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KIDS v PARENTS: BEST INTERESTS IN BC'S REFORMED RELOCATION LAW

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ABSTRACT

Under BC's *Family Law Act* (*FLA*), the best interests of the child are now the only consideration when resolving legal disputes over parenting arrangements. This seemingly neutral concept of the child's best interests can, however, have an unequal effect on the interests of others in family law actions. In relocation disputes, custodial or primary caregiver parents (who are still primarily women) tend to be more constrained by this decision-making framework than non-custodial or access parents (who are still primarily men). Consequently, BC's law of parental mobility may produce adverse effects that disproportionately affect women.

This paper first explores how the best interests principle became central to BC's family law reform agenda and ultimately to the *FLA*, including its precedent-setting relocation provisions. Secondly, it considers the effect of BC's legislative choice to elevate the best interests of the child above all others, with specific reference to relocation. It suggests that the rights of women are being disproportionately impacted, and refers to two recent relocation cases decided by the BC Court of Appeal: *Duggan v White* and *Barendregt v Grebliunas*. Finally, it considers prospects for reform of the current relocation regime with a view to re-injecting parents' interests and rights into the balance.

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INTRODUCTION

The "best interests of the child" is the central guiding principle of parenting provisions in BC's *Family Law Act*.[1] This includes provisions on relocation: the law of parental mobility. The child's best interests have gone from being the "paramount" consideration in the *FLA*'s predecessor, the *Family Relations Act*,[2] to the "only" consideration in determining parenting arrangements under current legislation. In other words, the child's interests were, previously, the most important among a range of considerations, suggesting a recognition and balancing of other interests. Today, the child's interests must be the only consideration when resolving legal disputes over parenting arrangements. If there is only one set of interests to consider, there can be no balancing among competing interests.

In this paper, I argue that this seemingly neutral concept of the child's best interests can have an unequal effect on the interests of others in family law actions. Specifically, I consider the operation and effect of the best interests of the child within relocation disputes. I suggest that putting the child's interests first has an unequal effect on parents. Custodial or primary caregiver parents (still primarily women)[3] tend to be more constrained than non-custodial or access parents (primarily men) by this decision-making framework.[4] As a result, the law may produce adverse effects disproportionately affecting women.

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[1] SBC 2011, c 25 [*FLA*].

[2] RBSC 1996, c 128, as repealed by *ibid*, s 259 [*FRA*].

[3] See Statistics Canada, *Parenting and Child Support After Separation or Divorce. Spotlight on Canadians: Results from the General Social Survey*, by Maire Sinha, Catalogue No 89-652-X – No. 001 (Ottawa: Statistics Canada, February 2014) (70% of parents reported that the mother's home was the child's primary residence after separation or divorce and 15% reported the child lived primarily with the father at 3); Statistics Canada, *Portrait of children's family life in Canada in 2016*, Catalogue No 98-200-X2016006 (Ottawa: Statistics Canada, 2 August 2017) ("In 2016, 81.3% of children aged 0 to 14 in lone-parent families were living with their mother, and 18.7% were living with their father" at 3).

[4] In this paper, I primarily use the "old" language of custody and access, referring to the custodial parent (with whom the child primarily resides) or non-custodial (access) parent, except where citing other sources. I do this because I think the old language is

While contested relocations with children tend to be rejected more often than approved,[5] for both men and women, it is overwhelmingly women who seek to move with a child.[6] Thus, by tending to favour non-relocation, the law disproportionately denies women the ability to move to access support, educational and work opportunities, and new relationships—the primary reasons parents seek to move[7]—while maintaining their role as primary caregiver. It is the best interests of the child principle that steers the law towards staying put.

In relocation disputes, children's interests can conflict with their parents' interests (or at least one parent's interests). While it is the parents who engage with the law to provide notice of the child's move, or to object to such a move, only the child's interests are to be considered when resolving the dispute.[8] Like custody and access more generally, relocation is "a unique area of our law, insofar as the litigants … have no legitimate rights or interests in the outcome."[9] Parents seek to move, but it is the child's interests that are determinative under the law.

The Supreme Court of Canada has ruled that the best interests of the child is not a principle of fundamental justice.[10] And yet, in relocation, children's

easier to understand—compare custodial parent to a guardian with or without substantially equal parenting time—and because the new language, which speaks of parenting time and parenting decisions, obscures the labour of caregiving and custody. Critics of the concepts of custody and access describe them as unduly focused on parental rights, outdated, and promoting "a winner-loser mentality between separated parents that promotes conflict;" see e.g. Nicholas Bala et al, "Shared Parenting in Canada: Increasing Use But Continued Controversy" (2017) 55:4 Fam Ct Rev 513 at 525-26.

[5] DA Rollie Thompson, "Legislating About Relocating: Bill C-78, NS and BC" (2019) 38:2 Can Fam LQ 219 at 233; Meredith Shaw, "A Gendered Approach to 'Quality of Life' After Separation Under the British Columbia *Family Law Act* Relocation Regime" (2021) 26 Appeal 121 at 128.

[6] Thompson, *supra* note 5 at 222.

[7] Nicholas Bala & Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" (2012) 30:3 Can Fam LQ 271 at 290.

[8] However, as discussed later, the *FLA*'s relocation provisions are one area where the best interests of the child can be interpreted broadly to include, to some extent, the moving parent's well-being.

[9] Noel Semple, "Whose Best Interests? Custody and Access Law and Procedure" (2010) 48:2 Osgoode Hall LJ 287 at 300.

[10] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 [*Canadian Foundation for Children*].

interests are able to trump individual interests tied to rights that have been vigorously defended in law (including in family law) and are now entrenched in our Constitution: an individual's *Charter* rights to mobility (section 6), life, liberty, and security of the person (section 7), and equality before and under the law and the equal protection and benefit of the law (section 15).[11] This paper asks why, in a jurisdiction with a powerful *Charter* of rights, parents' rights are eclipsed by those of their children in family law?

This paper is divided into two parts. First, I note the place of the best interests principle in international law, specifically in the United Nations' *Convention on the Rights of the Child*.[12] I explore how the concept became central to British Columbia's recent family law reform agenda and ultimately written into the *FLA*. I review the purpose and intent of the relocation reforms and consider arguments both in favour and against elevating the child's best interests in these reforms. I then introduce the *FLA*'s relocation provisions, which were the first to appear in any Canadian statute.

Second, I analyze the effect of BC's legislative choice to elevate the best interests of the child above all others, with specific reference to relocation. I first establish whether there has been a discernible effect on other rights-holders due to this change, and consider how these effects are distributed among parties to relocation disputes. I suggest that the rights of women are being disproportionately impacted and refer to the recent BC Court of Appeal (BCCA) decision in *Duggan v White* as an example as well as *Barendregt v Grebliunas* as a counter-example.[13] I then consider what justification, if any, has been put forward for the elevation of one set of rights over others, given these unequal and rights-infringing effects. Finally, I provide recommendations for reform to achieve a more balanced resolution of relocation disputes.

