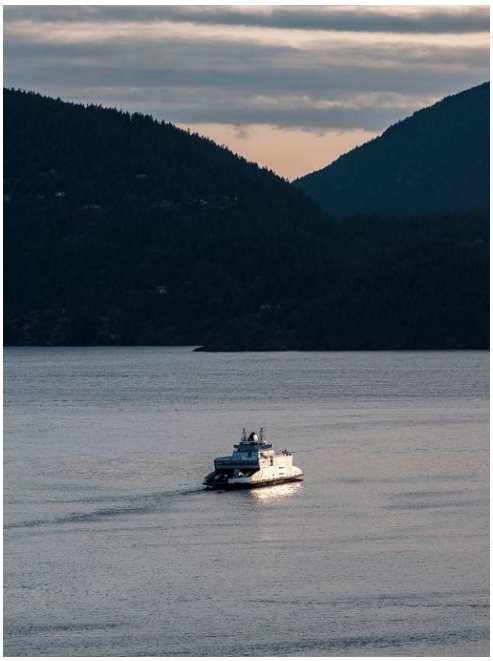
CHAPTER 2: Relocation of a Child

Introduction

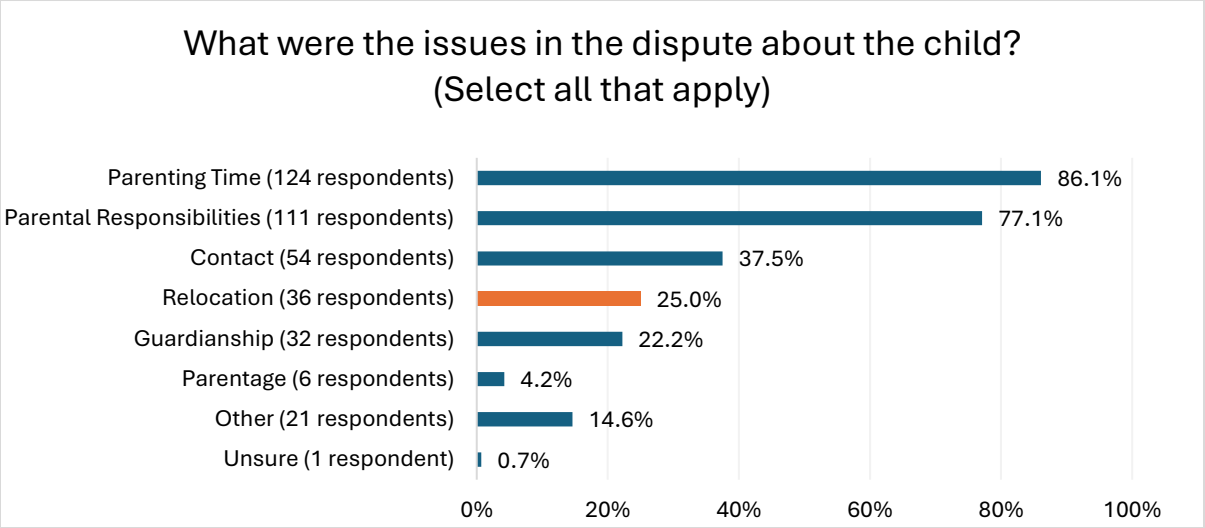


Part 4 of the FLA includes a division dedicated to the issue of the relocation of a child and Phase 2 of the Family Law Act Modernization Project includes a review of those provisions. Specifically, Part 4, Division 6 – Relocation addresses the following:

- Defining "relocation" (section 65),
- When, how, and to whom notice of an intended relocation is required (section 66),
- Required attempt of non-court resolution of relocation issues (section 67),
- When and how an objection to an intended relocation can be made (section 68),
- Presumptions/burdens of proof for orders about relocation (sections 69 and 70), and
- Clarifying that an order prohibiting relocation is not a change in the child's circumstances (section 71).

