to the loss of not one, but both parents."[187]

In light of the challenges facing custodial parents and the impact their behaviour has on children, many stress the importance of supporting the custodial parent. Many researchers identify a competent custodial parent as the most significant factor in predicting positive adjustments for children of divorce. Furstenberg and Cherlin concluded that "the most important factors in assuring the well-being of children after divorce are that the mother be an effective

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[182] J.S. Wallerstein, "The Long-term Effects of Divorce on Children: A Review" (1991) 30 J. Am. Academy of Child and Adolescent Psychology 349; J.B. Kelly, "Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice" (1988), 2 J. Fam. Psychology 119 at 122.

[183] J.S. Wallerstein & J.B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (New York: Basic, 1980).

[184] J.B. Kelly & J.S. Wallerstein, "Brief Interventions with Children in Divorcing Families" (1977) 47 Am. J. Orthopsychiatry 23 at 30.

[185] E.M. Hetherington *et al.*, "Effects of Divorce on Parents and Children," in M. Lamb, ed., *Non-traditional Families* (Hillsdale: Erlbaum, 1982); J.S. Wallerstein & J.B. Kelly, *Surviving the Breakup* (New York: Basic, 1980).

[186] J.S. Wallerstein, "Child of Divorce: An Overview" (1986) 4 Behavioral Sci. & L.105 at 109.

[187] *Ibid.*

parent, providing love, nurturing, a predictable routine, and consistent, moderate discipline, and that the children not be exposed to continual conflict between the parents."[188]

Support for the custodial parent is often identified as conflicting with a policy of encouraging participation by the access parent.[189] Goldstein, Freud, and Solnit argued that the custodial parent should be supported to the extent of being given veto power over access visits,[190] a proposal that has been widely criticized.[191] Goldstein responded to the criticism of his and his co-authors' text by stressing the value of access, saying "we did not and do not oppose visits. Indeed, other things being equal, courts, in order to accord with the continuity guideline, could award custody to the parent who is most willing to provide opportunities for the child to see the other parent."[192] The argument of Goldstein, Freud, and Solnit has been bolstered by recent studies, including the large-scale study conducted by Furstenberg *et al.* In that study it was found that the relationship of the child to the custodial mother was clearly associated with the child's well-being, outweighing the importance of contact with the access father significantly.[193]

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[188] F.F. Furstenberg & A.J. Cherlin, *Divided Families* (Cambridge: Harvard University Press, 1991) at 118. See also F.F. Furstenberg & C.W. Nord, "Parenting Apart: Patterns of Childrearing after Marital Disruption" (1985), 47 J. Marr. & Fam. 893; J. Guidubaldi & J.D. Perry, "Divorce and Mental Health Sequelae for Children: A Two-Year Follow-up of a Nationwide Sample" (1985) 24 J. Am. Academy of Child Psychiatry 531 at 536.

[189] See England, Law Commission, *Review of Child Law: Custody*, Working Paper No. 96 (London: HMSO, 1986) paras. 3.7 and 3.8, where various objectives of custody law are identified, including maintaining beneficial relationships and promoting a "secure and certain environment for the child ... in which the confidence and security of the person who is bringing him up may be an important element." The Law Commission that reconciling these two goals can cause "great difficulty," and suggested that in the case of conflicts between the two goals, priority should be given to the latter, reasoning, that this was "right in principle" and that "it is easier to predict what will promote the child's security in that home, which should not be put at risk for more speculative long-term aims."

[190] J. Goldstein, A. Freud, & A. Solnit, *Beyond the Best Interests of the Child*, rev'd ed. (New York: Free Press, 1979).

[191] M. Freeman, *The Rights and Wrongs of Children* (London: Pinter, 1983) 215-19. See also M. Freeman, "Taking Children's Rights More Seriously" (1992) Int'l J. L. & Fam. 52 at 55-56.

[192] J. Goldstein, "In Whose Best Interest" in J. Folberg, ed., *Joint Custody and Shared Parenting* (Washington: Bureau of National Affairs, 1984) 47 at 48.

[193] F.F. Furstenberg *et al.*, "Paternal Participation and Children's Well-being After Marital Dissolution" (1987), 52 Am. Sociological Rev. 695.

Furstenberg and Cherlin conclude from the more recent work on the relative importance of the custodial mother and the access father:

> This doesn't mean that we should abandon efforts to increase the involvement of divorced fathers in their children's lives. But for the near future, our chances of improving children's adjustment to divorce are probably better if we concentrate on supporting custodial parents and reducing conflict. More assistance to mothers and children and changes in family law carried out with those aims in mind will help the one million American children per year who must cope with their parents' divorce.[194]

2. Absence of Parental Conflict

While earlier research saw a link between delinquency and broken homes,[195] later studies posited that it is conflict associated with divorce, rather than the divorce itself, that is associated with delinquency.[196] Conflict between parents often precedes separation, and it is associated with relatively poor behaviour and educational achievement in children — whether or not the parents have separated — particularly in the case of boys.[197] Children with married parents who have a high degree of conflict have been found to be less well-adjusted than children whose parents are divorced and who live in a low-conflict environment.[198] One study found that children whose parents had a high degree of marital conflict were three times more likely to suffer psychological distress than children whose parents had a low or moderate degree of marital conflict before separation.[199]

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[194] F.F. Furstenberg & A.J. Cherlin, *Divided Families* (Cambridge: Harvard University Press, 1991) at 119.

[195] J. Kunz, "The Effects of Divorce on Children" in Stephen J. Bahr, ed., *Family Research: A Sixty-Year Review, 1930-1990* (New York: Lexington, 1992) 325.

[196] M. Rutter, *Maternal Deprivation Reassessed*, 2d ed. (Harmondsworth: Penguin, 1991) at 110.

[197] R.E. Emery, *Marriage, Divorce, and Children's Adjustment* (California: Sage, 1988); M. Rutter, *Maternal Deprivation*, *ibid*.

[198] E.M. Hetherington *et al.*, "Effects of Divorce on Parents and Children," in M. Lamb, ed., *Non-traditional Families* (Hillsdale: Erlbaum, 1982).

[199] J. Peterson & N. Zill, "Marital Disruption, Parent-Child Relationships, and Behavior Problems in Children" (1986), 48 J. Marr. & Fam. 295.

Disorders in children of divorcing parents are more likely to diminish if the divorce improves family relationships.[200] If parents continue to have a high degree of conflict after separation, children are more likely to have social and behavioural adjustment problems, particularly if there is physical violence between the parents.[201] Conflict between parents tends to have a damaging effect on parent-child relationships, whether or not the parents have separated.[202] Where parent-child relationships are maintained despite the parental conflict, children are less likely to suffer the negative effects.[203]

In a study of 100 children (ranging in age from one to 12) and their parents who were litigating the issue of custody or access and who had failed to reach agreement after mediation and lawyer negotiations, it was found that the parental interaction was very hostile and 71 per cent of the parents had engaged in physical violence against the other.[204] Less than five per cent of the children in this study were shielded from the parental conflict, and there was evident disregard for the children's safety and well-being. The children showed acute symptoms of distress; transition between the parents' homes was a particularly threatening event. Parents said that there was a marked change in the behaviour of the children at those times, such as severe withdrawal or zombie-like behaviour. Despite the anxiety associated with access, the children told researchers
that they wanted regular visits with both parents.

There were follow-up studies two and half years later as well as four and a half years after separation. It was found that the children were even more disturbed than in the initial study. In the four-and-a-half-year follow-up, it was found that children who were in court-ordered joint physical custody, or who had greater access because of court orders or mediated settlements that overrode the objections of one or both parents, were significantly more depressed and more

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[200] J.S. Wallerstein & J.B. Kelly, *Surviving the Breakup* (New York: Basic, 1980).