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[11] *Canadian Charter of Rights and Freedoms*, ss 6, 7, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[12] *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991), online: <www.ohchr.org/en/professionalinterest/pages/crc.aspx> [*CRC*].
[13] 2019 BCCA 200 [*Duggan*]; 2021 BCCA 11 [*Barendregt*].

The case law and literature on which this paper relies discuss relocation disputes and issues between, primarily, mothers and fathers. While the scope is not purposely limited to male-female parenting arrangements, the reported and reviewed case law is either expressly focused on disputes between male and female parents or is not stated. For example, custody data reported in Bala *et al* is tabulated by mothers and fathers but does not disaggregate same-sex from opposite-sex parenting relationships.[14] Shaw, on the other hand, who reviewed all 56 reported decisions from 2013 to 2020 in which the BC courts drew on the *FLA*'s quality of life factors in Division 6 relocation analyses, found that only one dispute was between same-sex partners.[15] As a result, the limited data does not permit consideration of how the gendered dynamics discussed in this paper affect same-sex parents or other family forms engaged in relocation disputes. Similarly, the literature, and often the case law itself, does not disclose race, immigration status, Indigeneity, and other characteristics that would permit an intersectional analysis of the issues discussed here. A closer consideration of the individuals and families involved in relocation disputes and their experiences deserves further study.

British Columbia, through the *FLA*, has adopted the best interests of the child as the only consideration for resolving family law matters. These matters, however, are not unidimensional. Family law disputes involve a multitude of competing interests and rights. This is particularly so in relocation disputes. The best interests of the child framework seeks to extinguish much of this source of conflict and streamline resolution and case processing by employing a singular lens. Decreasing conflict and increasing efficiency are worthy goals. However, at what cost to other rights-holders are these efficiencies gained? Sweeping reforms, such as those introduced with the *FLA*, risk reversing hard-won victories, particularly for women as primary caregivers, under the guise of a neutral best interests standard.

I have chosen relocation law in British Columbia as my focus for three reasons. First, relocation cases are one of the most frequently litigated areas in

[14] Bala et al, *supra* note 4 at 520-21.
[15] Shaw, *supra* note 5 at 128.

family law[16] and are, consequently, the source of significant jurisprudence. Second, British Columbia, through the *FLA*, was the first jurisdiction in Canada to provide a legislative framework for resolving relocation disputes, one that is firmly grounded in the best interests of the child.[17] And third, relocation law engages—and, for one parent, disrupts—fundamental rights to mobility, liberty, security of the person, and equality, and this calls for continuing scrutiny.

I. THE RISE OF THE BEST INTERESTS OF THE CHILD

The best interests of the child principle is not new to Canada, BC, or family law. Professor Semple notes that even before "best interests" language was integrated into statutes, courts were making custody and access decisions solely based on the best interests of the child since the late 1970s.[18] In BC, the best interests standard was also a key feature of the *FRA*, enacted in 1978.

The *FLA* defines the factors to be considered when determining the best interests of the child (see sections 37(2) and 38), as do most provincial and territorial statutes as well as the newly revised federal *Divorce Act*.[19] In BC's statute, these factors include the history of care of the child; the impact of family violence on the child's safety, security or well-being; the child's views, unless it would be inappropriate to consider them; and any civil or criminal proceedings relevant to

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[16] Susan B Boyd & Matt Ledger, "British Columbia's New Family Law on Guardianship, Relocation, and Family Violence: The First Year of Judicial Interpretation" (2014) 33:3 Can Fam LQ 317 at 328. See also Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, "White Paper on *Family Relations Act* Reform: Proposals for a new Family Law Act" (July 2010) at 69.
[17] Trudi L Brown, *British Columbia Family Law Practice 2020* (Toronto: LexisNexis, 2019) at 883. After BC, relocation provisions were adopted by Nova Scotia, and most recently in the amendments to the federal *Divorce Act*, RSC 1985, c 3 (2nd Supp), as amended by *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, SC 2019, c 16.
[18] Semple, *supra* note 9 at 296.
[19] Department of Justice, "The *Divorce Act* Changes Explained: Best interests of the child" (last modified 5 June 2020), online: <www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div50.html>.

the child's safety and well-being.[20] These factors are largely similar to those included in the more recent *Divorce Act* revisions (at section 16(3)). Over time, the principle has become more deeply entrenched in statutory law and common law, as well as in international law.

International influence

In international law, the best interests of the child is a well-established principle to be considered when administrative and other decisions are being made that affect children's rights. The principle is central to the UN's *Convention on the Rights of the Child*, with article 3(1) stating that, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[21] It is considered one of the fundamental values of the *CRC* and one of four general principles underlying the interpretation of the *CRC*'s remaining articles.[22]

The *CRC* was developed to respond to an identified gap in attention to children's rights. Children require special protections because, according to retired BC Supreme Court Justice Donna Martinson, "[t]hey do not have the same ability adults have to know about their rights, to access remedies, and to have their voices heard."[23] In addition, she adds, "their best interests can easily be overlooked. And their best interests may conflict with those of adults generally, or the adults meant to help them."[24] This can certainly be true in relocation.

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[20] BC Ministry of Attorney General, "Family Law Act" (last visited 4 August 2021), online: *gov.bc.ca: The official website of the Government of British Columbia* <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act>.
[21] *CRC*, *supra* note 12.
[22] UNCRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc CRC/C/GC/14 (2013) at para 1.
[23] The Honourable Donna J Martinson, "Children's Legal Rights in Canada under the United Nations Convention on the Rights of the Child" (2016) National Judicial Institute, Family Law Program: Children at 16, online (pdf): <www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/Toolkits/ChildRights/LegalRightsUnderUNConvention_Martinson.pdf>.
[24] *Ibid.*

While debates linger as to whether the ratified treaty, which has not been adopted into domestic law, is binding or simply persuasive in Canadian law, the question is largely irrelevant in BC where the standard adopted into law in the *FLA* is considerably higher: the child's best interests are the "only" consideration in the *FLA* as compared to a "primary" consideration in the *CRC*. Where the *CRC* is potentially relevant to BC family law is in providing additional interpretive guidance on the best interests standard to courts and other decision-makers. For example, the United Nations Committee on the Rights of the Child's General Comment No. 14 states that the best interests of the child should be understood as a substantive right (i.e., children have the right to have their best interests treated as a primary consideration); an interpretative legal principle (i.e., if more than one interpretation is possible, then that which most effectively serves the child's best interests should be chosen); and a rule of procedure (i.e., the potential impact of a decision on a child's best interests must be considered).[25]

The *CRC* has not yet played a significant role as interpretive guide in BC's relocation law. However, the instrument's emphasis on the child's right to be heard (article 12(2)) is relevant to at least one proposal for reform (discussed later in this paper): that if children's interests and views were represented and articulated by counsel, on equal footing to those of other parties, then their best interests would not have to be so carefully protected as the only judicial consideration.