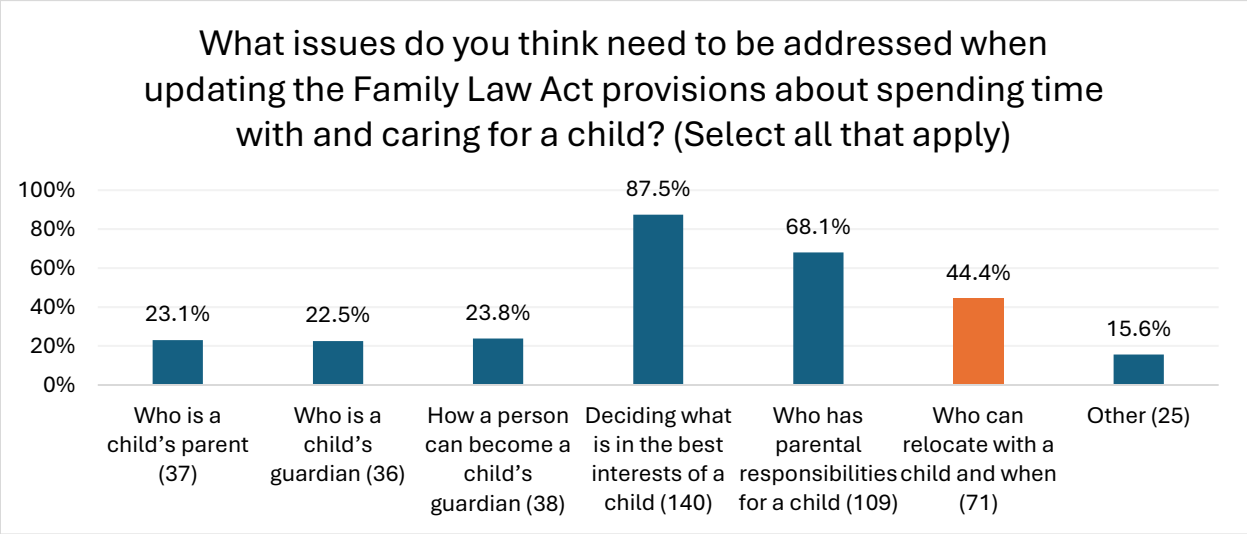
Responses from the survey highlighted the importance of the issue, as 25% of respondents listed relocation as an issue which they had to resolve (Figure 2-1).

Figure 2-1: Issues in Family Law Disputes



Also, 44.4% of survey respondents identified "Who can relocate with a child and when?" as one of the issues that needs to be updated in the Act (Figure 2-2).

Figure 2-2: FLA Issues Needing Updating



In the feedback received we heard a number of important themes.

We heard consistently about the importance of understanding and incorporating Indigenous traditional family practices within the FLA. This was offered as a way to improve specific provisions in the Act and as an important step in reconciliation with Indigenous persons.

We also heard that better alignment between the FLA and the *Divorce Act* is an important consideration for reform as a way of avoiding the development of inconsistent caselaw. Feedback was clear that an effort should be made to ensure different results do not emerge for similarly situated parties based only on the legislation used.

Further, the importance of understanding the unique impacts of relocation legislation on women was emphasized. The fact that an overwhelming majority of applications to relocate are brought by women needs to be recognized in the legislation to avoid exacerbating existing disadvantages they face.

What Was Said:

> *"Relocation is a zero-sum game. There is a winner and a loser and it is very hard to find a compromise. Sometimes a party just moves with the child and the other doesn't act quickly, so it creates a new status quo while the parties wind their way through court. Other times a party needs to move for reasons that are time sensitive, family issues, employment, etc... but the other party disagrees and so*

everyone is tied in place for 1 year or more while we wait for court, and the situation is radically different by the time trial arrives."

Relocation

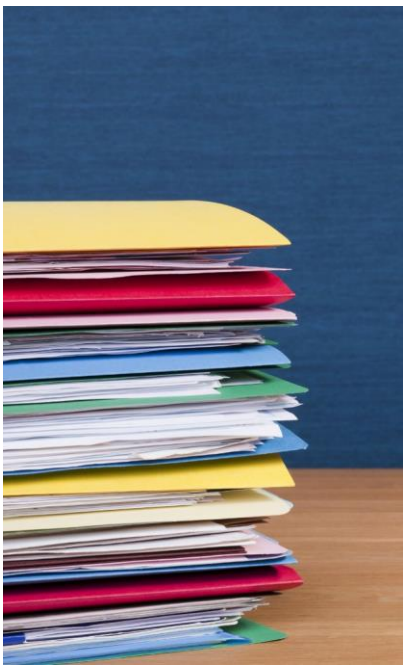
What is Relocation under the *Family Law Act*?