[201] J. Johnston *et al.*, "Ongoing Post-divorce Conflict: Effects on Children of Joint Custody and Frequent Access" (1989), 59 Am. J. Orthopsychiatry 605; M. Kline *et al.*, "Children's Adjustment in Joint and Sole Physical Custody Families" (1989), 25 Developmental Psychology 430.

[202] M. Richards, "Children, Parents and Families: Developmental Psychology and the Re-ordering of Relationships at Divorce" (1987), 1 Int'l J. L. & Fam. 295.

[203] R.D. Hess, "Post-divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children' (1979) 35 J. Social Issues 79; M. Richards, "Joint Custody Revisited", [1989] Fam. L. 19 at 84.

[204] M. Kline & J.M. Tschann, "Ongoing Post-divorce Conflict" (1989), 59 Am. J. Orthopsychiatry 576.

withdrawn compared to the other children. Parent-child relationships had deteriorated in the families with joint physical custody.

A study of 58 divorced/separated families from the Greater Toronto Area included 58 children between the ages of four and 12. Here it was also found that frequent access and high levels of parental conflict led to negative emotional processes and behavioral adjustments in the children. The researcher concluded:

> The presence of post-divorce interparental conflict is never a blessing for any children. Children who maintain consistent contact with both parents further reacted with anger in such a situation. Many of them attempted to seek support from parents by asking them not to fight; a strategy which may further worsen their behavioral adjustment. Children's negative emotional processes serve to reduce the beneficial aspects of both parents' continued involvement in children's life in a high-conflict situation.[205]

Although frequent and continuing contact with both parents was linked with better behavioural adjustment, this was not the case where that contact was associated with high levels of parental conflict.

3. Continuing Relationships with Both Parents

In many Anglo-American jurisdictions, there is evidence that a significant percentage of access fathers withdraw physically, emotionally, and financially from their children, and that this withdrawal increases over time.[206] Data from the 1987-88 U.S. National Survey of Families and Households revealed that three to five years after separation, only one-third of children saw their father weekly; 18 per cent saw their father once a year or not at all. Ten years after separation, only 12 per cent saw their father weekly; half never saw their father or saw him only once a year. Three to five years after separation, 36 per cent of fathers paid no child support at

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[205] M. Lee, "Post-Divorce Interparental Conflict, Children's Contact with Both Parents, Children's Emotional Processes, and Children Behavioral Adjustment" (1997), 27 J. Divorce & Remarriage 61 at 79.

[206] C.E. Depner & J. H. Bray, "Modes of Participation for Noncustodial Parents: The Challenge for Research, Policy, Practice, and Education" (1990), 39 Fam. Relations 378; F. Furstenburg *et al.*, "The Life Course of Children of Divorce: Marital Disruption and Parental Contact" (1983), 48 Am. Sociological Rev. 656; E.M. Hetherington *et al.*, "Divorced Fathers" (1976), 25 Fam. Coordinator 417; J.A. Seltzer & S.M. Bianchi, "Children's Contact With Absent Parents" (1988), 50 J. Marr. & Fam. 663; J.A. Seltzer, "Relationships Between Fathers and Children Who Live Apart: The Fathers' Role After Separation" (1991), 53 J. Marr. & Fam. 79.

all; and this increased to 54 per cent after 10 years.[207] A Canadian study that looked at access in the context
of divorce in the late 1980s found that over 40 per cent of parents granted access did not see their children at all or saw them no more than once a month. Generally, the involvement of access parents was found to be low, and there was a process of gradual disengagement from participation in active parenting over time.[208] In a 1985 Canadian review of studies on child support default rates, it was found that 50-75 per cent of access parents failed to honour their child support obligations.[209]

Wallerstein and Blakeslee reported that after 10 years, few of the children in their study continued to have a close relationship with both parents. Even though a relatively high percentage of the fathers continued to visit regularly, very few maintained an emotionally rich relationship with their children.[210] In a large-scale 1981 study conducted by Furstenberg *et al.*, it was found that 23 per cent of the fathers had had no contact with their children during the past five years, and an additional 20 per cent had not seen their children during the past year. It was found that when a relationship between the access parent and child did exist, it was primarily social; access parents rarely participated in the discipline or training of their children.[211]

Reasons offered for the physical and emotional disengagement of fathers are various, and a distinction may be drawn between reasons offered by access fathers, by custodial mothers, by third parties, and by researchers. Those given by custodial and access parents may be assessed in light of a possible underestimation by many parents of their own responsibility for the disengagement, and the greater knowledge each parent has with regard to his or her own circumstances and motivations. Researchers too may overemphasize the responsibility of one parent, particularly if their sample group includes only custodial parents or only access parents.

Ninety per cent of the 40 disengaged fathers in Kruk's study reported that discouragement or denial of access by the custodial mother was a reason for their disengagement. Additional reasons cited were: they had decided to cease contact (33 per cent); there were practical difficulties, such as distance, finances, or their work schedule (28 per cent);

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[207] J.A. Seltzer, "Relationships Between Father and Children," *ibid*.

[208] Canada, *The Evaluation of the Divorce Act* (Ottawa: Department of Justice, 1990).

[209] E. Finnbogason & Monica Townson, *The Benefits and Cost Effectiveness of a Central Registry of Maintenance and Custody Orders* (Ottawa: Status of Women, 1985).

[210] J.S. Wallerstein & S. Blakeslee, *Second Chances* (New York: Ticknor & Fields, 1989).

[211] F.F. Furstenberg, Jr. & C.W. Nord, "Parenting Apart" (1985), 47 J. Marr. & Fam. 893.

the children did not want contact (18 per cent); a legal injunction prevented access (16 per cent); and there was an early pattern of no contact (five per cent).[212]

Several studies show that a conflictual relationship between the father and mother and little discussion regarding child-rearing are associated with withdrawal by the access father.[213] A number of studies report that negative feelings of fathers after divorce may be linked to disengagement. Some access fathers report feelings of loss, guilt, anxiety, depression, and low self-esteem.[214] Some are dissatisfied with the custodial arrangements, and feel they lack influence over their children.[215] Some express a feeling of being treated unfairly, and exhibit hostility toward their ex-wives and their lawyers and anger and frustration with the legal system.[216] Some access parents also report feeling a sense of inequality in regard to their parenting role because of the new label assigned to them (i.e., "noncustodial parent"). This sense of inequality, generated by the language, led many custody disputes to become focused on power and the right to participate in
the lives of their children.[217]

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[212] E. Kruk, *Divorce and Disengagement* (Halifax: Fernwood, 1993) 71.

[213] C. Ahrons, "Predictors of Paternal Involvement Postdivorce: Mothers' and Fathers' Perceptions" (1983), 6 J. Divorce 55; E.M. Hetherington *et al.*, "Divorced Fathers" (1976), 25 Fam. Coordinator 417; M.E. Lund, "The Noncustodial Father: Common Challenges in Parenting After Divorce," in C. Lewis & M. O'Brian, eds., *Reassessing Fatherhood* (Lexington: Lexington, 1987) 173.

[214] A. D'Andrea, "Joint Custody as Related to Paternal Involvement and Paternal Self-esteem" (1983), 21 Conciliation Cts. Rev. 81; J. Grief, "Fathers, Children, and Joint Custody" (1979),
49 Am. J. Orthopsychiatry 311; E.M. Hetherington *et al.*, "Divorced Fathers" (1976) 25 Fam. Coordinator 417; H.J. Friedman, "The Father's Parenting Experience in Divorce" (1980) 137 Psychiatry 1177; J.R. Stewart *et al.*, "The Impact of Custodial Arrangements on the Adjustment of Recently Divorced Fathers" (1986) 13 J. Divorce 55.

[215] A. D'Andrea, "Joint Custody as Related to Paternal Involvement," *ibid.*; J. Grief, "Fathers, Children, and Joint Custody," *ibid.*; D. Luepnitz, *Child Custody* (Lexington: Lexington, 1982); and S. Steinman, "The Experience of Children in a Joint Custody Arrangement: A Report of a Study" (1981) 51 Am. J. Orthopsychiatry 403.