Family law reform process in BC

In BC, the beginning of the reform process can be traced to 2005, some six years before the new *FLA* was enacted to replace the *FRA*. In May 2005, the Family Justice Reform Working Group produced a report recommending the justice system in BC "find better ways to make children's best interests a meaningful part of the family justice process."[26] In response, the Ministry of the

[25] UNCRC, *supra* note 22 at para 6.

[26] BC Justice Review Task Force, "A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force" (May 2005), online (pdf): <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-services-branch/fjsd/final-05-05.pdf>. This group was

Attorney General produced a series of discussion papers on various aspects of the law to structure consultation, a *Report of Public Consultations* in 2009, and ultimately a White Paper in 2010 which proposed language to be incorporated into the new legislation.[27] The consultation process was broad, reportedly involving 156 stakeholders and eliciting 140 submissions.[28]

The new *FLA* was proposed to both modernize and simplify family law in BC. Lawmakers sought to make the law more understandable and predictable.[29] Reform was also driven by efficiency concerns. British Columbia had become, under the *FRA*, "one of the most litigious provinces in the country when it comes to family law litigation."[30] Of the six general policy values listed as underlying the statutory reform, at least four (italicized) advance efficiency objectives:

- *supporting fair, early, efficient, flexible and proportionate resolution of disputes;*
- *reducing the emotional and financial costs of family break-up*;
- *using out-of-court dispute resolution processes, where appropriate*;
- *using public resources wisely and efficiently*;
- encouraging families to resolve their disputes in co-operative ways; and
- maximizing the ability to discover and effectively apply children's best interests while encouraging parents to reduce conflict and the effect of conflict on children.[31]

The reformulation of the best interests standard as the only consideration in parenting disputes aligns with the *FLA*'s efficiency purpose. Greater certainty, predictability, and cost savings should result when only one set of interests is considered. Whether these results have been achieved remains to be seen. As I will discuss, the jurisprudence around relocation is, still, uncertain.

Support for the elevation of the best interests standard from "paramount" to "only" was, reportedly, "virtually unanimous" during the consultation

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comprised of representatives from the judiciary, Law Society of BC, Canadian Bar Association, and the provincial government.

[27] Ministry of Attorney General, *supra* note 16.

[28] "Bill 16, Family Law Act", 2nd reading, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39-4, 28:2 (17 November 2011, morning sitting) [*Hansard (17 November 2011)*] at 8858 (Jane Thornthwaite).

[29] Ministry of Attorney General, *supra* note 16 at 2.

[30] *Hansard (17 November 2011)*, *supra* note 28 at 8846 (Leonard Krog).

[31] Ministry of Attorney General, *supra* note 16 at 2-3 [emphasis added].

process.[32] This consensus also comes through clearly in the Hansard debate where there was a high degree of agreement from both sides of the house. Shirley Bond, the Attorney General at the time, identified the change in the best interests standard as being "the heart of the bill."[33] Only one member of the opposition, NDP member Harry Bains, raised a concern about the standard vis-à-vis other interests and perspectives on the family:

> I just want to make sure that I put those concerns before this House and to make sure that when we are talking about or making statements such as "best interests of the child" that we also must view them in the eyes of those who have different cultures and different religious backgrounds, and make sure that we are sensitive about their needs.[34]

Although few in number, there were critical commentators. West Coast LEAF, for example, advocated for the addition of an application section that would recognize certain gendered realities in the face of a seemingly gender-neutral law focused exclusively on children's interests. These included women's disproportionate responsibility for the primary care of children, "women's historical and ongoing disadvantaged position in family and in society," and "the need to support and validate women's autonomy and substantive equality rights."[35]

Like West Coast LEAF, Professors Susan Boyd and Gillian Calder advocated for recognition of women's economic needs and disadvantage. Women's needs should be given deference as a legitimate reason to relocate, they argued, particularly when she is the primary breadwinner and caregiver:

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[32] *Ibid* at 42.
[33] "Bill 16, Family Law Act", Committee of the Whole House, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39-4, 28:5 (21 November 2011, afternoon sitting) at 8944 (Shirley Bond).
[34] "Bill 16, Family Law Act", 2nd reading, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39-4, 28:3 (17 November 2011, afternoon sitting) at 8880 (Harry Bains).
[35] West Coast LEAF, "Submission of West Coast Women's Legal Education and Action Fund to the Ministry of Attorney General Justice Services Branch Civil and Family Law Policy Office: Family Relations Act Review, Phase III Discussions Papers" (December 2007) at 7.

> The ability of parents with primary responsibilities for children to make decisions in relation to jobs, relationships and family is apparently being compromised out of a sense that it is problematic to move children from familiar environments, from a second parent or from extended family. This trend is particularly significant for women who are still disproportionately custodial parents post-divorce, and for whom there still remain gendered pay inequities in the workforce.[36]

These voices are the only critical perspectives openly available in the consultation literature connecting the child's best interests standard with the displacement of women's interests and needs.

Product of reform: the *FLA* enacted with precedent-setting relocation provisions

The best interests of the child are now the only consideration when decisions are made, or disputes resolved, in or out of court, which affect the child. The best interests test is defined at section 37 of the *FLA* and mandates consideration of "all of the child's needs and circumstances" including:

- the child's health and well-being;
- the child's views;
- the child's relationships;
- the history of the child's care;
- the child's need for stability;
- parents'/guardians' ability to exercise their responsibilities; and
- family violence.[37]

These considerations run through the entire statute, including its relocation provisions.

The *FLA*'s relocation provisions were the first of their kind in Canada at the time.[38] No other Canadian jurisdiction had statutory guidance to override the Supreme Court's most recent decision on relocation, *Gordon v Goertz* (which, from

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[36] Susan Boyd & Gillian Calder, "Submission to the BC Ministry of Attorney General, Justice Services Branch, Civil and Family Law Policy Office: FRA Review – Chapter 14, Relocating Children" (2007) at 2 (a PDF copy of the original submission was provided by the authors and is cited with permission).

[37] Section 38 provides further guidance to decision-makers on how to assess family violence as part of the best interests test.

