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British Columbia's New Family Law on Guardianship, Relocation, and Family Violence: The First Year of Judicial Interpretation

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British Columbia's New Family Law on Guardianship, Relocation, and Family Violence: The First Year of Judicial Interpretation

Susan B. Boyd and Matt Ledger[*]

1. INTRODUCTION

British Columbia's new *Family Law Act* (*FLA*) came into force on March 18, 2013, representing the first major overhaul of family law in the province since 1979.[1] The goal of the new law is to reflect social change, place children first, and keep families safe.[2] Factors relevant to the best interests of the child principle are defined, and the language of "custody" and access" is removed in favour of "guardianship", which normally includes "parental responsibilities" and "parenting time". Although the *FLA* distances itself from presumptions regarding the preferred form of parenting arrangements, it articulates a default position that on separation, each parent is the child's guardian with all parental responsibilities. For the first time in British Columbia's family law, family violence is dealt with explicitly, including in the definition of the best interests of the child. Norms on relocation are also introduced, with burdens of proof that differ depending on the extent to which parenting was shared. The *FLA* sets out new norms and procedures for the resolution of family disputes, and emphasizes that out-of court dispute resolution should be used wherever possible.[3] The *FLA* has been hailed as innovative, but concerns have also been raised about some aspects, including the lack of governmental commitment to provide the funding and supports necessary for families to successfully negotiate the new norms.[4]

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1 *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*].

2 British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, 39th Parl, 4th Sess, No 9 (14 November 2011) at 8845 (Hon S Bond), online: Debates of the Legislative Assembly (Hansard) <http://www.leg.bc.ca/hansard/39th4th/index.htm>.

3 *FLA*, above note 1, s. 4.

4 British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, 39th Parl, 4th Sess, No 5 (21 November 2011) at 8929 (L Krog) and 8936-7 (C Trevena), online: Debates of the Legislative Assembly (Hansard) <www.leg.bc.ca/hansard/39th4th/index.htm>. See Rachel Treloar and & S B Boyd, "Family Law Reform in (Neoliberal) Context: British Columbia's *New Family Law Act*" (2014) 28:1 International J L Pol'y & Fam 77.

This article reviews the jurisprudence that has emerged over the first year of the *FLA*,[5] from both the Provincial Court and the Supreme Court of British Columbia in the fields of guardianship, relocation, and family violence. Although it is early as yet to determine the direction of the jurisprudence, and there is little appellate authority, the early case law suggests some trends and indicates some trouble spots.

2. GUARDIANSHIP

Since the *FLA* came into force, guardianship has proven to be a key battleground for some separating couples. The *FLA* specifies that only the best interests of the children must be considered when making determinations on guardianship and parenting arrangements.[6] Two key provisions that deal with guardianship are sections 39 and 51. In *H. (S.T.) v. G. (R.M.)*,[7] the Provincial Court interpreted section 39 as putting parents who have raised children together before separation on a more equal footing. Judge R. Hamilton stated that "in circumstances where parents lived together after the birth of their child and then separated, there is no need for the parents to apply for guardianship because they are statutorily deemed to be the child's guardian."[8] This decision attributed significance to the fact that the *FLA* did not create a provision for applying for sole guardianship and stated that a presumption of guardianship had been established.[9] In *Rashtian v. Baraghoush*,[10] the Supreme Court further clarified that "s. 39(1) creates a default position of joint guardianship unless the court orders or the parties agree otherwise."[11]

Only guardians are deemed to have parenting responsibilities and parenting time under the *FLA*,[12] and normally guardianship will arise while a child's parents are living together and after they separate.[13] Unless an agreement or order allocates parental responsibilities differently, these responsibilities, which are extensive,[14] may be exercised by each guardian in consultation with the other guardians, unless

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5 The research is current to June 30, 2014.

6 *FLA*, above note 1, s. 37(1). See *D. (C.W.H.), Re*, 2013 BCPC 135, 2013 CarswellBC 1700, [2013] B.C.J. No. 1200 (B.C. Prov. Ct.) at para. 10.

7 2013 BCPC 114, 2013 CarswellBC 1412 (B.C. Prov. Ct.) [*H.(S.T.)*].

8 *Ibid.* at para. 95.

9 *Ibid.* at para. 149. The BC government has stated repeatedly that there is no presumption in favour of equal parenting, but that is different than a presumption that both parents will have guardianship. See e.g. British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, 39th Parl, 4th Sess, No 5 (21 November 2011) at 8946 (Hon S Bond). For concerns that a presumption of guardianship would be established and problems that might arise as a result, see Susan B Boyd, "Joint Custody and Guardianship in the British Columbia Courts: Not a Cautious Approach" (2010) 29:3 Can. Fam. L.Q. 223 [Boyd, "Joint Custody"].

10 2013 BCSC 994, 2013 CarswellBC 1670, [2013] B.C.J. No. 1180 (B.C. S.C.) [*Rashtian*].

11 *Ibid.* at para. 26.

12 *FLA*, above note 1, s. 40.

13 *Ibid.*, s. 39.

14 *Ibid.*, s. 41.

consultation would be unreasonable or inappropriate.[15] As the Supreme Court has noted, responsibilities may be shared or exercised separately depending on whether it would be unreasonable to order shared parenting responsibilities.[16] If a person is removed as guardian, that person's parenting responsibilities cease, but they may still obtain "contact" with the child by agreement or order under sections 58 and 59.[17] Three recurring issues have arisen concerning guardianship that courts have tackled at length since the introduction of the *FLA*. These are appointment of guardianship, termination of guardianship, and the nature of guardianship rights where they are awarded.

(a) Appointment of a Guardian

If parties are not statutorily entitled to guardianship under section 40, they can still apply to a court to be appointed a guardian, based on sections 39(3) or 51(1). Several cases have involved this scenario.

In *P. (D.) v. S. (S.)*,[18] the parties had a six year old child. In addition to the mother and father, the grandmother was also applying for guardianship because the home was unstable, she felt that neither parent was capable, and the parents had had a rocky relationship characterized by drug abuse and violence. The father had relapsed with alcohol six months prior but had been off drugs for two to three years by the time of the application. The mother qualified as a guardian under section 39 because she had lived with the child, although during the first three and a half years following the child's birth she was in a drug addicted state. The father did not qualify as a guardian because he had never lived with the child. He had taken steps to go to recovery, and despite the grandmother's concerns the Ministry had none with either parent. Given these circumstances, the Provincial Court granted all three parties interim guardianship. The rationale was that "this extended family needs slow, steady, successful steps in order to foster respect and trust, and understanding of each other so that [the child's] life can expand to include a healthy stable relationship with her mother and father and grandmother and uncle and aunt."[19] The Court was satisfied that both parties had made a commitment to moving forward, despite the father's recent relapses and concerns about the child being alone with her mother.[20]

The Provincial Court placed weight on the fact that the Ministry had not expressed concerns about the parents in *P.(D.)*, even where the evidence suggested there might still be cause for concern. Primacy was given to the importance of children fostering relationships with their natural parents, and the judge seemed willing to do more than to grant contact in order to facilitate the nurturing of the

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15 *Ibid.*, s. 40(2).

16 See *J. (C.A.) v. J. (N.)*, 2014 BCSC 279, 2014 CarswellBC 443, [2014] B.C.J. No. 305 (B.C. S.C.) at para. 92 [*J.(C.A.)*], and *G. (M.A.) v. M. (P.L.)*, 2014 BCSC 126, 2014 CarswellBC 216, [2014] B.C.J. No. 134 (B.C. S.C.) at para. 43.

17 *Ibid.* at para. 92. Contact can be ordered under *FLA*, above note 1, s. 59, or agreed upon under s. 58.

18 2013 BCPC 181, 2013 CarswellBC 2192, [2013] B.C.J. No. 1565 (B.C. Prov. Ct.).

19 *Ibid.* at para. 53.

20 *Ibid.* at para. s. 57-58.

relationships. That the parties had recently been abusive to each other, the child did not want to be alone with the mother, and the father had had recent struggles with alcohol were not enough to deny them guardianship. This case suggests a relatively low bar that a birth parent has to surmount in order to be appointed a guardian. Addiction and unreliable behaviour were not enough to prevent that outcome, as long as the parents showed willingness to improve their behaviour.

Another important case is *F. (T.) v. D. (A.)*.[21] In this case, the mother had guardianship and the father had contact according to an interim consent order.[22] The child had special needs, and the father had a criminal record, an inability to pick up his child's cues, and an inability to put the child first. He was combative with the child's medical care professionals. The child presented well sometimes and terribly other times following visits with the father. The Provincial Court held that when determining guardianship, "the actual history of the child's care is more important than the wording of the now historical order."[23] The court also took into consideration the time spent with the child, and the fact that going to prison had cut into the father's time.[24] Because the child had special needs, the court considered the likelihood of each parent listening to care providers in awarding the mother decision making authority.[25] While the father was found to be a guardian pursuant to section 39(3) because he had regularly cared for the child, his behaviour led the court to limit his parenting responsibilities to those occurring during his parenting time, and he could not make any medical, dental or health decisions in respect of the child. This case shows that the nature of "guardianship" rights is case dependent, and that regular care of the child can be enough to appoint someone a guardian even where it is contrary to a prior order or agreement.