[216] J.A Arditti & Katherine R. Allen, "Understanding Distressed Fathers' Perceptions of Legal and Relational Inequities Postdivorce" (1993) 31 Fam. Conciliation Cts. Rev. 461.

[217] J. Pearson & N. Thoennes, "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation" (1984) 17 Fam. L.Q. 497.

Some suggest that another reason for the disengagement of fathers is that many of them assume caretaking responsibilities in second families. In effect, they "trade" one set of children for another, sometimes assuming responsibility for step-children and sometimes having more children with a new partner. If the father cannot afford to support two families, he is more likely to choose to support the family with which he lives. His access to the children of his first family may then terminate because of the mother's anger at his failure to pay child support, the children's feelings of abandonment, or his confused feelings about abandoning the children.[218]

Researchers have looked mainly at post-divorce withdrawal, but there is some evidence that paternal disengagement begins well before separation. In a 10-year study of personality and cognitive development of children in 110 families (41 of whom experienced divorce during the study), it was found that the fathers who eventually divorced withdrew from their children long before the crisis period and end of the marriage. Paternal disengagement and unreliable behaviour — particularly with regard to sons — coincided with the mother's wish that the father would become more involved in parenting.[219] If indeed disengagement develops before separation, explanations relating to post-separation variables may be regarded as partial. Efforts to address
the disengagement of fathers, however, have focused on post-separation variables, such as custody and access language. The fact that paternal disengagement begins before separation and may continue regardless of what happens afterward has been given little attention.

On the issue of child support and access, Haskins, in his study of North Carolina fathers, found that some access fathers have genuine difficulties in meeting their child support obligations. Haskins found that the men considered only unemployment and the failure of the mother to spend money on the children valid reasons for nonpayment. Some of the access fathers were bothered
by their lack of control over how support money is spent.[220] Some researchers offer evidence that access fathers who feel alienated from their children are less likely to pay child support regularly.[221] Although no causal link is drawn between support default and access problems, there is an association between support default and irregular or problematic access, where the

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[218] N. Weisman, a Canadian judge, makes this argument in "The Second Family in the Law of Support" (1984) 37 R.F.L. (2d) 245 at 268.

[219] J.H. Blocke *et al.*, "The Personality of Children Prior to Divorce" (1986), 57 Child Development 827.

[220] R. Haskins, "Child Support: A Father's View," in S. Kamerman & A. Kahn, eds., *Child Support: From Debt Collection to Social Policy* (Newbury Park: Sage, 1988) at 306.

[221] N. Pearson & J. Thoennes, "Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments" (1990), 22 Fam. L.Q. 319.

greatest levels of default coincide with no access or extremely problematic access.[222] Furstenberg and Cherlin point out that whatever their access experience, men tend to drift away, emotionally and financially, and invest their resources in their new households. They fail to pay child support because "they can get away with it."[223] Wallerstein and Blakeslee found that child support stopped abruptly when the children in their study reached the age of 18 — even fathers who were affluent did not pay support when they were no longer legally obliged to do so.[224]

The emotional and financial disengagement of fathers is an evident concern of policy-makers and law reformers,[225] and this is perhaps particularly the case in England and Wales. The importance of both parents maintaining responsibility for children has been stressed as a crucial policy behind the *Children Act* and the *Child Support Act.*[226] These pieces of legislation abandon the traditional "custody/access" model in favour of continuing shared parental responsibility after separation, and aim to ensure payment of adequate child support by the "nonresidential" parent. Virginia Bottomley, as Secretary of State for Health and Social Services, wrote, "People embarking on parenthood, at whatever age and in whatever circumstances, should recognise the lifetime duties it entails."[227]

The attempt to keep access fathers connected with their children by providing for continuing shared parental responsibility, or joint custody, is a goal that seems to follow from the social science evidence on the diminished life chances of children raised by single mothers and, more immediately, on the connection between father involvement after separation and child support compliance rates.[228] It is not clear, however, whether such legislative changes do cause

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[222] J. Pearson *et al.*, "Child Support in the United States: The Experience in Colorado" (1992),
6 Int'l J. L. & Fam. 321.

[223] F.F. Furstenberg & A.J. Cherlin, *Divided Families* (Cambridge: Harvard University Press, 1991) at 60.

[224] J.S. Wallerstein & S. Blakeslee, *Second Chances* (New York: Ticknor & Fields, 1989).

[225] Department of Justice Canada, *Custody and Access: Public Discussion Paper* (Ottawa: Ministry of Supply and Services, 1993) at 17.

[226] U.K., *Child Support Act 1991* (1991 c. 48).

[227] V. Bottomley, "Even Divorce Doesn't Change A Child's Need for Parents" (29 May 1994) *Sunday Express* 15. See also K. Whitehorn, "Plight Your Troth to Your Kids" (29 May 1994) *The Observer* 25.

[228] See, e.g., E. Maccoby & R.H. Mnookin, *Dividing the Child* (Cambridge: Harvard University Press) at 251-257, where it is reported that in a study of 1,100 California families the

access fathers to remain more involved with their children, or whether involved access fathers reduce the phenomenon of diminished life chances for children of divorced and separated parents. Maccoby and Mnookin have concluded that "joint legal custody is neither the solution to the problem of maintaining the involvement of divorced fathers, nor a catalyst for either increasing or softening conflict in divorcing families."[229]

Most research on access involves custodial mothers and access fathers; there has been relatively little investigation of access mothers. Anecdotal and impressionistic evidence suggests that mothers without custody are viewed more negatively than access fathers.[230] Mothers without custody are a minority, and may therefore be regarded as unusual. Generally, mothers are regarded as having stronger ties with their children than fathers; so mothers who consent to paternal custody may therefore be considered "unnatural." A perception that mothers are more likely to seek custody and are favoured in custody determinations carries with it the assumption that there must be something wrong with mothers who lose custody.

Such studies as are available indicate that access mothers tend to stay more involved with their children than do access fathers. Some access mothers follow the pattern of disappearing from their children's lives, but this is less likely to happen than in the case of access fathers. In Grief's study, 15 per cent of custodial mothers reported that access fathers never saw the children, compared with nine per cent of custodial fathers who reported that access mothers never saw the children.[231] Maccoby and Mnookin reported that while children tended to see their access fathers less as time went on, they tended to see access mothers more.[232] In their report on adolescents, Buchanan *et al*. reported that only 4.1 per cent of father-resident adolescents had not seen their access mother for at least a year, while 7.5 per cent of mother-resident adolescents had

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level of contact between the access father and the child was a strong predictor of compliance rates.

[229] E. Maccoby & R.H. Mnookin, *Dividing the Child* (Cambridge: Harvard University Press, 1992) at 289. See also F.F. Furstenberg & A.J. Cherlin, in *Divided Families* (Cambridge: Harvard University Press, 1991) at 116-117, where the authors canvass alternative legal standards for custody determination and conclude that "the empirical basis for choosing among these alternatives is still rather thin. In fact, the distinctions among all the legal standards seem to be modest; in all cases most children live with their mothers and most of their fathers will play a relatively small part in their upbringing."

[230] R. Jackson, *Mothers Who Leave* (London: Pandora, 1994); G.L. Grief, *Single Fathers* (Lexington: Lexington, 1985) 102.

[231] G.L. Grief, *Single Fathers* (Lexington: Lexington, 1985) 139.