[38] BC lawmakers looked to US jurisdictions in order to model the relocation provisions in the *FLA*, as well as to the *Proposed Model Relocation Act* drafted by the American

1996, was not particularly recent).[39] *Gordon*, however, offered no rules or presumptions to guide decisions by courts.[40] This gap in guidance led to increased uncertainty and litigation.[41] The uncertainty was such that the BC Government's 2010 White Paper on family law reform referred to relocation law prior to the proposed reforms as "rock, paper, scissors territory."[42] The amended *Divorce Act*, through its new relocation provisions, will now, hopefully, resolve some of this uncertainty for relocation disputes governed by the federal legislation.[43]

The new relocation provisions in the *FLA* include three primary elements aimed at addressing uncertainty and reducing litigation: first, a notice-to-move provision that applies to any guardian (including the non-custodial guardian); second, a child-centred definition of relocation that "focuses on the impact of the proposed move on the child's primary relationships [and] avoids the potential arbitrariness of distinctions drawn on threshold distances, travel times or borders;" and third, legislated factors that a judge must (or must not) consider, including presumptions and burdens of proof.[44]

Interestingly, relocation is one of the few areas in the statute where factors other than the child's immediate best interests (as enumerated in subsection 37(2)) must also be considered. These additional factors include:

- whether the proposed relocation is made in good faith;
- if the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardian(s);
- the reasons for the proposed relocation;
- 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; and
- a requirement that the court not consider whether a guardian would still relocate if the child's relocation were not permitted.[45]

Association of Matrimonial Lawyers; see Ministry of Attorney General, *supra* note 16 at 70.

[39] [1996] 2 SCR 27, 1996 CanLII 191 (SCC) [*Gordon*].

[40] Thompson, *supra* note 5 at 219.

[41] *Ibid.*

[42] Ministry of Attorney General, *supra* note 16 at 69.

[43] *Divorce Act*, *supra* note 17, ss. 16.9(1)–16.96(4). These provisions came into force March 1, 2021.

[44] Ministry of Attorney General, *supra* note 16 at 71.

[45] *FLA*, *supra* note 1, ss 69(4), 69(6)-(7).

These provisions provide a rare opportunity for the courts to consider the parents' interests within the larger framework of the child's best interests. As discussed in the next section, the opportunity has not been sufficiently seized, although the BC Court of Appeal's recent relocation decision, *Duggan v White*, may herald a change in course.

In summary, the most recent family law reform process in BC, resulting in the 2013 *FLA*, elevated the best interests of the child from the paramount to the only consideration when resolving family disputes involving children. Legal reform was intended to make the law more simple and predictable, and the family justice system more efficient. For the first time in a Canadian jurisdiction, the *FLA* included specific provisions relating to relocation. These provisions also centre the best interests of the child. But, unlike other sections, the relocation provisions permit some consideration of factors other than the child's immediate best interests, such as the reasons for the proposed move and whether it is likely to increase emotional well-being or financial or educational opportunities for the relocating parent. Part Two considers the effect of these provisions on the parents involved in relocation disputes.

II. THE LAW'S UNEQUAL EFFECT

Gendered mobility

Despite its gender-neutral language and its singular focus on the best interests of the child, BC's relocation law is undeniably gendered in its effect. Decisions which deny custodial parents the right to move with their children *in effect* deny women—who make up the majority of custodial parents[46] and are the vast majority of relocation applicants[47]—the rights and freedoms enjoyed by others, and in particular by their opposing non-custodial parent. While this pattern is not unique to relocation decisions made in BC, it has become even more restraining for women under the reformed family law regime in BC.

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[46] Statistics Canada, *supra* note 3.
[47] Thompson, *supra* note 5 at 222; Shaw, *supra* note 5 at 127.

Relocation approvals have decreased over time, both nationally and in BC. Nationally, litigated relocation application approvals went from 60 percent before the Supreme Court's decision in *Gordon* to 50 percent afterwards.[48] In BC, the relocation success rate between 2001 and 2011 was 54 percent compared to 51 percent nationally.[49] Now, since the introduction of the *FLA*, success rates have fallen to 45 percent under BC's provincial statute.[50]

Professor Thompson argues the *FLA*'s relocation provisions were intended and written to be pro-move.[51] The relocation must be presumed to be in the best interests of the child if the custodial parent has satisfied the court that the proposed move is made in good faith and reasonable and workable arrangements have been proposed to preserve the relationship between the child and the non-moving, access parent.[52] However, based on what Thompson deems to be misinterpretation by the courts of the Legislature's intent, BC has become one of the most restrictive jurisdictions for mobility.[53] For example, despite the pro-move presumption for custodial parents just noted, only 53 percent of moves which should have presumptively qualified under this provision—that is, moves proposed by custodial parents—were approved from 2015 to 2018.[54] Thus, the pro-move presumption was apparently successfully rebutted in nearly half of all cases.

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[48] DA Rollie Thompson, "Heading for the Light: International Relocation from Canada" (2011) 30:1 Can Fam LQ 1 at 2.
[49] Bala & Wheeler, *supra* note 7 at 288.
[50] Thompson, *supra* note 5 at 233 (based on data from 2015-2018). See also Shaw, *supra* note 5 (finding that the court permitted relocation in 46% of the 56 cases she reviewed from 2013-2020 at 128).
[51] Thompson, *supra* note 5 at 231.
[52] *FLA*, *supra* note 1, ss 69(4)(a)(i)-(ii). This presumption is rebuttable by the non-moving parent, per s 69(4)(b) and does not apply where the parents have "substantially equal parenting time with the child" per s 69(5). In these latter cases, the onus is on the relocating parent to satisfy the court that the proposed move is in good faith and reasonable and workable arrangements have been proposed (per s 69(5)(a)), and that the relocation is in the best interests of the child (per s 69(5)(b)).
[53] Thompson, *supra* note 5 at 233.
[54] *Ibid.* See also Shaw, *supra* note 5 (providing a detailed analysis of 56 relocation cases decided between 2013 and 2020 under the *FLA*, including information on the applicant, reasons for the move, factors considered, and success rates).

Because the vast majority of relocation applications are from women (greater than 90 percent[55]), restricting mobility clearly has gendered effects. Not only are women going through the burden of applying to move, but more than half of women who pursue litigation to secure the right to move are denied.[56]

Relocation law's disproportionate effect on women's autonomy, liberty, and equality has long been recognized. In its 2007 submission to the family law reform discussions, West Coast LEAF argued: "The gendered impact of mobility cases is clear as mothers are the primary custodial parents of children post-separation and decisions by the courts in limiting or allowing their ability to relocate with their children challenges women's ability to make autonomous decisions about their lives and the lives of their children."[57]

In *Stav v Stav*, Justice Prowse cited with approval Justice Kirby of the High Court of Australia's characterization of how the denial of relocation can tread on the liberty of, primarily, women:

> In practical terms, court orders restraining movement of a custodial (or residence) parent ordinarily exert inhibitions on the freedom of movement of women, not men…. It will be she, not the husband, who will usually be confined, in effect, in her personal movements, emotional environment, employment opportunities and chances of remarriage, re-partnering and reparenting. Effectively, as here, it is she who will be controlled by court orders that require her to live, and make the most of her life, in physical proximity to the husband's whereabouts. In this way, inconvenience to the husband is minimised. But the effect on the wife may be profound.[58]

This excerpt from *Stav* was quoted again in *Duggan*,[59] highlighting the court's recognition of the gendered reality of relocation applications—and, more importantly, their rejection.