Section 65(1) of the FLA defines "relocation" based on how much a change in residence will affect a child's relationship with other guardians or "other persons having a significant role in the child's life." It has no geographical component such as a minimum distance between current and proposed residence. Section 65(2) of the Act indicates that the provisions in Division 6 - Relocation only apply to the change in residence if there is an existing written agreement or order indicating the parenting arrangements of the child.

If a guardian decides to change the residence of a child before a written agreement or order about parenting arrangements is made, it is governed by section 46 of the FLA which is not within Division 6 - Relocation. Under Section 46, the concern is only about the impact of the residence change on the child's other guardians and has no notice requirements.

As noted, we received feedback on the relationship between relocation provisions under the FLA and those under the *Divorce Act*. What is "relocation" under section 2(1) of the *Divorce Act* is similar but less broad than under the FLA. Like the FLA, relocation under the *Divorce Act* does not have a geographical component. However, unlike the FLA the *Divorce Act*'s definition is based on potential impact on only those with parenting time, decision-making responsibilities or contact with the child. The *Divorce Act*'s definition also has no requirement for an existing order or agreement and clarifies that it applies to a "pending application for a parenting order," which is the FLA section 46 equivalent.

Generally, feedback supported harmonizing the FLA and *Divorce Act* relocation definitions and bringing section 46 change of residence applications under Division 6 - Relocation. It was suggested that having a section that deals with a change of residence situation where there is no existing agreement or order separate from Division 6 - Relocation in the Act is confusing for parties.



Other feedback suggested that the definition of relocation in the Act should:

- Ensure parties cannot avoid it by, for example, maintaining a residence that would not trigger Division 6 but actually living somewhere else that would;
- Use a "geographic marker" to exclude short-distance moves and create additional clarity about whether a change in residence is a "relocation" despite the possibility of capturing relocations which are not significant to the persons involved; and
- (If section 46 is retained) clarify whether an interim order about parenting arrangements qualifies as an order about parenting arrangements for the purposes of the definition of "relocation".

Notice of and Objections to Relocation

Section 66 of the FLA says that notice of a relocation must be given to the child's other guardians and persons having contact with the child. There is no prescribed form for notice under the FLA as there is under the *Divorce Act*, and the *Divorce Act* requires significantly more information in a notice of relocation than does the FLA. Neither act prescribes a method for giving notice or requires proof that notice was given.

Section 66(2) allows the court to grant an exemption from giving notice only if satisfied that:

- Notice cannot be given without incurring a risk of family violence, or
- There is no ongoing relationship between the child and the other guardians or people with contact that would otherwise get notice.

By contrast, the *Divorce Act* does not limit the reasons that an exemption may be granted, although it does state that one reason can be that "there is a risk of family violence."

Section 67 of the FLA requires parties to use their best efforts to cooperate in resolving issues related to the proposed relocation after notice has been given. The section does not indicate what "best efforts to cooperate" means and imposes no consequences for non-compliance. Section 68 of the FLA gives a guardian 30 days from the date they receive a notice to file an application to prohibit the relocation.

Indigenous Perspectives: Relocation and Indigenous Families

An important theme that we heard when speaking with Indigenous people with lived experience is that the FLA needs to recognize Indigenous family networks. Indigenous families extend beyond the colonial concept of nuclear family, and include aunts, uncles, grandparents, and even non-related community members who may step in and act as a child's guardian. The FLA's relocation provisions require notice to be given to a child's other guardians and people who have formal contact with the child. The people who may object to a relocation application is further limited to guardians. The FLA's relocation provisions currently do not recognize people who may play a role in an Indigenous child's life unless they have formally obtained guardianship or an order for contact with the child, which may fail to recognize an Indigenous child's family network.

We heard that provisions related to giving notice can create problems in cases with family violence. The requirement to give 60 days advance notice often cannot be complied with if a person is fleeing family violence. Also, requiring them to provide a new address is potentially unsafe and the current section 66(2)(a) exemption is an application process only. Someone fleeing from family violence must take the chance that a court will agree that in their case "notice cannot be given without incurring a risk of family violence." It was also pointed out that a parent may not have 60 days before being required to accept housing offered by BC Housing which currently requires applicants for housing to relocate in less than 60 days.

Did you know?

In 2024, BC launched a systemic review into the legal system's treatment of sexual and intimate partner violence. The government launched this review recognizing that despite efforts to improve the legal system for survivors of sexual violence and intimate partner violence, survivor accounts and statistics demonstrate that these forms of violence continue to be pervasive and drastically underreported.