The Supreme Court also addressed this issue in *F. (S.J.) v. N. (R.M.)*.[26] Here, too, the father never lived with the child. The parties had been together briefly during 2011. They soon separated and following the separation, the mother discovered she was pregnant. The father had seen his child on a weekly basis for only a few months since its birth in 2012. There was a three week interruption of that weekly access. The Court found that such limited contact "cannot be characterized as him having 'regular care' of the child" within the meaning of section 39 of the *FLA*.[27] Therefore, the father had to apply to be appointed a guardian under section 51. The court granted the father guardianship in any event, despite the fact that the mother had made allegations that the father had been violent towards her sexually,

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21 2013 BCPC 205, 2013 CarswellBC 2277, [2013] B.C.J. No. 1695 (B.C. Prov. Ct.) [*F.(T.)*].

22 *Ibid.* at paras. S. 3-4.

23 *Ibid.* at para. 22.

24 *Ibid.* at para. 30.

25 *Ibid.* at para. 29.

26 2013 BCSC 1812, 2013 CarswellBC 2982, [2013] B.C.J. No. 2175 (B.C. S.C.) [*F.(S.J.)*].

27 *Ibid.* at para. 30. Section 39(3) of the *FLA*, above note 1, suggests that a parent who has never resided with his or her child might nevertheless become a guardian by regularly caring for the child. "Regular care" is not defined so the jurisprudence on this point will be important.

was controlling and manipulative, and had spat at her. According to the judge, the sexual assault allegations were not proven on a balance of probabilities but the other allegations were accepted. The Court noted instead that the father had no criminal record, that it was in the best interests of the child to have both parents actively involved in the child's upbringing, and that his dominant and controlling personality did not impair his ability to be a good parent.[28]

These cases suggest that when it comes to appointing parties as guardians, the courts have thus far set a fairly low bar. They seem to give primacy to the principle that maximum contact with and care by parents is a good thing for children, even where those parents have battled addictions or there have been allegations of domestic abuse, so long as that abuse is not directed towards the child. The slightest hint of efforts at rehabilitation or improvements in behaviour has been enough to date for the courts to declare people guardians provided they have either lived with the child, exercised regular care (as in *F.(T.)*), or the judge simply felt it was important for the child to have an active father figure. This approach is consistent with broader trends to encourage involvement by fathers, sometimes in circumstances that are less than optimal.[29] Yet the *FLA* does not contain a maximum contact principle. To date, it seems that BC judges are presuming, and preferring, that parents of a child have guardianship, continuing and strengthening the approach that had emerged under the *Family Relations Act*.[30] To the extent that a parent's behaviour and access needs to be controlled or limited, the courts so far seem to favour doing so by restricting the scope of their parenting responsibilities or decision-making authority, rather than denying them guardianship.

This approach may perhaps be explained by the fact that guardianship orders can be varied should the parents change and improve their behaviour. Parents and other important parties are therefore given more opportunity for growth and to play significant roles in the lives of children. The risk, though, is that in setting such a low bar, courts will expose children to negative or debilitating influences and perpetuate their exposure to family conflict where decision-making authority is not clear or ill placed. As with other jurisdictions that prioritize contact while also emphasizing the significance of domestic violence to children's wellbeing, contact appears too often to trump safety.[31] What is surprising is that this trend is occurring in British Columbia despite the strong language emphasizing children's safety in the

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28 *F.(S.J.)*, above note 26 at para. 94.

29 Fiona Kelly, "Enforcing a Parent/Child Relationship at all Cost? Supervised Access Orders in the Canadian Courts" (2011) 49:2 Osgoode Hall L.J. 277.

30 *Family Relations Act*, RSBC 1996, c. 128 [*FRA*]. See Boyd, "Joint Custody" above note 9, where it was suggested that the shift of default provisions in the *FLA* towards ongoing guardianship of parents might exacerbate the trend to award joint guardianship in circumstances that were less than ideal, such as serious conflict between the parents.

31 See e.g. Helen Rhoades, "Legislating to Promote Children's Welfare, and the Quest for Certainty" (2012) 24:2 Child & Fam L.Q. 158 [Rhoades, "Legislating to Promote Children's Welfare"].

FLA and the absence of a maximum contact principle.[32] We return to this issue below in our discussion of family violence.

(b) Termination of Guardianship

Another main issue that the courts have had to address is the termination of guardianship. In fact, they have had some difficulty determining the appropriate avenue for termination of guardianship. Termination cases have been brought under both sections 39 and 51, and courts have used both sections. In an early case, *H. (S.T.) v. G. (R.M.)*,[33] the Provincial Court stated that "should a parent wish to have sole guardianship of a child in circumstances where both parents are statutorily presumptive guardians, then the route to that outcome, in my view, is for one parent to apply to terminate the other parent's guardianship pursuant to section 51(1)(b) of the FLA."[34] The court held that termination could only be granted under this section "in the rarest and clearest of cases where cancelling guardianship was clearly in the child's best interests."[35] In that case the mother had had difficulty fulfilling her parenting responsibilities and had exposed her child to violent relationships. Since she was able to exercise some of these responsibilities at the time of trial, and was no longer in a violent relationship at that time, terminating the mother's guardianship was not found to be necessary. The very next day on May 1, 2013, the Provincial Court held in *M. (J.L.) v. T. (G.A.)*,[36] that there was authority to terminate guardianship under section 39, so there was no need to go into section 51 analysis.[37]

It remains unclear which section the courts will gravitate towards when deciding whether to terminate a party's guardianship rights. A plain reading of section 51 indicates that it is the section that expressly contemplates the termination of guardianship. In either case however, it appears that the standards the courts will use are the same. To this point, courts have been fairly consistent in setting a very high bar for termination of guardianship status. Only in the clearest of cases will courts find that cancelling guardianship for a party is in the child's best interests. In *D. (C.W.H.), Re*,[38] the Provincial Court reasoned that "termination can only occur in the most extreme situations. The approach to be taken is, first, to ask whether, through an allocation of parenting responsibilities, it continues to be in the best interests of the children that the parent remain a guardian. If it is, guardianship

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32 Notably, section 37(3) of the *FLA*, above note 1, states that an agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

33 *S.T.H.*, above note 7.

34 *Ibid.* at para. 102.

35 *Ibid.* at para. 150. The court also mentions at para. 103 that the *FLA* "does not set out what the court should consider" in termination cases, other than "the overarching consideration of the child's best interests set out in s. 37 of the *F.L.A.*"

36 2013 BCPC 96, 2013 CarswellBC 1102, [2013] B.C.J. No. 886 (B.C. Prov. Ct.).

37 *Ibid.* at para. 12.

38 2013 BCPC 135, 2013 CarswellBC 1700, [2013] B.C.J. No. 1200 (B.C. Prov. Ct.) [*D.(C.W.H.)*].

should not be terminated."[39] The court places great emphasis on giving parents "the maximum opportunity to remain a significant part of the child's life."[40]

What constitutes a clear case sufficient for termination is still being defined. *M.(J.L.)* featured evidence of repeated family violence on the part of the father, and a lack of desire on his part to exercise his guardianship rights. In *H.(S.T.)*, the mother was found to have capacity to exercise some of her parenting responsibilities, and despite a history of involvement in violent relationships, was no longer in one. In both cases, the court declined to terminate guardianship. In *G. (M.A.) v. M. (P.L.)*,[41] the Supreme Court followed and cited *D. (C.W.H.), Re*, for the view that "guardianship should only be terminated in the most extreme situations and only after determining whether through an allocation of parental responsibilities, it is in a child's best interests that the parent(s) remain a guardian."[42] Rather than risk depriving both the parent and child of a parent-child relationship, the courts have taken the position that "by allocating or reallocating parenting responsibilities to a more capable parent as opposed to terminating guardianship, a child may safely retain the benefit of having a parent remain a significant part of his or her life."[43]

Until now, occasional acts of family violence and a history of neglectful behaviour have not been enough to terminate guardianship as long as the guardians are making efforts to improve and remain involved in the child's life. Repeated incidents of violence towards members of the family are not necessarily enough to strip parties of their guardianship rights.[44] Particularly where the child expresses a wish to remain connected to a guardian, courts will presume that it is in the child's best interests to have both parents as heavily involved in their lives as possible. If the Ministry either expresses confidence in the parents or continues to play a role in the family, keeping parents involved in children's lives appears more likely. This approach could potentially leave children vulnerable to abuse where their expressed desire to remain close to a guardian is motivated by fear, as is often the case in abusive relationships where one party is disempowered. Children's reliance on guardians makes them extremely vulnerable in such circumstances.

However, a recent decision by the Court of Appeal indicates that going forward, there may be unique circumstances where guardians could be stripped of that status and some of their parenting responsibilities. In *British Columbia Birth Registration No. 2004-59-020158, Re*,[45] the mother and father had separated when their only child was eighteen months old. After separation, they reached a separation agreement that gave the mother sole custody and the father reasonable access.[46] They finalized a divorce four years later and the mother re-married. The

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39 *Ibid.* at para. 24.

40 *Ibid.* at para. 26.

41 2014 BCSC 126, 2014 CarswellBC 216, [2014] B.C.J. No. 134 (B.C. S.C.).

42 *Ibid.* at para. 44.

43 *Ibid.*

44 *D.(C.W.H.)*, above note 38 at para. 27.