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[55] Thompson, *supra* note 5 at 222. See also Eiad El Fateh, "A Presumption for the Best" (2009) 25:1 Can J Fam L 73 at 78; Bala & Wheeler, *supra* note 7 at 289.
[56] See e.g. Shaw, *supra* note 5 (of 48 applications by mothers, relocation was permitted in 23 instances at 128).
[57] West Coast LEAF, *supra* note 35 at 27.
[58] *Stav v Stav*, 2012 BCCA 154 [*Stav*] at para 87.
[59] *Duggan*, *supra* note 13 at para 16.

Why do parents move?

The adverse effects of denied mobility are clearer when the equality- and security-seeking reasons for relocation applications are considered. The top reasons for seeking to relocate are: 1) for economic well-being, such as a job transfer, better job opportunity, or educational upgrading; 2) for a new relationship; and 3) for better family support.[60] Better family support (the third reason) is often crucial to enable single parents to pursue improved economic well-being (the first reason), particularly when affordable childcare options are limited. To this list, Shaw adds affordability and availability of housing (a motivating factor in 38% of the cases reviewed) and family violence (raised in a quarter of the cases).[61] These factors are significant for female relocation applicants because "women are more likely to be left in a worse financial position following separation than are men and … women are more commonly the targets of family violence."[62]

The disparity in income between moving and non-moving parents highlights the existing inequality between custodial and non-custodial parents, and is reflective of the broader economic inequalities between women and men in society. The gap underscores why women seek to move: the average annual income of moving parents in Bala and Wheeler's study was $38,756, whereas that of the non-moving parents was $62,217.[63] When women are denied the right to move with their child(ren), they are denied the freedom to improve their economic well-being. Stated differently: in these cases where the move is motivated by improved job prospects and/or family support to facilitate labour-market participation, courts are preventing women—specifically, single mothers—from pursuing the dual goals of career and raising a family. Viewed through the lens of the child, this may also be contrary to the child's best interests.

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[60] Bala & Wheeler, *supra* note 7 at 290.
[61] Shaw, *supra* note 5 at 136, 139.
[62] *Ibid* at 136.
[63] Bala & Wheeler, *supra* note 7 at 290.

New data shows that growing up in a lower income family has a lasting effect on a child's educational attainment, health status, and income as adults.[64]

Duggan provides a cogent example of economic well-being as a driver for mobility.[65] Until two lower court decisions were overturned by the Court of Appeal,[66] the case was also an example of the courts' reticence to recognize and consider the legitimacy of the moving parent's interests.

Duggan v White, 2019 BCCA 200

Duggan concerned a mother's request to move within BC from the Kootenays to Langley with her two-year-old son in order to obtain the university degree necessary for a career in correctional services, which was unavailable in the Kootenays.[67] The mother secured subsidized housing, full-time daycare, and had extended family and friends in the Lower Mainland to assist her.[68] She was the child's primary caregiver.[69] At the time of her relocation application, she was working as a house cleaner and also relied on social assistance, with reported annual income ranging from $9,870 to $17,678.[70] Mr. White, the father and respondent, was working at a sulphide bleaching plant and earning $74,780 annually with a benefits package.[71] His work was not portable.[72] Prior to the proposed relocation, Mr. White did not exercise substantially equal parenting time

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[64] Statistics Canada, *Intergenerational income mobility: The lasting effects of growing up in a lower-income family*, (infographic), Catalogue No 11-627-M (Ottawa: Statistics Canada, September 2020).
[65] *Duggan*, *supra* note 13.
[66] The case was first heard at BC Provincial Court (unreported), where the mother's move was denied, and then appealed to the BC Supreme Court, which dismissed her appeal without reasons for judgement (*Duggan v White*, Nelson Docket No. S20223, as reported in *Duggan v White*, 2019 BCCA 200). The BCCA overturned these decisions and allowed the move.
[67] *Duggan*, *supra* note 13 at para 32.
[68] *Ibid* at para 34.
[69] *Ibid* at para 29.
[70] *Ibid* at para 38.
[71] *Ibid* at para 40.
[72] *Ibid.*

(that is, he was the access parent), but did have regular and increasing parenting time with the child.[73]

At trial in Provincial Court, Ms. Duggan's relocation request was denied. A second order was made regarding parenting time, assuming she would not move without the child, an assumption specifically disallowed by the statute.[74] The court provided a specific schedule, organized around Mr. White's work, assigning over 70% of the parenting hours to Ms. Duggan.[75] Viewed through a critical feminist lens, the court favoured Mr. White's career, consigned Ms. Duggan to low-income work (as her planned-for educational improvements were denied with the move), and assigned the lower-income parent unpaid caregiving for the benefit of the higher-income parent's career and access benefits. As observed by Boyd and Calder in 2007, "where a move may provide a custodial parent with better work or more access to family caregiving or support, denying the move … seems the unjust result."[76] Here, Ms. Duggan, the custodial parent, was effectively denied opportunity for self-improvement and support (without having to leave her son), while Mr. Duggan's already advantageous economic position was buttressed with convenient access, convenient childcare, and stability.

Ms. Duggan appealed this decision. Justice Saunders of the BCCA, who ultimately approved the mother's relocation with the child,[77] draws attention to the equality concerns at play in this and other relocation disputes, suggesting that there may indeed be a role for consideration of the mother's economic equality interests:

> Opportunities for employment and education are not spread evenly throughout the province. For this reason, it is not unusual for parties in family disputes to have to adapt to changes that require relocation… In my view, just as parties must adapt, courts must allow for adaptation in parenting situations, and be assiduous in seeking to avoid results that

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[73] *Ibid* at para 29.
[74] *Ibid* at paras 41, 58. *FLA*, section 46(2) reads: "To determine the parenting arrangements that would be in the best interests of the child in the circumstances set out in subsection (1) of this section, the court … (b) must not consider whether the guardian who is planning to move would do so without the child."
[75] *Duggan*, *supra* note 13 at para 41.
[76] Boyd & Calder, *supra* note 36 at 3.
[77] *Duggan*, *supra* note 13 at para 70.

> artificially keep one of the parents down. The best interests of the child is a large concept – one which, in my view, can be quite capable of providing, with a generous stance, an opportunity for one of the parents to lift himself, or herself, closer to the level of the more advantaged parent.[78]

As Justice Saunders underscores, in a province where opportunities are not evenly spread (much like the rest of Canada), upward mobility often requires geographic mobility.