[232] E.E. Maccoby & R.H. Mnookin, *Dividing the Child* (Cambridge: Harvard University Press, 1992) at 197.

not seen their father.[233] The reasons for access mothers becoming estranged from their children may be somewhat different, as well. For example, there is some research to show that custodial fathers may be more likely than custodial mothers to give negative information to the children about the other parent.[234]

Access mothers are less well-off and less likely to be ordered to pay child support than access fathers. In a sample of 731 custodial parents, selected randomly from Colorado households with telephones, it was found that six per cent were fathers with sole custody. In nearly half of these cases (46 per cent), there was no order for the access mother to pay child support. In cases where child support was ordered, the amounts were lower ($138/month) than those ordered for access fathers ($192/month). Default rates were the same for mothers as for fathers. Access mothers were more likely than access fathers to maintain contact with their children, even if they had defaulted on their child support payments.[235] Greif found that access mothers with higher incomes were more likely to be paying child support, and that the more contact there was between the father and mother, the more apt the mother was to be paying something.[236]

Children are more likely to experience a positive adjustment after divorce if they have and maintain a good relationship with both parents.[237] Regular access has been identified as a significant factor contributing to a positive adjustment by children after parental separation.[238] Research suggests that the quality of the parent-child contact is more important than the quantity. Hess and Camera found that infrequent access did not lessen the child's sense of the importance

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[233] C.M. Buchanan *et al.*, *Adolescents After Divorce* (Cambridge: Harvard University Press, 1996) at 162. This book is based on a follow-up study to the 1,100 California families that were part of the Stanford Custody Project. The first part of the study was reported in *Dividing the Child*, *ibid*.

[234] J. DeFrain & R. Eirick, "Coping as Divorced Single Parents: A Comparative Study of Mothers and Fathers" (1981), 30 Fam. Relations 265; J.L. Fischer & J.M. Cardea, "Mother-Child Relationships of Mothers Living Apart From Their Children" (1982) 5 Alternative Lifestyles 42.

[235] J. Pearson *et al.*, "Child Support in the United States: The Experience in Colorado" (1992),
6 Int'l J. L. & Fam. 321 at 332.

[236] G.L. Grief, *Single Fathers* (Lexington: D.C. Heath, 1985) 111.

[237] D.A. Luepnitz, *Child Custody* (Lexington: Lexington, 1982).

[238] Y. Walczak & S. Burns, *Divorce: The Child's Point of View* (London: Harper & Row, 1984).

of the relationship with the access father.[239] In a study of children in boarding schools, it was found that many felt close to their parents despite the fact that they saw their parents infrequently. Researchers commented that "perceptions of links did not correspond with the frequency of contact and children felt close to absent parents who they knew would act in their interests as and when necessary."[240]

The most widely cited study supporting the value of continuing contact is Wallerstein and Kelly's *Surviving the Breakup*.[241] The sample for this study consisted of 131 children, ranging in age from three to 18 at the time of separation. They were from mostly white, well-educated, middle-class families. Although this was a particularly troubled group of 60 families, none of the children in the study were developmentally delayed and all were functioning within normal limits at the time of the separation. They were studied with their parents in clinical interviews around the time of separation, and subsequently at 18 months and five years. There was no control group. Researchers found a diminished capacity to parent in many of the families; many parents were unaware of their children's emotional needs. Many of the children were not consulted about access arrangements, and most yearned for their absent fathers. At the five-year follow-up, it was found that the most crucial factors for positive adjustment were the quality of relationships within the post-divorce family, and the extent to which the family had created a nurturing environment for the children. One-third of the children were experiencing moderate to severe depression.

Wallerstein continued the study and reported on 10-year and 15-year follow-ups.[242] At the 10-year follow-up, many of the children still spoke sadly of the emotional and economic deprivation they had experienced. Half of the children continued to have reconciliation fantasies. Their relationships with the access fathers were still important to them, whether visits were frequent or infrequent. During adolescence, many of the children felt a need to establish closer relationships with absent fathers. The older children, who ranged in age from 19 to 29 at the 10-year follow-up, continued to regard their parents' divorce as the major formative experience of their lives. *Second Chances*, a report on the 10-year follow-up, was a popular success but widely criticized by researchers in the field. Behind much of the criticism was the concern that

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[239] R.D. Hess & K.A. Camera, "Post-divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children" (1979), 34 J. Social Issues 79.

[240] S. Millham *et al.*, *Lost in Care* (Hants: Gower, 1986) at 16.

[241] J.S. Wallerstein & J.B. Kelly, *Surviving the Breakup: How Children and Parents Cope With Divorce* (New York: Basic Books, 1980).

[242] J.S. Wallerstein & S. Blakeslee, *Second Chances* (New York: Ticknor & Fields, 1989).

the book identified divorce itself to be associated with a variety of negative outcomes for children, thereby supporting the claims of traditionalists who oppose liberal divorce laws and argue that divorce is immoral and pathological. As well, the book's suggestion that joint custody was no better than traditional sole custody was criticized as being "based on unfinished, small-scale research done
in Wallerstein's own centre, largely ignoring research done elsewhere."[243] That many of the criticisms with regard to Wallerstein's method (for example, the criticisms of sample bias and lack of control group) would also apply to the widely cited Wallerstein and Kelly research gives some indication of the charged ideological background of much of this kind of research. The importance of a continuing relationship with both parents was the argument of *Surviving the Breakup*. This argument has been the received idea informing access reform and the project of "wooing" the access father over the last decade.

The maintenance of a relationship with the access father was found to be an important factor in positive outcomes for children in some studies. More recent studies, however, call into question this emphasis.[244] The large-scale study conducted by Furstenberg *et al.* found that fathers did indeed tend to disengage from their children; it did not, however, draw the conclusion that paternal contact benefits the child. They found that children who had not seen their fathers in five years appeared often to be doing better on a range of behavioural and academic measures than children who had seen their fathers frequently or more recently. They concluded that, "[o]n the basis of our study, we see no strong evidence that children will benefit from the judicial or legislative interventions that have been designed to promote paternal participation, apart from providing economic support."[245] Similarly, Buchanan *et al.* reported that the level of access was not important to the post-separation adjustment of adolescents. The study found that "[e]ven adolescents who rarely or never saw their nonresidential parents were, on average, adjusting as well as adolescents who saw their nonresidential parents on a regular basis."[246] In a review of recent studies of various custody arrangements, Johnston concluded that "more substantial

[243] D. Bagshaw, "Children of Divorce in Britain and the United States: Current Issues in Relations to Child Custody and Access" (1992) 6 Aust'n J. Fam. L. 32 at 47.

[244] R.E. Emery, *Marriage, Divorce, and Children's Adjustment* (Beverly Hills: Sage Publications, 1988) 85-88.

[245] F.F. Furstenberg *et al.*, "Paternal Participation and Children's Well-being After Marital Dissolution" (1987) 52 Am. Sociological Rev. 695.

[246] C.M. Buchanan *et al.*, *Adolescents After Divorce* (Cambridge: Harvard University Press, 1996) at 262.

amount of access/visitation, in itself, was associated with neither better nor worse outcomes in these children."[247]

Martin Richards, on the other hand, noted the downward social mobility of children of divorce, and that access fathers have the potential to contribute not just child support but other material assistance, as well as access to a broader kinship group that is also a source of material assistance. He suggests that more attention should be paid to the long-term implications for children. He wrote, "Doing all we can to maintain children's parental relationships and kin network through divorce may be much more important than those concerned with the immediate aftermath of divorce have suggested."[248] This distinction between the implications of father loss on life chances as opposed to psychological adjustment following separation is important. It has been noted that the loss of a father after separation is a common experience for children. The significant impact of this loss is enhanced when it carries with it a loss of the father's side of the family, as well. The loss of emotional, social, and material support that extended family members may provide may be linked with the general pattern of downward social mobility that is associated with parental divorce.[249] The conclusions of those who focus on adjustment following separation and do not fully consider the issue of life chances may under-emphasize the impact of father loss.

4. Policy Implications of Social Science Evidence

The social science data on the effect of the well-being of the custodial parent, the absence of conflict, and a continuing relationship with both parents on children does not assist courts substantially in determining the best interests of the child. This is because they appear to lead to different results. One Canadian judge commented on this dilemma:

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[247] J.R. Johnston, "Children's Adjustment in Sole Compared to Joint Custody Families and Principles for Decision Making" (1995), 33 Fam. & Conciliation Cts. Rev. 415 at 419.