45 2014 BCCA 137, 2014 CarswellBC 926, [2014] B.C.J. No. 623 (B.C. C.A.); additional reasons 2014 CarswellBC 2650 (B.C. C.A.) [*British Columbia Birth Registration (BCCA)*].

46 *Ibid.* at para. 1.

mother applied to BC Supreme Court for an order that the child be adopted by her new husband, and that the requirement of the father's consent be waived. The trial judge declined to dispense with the father's right to consent, and did not resolve the issue of his guardianship rights. The mother appealed, asking for a determination on the father's guardianship rights and for the court to remove the requirement that the father consent to the adoption.

This case had particularly interesting facts. Following their separation in 2006, the father was hospitalized and treated for major depression and substance dependency. For the following two years he struggled with substance problems, which led to dangerous behaviour where he repeatedly endangered himself, even attempting suicide on one occasion. From about 2008 onwards, his access to the child became sporadic and eventually "ceased altogether."[47] During the trial, the judge noted that "as the mother became more committed to [her new husband], she became less committed to ensuring that the child saw his father. She testified that the child was looking to identify with a male role model and that [her new husband] became the child's male role model as they spent more time together."[48] This bonding resulted in the child developing closer ties to the mother's new husband. The trial judge noted that "there [was] no dispute the child considers [his mother's new husband] to be his father." Late in the summer of 2010, the mother and her husband moved to interior British Columbia without notifying the father. Over the next two years the father cleaned up and obtained gainful employment. He made a series of attempts to gain access to his son, which the mother frustrated.[49]

In determining whether the father still qualified as a guardian, the Court of Appeal first considered the original separation agreement under the old *Family Relations Act*,[50] which granted the mother custody and the father reasonable access. It referred to a transition provision of the *FLA*, section 251(1)(b), under which a party with access to, but not custody or guardianship of, a child has only contact with the child, not guardianship. The Court nevertheless held that the separation agreement did not remove the father's guardianship rights because it referred very generally to guardianship "without more" and implicitly continued the guardianship regime in place, which afforded joint guardianship of the child's estate to both parties.[51] It stated that section 251, as a transitional provision, should not be lightly interpreted as taking away substantive vested rights.[52]

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47 *Ibid.* at para. 9, quoting *British Columbia Birth Registration No. 2004-59-020158, Re*, 2013 BCSC 1262, [2013] B.C.J. No. 1540 (B.C. S.C.) at para. 19 ; reversed in part 2014 CarswellBC 926 (B.C. C.A.); additional reasons 2014 CarswellBC 2650 (B.C. C.A.) [*British Columbia Birth Registration (BCSC)*].

48 *Ibid*. at para. 10, quoting *British Columbia Birth Registration (BCSC)*, above note 47 at para. 22.

49 *Ibid.* at para. 24.

50 *FRA*, above note 30. The concept of guardianship was different under the old statute and referred mainly to decision-making. In the *FLA*, it embraces both parental responsibilities and parenting time.

51 *British Columbia Birth Registration (BCCA)*, above note 45 at para. 59.

52 *Ibid.* at para. 58.

However, the Court of Appeal found that it would not be in the child's best interests for the father to have the particular decision-making rights contemplated in s. 41(h, i, j, and k) of the *FLA* and terminated his guardianship rights. The Court cited the mother's re-marriage, the trial judge's appointment of her new husband as a guardian of the child, and the potential for friction and impasses[53] as the primary justification. That said, it ordered that the father be notified from time to time of decisions made in respect of the child, and that the mother and her husband facilitate telephone and e-mail contact between father and child on a "reasonably regular basis."[54] The case seems to indicate that where a prior separation agreement grants a mother custody, the father has been absent from the child for a long period of time due to mental health issues, the child has bonded with another father figure, and it would create additional conflict to grant the father parental responsibilities, courts may be willing to terminate a biological father's guardianship status.

(c) The Nature of Guardianship

Where the courts have established guardianship rights, their structuring of parenting arrangements has been instructive, especially regarding what level of sharing of parental responsibilities and parenting time is deemed appropriate. Section 40(4) of the *FLA* emphasizes that no particular parenting arrangement is presumed to be in a child's best interests. In particular, it must not be presumed that parental responsibilities should be allocated equally among guardians, that parenting time should be shared equally, or that decisions should be made separately or together.[55]

In *D. (L.D.) v. C. (R.C.)*,[56] one of the first guardianship cases under the *FLA*, the Supreme Court found that "[e]ach of the parties have fulfilled some of the roles normally reserved for parents albeit often in conflict with one another".[57] Therefore, the Court held that both parties would be guardians and would consult each other "as contemplated by the former 'Master Joyce Model' and as now provided in the *Family Law Act*, ss. 39–45".[58] The Master Joyce model had been used in some guardianship cases under the old statute, particularly where there were concerns about the parents' ability to cooperate.[59] Under the Joyce model, even if parents shared joint guardianship and had the obligation to discuss decisions of a significant nature, such as health or education, one parent was given final decision-making power in the case of failure to reach agreement despite best efforts. In *D. (L.D.)*, the court gave final decision-making to the father, and gave the mother the right to apply to court to challenge any decision. It was not clear on the reasons why the father was awarded final decision-making over the mother. Nevertheless, this case signalled that the Joyce model could be adapted for use under the *FLA*.

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53 *Ibid.* at para. 61.

54 *Ibid.*

55 *FLA*, above note 1, s. 40(4).

56 2013 BCSC 590, 2013 CarswellBC 866, [2013] B.C.J. No. 662 (B.C. S.C.).

57 *Ibid.* at para. 22.

58 *Ibid.* at para. 25.

59 See Boyd, "Joint Custody", above note 9, for further elaboration of the Joyce Model.

About a month later, *P. (G.) v. P. (M.J.R.)*[60] was decided by Justice Crawford of the Supreme Court. In this case, an existing interim order under the old statute had granted joint guardianship on the Joyce Model, giving the father principal residence and decision-making authority. The basis for this order was the "mother's basic inability to be punctual, her lifestyle, her inability to be truthful and her bellicose attitude towards anyone questioning her abilities."[61] Although the father had primary parenting responsibilities, the mother had actually spent more days with the children over the preceding year. The court upheld the interim order, giving decision-making authority to the party with primary residence, rather than the one who had spent more time with the child. Justice Crawford felt that the children were flourishing under the father's decision-making, and highlighted the need for stability.

This case was significant because, despite the fact that section 37(2)(d) of the *FLA* emphasizes "the history of the child's care" as a factor that must be considered in determining the best interests of a child, the court did not find the past record of parenting time to be determinative of a parent receiving primary residence or decision-making authority. In this case, preserving stability was seen as more important, since the children were on a successful track. By and large, judges seem to be applying the Joyce Model, with case by case variations on who gets ultimate decision making authority that are based on factors such as stability for the child, which parent is more willing to facilitate contact, and which parent is more likely to listen to specialists and professionals.[62]

The courts also seem to be in favour of giving more parenting time to the party to whom it grants primary decision-making authority. The BC Supreme Court discussed this topic further in *M. (B.D.) v. M. (A.E.)*,[63] where the father sought sole custody of the child with limited supervised access to the mother. The mother sought an order giving her the bulk of parenting time and final authority over many areas of parental responsibility.[64] The Court gave the bulk of the parenting time and final authority to the mother, based on the father's "lack of insight about his own shortcomings and in particular to his demonstrated inability to distinguish between his perceptions and objective reality, and make decisions that are in [the child's] best interests."[65] The court also opined that the child's best interests "will be promoted by an arrangement in which she spends the majority of her time living with the party who will have the final authority to make important decisions about her upbringing."[66]

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60 2013 BCSC 746, 2013 CarswellBC 1092, [2013] B.C.J. No. 867 (B.C. S.C.).

61 *Ibid.* at para. 8.

62 See also *Van Kooten v. More*, 2013 BCSC 1076, 2013 CarswellBC 1829, [2013] B.C.J. No. 1305 (B.C. S.C.); *F.(T.)*, above note 21; *M. (C.K.B.) v. M. (G.)*, 2013 BCSC 836, 2013 CarswellBC 1290, [2013] B.C.J. No. 982 (B.C. S.C.).

63 2014 BCSC 453, 2014 CarswellBC 706, [2014] B.C.J. No. 474 (B.C. S.C.) [*M.(B.D.)*].

64 *Ibid.* at para. 89.

65 *Ibid.* at para. 161.

66 *Ibid.* at para. 168.

Another interesting theme that has emerged is what is required of guardians in the exercise of their parenting responsibilities. In *P. (L.J.) v. B. (D.L.)*,[67] the Provincial Court stated that "s. 40 [of the *FLA*] obligates each guardian to exercise parental responsibilities with respect to the child in consultation with the child's other guardians unless that consultation would be unreasonable or inappropriate in the circumstances. This section demands that parents communicate effectively."[68] In this statement the court seems to interpret section 40 of the *FLA* as requiring civil communication between guardians.

In *M.(B.D.)*, the BC Supreme Court characterized the case as a "prolonged and ruinously expensive dispute between the parties."[69] Justice Sewell observed that "the parties have a very limited ability to cooperate on issues affecting [their child]. That lack of cooperation has already adversely affected timely arrangements for [the child's] education, and her ability to engage in other activities. It is clear to me that the best interests of [the child] require that any parenting arrangement ordered cannot be dependent upon cooperation between the parents."[70] Yet despite making these statements, the court still required that the mother "attempt to consult" with the father prior to exercising her parenting responsibilities.