While discussing how the trial judge erred in requiring necessity to justify the move, Justice Saunders makes increasingly stronger equality arguments in favour of the right to move, each time grounding them in the best interests of the child. For example, she notes that staying where the father is "may keep [Ms. Duggan] in a situation of comparative under-employment for a longer period of time" and she asks "how the prolongation of such unequal circumstances can be in the best interests of the child."[79] She points, instead, to the established view in family law that individual financial independence is "consistent with the best interests of children caught in the breakdown of family relationships."[80] She then argues that the *FLA*'s defined scope of the best interests of the child "provides room for considering the concepts of equal opportunity, review of the present disparity between the economic circumstances of the parents, and recognition of the potential prolongation of that disparity consequent on the decision made by the judge on the application before him."[81] Her reasoning suggests that courts should not be blind to the inequalities that a narrow consideration of the child's best interests can sow or sustain.[82]

Throughout her judgment, Justice Saunders tethers each of her arguments in favour of the mother's liberty and equality interests to those of her child's best interests. In effect, she does just what Boyd and Calder warn against in the opening lines of their 2007 submission: "Parents should not have to prove that a

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[78] *Ibid* at para 68.
[79] *Ibid* at para 63.
[80] *Ibid* at para 65.
[81] *Ibid* at para 66.
[82] *Ibid* at para 68.

move is calculated to improve the best interests of children in order that it be approved."[83] But there is a clear and sustained sub-narrative throughout the judgment bringing attention to the mobility, liberty, and equality rights of custodial parents—one that is ultimately satisfied in the decision to grant Ms. Duggan's move. In this way, Justice Saunders' approach in *Duggan* differs from other *FLA* relocation decisions, as discussed below.

Uncertainty

While the *FLA*'s relocation provisions were meant to bring greater certainty to the law,[84] the BC courts' interpretation of these provisions has been anything but certain. For example, prior to *Duggan*, key cases on subsection 69(7) held that the relocation provision does not preclude the court from considering the status quo parenting arrangement.[85] This is important because when the status quo is considered in the best interests test, it will tend to favour the case of the parent opposing the move. For this reason, some argue it should be precluded or it will function as an anti-move presumption. In *CMB v BDG*,[86] Justice Fleming reasoned that to preclude consideration of the status quo "is to risk prioritizing the rights of the relocating parent over the best interests of a child."[87] In *Walker v Maxwell*,[88] Justice Harris held that the trial judge was not to be criticized for finding that the status quo scenario was where the child's best interests were served.[89] Similarly, the court held in *Fotsch v Begin*[90] that subsection 69(7) does not expressly preclude the court from considering the status quo.[91] However, in *Duggan*, the most recent appellate decision to explicitly discuss the status quo,[92]

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[83] Boyd & Calder, *supra* note 36 at 1.
[84] See the "Ministry Comment" on *FLA* s 69 in Brown, *supra* note 17 at 935.
[85] Section 69(7) concerns relocation where there is an existing written agreement or order respecting parenting arrangements, in contrast to section 46 which applies where there is no written agreement or order, as was the case in *Duggan*.
[86] 2014 BCSC 780.
[87] *Ibid* at para 104.
[88] 2015 BCCA 282.
[89] *Ibid* at para 36.
[90] 2015 BCCA 403.
[91] *Ibid*, ratio taken from Brown, *supra* note 17 at 936.
[92] Since *Duggan*, the BC Court of Appeal has issued two other decisions engaging relocation issues: *Barendregt v Grebliunas*, 2021 BCCA 11, discussed below, and *Johansson v*

Justice Saunders holds that "the status quo approach is eschewed by the *Act* and jurisprudence."[93] Justice Saunders determined that, rather than evaluating the relative merits of the two proposals before him—one from the mother proposing relocation, and one from the father proposing he become the primary caregiver—the trial judge erred by constructing and ordering a third parenting option based on the status quo.[94] Instead, she reasoned, the court must assess the proposals for parenting that have been presented to the court, which, in most cases, will be the moving parent's proposal and the non-moving parent's opposing proposal. Because the court "lacks authority to require a parent to remain in a community," ordering all parties to maintain the status quo is not a viable option.[95] However, the BCCA's more recent decision in *Barendregt v Grebliunas*[96] appears to do just that.

Barendregt v Grebliunas, 2021 BCCA 11

Issued after *Duggan*, the BCCA took an opposing approach in *Barendregt*. At trial,[97] the mother was granted primary residence and permission to relocate with the children from West Kelowna to Telkwa, where she had extended family and emotional support. On appeal, the court ordered the children be returned to West Kelowna, where the father continued to reside, to allow for shared parenting and shared guardianship—under the presumption that the mother would also return.[98]

At trial, the availability of supports for the mother in the new location and the father's questionable financial capacity to house the children in the family home in West Kelowna mitigated in favour of the move. However, on appeal, the mother's needs for emotional support were found not to outweigh the

Janssen, 2021 BCCA 190, which is primarily a dispute about jurisdiction and conflict of laws.

[93] *Duggan*, *supra* note 13 at para 18.
[94] *Ibid* at paras 57-59.
[95] *Ibid* at para 20.
[96] *Barendregt*, *supra* note 13.
[97] *Barendregt v Grebliunas*, 2019 BCSC 2192.
[98] *Barendregt*, *supra* note 13 at para 91.

benefits to the children of staying in West Kelowna, with or near their father.[99] That the mother did not move for reasons of work or education weakened her position.[100] The father's position was strengthened, in turn, by admission of new evidence going to his capacity to house and financially support the children in West Kelowna.

In *Barendregt*, the mother's interests were not sufficiently aligned with her children's interests to justify their fulfillment: that is, the mother's interests could not be read into a generous interpretation of the best interests of the child, as in *Duggan*. Instead, the court, on appeal, overturned the decision which allowed her to move with the children and ordered a parenting arrangement that assumed her presence in West Kelowna, despite the court being unable to order her return. Like the lower court decisions of *Duggan*, the parenting plan, and so too the mother's location, was tethered to the wealthier parent's (i.e., the father's) circumstances.

While it is beyond the scope of this paper to address in detail the diversity of factors at play in these cases, in broad strokes *Duggan* and *Barendregt* stand in opposition to each other in terms of their treatment by the lower and appeal courts. These recent cases point to the continuing uncertainty in the law of relocation in BC.

In *Duggan*, by contrast, three years after filing her initial application, the mother was granted the right to move by Justice Saunders—ironically, approximately the same amount of time needed to acquire the degree she sought.[101]

Justification

I return to my question of justification: how can the child's best interests not merely outweigh but virtually extinguish other rights-holders' interests? A

[99] *Barendregt*, *supra* note 13 at para 90.
[100] *Ibid* at para 67.
[101] Ms. Duggan, in fact, moved with the child prior to hearing the trial-level decision that denied her relocation request, something that might have been treated as a factor against her, but which Justice Saunders states as a matter of fact and seemingly without judgement; see *Duggan*, *supra* note 13 at para 36.

reasoned justification for the displacement of parents' rights and interests is not to be found in the jurisprudence. The supremacy of the best interests of the child appears to be largely settled.