[248] M. Richards, "Children and Parents and Divorce," in J. Eekelaar & P. Sarcevic, eds., *Parenthood in Modern Society* (Dordrecht: Martinus Nijhoff, 1993) 307 at 314.

[249] For evidence of the downward social mobility see M. MacLean & M.E.J. Wadsworth, "The Interests of Children After Parental Divorce: A Long-term Perspective" (1988), 2 Int'l J. L. & Fam. 155. This study draws on the MRC National Survey of Health and Development, which includes 5,362 children born in March 1946. The link between loss of kinship ties and downward social mobility is posited in G.C. Kitson & L.A. Morgan, "The Multiple Consequences of Divorce: A Decade Review" (1990), 52 J. Marr. & Fam. 913; M. Richards, "Children and Parents and Divorce," in J. Eekelaar & P. Sarcevic, *Parenthood in Modern Society* (Dordrecht: Martinus Nijhoff, 1993) 307.

> If the custodial parent's ability to function, despite the separation, may be the main influence on children's long-term outcomes, courts should exercise caution before adding to the parent's stress by dismissing his or her stated fears for the children, and mandating the increased contact between estranged ex-spouses that access can bring. On the other hand, if an ongoing relationship with the non-custodial parent can help mitigate the harmful effects of parental separation, ordering access seems attractive, despite the custodial parent's objections. Ordering access, however, can bring this third factor into play. Increased parental contact can revive chances of being harmed.[250]

In addition to uncertainty as to whether priority should be given to maintaining the relationship with the access parent when it conflicts with avoiding conflict or supporting the custodial parent, there is also a paucity of evidence on the effects of increased involvement of the access father on the life chances of children of divorce. Although there is evidence of higher child support compliance rates in cases of regular access, which benefits children, custodial parents, and the state, it is not clear that regular access and higher compliance rates shelter children from the negative effects of parental divorce and separation. Regardless of the quality and frequency of access, it may not be an adequate substitute for an intact family. As Wallerstein and Blakeslee said: "[I]t is difficult to transplant the father-child relationship from the rich soil of family life to the impoverished ground of the visiting relationship."[251]

Despite conflicting social science evidence, maintaining a relationship with the access parent has been a dominant policy goal pursued in many jurisdictions, particularly those with presumptive joint custody or continuing shared parental responsibility after separation. Judges may give effect to the policy of maintaining the relationship with the access parent without considering whether their decisions will generate parental conflict or undermine the functioning of the custodial parent.

Many commentators have emphasized the social science evidence on the importance of continuing contact with the access parent in formulating their arguments on custody and access policy. Michael Freeman critiqued Goldstein, Freud, and Solnit's book *Beyond the Best Interests of the Child*, in which the authors argued in favour of giving the custodial parent control over access.[252] His own arguments for educating parents on the importance of access visits to their children, and for increased state supervision of access arrangements, drew on Wallerstein's

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[250] N. Weisman, "On Access After Parental Separation" (1991), 36 R.F.L. (3d) 35.

[251] J.S. Wallerstein & S. Blakeslee, *Second Chances* (New York: Ticknor & Fields, 1989) at 234-235.

[252] J. Goldstein, A. Freud & A.J. Solnit, *Beyond The Best Interests of the Child* (New York: Free Press, 1979) (first published 1973).

and Kelly's research findings on the importance of continuing contact.[253] Susan Maidment also rejected the Goldstein, Freud, Solnit argument. She looked at Wallerstein and Kelly, as well as other available studies on children of divorce, and concluded that "it is in the child's best interests to maintain a continuing relationship with both natural parents, and the closer and more normal
that relationship can be, for example through staying [i.e., overnight] access, the better it is for the child."[254] Like Freeman, Maidment recommended increased judicial supervision and the education of parents.[255] Maidment examined studies on a child's distress after divorce, his or her yearning for the absent parent, and the beneficial effects of continuing involvement by the access parent. From these studies, she concluded that "[t]he law's current insistence that access ... is the right of the child to 'know' both his parents despite their divorce, thus accords with the policy implications of the social science evidence."[256]

Some judges, law-makers, and commentators have emphasized the goals of avoiding conflict and supporting the custodial parent. Although few have adopted the argument of *Beyond the Best Interests of the Child* (that custodial parents should have control over whether and how access is exercised), some have argued against presumptive joint custody or continuing shared parental responsibility, on the grounds that parents may be unable or unwilling to cooperate after separation, and that joint custody arrangements may generate conflict. For example, Justice L'Heureux-Dubé, after an extensive review of selected social science evidence, argued against expanding the role of the access parent, "unbundling" the incidents of custody, and distributing such incidents between the two parents, stating:

> It is to avoid the spectre of the child as the field upon which the battle of competing parental rights is played out that the law confirms the authority of the custodial parent. This policy serves two functions: it precludes such contests entirely and it provides the necessary support to the parent who bears the responsibility for the child. The wisdom of this approach lies in recognizing the ease with which the interests of the child could be obscured or forgotten were courts to get into the business of parcelling out jurisdiction

[253] M. Freeman, *The Rights and Wrongs of Children* (London: Pinter, 1983) 215-19. Freeman's antipathy to the Goldstein, Freud, Solnit argument appears to be unabated: M. Freeman, "Taking Children's Rights More Seriously' (1992), Int'l J. L. & Fam. 52 at 55-56.

[254] S. Maidment, *Child Custody and Divorce* (London: Croon Helm, 1984) at 253.

[255] *Ibid.*, at 254-256.

[256] *Ibid.*, at 254.

over the emotional, spiritual and physical welfare of the child between parents who no longer agree.[257]

As well, some judges and policy-makers support a "presumptive deference" in favour of the custodial parent when disputes arise in relation to access. They invoke social science evidence on the negative impact of parental conflict on children to support their arguments. For example, in supporting restrictions on an access father's right to involve the child in religious activities during access visits, Justice L'Heureux-Dubé argued in favour of presumptive deference to custodial parents in access disputes in order to minimize conflict between parents. She stated that such conflict "is the single factor which has consistently proven to be severely detrimental to children upon separation or divorce."[258] Presumptive deference to the custodial parent in access disputes may avoid conflict (although this is by no means clear); it may, however, put at risk the child's interests where the custodial parent acts contrary to them.

The English Law Commission considered various objectives of custody law. It noted the difficulty of reconciling two of these objectives — encouraging the continuation of beneficial relationships "to the maximum extent possible," and promoting "a secure and certain environment for the child while he is growing up, in which the confidence and security of the person who is bringing him up may be an important element."[259] The Law Commission concluded that where these objectives are evenly balanced, priority should be given to the latter goal of promoting a secure environment and supporting the functioning of the custodial parent. The Commission
stated: "Not only do we think this right in principle, once it has been determined where the child will have his home; we also believe that it is easier to predict what will promote the child's security in that home, which should not be put at risk for more speculative long-term aims."[260] The Law Commission, however, expressed the hope "that the law can be so framed as to encourage rather than to impede the achievement of both objectives."[261]

Social science evidence on the effects of separation on children suggests that efforts should be made to promote the functioning of the custodial parent, minimize parental conflict, and promote continued contact with both parents. The evidence on which of these objectives

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[257] *Young*, at 222.

[258] *Ibid*.

[259] England, Law Commission, *Review of Child Law: Custody*, Working Paper No. 96 (London: HMSO, 1986) at 82.

[260] *Ibid.*, at 83.