While courts have stated several times that they want to limit conflict between the parents, practically speaking, it seems that requiring one parent to consult the other prior to making decisions can risk increasing conflict. It is unclear at the moment what the bar is that would make such communication inappropriate or unreasonable. It appears that courts will have a low tolerance for guardians who are unwilling to communicate with each other. It will be particularly interesting to see how courts enforce this requirement in cases involving allegations of abuse or unbalanced power dynamics. Presumably, they will be more likely to regard cases involving family violence or abuse as presenting circumstances where demanding communication between the parties is unreasonable.[71]

One way in which judges have begun to address difficulties in communication is by requiring guardians to consult with parenting coordinators in the event of disagreement on major decisions. An innovation of the *FLA* is the delineation of the responsibilities and powers of parenting coordinators.[72] In *Rashtian*, the parents showed an unwillingness to coordinate their decision-making in respect of the child.[73] As there was no evidence of an abusive dynamic, the court felt it was pos-

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67 2013 BCPC 104, 2013 CarswellBC 1180, [2013] B.C.J. No. 946 (B.C. Prov. Ct.) [*P.(L.J.)*].

68 *Ibid.* at para. 6.

69 *M.(B.D.)*, above note 63 at para. 1.

70 *Ibid.* at para. 170.

71 Indeed, in *M. (L.J.S.) v. S. (L.T.)*, 2013 BCSC 796, 2013 CarswellBC 1177, [2013] B.C.J. No. 941 (B.C. S.C.) [*M.(L.J.S.)*], where one party was seen as abusively manipulating the other, the parent being manipulated was given sole custody (this was mainly a *Divorce Act* RSC 1985, c. 3 (2nd Supp) [*DA*] case, so the language of custody was used) and not required to communicate with the other party for the purpose of decision-making.

72 *FLA*, above note 1, ss. 14–19.

73 *Rashtian*, above note 10.

sible for, and incumbent on, the parents to overcome their inability to communicate for the sake of their children. To that end, the parents were required to retain a parenting coordinator in the event of an impasse and ordered to share the costs of the parenting coordinator equally.[74]

Parenting coordination can offer positive implications for children. In appropriate cases, it has the potential to transform the communication patterns of parents and enable them to be more united in parenting even as they are separating. It may assist in reducing the potential for conflict over decision-making that may be detrimental to children, and prevent children from being used as a weapon or as a conduit for undermining the other party. If successful, children may have the opportunity to develop positive relationships with each parent. Questions remain, however, about who bears the costs and whether parenting coordinators can be used effectively in cases reflecting a pattern of abuse or other very serious power imbalances. Some parents may be unable to bear the costs of a parenting coordinator. It is conceivable that a parenting coordinator might be assigned in circumstances that might have warranted an order restricting the role of one parent. In order for all parents and children to benefit from innovations such as parenting coordinators, it is incumbent upon the government to consider funding or subsidies for parties who cannot afford this assistance themselves and to monitor whether this innovation is being used only in appropriate circumstances.

3. CHANGE OF RESIDENCE AND RELOCATION

Difficulties can arise when one parent proposes to change either the location of their residence or that of the child. In fact, this issue is one of the most frequently litigated in family law.[75] One novel aspect of the *FLA* is that it establishes guidelines and burdens of proof (some would say presumptions) to assist with decision-making in this controversial field. In *J. (L.L.) v. J. (E.)*,[76] the court noted that when a relocation application is decided,

> [a]lmost inevitably, someone's heart is broken no matter what the outcome of the application. If the party seeking to relocate is denied permission, plans are shelved, opportunities are lost and the overall welfare of the family, beyond considerations strictly concerned with the best interests of the child, are compromised. If the application is allowed, the party left behind struggles to maintain a relationship with the child often at considerable distance and expense, frequently in circumstances of modest means.[77]

Apart from cases of abuse where the relocation is done for the sake of child or spousal safety, a relocation scenario can mean that someone inevitably loses out. To what extent the *FLA* guidelines will assist in these difficult decisions is thus a question of great interest. Before the burdens of proof in Division 6 (section 69) kick in, it must be determined which of sections 46 or 69 applies.

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74 *Ibid.* at para. 54.

75 Rollie Thompson, "Where is B.C. Law Going? The New Mobility" (2012) 30:3 Can. Fam. L.Q. 235 at 238 [Thompson, "New Mobility"].

76 2013 BCSC 1233, 2013 CarswellBC 2101, [2013] B.C.J. No. 1506 (B.C. S.C.).

77 *Ibid.* at para. 18.

(a) Change of Residence or Relocation? Whether to Apply Section 46 or Section 69

The first step is determining whether any prior orders or agreements between the parties govern the parenting arrangement. Where none exists, section 46 on changes to the location of the child's residence applies. Where, on the other hand, there is a prior order or agreement, Division 6 applies, specifically sections 64–70. Deciding which sections of the *Act* apply sounds fairly straightforward. However, judges have already identified a grey area that is complicating decisions. Intense debate has arisen regarding whether interim orders or agreements constitute prior orders or agreements for the purposes of triggering Division 6.

In *R. (L.J.) v. R. (S.W.)*,[78] several interim orders regarding division of parenting time between the parties were in effect prior to the application. The key consideration undertaken by the Supreme Court was whether these prior orders constituted "an order respecting parenting arrangements or contact with a child", as contemplated by the *Act*. The *FLA* itself does not distinguish between final orders and interim orders for this purpose. In this case, the court noted that there was "no indication that the form of an agreement or order should be considered by a court faced with these circumstances".[79] Therefore, "the analysis of a given order or agreement must be restricted to the subject matter of that order or agreement — nothing more nothing less."[80] Applying this criterion, as the interim orders addressed arrangements around contact with the child, they were sufficient to trigger Division 6 and the relocation analysis was conducted under section 69.[81]

The decision in *R.(L.J.)* was subsequently questioned by the Supreme Court in *S. (S.L.) v. S. (J.A.)*[82] and *F. (S.J.) v. N. (R.M.)*.[83] In both cases, the courts highlighted the importance of exercising caution concerning interim orders and were critical of the suggestion that interim orders sufficiently qualified as orders for the purposes of triggering section 69 of the *FLA*. They noted that interim orders do not qualify as orders because by definition, courts have not heard all the evidence or had the benefit of submissions from counsel.[84] As well, trial judges are in a better position than chambers judges to have all the facts.[85] Because prior parenting arrangements are used in section 69 to establish presumptions in favour of one party or the other, a legitimate concern arises that interim orders could be used to do so in cases where all the facts have not yet been fully vetted.

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78 2013 BCSC 1344, 2013 CarswellBC 2283, [2013] B.C.J. No. 1645 (B.C. S.C.) [*R.(L.J.)*].

79 *Ibid.* at para. 52.

80 *Ibid.* at para. 53.

81 *Ibid.* at para. 56.

82 2013 BCSC 1775, 2013 CarswellBC 2913, [2013] B.C.J. No. 2134 (B.C. S.C.) [*S.(S.L.)*].

83 *F.(S.J.)*, above note 26.

84 *Ibid.* at para. 51.

85 *S.L.S.*, above note 82 at para. 31.

This debate has yet to be settled. On October 31, 2013, the BC Supreme Court attempted to provide resolution in *D. (A.J.) v. E. (E.A.)*.[86] In this case, the parties had an interim consent order that had been issued at the judicial case conference. The court considered both perspectives, acknowledging the concern that an interim order that may not have had the benefit of fulsome consideration of evidence by a judge could be used to impose a presumption one way or another pursuant to section 69(4).[87] However, the court noted that "the principles of statutory interpretation would not ordinarily support limiting the interpretation of orders to exclude interim orders. . . . The FLA does not distinguish between written agreements which are interim and those which establish more permanent parenting arrangements, and indeed it would be difficult to make this distinction."[88] The court further noted that the parties "could have elected not to confirm the agreement they reached at the judicial case conference in the form of a consent order."[89] On this reasoning, the interim consent order was deemed to be an order for the purposes of triggering Division 6 analysis.[90]

Most recently, in *N. (S.) v. C. (E.)*,[91] the mother proposed moving the children from Tofino to Penticton. Two interim orders dealt with guardianship of the children and the father's access. One interim order came into effect a year and a half prior to this hearing, the other approximately six months before. Citing *R.(L.J.)*, the Provincial Court held that they were orders respecting parenting arrangements as contemplated by s. 65 and that Division 6 therefore applied to the relocation.[92]

When it comes to determining whether relocation should be granted on an interim application, however, Master Scarth of the Supreme Court has since noted in *K. (D.R.) v. G. (S.G.)*[93] that relocation cases should not be decided in this manner. The Master stated that "[a]n interim order allowing [the claimant] to move would have the effect of a final order and interim proceedings are not geared for final determination of issues".[94] The application was adjourned to trial. The concern about applying the Division 6 analysis, which uses presumptions based on certain facts, especially applies to interim applications where, as in *K.(D.R.)*, there is conflicting affidavit evidence concerning the best interests of the child.

(b) Section 46: Change of Location of Residence

As outlined above, section 46 specifically governs changes to the location of a child's residence. It is triggered when all of the following apply: There is no prior agreement or order as discussed above, a guardian makes an application under sec-

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86 2013 BCSC 2160, 2013 CarswellBC 3581, [2013] B.C.J. No. 2586 (B.C. S.C.) [*D. (A.J.)*].