Further, we heard that the family violence exemption in section 66(2)(a) is unnecessarily onerous because it provides that establishing a risk of family violence is not enough. In addition, it requires a party to demonstrate that notice cannot be given without incurring

the risk. By contrast, an exemption under the *Divorce Act* can be granted if "there is a risk of family violence."

What Was Said:

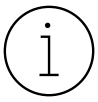
> *"I think relocating inside the province should not be classified as relocation within a certain distance. Such as moving from [the Lower Mainland] to Victoria. The distance is extremely close even though it has a ferry trip added, especially when the "relocation" is because the parent is fleeing an abusive relationship."*

There was some support for creating additional consequences for a failure to give notice of a relocation such as a loss of a presumption in favor of that parent, if applicable. However, feedback also cautioned that creating extra consequences could negatively affect survivors fleeing family violence. It was suggested that a better approach would be a case-by-case assessment about why notice was not given and followed by consequences if needed.

What Was Said:

> *"My ex-wife moved 2 hours away and expected me to do all of the driving to see our children. It was not known that I had a choice in saying no to this."*

Other feedback related to notices of relocation suggested the Act should:

	Create an optional prescribed form for both notice of relocation and notice of objection that would specify the information needed.
	Require the same information as the *Divorce Act*'s prescribed notice/objection forms except that the name of city/town should be sufficient if exact address is unknown.
	Remove the attempt to resolve requirement because there is already FLA provisions encouraging out of court settlement and it unfairly adds a burden on mothers seeking to relocate because they are the vast majority of relocation applicants.
	Require individuals outside the nuclear family to be given notices of relocation and allow them to object as a way of recognizing Indigenous family networks.
	Give non-guardians some way to share concerns they may have about a proposed relocation by, for example, granting them status to make representations.

Presumptions and Burdens

Section 69 of the FLA addresses who has the burden of proving to a court whether a relocation is or is not in the best interests of a child. The section adjusts who has the burden based on whether the parties have "substantially equal parenting time" or not in their existing parenting arrangements.

Although Section 16.93 of the *Divorce Act* addresses the issue of burdens of proof similarly, in the sense that the burden shifts based on whether the parties have substantially equal time with the child, the *Divorce Act* explicitly addresses whether the parties are "substantially complying with their parenting arrangements." The FLA does not address the issue of actual compliance.

Other important differences exist between the statutes related to the concept of "good faith" and whether "reasonable and workable arrangements" have been developed.

Section 69(4)(a) of the FLA requires a relocating applicant to establish that the proposed relocation is in "good faith," and that they have proposed "reasonable and workable arrangements" to preserve the child's relationships with other guardians, persons entitled to contact with the child, and other persons who have a significant role in the child's life. What "reasonable and workable arrangements" means is not expanded on in the Act but factors to be considered in a "good faith" analysis listed in section 69(6) include:

"(a) the reasons for the proposed relocation;

(b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;

(c) whether notice was given under section 66 [notice of relocation];

(d) any restrictions on relocation contained in a written agreement or an order."

Section 69(7) of the FLA specifically prohibits the court from considering whether a guardian would relocate if the court were to prohibit their child's relocation. Section 16.92(2) of the *Divorce Act* mirrors this prohibition.

Support was received for modifying the burdens of proof to more closely follow those in the *Divorce Act*. As noted, the *Divorce Act* references a need to assess "substantial compliance" with existing parenting arrangements as part of determining who has the burden of proof. The FLA is less explicit in this regard.

Did you know?

Approximately 90 to 95 per cent of parties applying to relocate with their child are women.

There was also support for section 69 of the FLA to better reflect the gendered nature of relocations in the FLA by including a consideration of a perpetrator's ability to parent due to family violence and the survivor's ability to parent or keep the child safe when there is a risk of family violence.

The "good faith" requirement under section 69(4)(a) received criticism. We heard that, because of the gendered nature of applications to relocate, the requirement imposes an unfair and significant burden on mothers who seek to relocate. The provision requires them to give evidence about the factors listed in section 69(6) including the reasons for the proposed move and how the move enhances the quality of life of the child. The "good faith" requirement was also viewed as unnecessary and potentially harmful in that it carries an unwarranted moral judgement that is not imposed on the motives of an objecting guardian nor on any other type of applicant. A suggestion was made that if the good faith requirement is retained

there should be recognition in the Act that valid reasons for relocation can include things like:

- An applicant's right to be free from family violence,
- The socio-economic realities of the applicant including things like housing availability and affordability, employment or educational opportunities, and
- The proposed relocation's proximity to social and emotional supports.