In the first decade of *Charter* jurisprudence, the Supreme Court essentially decided that the *Charter*, an individualistic rights tool, should not be applied to family disputes involving children.[102] In *Young v Young*,[103] a case originating in BC, the Supreme Court considered whether the *Charter* can outweigh the best interests of the child.[104] The majority of the Court said no: the *Charter* does not displace the best interests test. Justice L'Heureux-Dubé, writing for the majority on the constitutional question, held:

> It would seem to be self-evident that the best interests test is value neutral and cannot be seen on its face to violate any right protected by the *Charter*. Indeed, as an objective, the legislative focus on the best interests of the child is completely consonant with the articulated values and underlying concerns of the *Charter*, as it aims to protect a vulnerable segment of society by ensuring that the interests and needs of the child take precedence over any competing considerations in custody and access decisions.[105]

Harvison Young interprets the result in *Young* not so much as a product of legal reasoning but as a reflection of a Court, and Canadian society more generally, deeply reluctant to place children's interests into conflict with parents' rights.[106] In *Young*, the individualistic rights model of the *Charter* was cast as inappropriate for application to the family. Then, three years later, when the Court heard the *Gordon* relocation case, the mobility rights of the moving parent were not even raised as an issue in the majority decision.[107] The parent's rights were no longer up for consideration when positioned against the child's best interest.

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[102] Alison Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001) 80:1-2 Can Bar Rev 749.
[103] [1993] 4 SCR 3, 1993 CanLII 34 [*Young*].
[104] *Ibid* (in this custody and access case, the father claimed that his *Charter* rights to freedom of religion, expression, and association were denied by the best interests test).
[105] *Ibid* at 71.
[106] Harvison Young, *supra* note 102 at 768.
[107] *Ibid* at 772. Justice L'Heureux-Dubé's dissenting judgement in *Young* discusses restrictions on custodial parents' rights at paras 95-99.

There is remarkably little case law, apart from *Young*, addressing the potential of competing rights and interests of parents and children. Two examples can be cited. In *New Brunswick (Minister of Health and Community Services) v G (J)*, the Supreme Court recognized violation of a mother's right to security of the person in a best interests-driven child protection proceeding.[108] In *Canadian Foundation for Children*, the Court decided that the best interests of the child is not a principle of fundamental justice capable of justifying deprivations to the *Charter*'s section 7 rights to life, liberty and security of the person.[109] These two examples, while important in their own right, were not successful in chipping away at the grip of the best interests of the child principle in family law.[110]

In *Young*, the Supreme Court justifies the power of the best interests standard based on it being value neutral and being "completely consonant with the articulated values and underlying concerns of the *Charter*".[111] In relocation disputes, where the best interests standard operates to silence the relocating parent's fundamental rights, it is difficult to reconcile the principle with the *Charter*'s concern for protection of individual rights. Courts are unable to directly infringe the parent's liberty by ordering them to remain, as Justice Saunders noted in *Duggan*,[112] but can instead employ the best interests principle to require the child to stay, forcing the moving parent to make an impossible choice between their role as a custodial parent and their reasons to move.

More than two decades before the *FLA* came into force, the late Professor Marlee Kline argued the best interests of the child ideology can operate to harm children, particularly those who are Indigenous or racialized.[113] While Kline's focus on the child welfare system is different from the focus of this paper, her critique of the best interests principle is relevant to its operation in contemporary

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[108] [1999] 3 SCR 46, 1999 CanLII 653.
[109] *Canadian Foundation for Children*, *supra* note 10.
[110] Notably, in both of these cases, the state was a party to the dispute and so the *Charter* had a direct role to play in protecting the individual (or organization) against the power of the state.
[111] *Young*, *supra* note 103 at 71.
[112] *Duggan*, *supra* note 13 at para 20.
[113] Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 Osgoode Hall LJ 375.

family law issues. Kline explored how the best interests of the child can be used to suppress other interests and rights, such as maintenance of Indigenous identity and connection to culture. She argued that portraying the best interests standard as neutral, impartial, and universal obscures the principle's disparate, and sometimes both coercive and destructive, impact on Indigenous children, families, and communities. She called into question whether the best interests principle is indeed value neutral as the SCC claimed in *Young*.

In the academic community today, there seems to be almost total agreement around the child's best interests. Semple has noted the "remarkable degree of consensus" supporting the best interests of the child principle and its "near-universality" in statutes, case law, and normative scholarship.[114] I observed earlier in this paper that few voices offered critical perspectives on the best interests standard during the pre-*FLA* law reform debates and consultations. However, even fewer are vocal now: Professor Thompson's critique of the best interests standard is one of the only to appear in the current Canadian literature.[115] Semple finds the best interests principle is "so firmly ensconced in the law that most scholars do not bother advocating [for] or defending it."[116]

In 2004, reflecting on the failed federal family law reform process of the late 1990s, in which child support and custody and access law was debated with a view toward greater reliance on shared parenting presumptions, Boyd questioned if self-censoring by feminists in order to have their voices better heard and accepted contributed to the invisibility of women's interests in subsequent family law reform debates: "Women's groups generally have tried in recent years to couch their concerns by reference to the best interests of children principle rather than by emphasizing the detrimental impact on women of some of the law reform proposals. I wonder now if that strategy—of emphasizing children's interests

[114] Semple, *supra* note 9 at 290.
[115] See e.g. Rollie Thompson, "Presumptions, Burdens, and Best Interests in Relocation Law" (2015) 53:1 Family Court Rev 40.
[116] Semple, *supra* note 9 at 298.

over women's—is the right one."[117] Justice Saunders does just this in *Duggan*: she reads Ms. Duggan's legal interests into the "large" and "generous" best interests concept to arrive at her result in favour of Ms. Duggan's proposed relocation.[118] Boyd recommended changing the conversation by "re-inserting" women's stories and feminist analysis "more vocally and evocatively into the public domain."[119] The best interests of the child principle has since become so entrenched that the only way of "re-inserting" women's interests may be through the child's dominant interests, as was done in *Duggan*.

Prospects for reform

The prospects for change in an area where there is almost total consensus is, admittedly, limited. Stephen Toope predicted in 1991, before *Gordon*, that the still-new *Charter* would have little impact on drawing out parents' rights in family law, in part because "emphasis upon the 'best interests of the child' is so intuitively attractive that it will not easily be displaced by alleged *Charter* rights of the parent."[120] Furthermore, that BC recently went through a five- to six-year consultation period before reforming its family law regime less than a decade ago weighs heavily towards a "wait-and-see" approach.