87 *Ibid.* at paras. 29-30.

88 *Ibid.* at para. 31.

89 *Ibid.*

90 *Ibid.* at para. 32.

91 2014 BCPC 82, 2014 CarswellBC 1276, [2014] B.C.J. No. 898 (B.C. Prov. Ct.).

92 *Ibid.* at para. 92.

93 2013 BCSC 2107, 2013 CarswellBC 3524, [2013] B.C.J. No. 2531 (B.C. S.C.).

94 *Ibid.* at para. 17.

tion 45 for an order concerning parenting arrangements, the child's guardian plans to change the location of the child's residence, and that change can reasonably be expected to have a significant impact on that child's relationship with another guardian or other significant persons in the child's life.[95] Section 46(2) outlines what factors the Court should consider when determining the parenting arrangements that would be in the best interests of the child, in addition to the factors set out in section 37(2).

Section 46 has not, as yet, received much judicial examination. In *K. (T.) v. A. (R.J.H.)*,[96] the Supreme Court noted that "section 46(2) of the *FLA* expressly mandates that the court must consider the reasons for the proposed change in location of the child's residence, but must not consider whether the parent who is planning to move would do so without the child."[97] This wording differs slightly from section 69(7), which stipulates that "the court must not consider whether a guardian would still relocate if the child's relocation were not permitted." The BC Supreme Court has since interpreted section 69(7) as providing "that a trial judge must not consider a statement by the relocating parent that he or she would *not* move without the child as opposed to whether or not he or she would move without the child."[98] In *K.(T.)*, the court also noted that "[t]he *FLA* is strangely silent on the converse question of whether the evidence of *the other parent* may be considered."[99] These statements suggest that courts may choose to allow different evidence depending on whether a relocation issue is decided under section 46 or section 69. In *K.(T.)*, rather than delving further into a s. 46 analysis, the court declined to decide the case under the *FLA*, choosing instead to apply the *Divorce Act* jurisprudence on relocation and indicating that the factors to be weighed differ from those in the *FLA*.[100]

A detailed discussion of the application of section 46 also occurred in *De Jong v. Gardner*,[101] which involved an application for primary residence. The father was from Alberta and the mother from BC, and they had a seven year old son. When the child was five, the mother unilaterally relocated to Alberta with the child, and told the father she was staying there. She gave the father regular access and he had since made several visits to see the child. Both parties were capable parents and had been involved in caring for the child. The child had a good relationship with each and the Court decided that he had been removed from a stable life in BC. The court went through the section 46 factors as discussed above, but found that while the first two requirements of section 46 were met, section 46 did not apply because the

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95 *FLA*, above note 1, s. 46.

96 2013 BCSC 2112, 2013 CarswellBC 3545, [2013] B.C.J. No. 2540 (B.C. S.C.) [*K.(T.)*].

97 *Ibid.* at para. 39.

98 *B. (C.M.) v. G. (B.D.)*, 2014 BCSC 780, 2014 CarswellBC 1232, [2014] B.C.J. No. 871 (B.C. S.C.) at para. 108 [*B.(C.M.)*].

99 *K.(T.)*, above note 96 at para. 39 [emphasis added].

100 *Ibid.* In cases where there are claims under both the *FLA*, above note 1, and the *DA*, above note 71, the analysis of the *FLA* is often unclear. In other cases that we have not cited, it is not even clear which statute is being applied.

101 2013 BCSC 1303, 2013 CarswellBC 2217, [2013] B.C.J. No. 1597 (B.C. S.C.) [*De Jong*].

mother had already moved with the child, and was not "planning to move". The judge chose instead to conduct the analysis under the *Divorce Act* and ordered that the child be returned to BC under a shared parenting arrangement. The child was to have his primary residence with the father until such time as the mother returned. In another case, *R.(L.J.)*, the court also noted that under section 46, in contrast to section 69, the only consideration in determining whether the relocation should be allowed is the child's best interests.[102]

(c) Section 69 and Division 6: Relocation and Burdens of Proof

In contrast to section 46, Division 6 establishes burdens of proof, some would say presumptions, to guide decision-making. Division 6 is triggered when a guardian plans to change the location of the residence of a child or the guardian or both, and when a written agreement or an order respecting parenting arrangements or contact applies to the child.[103] For the purposes of Division 6, "relocation" means a change in the location of the residence of a child or guardian that can reasonably be expected to have a significant impact on the child's relationship with a guardian or other persons that have a significant role in the child's life.[104] To qualify as a relocation, according to Master MacNaughton in a pre-trial application in *Berry v. Berry*,[105] a case must involve a change in residence that would have a significant impact on the ability of a parent to spend time with their children.[106] The test is child centred, with the impact of a change in residence on a child's important relationships being the primary consideration. In *Berry*, the Supreme Court decided that a move from Surrey (outside Vancouver) to the North Shore of Vancouver did not constitute a relocation under the *FLA*. While the children would have to travel a little further to see their father and extended family, the move would not meaningfully affect the father's parenting time.

(i) Standing in Relocation Applications

An important issue in relocation cases to date is who has standing to challenge relocation, and what courts will do in the event that relocation affects those without standing, for example with parents who are not legal guardians. Specifically, under the *FLA*, standing to challenge or apply for relocation is reserved for guardians.[107] The decision to move a child falls under the umbrella of parenting responsibilities, which are held only by guardians.[108] In *C. (T.) v. C. (S.)*,[109] the court states that "the father in the case at bar is *not* a guardian of the child because he never ob-

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102 *R.(L.J.)*, above note 78 at para. 61.

103 *FLA*, above note 1, s. 65(2).

104 *Ibid.*, s. 65(1); *G. (S.) v. P. (J.)*, 2013 BCPC 126, 2013 CarswellBC 1559, [2013] B.C.J. No. 1105 (B.C. Prov. Ct.) [*G.(S.)*].

105 2013 BCSC 1095, 2013 CarswellBC 1878, [2013] B.C.J. No. 1334 (B.C. S.C.) [*Berry*].

106 *Ibid.* at paras. 26, 28, 33, 37.

107 *FLA*, above note 1, s. 69(2); *C. (T.) v. C. (S.)*, 2013 BCPC 217, 2013 CarswellBC 2484, [2013] B.C.J. No. 1815 (B.C. Prov. Ct.) at paras. 35-36 [*C.(T.)*].

108 *FLA*, above note 1, s. 40(1), s. 41.

109 *C.(T.)*, above note 107.

tained an order for custody or guardianship under the *Family Relations Act* and his agreement with the mother provides only access to the child."[110] Section 39(3) of the *FLA* enables the Court to find guardianship status where, even though the parent has never lived with the child, the party "regularly cares for the child" (among other avenues). In this case, however, after having resided with the child for a few months after birth, the father had given up the right to be considered a guardian in a prior separation agreement.[111] As such, the circumstances of this contact parent did not technically fall within section 39(3).

The Provincial Court nevertheless found that for the purposes of this application for relocation, the father could be appointed a guardian under section 51.[112] The court noted that the substance of his parenting since signing that agreement was regular and meaningful. As such, it would be unjust not to award him guardianship for the purposes of determining a relocation application. Despite being granted standing, the father's application ultimately failed. The case appears to stand for the principle that a parent who plays a significant parenting role in the life of a child, regardless of whether she or he has signed away their right to guardianship via previous agreement, may be appointed as interim guardian in order to challenge a relocation application.

(ii) Burdens of Proof

Section 66 requires the relocating party to give the other party written notice of a planned relocation, regardless of whether the relocating guardian is taking the child. This section reflects the fact that although most relocation cases reflect applications by a parent to relocate with a child, a move by a guardian away from a child can create the same disruption in the parent-child relationship. While the notice requirement might leave abused parties vulnerable to being tracked or harassed by the other party, thus far, this requirement has been considered inconsequential as long as it does not prejudice the other party.[113]

The factors outlined in section 69, especially in sections 69(4) and 69(5), drive the analysis of relocation cases. Under both subsections, relocating guardians must show that the relocation is made in good faith, that workable arrangements have been made to preserve existing relationships with significant persons in the child's life, and that the relocation is in the best interests of the children.[114] Section 70(2) also provides that "when making a relocation order, courts must seek to preserve, to a reasonable extent, parenting arrangements under the original agreement or order."[115]

As the courts have held, sections 69(4) and (5) allocate burdens of proof between the parties, depending upon whether the guardians have substantially equal

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110 *Ibid.* at para. 50 [emphasis in the original].

111 *Ibid.* at paras. 15-16.

112 *Ibid.* at para. 57.

113 *G.(S.)*, above note 104 at para. 35.

114 *Hansen v. Mantei-Hansen*, 2013 BCSC 876, 2013 CarswellBC 1463, [2013] B.C.J. No. 1038 (B.C. S.C.) at para. 72 ; additional reasons 2013 CarswellBC 3049 (B.C. S.C.) [*Hansen*].