[261] *Ibid.*

should be given priority is inconclusive. Selective use of social science evidence to support presumptions or
"sub-rules" as to what is in the best interests of the child is problematic. As the English Law Commission stated, "the conclusions drawn from theory or empirical observation may differ so widely that their usefulness in terms of legal policy is difficult to determine."[262]

In the case of proposed relocations that will hinder access, a conflict arises between the goal of maintaining frequent and continuing contact with both parents, and that of maintaining stability in the child's relationship with the custodial parent. Social science evidence on such issues as the importance of supporting the custodial parent and the importance of maintaining a relationship with both parents does not resolve the question of what is in the best interests of the child in relocation cases, because it leads to conflicting results.[263] Existing empirical evidence on the effect on children of various patterns of post-separation parenting does not support the adoption of particular presumptions or rules in relation to relocation disputes.

D. Principles to Govern Relocation Disputes

This section will address the research questions: When and to what extent should the child's wishes influence an assessment of what is in the best interests of the child, and what impact should the United Nations Convention on the Rights of the Child have on relocation disputes? What principles should inform an assessment of the best interests of the child, when either parent wishes to relocate to a place that will disrupt the child's contact with the other parent? How can
the Divorce Act *take into account the social and economic need of a parent to relocate within the framework of the best interests of the child? Should Canada adopt a presumption in favour of the primary caregiver? What weight should be given to the principle of maximum contact with both parents in determining the best interests of the child in the context of a relocation dispute? How can relocation disputes best be resolved and what is the role of the law?*

1. Rights and Interests of the Child

The best interests of the child is the test for determining all issues relating to custody and access, including relocation. This test can be difficult to apply; it requires the court to make a highly discretionary prediction about a particular child in the absence of clear guidelines as to

[262] *Ibid.*, at 81.

[263] The same general conclusion was reached by O. Bourguignon, J.-L. Rally & I. Théry in *Du divorce et des enfants*, coll. Ined (Paris: P.U.F., 1985) 33-114 at 98.

what factors should be given most weight in that particular case. The standard is often criticized on the grounds that it allows judges to give effect to their own assumptions and biases. Because its indeterminate nature results in uncertainty, conflict between parents, and an increased likelihood of litigation or more protracted litigation, it can actually cause harm to the child.[264] Those who criticize the best interests of the child standard often support presumptions or "sub-rules" in favour of one parent or another. The proposed presumptions and sub-rules, however, have the effect of undermining the best interests of the child principle. The individualized inquiry into the best interests of each child should be maintained, in order to promote the most positive outcomes for children following parental separation.

The English Law Commission has provided a helpful discussion on the "welfare principle" (i.e., the best interests of the child principle), and whether it should be replaced by a more rule-governed system.[265] It concluded that it should not be, stating:

> There are various arguments for modifying the paramountcy rule [i.e., the rule that the best interests of the child should be the paramount consideration], but the indications are that it needs to be strengthened rather than the reverse. It is an important statement of the principle that adults are expected to put the children's welfare before their own and any modification could put the welfare of the children seriously at risk.[266]

The English Law Commission acknowledged the "inconsistency and subjectivity in applying the welfare test." It suggested that checklists of factors to be taken into account may be helpful in countering this inconsistency, and that "a factor which should always be considered is the wishes and feelings of the child himself to the extent that this is appropriate in view of his age and understanding."[267]

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[264] For a summary of criticisms of the best interests standard, see J.L. Dolgin, "Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies" (1996) 28 Ariz. State L.J. 473 at 495-98. See also A. LaFrance, "Child Custody and Relocation: A Constitutional Perspective" (1995-96) 34 U. Louisville J. Fam. L. 1 at 125: "The confusing nature and unclear standards of custody decisions in relocation cases lead inevitably to protracted litigation. This leads, in turn, to months or years of instability, disruption, and turmoil in the lives of the children who might otherwise have long since successfully adjusted to a move."

[265] England, Law Commission, *Review of Child Law: Custody*, Working Paper No. 96 (London: HMSO, 1986) 179-209.

[266] *Ibid.*, at 216.

[267] *Ibid.*, at 217.

Goertz identifies the views of the child as one factor to consider in determining the best interests of the child in relocation cases. This is consistent with Canada's general laws in relation to custody and access, and with Canada's obligations under Article 12 of the UN Convention on the Rights of the Child. The UN Convention provides that the wishes of the child are to be considered in custody and access decisions and given due weight in accordance with the age and maturity of the child.

The Supreme Court of California explicitly cited the wishes of the child as a factor to consider[268] where the child is old enough to express a preference. It noted that:

> *amica curiae* Professor Judith S. Wallerstein, who has published extensively on issues concerning children after divorce, observes that for "reasonably mature adolescents, i.e., those who are well adjusted and performing on course in their education and social relationships ... stability may not lie with either parent, but may have its source in a circle of friends or particular sports or academic activities within a school or community." She suggests that "[t]hese adolescents should be given the choice ... as to whether they wish to move with the moving parent."[269]

Other jurisdictions have given effect to the choice of adolescent children in relocation cases. The Wyoming Supreme Court respected the wish of a 15-year-old son not to move away, but to stay in his home town to finish high school with his friends (and therefore be in the custody of his father). At the same time, the Court ordered that the 11-year-old daughter move with her mother.[270] In their study of adolescents in California, Buchanan *et al.* found that when the adolescents in their study had changed residences, the most common reason for the change was a relocation by one or both parents. They also found that the change was usually the adolescent's own choice, and that adolescents were motivated by a desire to stay near friends or to finish school at the same school they had been attending.[271] The views of older, mature children should be given effect, except in unusual cases where this is not in the best interests of the child.

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[268] *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1966).

[269] *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996) footnote 11. Wallerstein's general position, however, was that when "a child is *de facto* in the primary residential or physical custody of one parent, that parent should be able to relocate with the child, except in unusual circumstances": J.S. Wallerstein & Tony J. Tanke, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce" (1996), 30 Fam. L.Q. 305 at 318.

[270] *Love* v. *Love*, 851 P.2d 1283 (Wyo. 1993).

[271] C.M. Buchanan *et al*., *Adolescents After Divorce* (Cambridge: Harvard University Press, 1996) at 32-33.

Article 9 of the UN Convention on the Rights of the Child provides that "States Parties shall ensure that a child shall not be separated from his or her parents against their will" except in accordance with the best interests of the child. Further, it provides that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." "Maintain" suggests that the right requires a pre-existing relationship, not simply a legal or biological tie. In cases where there is a pre-existing relationship, a child has a right to maintain contact on a regular basis unless it would be contrary to the child's best interests. Thus, Canada has an obligation to ensure any decision that will interrupt regular contact between a child and a parent (e.g., a decision to allow the custodial parent to relocate) will be made under the best interests of the child test.

The notion that access is a right of the child is not only set out in the UN Convention on the Rights of the Child, but was also enunciated in the 1987 case of *Frame* v. *Smith*,[272] and subsequent court decisions. Access as a right of the child was seen as inevitably following the adoption of the best interests of the child standard, and indeed, is inextricably linked with the child's best interests. The right, then, was a right to have an access order made that was in the best interests of the child. The child's right to have access that promotes his or her welfare should override a parent's right to access (though in practice there is a strong operative assumption that access is in the best interests of the child). In relocation disputes, a parent's "right" to access should not override the child's best interests; the child's right to access should not be deployed
by judges or parents to displace the best interests of the child test.

Relocation disputes should be resolved in accordance with the best interests of the child standard. This standard should not be modified by the introduction of presumptions in favour of one parent or another. The wishes of the child should be taken into account in decisions concerning the child — particularly major decisions such as relocation — provided the child is old enough to express those wishes. The weight given to the wishes of the child should increase with the age and maturity of the child. The wishes of mature adolescents should be given effect, except in unusual cases where it would not be in the best interests of the child. Canada's obligation to protect the rights of the child — specifically, by ensuring that the wishes of the child in regard to relocation are taken into account properly and that relocation decisions are made in accordance with the best interests of the child test — should be taken seriously.