Regarding the requirement in section 69(4)(a) of the FLA for a relocating guardian to propose "reasonable and workable arrangements," there was divided feedback on whether the Act should explicitly address technological advancements such as video communication as a way of preserving a child's relationship with another person. Some felt this recognition was important while others believed it unnecessary because the use of the technology was commonplace. Feedback also suggested imposing the same requirement to propose reasonable and workable arrangements on an objecting party as well.

The prohibition in section 69(7) of the Act against asking whether a parent would relocate without their child also generated interesting feedback. There was some support for removing the prohibition while others believed to do so would place survivors of family violence in an untenable situation. Feedback noted that not asking the question allows for the creation of parenting arrangements based on an assumption that the parent will relocate without the child. This can result in terms that are more favourable to the non-applicant guardian which is often a substantial departure from the existing arrangements. A subsequent variation application was considered to not be an adequate answer because survivors of family violence cannot apply to vary these orders because of their social and economic realities.

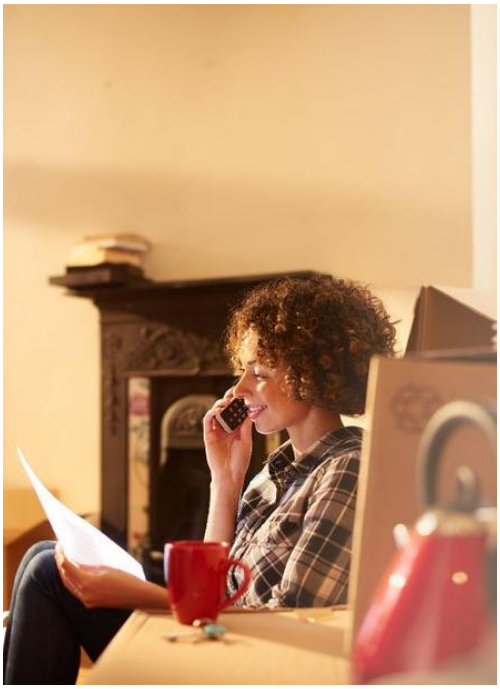
It was also pointed out that asking the question at least removes the need for a court to speculate about whether or not the parent would move and would be able to consider what the child's life would be like should the relocation be prohibited. The suggestion was that the court needs to know things like who would then care for the child if the primary caregiver moved away, and would these arrangements be in the best interests of the child or should the relocation be allowed. Further, if as a result of prohibiting the relocation, the primary caregiver has to give up the benefits and opportunities of the relocation to stay with the child, then the court ought to consider how those things will impact the child.

Factors to be Considered

In any relocation application, the court must consider the best interests of the child. In order to determine this, the court must consider all the factors listed in section 37(2) of the FLA and, under section 38, the impact of family violence on a child and on the ability of a person to care for and meet the needs of the child. Section 69(3) of the Act uniquely adds the factors of "good faith" and "reasonable and workable arrangements" listed in section 69 (4)(a) to the section 37 factors.

What Was Said:

> *"I would like relocation (within a reasonable distance) to be more easily obtainable, especially to be closer to family support and a healthier environment for children. I would like judges to be more abuse conscious and for children testimony to have more weight even at a young age."*



Section 16.92 of the *Divorce Act* provides best interests of the child factors that are to be considered in a relocation application. Some are similar to factors that the court must consider under the "good faith" requirement in section 69(6) of the FLA noted above.

In speaking with Indigenous people with lived experience, we heard is that it is vital for every Indigenous child to grow up with their culture and that the FLA should emphasize the importance of staying connected with both sides of their Indigenous families. Ideally, an Indigenous child should live within their Indigenous community, but if this is not possible, then maintaining the child's connection to their community and culture must be a priority.

There was also support for 'harmonizing' the factors to be considered in relocation cases with the best interests of the child factors listed in section 16.92 of the *Divorce Act*. Bringing sections 46 change of residence and 69 presumptions in line with the additional the *Divorce Act* would bring consistency to the approach used by the Supreme Court of Canada in the 2022 decision of *Barendregt v. Grebliunas* and make the law clearer and more accessible.

Another comment suggested that an objection to a relocation should also be some how assessed using the same best interests of the child factors. Consideration could be whether it was in the best interests of a child for the child to not relocate.