115 *Ibid.* at para. 73.

parenting time or not.[116] When they do have substantially equal parenting time, section 69(5) applies, placing a heavier burden on the parent who seeks to relocate. In *B. (C.M.) v. G. (B.D.)*,[117] the BC Supreme Court cited Hansard, in which it was noted that in such cases "the threshold is higher, and the moving guardian has full responsibility for satisfying the court that the move is made in good faith, that it's reasonable and continues to allow workable arrangements."[118]

Where they do not have substantially equal parenting time, section 69(4) applies, so that "the proposed relocation must be presumed to be in the child's best interests" once the good faith and reasonable arrangements factors have been met, placing the burden is on the guardian staying behind to show that it is not in the child's best interests.[119] However, in *B.(C.M.)*, on appeal from the Provincial Court, the Supreme Court stated that in its view, "satisfaction of the additional criteria of good faith and reasonable and workable arrangements is a precondition to a relocating guardian benefiting from a presumption that the move is in the child's best interests."[120] The absence of either of these criteria, however, is not determinative. They are simply necessary for a guardian to benefit from the 69(4)(b) presumption and "[i]f one or both of these criteria are not met, the court must still go on to consider whether the proposed relocation is in the child's best interests."[121]

The ruling in *D. (A.J.) v. E. (E.A.)*[122] demonstrates the reluctance of the courts to apply these onuses when the prior parenting arrangement comes in the form of a short term (three month) consent order that was arrived at without full exploration of the facts.[123] This case represents an application of the interim order rule explained above and suggests that the courts are still debating whether interim orders are sufficient to trigger presumptions based upon parenting time. Here the court seemed concerned that three months is too short a time to trigger an onus one way or another, but whether the courts will take a similar view of interim orders that have been in effect for longer time periods remains to be seen. In addition, in this case, the court was unclear which statute was being applied.

In addition, section 69(7) clarifies that judges are not permitted to consider whether the guardian would still move without the child if the relocation were denied. In *M. (M.) v. J. (C.)*,[124] Justice Jenkins clarified that "section 69(7) is meant to codify the Court of Appeal cases that say I must not consider a statement by the

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116 These burdens of proof reflect assumptions about what lies in a child's best interests and attempt to provide some certainty in a field that has been largely subject to judicial discretion. See Susan B Boyd, "Relocation, Indeterminacy, and Burden of Proof: Lessons from Canada" (2011) 23:2 Child. & Fam. L.Q. 155.

117 *B.(C.M.)*, above note 98.

118 *Ibid.* at para. 76.

119 See *R.(L.J.)*, above note 78 at para. 65.

120 *B.(C.M.)*, above note 98 at para. 75.

121 *Ibid.* at para. 78.

122 *D.(A.J.)*, above note 86.

123 *Ibid.* at para. 79. There was only a short consent order covering a 3-month span, not enough to create a presumption one way or the other.

124 2014 BCSC 6, 2014 CarswellBC 10, [2014] B.C.J. No. 8 (B.C. S.C.) [*M.(M.)*].

relocating parent that he would *not* move without the child."[125] In *B.(C.M.)*, the BC Supreme Court noted on appeal from the Provincial Court that this subsection was not meant to "limit the court from engaging in a 'full and sensitive inquiry' into the best interests of a child".[126] The possibility of maintaining the status quo was thus considered as a possible option in this case. Justice Fleming agreed with the interpretation of s. 69(7) which provides that a "trial judge must not consider a statement by a relocating parent that he or she would *not* move without the child, as opposed to whether or not he or she would move without the child."[127] All section 69 factors are to be considered under the umbrella of what is in the best interests of the child under section 37.[128]

As a result of the different burdens of proof in relocation cases, it is crucial to analyze what constitutes "substantially equal" versus "non-equal" parenting time. In *C.(T.)*, in the first two years post separation, the father had contact but not overnight parenting of the child. Subsequent to that time, the father had the child for two nights each week and two full parenting days every second week. The court found that this pattern did not constitute equal parenting time, so section 69(4) was applied. The mother's plans were found to have been made in good faith with no improper motives. She had made reasonable arrangements for contact, which amounted to an extra 60 minutes of travel, so that no significant impediment in time or distance was posed to the father preserving his relationship with his son. The onus was shifted to the father, who opposed the move, to prove that it was not in the child's best interests.[129] The relocation by the mother and child to Washington State was permitted.

In *D.(A.J.)*, both parents were involved in the care of the child prior to and following separation. After the parties separated they agreed to share parenting. The father had an irregular out of town schedule that made it more difficult to schedule parenting time. Prior to kindergarten, the court found that the father had a significant role in the child's life. The child was now eight, and since kindergarten the father conceded his parenting time was approximately 30 percent. The Court found that in this circumstance the mother had substantially more parenting time and therefore section 69(4) was applied.[130]

However, the court declined to apply the presumption in favour of the mother. Instead, it followed the principle outlined in *Hadjioannou*,[131] and regarded the section 69 factors as merely factors to be considered under the umbrella of what is in the best interests of the children, in addition to the section 37 analysis. The court noted that they merely weigh in one direction or the other, none of them precluding a best interests analysis.[132] Here, the mother was applying for a temporary reloca-

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125 *Ibid.* at para. 47 [emphasis in the original].

126 *B.(C.M.)*, above note 98 at para. 104.

127 *Ibid.* at para. 108.

128 See *Hadjioannou v. Hadjioannou*, 2013 BCSC 1682, 2013 CarswellBC 2736, [2013] B.C.J. No. 2006 (B.C. S.C.) [*Hadjioannou*]; *D.(A.J.)*, above note 86 at paras. 36-37.

129 *C.(T.)*, above note 107 at para. 65.

130 *D.(A.J.)*, above note 86 at para. 33.

131 *Hadjioannou*, above note 128.

132 *D.(A.J.)*, above note 86 at paras. 36-37.

tion to New Brunswick, but there was evidence that the relocation was really intended to "create a new life with her partner".[133] Because the court had not had the benefit of a trial to fully vet the family dynamics, and since the consent order on file giving the mother primary parenting time and responsibilities only covered a recent three month period, there was no legal presumption in favour of the mother's relocation.[134] The court found it in the best interests of the children to remain in North Vancouver close to their father and grandparents, with whom they had a strong bond. The court also noted it would be disruptive to eight year old children to have to go to a new school in a new part of the country and make friends.[135]

In *B.(C.M.)*, the BC Supreme Court cited two other cases of relevance when discussing what comprises substantially equal parenting time. It highlighted *A. (M.K.) v. W. (A.F.)*,[136] where 29 percent of the parenting time, which amounted to 36 per cent when vacation time was included, did not constitute substantially equal parenting time.[137] It also considered the comments of Justice Barrow in *M. (H.D.) v. T. (S.W.)*,[138] who held that "substantially equal" is something different that precisely equal parenting time, and ruled that five days out of fourteen spent with the child was substantially equal. The Supreme Court observed that Justice Barrow had "reached that conclusion with reference not only to the schedule, but also bearing in mind a term of the parties' separation agreement providing for shared parenting with the goal of 50:50 parenting time, and the history of equal parenting time from 2008 until February 2013, approximately 10 months before trial."[139]

The *FLA* provides little guidance on this point and case law suggests that determining substantially equal parenting time will involve more than strict calculations of time spent with the child.[140] These cases seem to indicate that it will take significant and sustained differences in post-separation parenting time for the courts to invoke the presumption. Something in the order of a 65 - 35 split in parenting time may suffice to trigger section 69(4) over section 69(5). However, the courts have also been careful to point out that presumptions do not create bars to decisions that would otherwise be in the best interests of the child. The overarching concern is always the child's best interests and any presumption one way or the other will merely be treated as an additional factor to consider. This interpretation of the new burden of proof provisions does not offer the clarity that many perhaps expected of the reform. It also raises questions as to whether the application of sections 69(4) or (5) will be significant in the overall analysis. For some judges it likely will and for others it will not, and for some families it will and for others it will not. As in previous relocation decisions, determinations remain subject to quite

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133 *Ibid.* at para. 42.

134 *Ibid.* at para. 79.

135 *Ibid.* at para. 45.

136 2013 BCSC 1415, 2013 CarswellBC 2354, [2013] B.C.J. No. 1714 (B.C. S.C.) [*A.(M.K.)*].

137 *B.(C.M.)*, above note 98 at para. 142, citing *A.(M.K.)*, above note 136.

138 2013 BCSC 1863, 2013 CarswellBC 3080, [2013] B.C.J. No. 2242 (B.C. S.C.) [*M.(H.D.)*].

139 *B.(C.M.)*, above note 98 at para. 143, citing *M.(H.D.)*, above note 138.

140 *B.(C.M.)*, above note 98 at para. 145.

broad judicial discretion, albeit some patterns can be used to predict outcomes, notably patterns of care prior to the decision.[141] Even the legal procedures the families pursue or have pursued (e.g. chambers application vs. trial) could influence judicial decisions.