2. Principle of Supporting the New Family Unit

Policies and laws that support the new family unit (usually the custodial mother and the children) by respecting the custodial parent's wish to move accord with social science evidence

[272] *Frame* v. *Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.).

that a well-functioning custodial parent is an important factor related to positive outcomes for children. It should be kept in mind, however, that maintaining a relationship with both parents is also associated with positive outcomes for children. There is no clear evidence on which factor should be given priority in cases of conflict.

Another reason to support the custodial parent's wish to move is to enable each parent to build a new life. Restricting the custodial parent from moving may prevent that parent from carrying through with important life decisions, possibly creating an unstable situation for the children. This argument has been made by influential researcher Judith Wallerstein, who wrote with co-author Tony Tanke:

> Court intervention designed to maintain the geographical proximity of divorced parents is fundamentally at odds with a divorce decision that necessarily determines that each parent will rebuild his or her life separate from the other. To require divorcing parents to spend their lives in the same geographical vicinity is unrealistic. ... Forcing divorced parents to remain in the same place may undermine the divorce decision and threaten the child with continued instability throughout his or her childhood.[273]

Another argument in favour of respecting the custodial parent's wish to move begins with the fact that most custodial parents are women and that lone-parent families headed by women experience disproportionate levels of poverty. Custodial mothers may well need to relocate in order improve the financial situation or support network of their family. Thus, the mother in the Australian case of *B* v. *B* and LEAF in the *Goertz* case argued that courts should take judicial notice of the economic and social consequences to women that may result from restricting relocation. It is even more important for courts to examine the consequences of restricting relocation, or allowing relocation, for each particular custodial parent. Ultimately, the judge must consider the effect of restricting or allowing relocation on the particular child whose interests are at stake. A non-removal order that prevents a custodial mother or father from improving her or his economic circumstances or support network, or from joining a new spouse or partner may well have negative implications for the child. These should be weighed seriously in assessing what is in the best interests of the child.

In *Goertz,* it was argued that there should be a presumption in favour of the custodial parent, partly on the grounds that this would reduce uncertainty and conflict. The urge to impose certainty and to decrease litigation were the express reasons for the Supreme Court of Tennessee's ruling that a custodial parent be allowed to move away with the child, unless the access parent can show that the custodial parent's motives for moving are to defeat or deter

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[273] J.S. Wallerstein & T.J. Tanke, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce" (1996), 30 Fam. L.Q. 305 at 314.

access.[274] The Supreme Court of Tennessee stated that "the interests of the custodial parent and the interests of the child are basically interrelated, even if they are not always precisely the same."

It is not entirely clear, however, that the best interests of the child test does "lead inevitably
to protracted litigation," or that importing presumptions or "sub-rules" to the best interests test is the best way to address any increase in relocation litigation. Moreover, presumptions operate to displace the best interests of the child test, and to shift the focus to the interests and rights of the parents. This point was made in *Goertz* by McLachlin J., who also said:

> The effect of the presumption might to be to deflect the inquiry from the facts relating to the child's need and the parents' ability to meet them to legal issues relating to whether the requisite burden of proof was met ... Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminished the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the *Divorce Act* for a contextually sensitive inquiry into the needs, means, condition and other circumstances of "the child' whose best interests the court is charged with determining ... Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected.[275]

Another reason to reject a presumption in favour of the custodial parent is that the needs and circumstances of children change over time, as does their ability to make decisions for themselves. And, as McLachlin J. pointed out, "To the extent that the proposed presumption would give added weight to the arrangement imposed by the original custody order, it may diminish the weight accorded to the child's new needs and the ability of each parent to meet them."[276]

Although the Supreme Court rejected the adoption of a presumption in favour of the custodial parent in *Goertz*, the Court stated that 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."[277] The Court added that the first factor to consider in determining the best interests of the child was "the existing custody

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[274] *Auby* v. *Strange*, WL 189801 (Tenn. 1996).

[275] *Goertz*, paras. 43-44.

[276] *Goertz,* para. 45.

[277] *Goertz*, para. 48.

arrangement and relationship between the child and custodial parent."[278] This emphasis on the views of the custodial parent is consistent with the trend in other jurisdictions. It recognizes that ours is a highly mobile society, that custodial parents must be allowed to rebuild their lives, and that a child's interests will often be protected by supporting the custodial parent's decisions.

Relocation disputes should continue to be governed by the best interests of the child, and there should be no legal presumption either for or against relocations. The particular economic challenges faced by custodial parents, most of whom are women, and the advantages to the child of supporting the decisions of the custodial parent, should be taken into account when determining what is in the best interests of the child, but there should be no legal presumption that the custodial parent's decision to move is in the best interests of the child.

3. Principle of Maximum Contact

Canada's *Divorce Act* states that in making a custody or access order, the court shall give effect to the principle that a child should have "as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."[279] Pursuant to this provision, if one spouse is willing to encourage maximum contact while the other is opposed to generous access, and both are equally competent parents, the court should give custody to the spouse who will encourage access, provided this is in the best interests of the child.[280] Several American states also encourage parents to promote a loving and close relationship with the other parent with explicit statutory policies;[281] 18 states include this as a factor to consider when determining the best interests of the child.[282]

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[278] *Goertz*, para. 49.

[279] *Divorce Act*, s. 16(10) and s. 17(9).

[280] J.D. Payne, *Payne's Commentaries on the Divorce Act, 1985* (Don Mills: DeBoo, 1986) at 83.

[281] Cal. Fam. Code s. 3020; Colo.Rev.Stat.Ann. s. 14-10-124; Fla.Stat.Ann. s. 61.13; Ga. Code Ann. s. 19-9-3; Iowa Code Ann. s. 598.41; Mo.Ann.Stat s. 452.374; Mont. Code Ann. s. 40-4-333; Nev.Rev.Stat. s. 125.460; N.J.Stat.Ann. s. 9:2-4; Tex. Fam. Code Ann. s. 14-021.

[282] Alaska Stat. ss. 25.20.090 and 25.24.150; Ariz.Rev.Stat.Ann. s. 25-332; Colo.Rev.Stat.Ann. s. 14-10-124; Fla.Stat.Ann. s. 61.13; Ill.Ann.Stat. ch 750, para. 5/602; Iowa Code Ann. s. 598.41; Kan.Stat.Ann. s. 60-1610; Me.Rev.Stat.Ann. tit. 19, ss. 214, 581 and 752; Mich.Comp. Laws Ann. s. 722.23; Minn.Stat.Ann. s. 518.17; Mo.Ann.Stat. s. 452.375; Ohio Rev. Code Ann. s. 3109.04; Okla.Stat.Ann. tit. 43, s. 112; Tex. Fam. Code Ann.

"Friendly parent" provisions in America and the Canada have been criticized on the basis that they give undue emphasis to a willingness to facilitate access over the primary caregiver's historical and ongoing contributions to child-rearing. They also may inhibit complaints about the parenting skills of the other party, even when there are concerns about abuse.[283] Because of concerns relating to ongoing abuse in connection with access, there have been calls to amend friendly parent provisions to address cases where there has been domestic violence.[284]

The application of friendly parent provisions has been problematic in some cases. Some courts in Canada have held that a child who has been raised by the mother should be awarded into the custody of the father, on the grounds that the father is more likely to grant substantial access visits.[285] Other Canadian courts, however, have ruled that even a deliberate interference with access will not always be sufficient to justify a change in custody arrangements.[286] American courts have also applied a friendly parent rule in determining custody,[287] and in some cases have perhaps emphasized this factor too much. In the California Court of Appeal decision *In Re Marriage of Lewin*, for example, custody of a two-year-old girl, who had been born after her parents' separation and had lived all her life with her mother, was awarded to the father partly
on the basis of the friendly parent rule:

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s. 14-012; Utah Code Ann. s. 30-3-10.2; Vt.Stat.Ann. tit. 15, s. 665; Va. Code Ann. s. 20-124.3; Wis.Stat.Ann. s. 767.24.