Several options remain that could be pursued short of a law reform overhaul or constitutional challenge. Semple, for example, identifies a critical inconsistency in family law ripe for procedural reform. He notes that while the content of the law is focused exclusively on the interests of the child, the procedure is structured to protect the interests of the adult litigants.[121] This dissonance, he suggests, could be resolved in one of two ways: either the substance of the law could shift to re-focus on the interests of the adult litigants, or the procedure could be reformed to re-centre the child's interests, like the current substance of the law does.

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[117] Susan B Boyd, "Backlash against Feminism: Canadian Custody and Access Reform Debates of the Late Twentieth Century" (2004) 16:2 CJWL 255 at 288. For description of the failed federal reform process, see also Bala et al, *supra* note 4 at 524.
[118] *Duggan*, *supra* note 13 at para 68.
[119] Boyd, *supra* note 117 at 288.
[120] Stephen J Toope, "Riding the Fences: Courts, Charter Rights and Family Law" (1991) 9:2 Can J Fam L 55 at 95, cited in Harvison Young, *supra* note 102 at 768.
[121] Semple, *supra* note 9.

Semple prefers the latter option and offers, as an initial suggestion, that rules be devised that consider, from a child's best interests perspective, "(1) *whether* custody and access litigation occurs, (2) *how* it occurs when it does occur, and (3) *whether and how* children's evidence is heard within it."[122] While Semple's preferred reform would likely further undermine consideration of parents' interests and rights, it at least furthers consistency between substance and procedure.

However, if Semple's proposal for procedural reform were taken further, for example by strengthening the direct representation of children's interests through court-appointed counsel (like Ontario's Office of the Children's Lawyer or the Northwest Territories' Children's Lawyer), it could serve to create space for parents' voices too. Greater representation of children's views and interests would be consistent with Article 12(2) of the *CRC*.[123] If the rationale for elevating the child's best interests to the only or primary consideration is the vulnerability of children (as argued by L'Heureux-Dubé in *Young*) or, as Martinson argued, that they do not have the same ability as adults to know their rights, access remedies, and have their voices heard,[124] then introducing procedural mechanisms to address their vulnerability, lack of knowledge, and effectively represent their interests in the litigation could, theoretically, remove the need for their interests to be so carefully protected as the only consideration. That is, if children's interests and rights are represented and articulated by counsel, they could, then, be explicitly weighed against those of other parties.[125]

Another alternative for change would be if reform came from the apex court. According to Thompson, writing in 2019, the Supreme Court has refused leave to appeal for relocation cases 24 times since *Gordon* was decided in 1996.[126]

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[122] *Ibid* at 328.
[123] *CRC*, *supra* note 12.
[124] Martinson, *supra* note 23 at 16.
[125] While outside the scope of this paper, this question deserves further study: for example, does the use of children's lawyers in relocation disputes have a discernible effect on the articulation, balancing, and outcome of children's interests vis-à-vis parents' interests?
[126] Thompson, *supra* note 5 at 219. On January 21, 2021, the Supreme Court granted leave to appeal in *Richardson v Richardson*, 2021 CanLII 2826 (SCC), on appeal from *Richardson v Richardson*, 2019 ONCA 983. Relocation was one of several issues in the case

Given the changes to the social, cultural, and economic landscape since 1996, and the recently amended *Divorce Act*, a new statement on the law from the Court is long overdue.

Finally, the most encouraging signs of change come from decisions like *Duggan*, which make immediate changes and lay the groundwork for further incremental change. Unfortunately, the BCCA's more recent decision in *Barendregt* does not take up this pathway to change, instead turning course again. (The decision does not even make reference, positively or negatively, to *Duggan*.) *Duggan* falls short of a reconsideration of the best interests orthodoxy, but breathes some life back into parents' rights by recognizing their interests through a "generous" reading of the best interests concept. The *Duggan* decision arcs relocation jurisprudence a little closer to Justice L'Heureux-Dubé's dissenting opinion in *Gordon* where she argued that "imposition of restrictions on the rights of custodial parents are and should remain the exception rather than the rule."[127] That restrictions on custodial parents' rights were once thought of as an exception to the rule feels very distant from today where parents' rights often appear to no longer even be considered part of the equation.

CONCLUSION

In this paper, I sought to demonstrate the potential harmful effects a seemingly neutral and universally-accepted standard—the best interests of the child—can produce for other rights-holders, primarily female parents, within family law disputes when only one standard, or set of interests, is considered. Women seeking to move with their child have been disproportionately affected by its operation, which has had the effect of denying their moves in a majority of cases. Shaw captures succinctly the barriers to substantive equality women face following separation and seek to overcome through relocation:

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but the relocation itself is not an issue on appeal. Leave to appeal was also granted May 13, 2021 in *Barendregt* (see *Barendregt v Grebliunas*, 2021 CanLII 39842 (SCC)), however the issues on appeal appear to primarily concern rules of evidence as opposed to relocation law and mobility rights.

[127] *Gordon*, *supra* note 39 at para 95.

> Women are likely to suffer more severely, financially, from the dissolution of a relationship and are more likely to experience family violence. Mothers in heterosexual relationships are more likely to have care of children after separation than are fathers. In the face of those challenges, many guardians will apply to relocate for reasons that include seeking out emotional support from extended family and new partners, better financial opportunities, and housing affordability and availability.[128]

Through family law, and relocation law in particular, the state surveils and intervenes in both the everyday and fundamental life decisions of non-intact families about where to live, how to earn a living, proximity to support systems, and new partnerships. Through orders about relocation—which, more often than not, are orders to stay—courts are conveying, both implicitly and explicitly, that a non-intact family is less desirable than a traditional family; that it is bad for children to move frequently (even though the social science research is split on this question);[129] and that maximized contact with both parents is a more important objective than the individual rights and freedoms of adult parents.

The near-total consensus surrounding the best interests standard provides little hope for its displacement, particularly by the comparatively unpopular rights of parents. But recent jurisprudence from the BCCA does provide some hope that women's rights to equality, mobility, and liberty might be brought back out of the shadows. By giving generous scope to the best interests of the child principle, and reading the relocating parent's rights into it, Justice Saunders' decision in *Duggan* may provide a way to reclaim some freedom for custodial parents to relocate in order to pursue meaningful opportunities.

Should this be celebrated as a step forward for women? In current circumstances, where joint parenting is celebrated but unequal responsibility and constrained liberty is often the effect, then, yes, this is a step forward. But a real step forward would be if women's constitutionally-affirmed rights and freedoms could stand on their own two feet, rather than being carried by their child's interests, in family law.

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[128] Shaw, *supra* note 5 at 121.
[129] See Bala & Wheeler, *supra* note 7. See also Thompson, *supra* note 5 at 226.