(iii) Good Faith

One of the key factors in any relocation analysis is whether the relocation is being proposed by a parent in good faith. A determination that it is not will weigh strongly against the court being willing to allow the relocation application, although the best interests of the child will be the overriding factor.[142] Section 69(6) provides the factors that courts must consider when conducting a "good faith" analysis, including: the reasons given for the relocation, whether the relocation is likely to enhance the child's the general quality of life of the child and, if applicable, the relocating guardian (including increasing emotional well-being or financial or educational opportunities), whether adequate notice was given by relocating party, and any pre-existing restrictions on relocation in a prior agreement or order.[143]

In *R.(L.J.)*, the court noted that section 69 "does not preclude applications [for relocation] where notice is not given or where best efforts to cooperate with each other have not been undertaken between the parties, but the failure to satisfy these requirements is part of the good faith analysis required in s. 69(4)."[144] The court also noted that "good faith is a subjectively held state of mind", but that "to the extent a factor listed in s. 69(6) is objective, a positive or negative finding suggests an inference that the relocating guardian either possessed or did not possess the required subjective good faith."[145] In *R.(L.J.)*, the mother gave notice. Her reasons for moving were indicative of subjective good faith in that they were an attempt to improve economic security and her employment situation. However, she did not

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141 DA Rollie Thompson, "Movin' On: Parental Relocation in Canada" (2004) 42:3 Fam Ct Rev 398; Thompson, "New Mobility", above note 75. In the latter article, Thompson reviewed case law from 2009–2011, just prior to the *FLA*, above note 1, and predicted that the new burdens of proof in the *FLA* would change few outcomes. Thompson's research shows that "well-behaved" primary caregivers generally are permitted to relocate, whereas shared care cases result mostly in relocation denials. These patterns mirror the effects of the burdens of proof in the *FLA*.

142 *Hadjioannou*, above note 128.

143 *FLA*, above note 1, s. 69(6).

144 *R.(L.J.)*, above note 78 at para. 63. See also *G.(S.)*, above note 104 at para. 35: verbal notice in late 2012 was deemed sufficient to weigh in favour of good faith since the father was not prejudiced by the lack of written notice.

145 *R.(L.J.)*, above note 78 at para. 71. See also *S.(S.L.)*, above note 82 at para. 28 where the BC Supreme Court notes that "some elements of the *Act*'s test are unquestionably objective." This is seemingly slightly at odds with the BC Provincial Court ruling in *G.(S.)*, above note 104, where the Court found the mother's application for relocation was made in good faith despite the fact that the court also found it was not likely to improve the child's quality of life, or in the best interests of the child who had special needs. The fact that the mother's primary motivation to relocate was to obtain assistance for her child was good enough for a good faith finding, even though the court disagreed in the end that the move was in the child's best interests.

objectively prove that the relocation was likely to improve her situation, and she had already relocated, in violation of an interim order. Taken together, the court found she had not acted in good faith, noting that it would be unfair to encourage parties to relocate and gain an advantage by having the court consider the disruption to the child of moving back.[146] The court also highlighted that even where a relocation is not found to be in good faith, it still must consider the section 37(2) factors and determine if it is in the child's best interests that the relocation be allowed. In that case, the child had been moved from British Columbia to Tennessee. The resulting distance from important family members and key relationships, as well as the lack of clear economic or emotional enhancement, was enough to deny the relocation.

In *Hadjioannou*, the father sought to block the mother from relocating to Alberta with their three children. Neither party was co-parenting in a cooperative manner following their separation. The mother admitted to being broke, hurt and depressed, and wanted to get away from the father and court proceedings. She moved away[147] (leaving the children with the father pending the hearing) as a means of doing so, following her new husband who had family in Alberta and who had moved there to take a job. The court found that the mother showed a lack of judgment in thinking that moving away from the father would meet the needs of the children.[148] The evidence showed that she had made little effort to make her financial situation work where she was. Specifically she had made no effort to apply for jobs prior to relocating. In denying the relocation, the BC Supreme Court held that the relocation was in bad faith and that moving the children away from their father was adverse to the children's best interests.[149] This case indicates that courts may not be sympathetic to parents who relocate with the children because of depression or to avoid court proceedings, particularly where such action would rob the children of another significant figure in their lives. Perhaps the ruling would have been different had the mother been diagnosed with clinical depression and her lawyers could show that leaving the area would benefit her and, by extension, her children.

Under the good faith factor, it appears the courts will also require relocating parents to consider the impact of the move on the child's emotional well-being, which is often closely linked to the maintenance of significant relationships in the child's life. In *D.(A.J.)*,[150] discussed earlier, the mother sought to move to Atlantic Canada to pursue economic opportunities and her relationship with her new partner. She attempted to frame the move as adventure for the child and an opportunity to be exposed to new culture. The court found that the mother's actions were not in good faith because she failed to consider the impact of her decision to move the

146 *R.(L.J.)*, above note 78 at para. 73.

147 *Hadjioannou*, above note 128 at para. 68. The court distinguished the case from *R.(L.J.)*, above note 78, on one basis, that in *R.(L.J.)*, the mother had relocated with the child by the time the application could be heard, which it deemed "a much more serious matter to address."

148 *Ibid.* at para. 51.

149 *Ibid.* at paras. 54, 57, 90.

150 *D.(A.J.)*, above note 86 at para. 45.

child on the child's relationship with the father and the grandparents, who were significant figures in the child's life.

Good faith has, however, been found by the courts in some cases. In *C.(T.)*, discussed above, the mother wanted to move from Port Coquitlam to Bellingham, Washington with her six year old child. Her primary reasons for the move were to be with her new husband and to take advantage of what she perceived to be better economic opportunities. The court found that these were acceptable motives and that the mother was being reasonable in her belief that the move would be better for her and her child.[151] In allowing the relocation, the Court placed great weight on the new location not being too far away and the mother's offer to drive the child to the Canadian side of the border. The court found it was comparable to moving to Surrey and that it caused no significant impediment in time or distance to the father that would undermine his attempts to preserve a relationship with his son.[152]

In *M. (M.) v. J. (C.)*,[153] the father applied to move an eight year old child from Maple Ridge (near Vancouver) to an area just outside Calgary. The parties had separated when the child was four. A prior joint custody agreement prohibited relocation with the child from the Lower Mainland without approval of the other guardian, and the parties had had substantially equal parenting time since separation. The mother did not like the father's new partner, with whom the child had bonded. The father argued that the move would allow him to pursue his dream job with the RCMP. The court found that this set of facts was sufficient to constitute good faith, despite the fact that the father had demonstrated a pattern of unilaterally making changes to prior agreements between the parties. The significance of the promotion and the excellence of the opportunity were cited as primary reasons, noting the lifestyle benefits for the child.[154] The relocation restriction in the separation agreement that the father had disregarded was stated as a factor to consider, but not determinative, since it is the best interests of the child that are the primary consideration.[155] Great emphasis was placed on the fact that both parties from the marriage had remarried and had new children, and the father's opportunity for career advancement.[156] The child had also expressed a preference to live with the father.[157]

As noted above, the Supreme Court recently provided greater clarity on good faith analysis in *B.(C.M.)* Justice Fleming "concluded that the correct approach under s. 69(4) and s. 69(5) is for the court to consider whether the proposed relocation is made in good faith and whether reasonable and workable arrangements have been proposed. If one or both of these criteria are not met, the court must still go on to consider whether the proposed relocation is in the child's best interests. Satisfaction of good faith and reasonable workable arrangements is necessary in order for a

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151 *C.(T.)*, above note 107 at paras. 76, 84.

152 *Ibid.* at para. 89.

153 *M.(M.)*, above note 124.

154 *Ibid.* at paras. 61, 62.

155 *Ibid.* at para. 65.

156 *Ibid.* at para. 66.

157 *Ibid.* at para. 75.

relocating guardian to benefit from the presumption under s. 69(4)(b) that the move is in the best interests of the child."[158]

Showing a superior economic opportunity from an objective perspective seems to go a long way toward establishing good faith, as it did in much previous jurisprudence. This factor can be persuasive even where a prior separation agreement indicates roughly equal parenting time and a hurdle to the success of an application to relocate. Economic advantages are presumed to be in the best interests of the child, particularly where the child expresses a preference to live with the relocating parent. Parents can, it seems, disregard separation agreements and still be found to be in good faith when the right set of conditions adheres.

The primary factors that courts have considered to date are the preservation of stability, particularly within a community and at school, and the important relationships in the child's life (often, but not limited to, the other guardian and their relatives),[159] educational and cultural opportunities for the child,[160] and prospects for economic improvement on the part of the relocating parent.[161] In cases where the children have special needs, access to and a guardian's willingness to work with professionals responsible for the child's care is a paramount consideration. In such cases, the importance of preserving close relationships with the child is also magnified.[162] The views of the child, as long as the child is eight or older, have also carried weight with the courts.[163]

4. FAMILY VIOLENCE

The introduction of the *FLA* is particularly significant when it comes to the definition and application of family violence, which must be taken into account in making parenting determinations. Unlike the *Family Relations Act*, which did not mention family violence, the *FLA* both defines family violence and tries to make it a central consideration in determinations of parenting arrangements that are in the best interests of a child. Family violence is defined as including attempted and actual physical or sexual abuse, as well as psychological and emotional abuse. Physical abuse is broadly defined in section 1 to include "forced confinement or deprivation of the necessities of life, but not including the reasonable use of force to protect oneself or others from harm."[164] It also includes "sexual abuse of a family member" and attempts to physically or sexually abuse a family member. Psychological or emotional abuse is defined to include the following: "intimidation, harassment, coercion or threats, including threats to person, pets or property; unreasonable restrictions on, or prevention of, a family member's financial or personal

158 *B.(C.M.)*, above note 98 at para. 78.

159 *P.(L.J.)*, above note 67.

160 *S.(S.L.)*, above note 82 at paras. 39-40.

161 See *Hansen*, above note 114; *M.(M.)*, above note 124; *De Jong*, above note 101; *R.(L.J.)*, above note 78.

162 *G.(S.)*, above note 104; *C. (K.A.) v. M. (R.J.)*, 2013 BCSC 1103, 2013 CarswellBC 1894, [2013] B.C.J. No. 1348 (B.C. S.C.).