[283] "Custody Litigation and the Child Sexual Abuse Backfire Syndrome" (1988) 8:3 Jurisfemme 21; J. Zorza, "'Friendly Parent' Provisions in Custody Determinations" (1992), Clearinghouse Rev. 921.

[284] The Family Violence Project of the National Council of Juvenile and Family Court Judges, "Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice" (1995) 29 Fam. L.Q. 197 at 202.

[285] In *Tremblay* v. *Tremblay* (1987), 10 R.F.L. (3d) 166 (Alta. Q.B.), the maternal custody order was varied and the father was given custody in part because of the court's finding that the father would grant generous access. The court criticized the mother's failure to allow access in accordance with the original court order. In *Tyndale* v. *Tyndale* (1986), 48 R.F.L. (2d) 426 (Sask. Q.B.), the court granted custody to the father, who "only really became a father to the boys after the separation," to ensure contact between the children and both parents. It was not that the mother would interfere with access, but that the father would withdraw if he did not get custody.

[286] *Legault* v. *Legault* (1988), 93 A.R. 370 (Alta. Q.B.).

[287] See, e.g., *Schmidkunz* v. *Schmidkunz*, 529 N.W. 2d 857 (N.D. 1995), where the court determined that a custody award to the father was in the best interests of the child because the father was likely to foster access with the mother, whereas the mother was unlikely to foster access with the father.

> [T]he Legislature [has] acknowledged the importance of a child's need to maintain frequent and continuing contact with the noncustodial parent. This is the only way a child may grow up knowing both parents. The trial court was correct in concluding Laurence is the parent most likely to allow Laurie this opportunity ... The fact the child had been with Sally since birth did *not* shift to Laurence the burden of showing a change of circumstances in order to gain custody.[288]

California's Senate Task Force on Family Equity recommended amendments to the legislative friendly parent preference and *de facto* presumption of joint custody. Some responsive changes were made as a result.[289]

In the context of relocation, in the *Goertz* case, McLachlin J. referred to s. 16(10) of the *Divorce Act*, and stated that the principle of "maximum contact" is "mandatory, but not absolute." Rather, the judge is obliged to respect the principle of maximum contact to the extent that such contact is consistent with the child's best interests, and "if other factors show that it would not
be in the child's best interests, the court can and should restrict contact."[290] She also said that "[i]f the child's needs are likely to be best served by remaining with the custodial parent, and this consideration offsets the loss or reduction in contact with the access parent, then the judge should not vary custody and permit the move."[291]

Subsection 16(10) as interpreted and applied by McLachlin J. in *Goertz* does not seem inconsistent with the best interests of the child standard. Nevertheless, the provision is problematic because it singles out one factor associated with positive outcomes for children for special mention, thereby giving it added legislative emphasis. As discussed above, however, many respected researchers have come to the conclusion that continuing contact with both parents is less important than a well-functioning custodial parent and avoidance of parental conflict. Furstenberg and Cherlin, for example, stated that "the most important factors in assuring the well-being of children after divorce are that the mother be an effective parent, providing love, nurturing, a predictable routine, and consistent, moderate discipline, and that the children not be exposed to continual conflict between the parents."[292] While maintaining regular

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[288] *In re Marriage of Lewin,* 231 Cal.Rptr. 433 (Cal. Ct. App. 1986).

[289] California, *Final Report of the Senate Task Force on Family Equity* (Sacramento: Joint Publications, 1987).

[290] *Goertz*, para. 24.

[291] *Goertz,* para. 25.

[292] F.F. Furstenberg & A.J. Cherlin, *Divided Families* (Cambridge: Harvard University Press, 1991) at 118.

access might outweigh the factors mentioned by Furstenberg and Cherlin in particular cases, there are no grounds for "privileging" continuing contact with each parent in the assessment of what is in best interests of the child.

Subsections 16(10) and 17(9) of the *Divorce Act* should be amended to take into account the fact that continuing contact with each parent is only one factor associated with positive outcomes for children. Other factors — specifically, a well-functioning custodial parent and avoidance of parental conflict — are also associated with positive outcomes for children. No one factor should be given primacy in the legislation.

4. Education Programs, Dispute Resolution, and the Role of the Law

The limits of law in addressing access problems effectively have long been identified. Judges and legislators work to persuade parties to adopt behaviours that serve the interests of children, and acknowledge that positive outcomes cannot be achieved by court orders alone. As Berend Hovius has said:

> The ultimate answer is for all parents to be secure human beings who are knowledgeable about child development, give priority to their child's needs and develop effective conflict resolution skills and mechanisms. Courts cannot, however, order people "to change their attitudes, feelings and manner of relating to one another." Counseling and mediation may provide the best avenues for showing parents the child's need for a meaningful relationship with both parents and the means whereby this need can be fulfilled.[293]

Parents should be encouraged and assisted to settle post-separation parenting arrangements for themselves. Education programs and mediation services would support responsible decision-making on the part of parents. Connecticut was one of the first states to establish a state-wide mandatory parent education program that addresses parenting issues and how to protect children from parental conflicts. Under Connecticut law, all parents involved in cases in the family division of the court are required to attend a six-hour education program.[294] Twaite and Luchow, after reviewing the literature on children's post-divorce adjustment, argued in favour of parental education programs as a method of reducing parental conflict, which they

[293] B. Hovius, "The Changing Role of the Access Parent" (1993), 10 Can. Fam. L.Q. 123 at 185.

[294] Conn.Gen.Stat.Ann. s. 46b-69b (Supp. 1994).

identified as "a powerful predictor of children's adjustment."[295] Education programs that provide information on the effects of parental separation on children and the factors associated with positive outcomes for children would increase the likelihood that parents will agree on arrangements that serve the interests of their children.

Parents should be encouraged to settle arrangements for their children themselves. The law plays a role in settlements, not only by providing education programs and mediation services,
and adjudication where parents cannot agree, but also by establishing legal norms that support the best interests of the child. Maintaining the best interests of the child as the sole criterion in relocation and other custody/access disputes clearly establishes the expectation that parents put their children's interests before their own. This norm can be expected to influence settlements:

> It is not known exactly how the formal statutory rules contained in legislation impact on the making of private custody and access arrangements. It is, however, important to acknowledge that the law likely has a significant effect. Even when informal private arrangements are worked out between the parents, it is arguable there is an indirect impact because the parents' perception or understanding of the law guides the informal discussions. Thus the eventual arrangements can be seen to be based, at least in part, on what the parents perceive to be their basic rights and obligations.[296]

Jehanne Sosson made a similar point in her comment on the new laws establishing the joint exercise of parental authority in Belgium, advancing the idea of law as a tool for education:

> The new law clearly breaks with the previous system under which it was for the parent with material care of the child alone to exercise parental authority over the child's person and over his assets. The basic idea of the legislation was to enact the principle that the father and mother should cooperate not only while they live together, but — and here is the innovation — also after their separation. It is a question of extending the duration of the parental pair to cover the period after the separation of spouses or concubines. The law clearly hopes to educate social attitudes, and its symbolic effect is important.[297]

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[295] J.A. Twaite & A.K. Luchow, "Custodial Arrangements and Parental Conflict Following Divorce: The Impact on Children's Adjustment" (Spring 1996) J. Psych. & L. 53 at 71-72.

[296] Department of Justice Canada, *Custody and Access: Public Discussion Paper* (Ottawa: Minister of Supply and Services Canada, 1993) at 18-19.

[297] J. Sosson, "Belgium", in A. Bainham, ed., *The International Survey of Family Law 1996* (The Hague: Martinus Nijhoff, 1996) at 79.

The law is important as a tool of education and to establish norms and clear expectations for parents.

Education programs on the effects of parental divorce and separation, and alternative dispute resolution mechanisms (particularly mediation) on children should be made available and encouraged in order to promote responsible agreements in relation to relocation and other child custody and access issues.

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