163 *M.(M.)*, above note 124 at para. 79. See also *FLA*, above note 1, s. 37(2)(b).

164 *FLA*, above note 1, s. 1.

autonomy; stalking or following the family member; and intentional damage to family property."

As concerns children, family violence includes either direct or indirect exposure of the child to family violence.[165] Section 37 of the *FLA* specifies that an agreement or order will not be in the best interests of a child "unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being." The section also requires that the impact of any family violence on the child's safety, security or well-being be considered, no matter whether the family violence is directed toward the child or another family member. Courts must also consider whether the actions of the person responsible for the violence indicate that their capacity to care for the child and meet the child's needs may be impaired.[166]

The *FLA* leaves ample room for latitude by the courts in the determination of what constitutes family violence. An expansive discussion of what constitutes family violence occurred in *B. (M.W.) v. B. (A.R.)*, which involved a dispute over who should have primary residence. The mother and father had two children, the youngest of which was twelve. The mother had been the primary caregiver for three years since the divorce. In that time, the mother repeatedly interfered with the father's access to and communication with his children, and refused to settle orders that were correctly drawn up by lawyers, thus prolonging litigation and intensifying the conflict. The children had been exposed to escalating conflict throughout the proceedings. The court found that the combination of the mother's conduct in obstructing the sale of the commercial property, restricting the father's access to his children, frivolous escalation of the litigation, and actions in respect of parenting arrangements were emotionally abusive and constituted family violence.[167] The father was given primary residence. This case demonstrated how several factors taken together can constitute family violence, even where each factor taken alone may not do so.

The inclusion of psychological and emotional abuse will be of particular interest as the number of potential acts that could constitute family violence has been clarified and, arguably, expanded. Section 38 states that "the court must consider whether any psychological abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member",[168] codifying a characterization of controlling behaviour as a form of abuse. The BC Provincial Court has cited *B. (M.W.) v. B. (A.R.)*[169] for the proposition that "what is or is not family violence must be interpreted from a liberal and expansive view and can include many forms of behaviour."[170] It is therefore relevant to examine how the courts have applied this expanded definition thus far, including the influence of culture on

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165 *Ibid.*

166 *Ibid.*, s. 37(2)(g), s. 37(2)(h); see also *J.(C.A.)*, above note 16 at para. 100.

167 *B. (M.W.) v. B. (A.R.)*, 2013 BCSC 885, 2013 CarswellBC 1466, [2013] B.C.J. No. 1041 (B.C. S.C.) at paras. 199-200 [*B.(M.W.)*].

168 *FLA*, above note 1, s. 38(d).

169 *B.(M.W.)*, above note 167.

170 *R. (N.C.) v. C. (K.D.)*, 2014 BCPC 9, 2014 CarswellBC 361, [2014] B.C.J. No. 273 (B.C. Prov. Ct.) at para. 113.

the analysis, as well as the effect this interpretation has had on parenting arrangements.

In an interesting application, a failure to pay child support in conjunction with inappropriate behaviour was found to constitute family violence. In *P. (J.C.) v. B. (J.)*,[171] the daughter was living with the mother and her family in Surrey. The father had access. The evidence was conflicting, with both parties claiming assault by the other. The mother claimed that the child was conceived by sexual assault and that the father inappropriately touched the child. It was established that the father used a secret camera to record a parenting time exchange and then submitted that evidence in court. He also used the child to try to get the mother to agree to certain things and failed to pay child support on time and in full. The mother applied for a finding of family violence and a parenting order.

The Provincial Court found that the conflicting evidence regarding the assaults amounted to a "he said she said" scenario, so assault was not established on a balance of probabilities.[172] However, the father's failure to pay child support on time and in full, combined with his other actions and words did constitute family violence: his failure to pay was a calculated and deliberate act designed to inflict psychological and emotional harm and control the mother's behaviour. Judge Merrick was satisfied that the father's goal was to inflict emotional harm and destabilize the mother's parenting.[173] He also found that this impacted the child's well being, and that the father's ability to care for the child was impaired. He exhibited a lack of commitment to the child, an unwillingness to work with the mother, and a pattern of putting his own interests ahead of the child.[174] This case demonstrated a judge considering a guardian's actions in context and in combination when determining what constitutes psychological abuse.

Another example of this contextual analysis is found in *R. (L.A.) v. R. (E.J.)*[175] On the evidence, there were two serious incidents of violent conduct by the father during the marriage. The children were not exposed to this violence but during both the marriage and the post separation period, the father directed comments towards the mother in the presence of the children that were deemed to amount to "actual 'emotional abuse'".[176] Justice Schultes found that "in general [the father] has not taken the care that a responsible parent should do to avoid speaking disparagingly of a former spouse and her new partner, and to avoid involving children in topics that are beyond their maturity to cope with."[177] Combined with the physical assault that the father perpetrated on the mother's new boyfriend, the judge was "concerned about what else he might be capable of if further conflict with [the mother]or [her boyfriend] leads him to deem it justified."[178] The children were

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171 2013 BCPC 297, 2013 CarswellBC 3253, [2013] B.C.J. No. 2048 (B.C. Prov. Ct.).

172 *Ibid.* at para. 12.

173 *Ibid.* at para. 15.

174 *Ibid.* at paras. 19–24.

175 2014 BCSC 966, 2014 CarswellBC 1511, [2014] B.C.J. No. 1072 (B.C. S.C.).

176 *Ibid.* at para. 149.

177 *Ibid.*

178 *Ibid.* at para. 150.

required to live with their mother, and professional supervision of the father's parenting time was ordered until "he [demonstrated] a track record of mature parenting that [made] it safe for the children to dispense with it."[179]

This decision demonstrates an understanding of the potentially damaging effects on children of exposing them to abusive verbal communication between their parents. Also, the acknowledgement that evidence of violent altercations warranted a concern regarding what else could occur, showed insight into the importance of the court having an eye to limiting children's exposure to future violence. In service of that objective, a graduated parenting arrangement predicated on improvements in an abusive parent's behaviour, represents a comprehensive effort to protect children from the deleterious effects of family conflict and provides a useful example going forward.

Also of interest is the manner in which courts have assessed violence that seems ambiguous in origin, where it is difficult to tell who initiates the violence. In *B.(C.M.)*, there was evidence of violent behaviour by both parties.[180] The case was on appeal from Provincial Court, where the trial judge had found that the violence had not been perpetrated against the mother "for no reason".[181] This finding was an essential factor in the trial judge's decision that the father's behaviour did not constitute family violence. The BC Supreme Court called this a "troubling conclusion", stating that "it is not for Ms. B to prove she was the innocent victim of violence, nor is the "consensual" nature of violence at all meaningful when determining the best interests of the children."[182] The failure to consider the impact of the violence on the children in accordance with sections 37 and 38 of the *FLA* constituted an error of law. In allowing the appeal, the Supreme Court explicitly cited the combination of the trial judge's approach to family violence, her failure to consider mandatory factors regarding family violence as well as some section 37(2) factors, and her misapprehension of important evidence relevant to the best interests of the child as the primary reasons for this decision.[183] The order of the Provincial Court was set aside and the matter was "remitted to the Provincial Court for a new trial on all issues."[184]

The statement in *B.(C.M.)* that the party alleging family violence does not have to prove that they are an innocent victim, demonstrates an important awareness that victims of violence, particularly children, may still experience harm even where they have participated in the violence to some degree themselves. Going forward, this interpretation should help to undermine and discourage the use of the argument that one party "provoked" the violence, in order to justify it. This argument is often put forward by abusers to justify their actions so it is encouraging to see the Court effectively block its use. However, the manner in which the courts will draw lines between those initiating violence and those using self-defence remains to be seen. The boundaries of what constitutes the initiation of violence also

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179 *Ibid.* at para. 151.

180 *B.(C.M.)*, above note 98 at para. 125.

181 *Ibid.* at para. 126.

182 *Ibid.*

183 *Ibid.* at para. 150.

184 *Ibid.* at para. 153.

need to be defined. If a verbal statement leads to an overt physical confrontation, will the statement itself be considered violence in addition to the altercation? It is also noteworthy that the court in *B.(C.M.)* separates the discussion of who caused the violence from its impact on the children. Justice Fleming highlights that "consensual" violence between spouses may be harmful to children, regardless of who initiated it.[185] This approach demonstrates the court placing the focus on determining what arrangement is in the best interests of the children and will minimize the damage and likelihood of reoccurrence of violence, as opposed to assigning blame to either party.

Given the broad interpretation of the family violence provisions in the early jurisprudence, it is important to consider what acts the courts have found do *not* constitute family violence. In *British Columbia (Director of Child, Family and Community Service) v. M. (A.)*,[186] both the mother and the father were drug users. The mother's parents were also drug addicts and had frequently been incarcerated for stealing and drug possession. The mother and her parents had been living with the children. Child protection concerns had been present since 2011. The child's grandparents had caused the mother and the child to be evicted and had exposed the child to drug paraphernalia and drugs. The father took over care of the children after this occurred, and had facilitated access with the mother. However, the father admitted to smoking marijuana after the kids were asleep.[187] The Court found that the father's marijuana use and the presence of drugs in the same home as the children did not constitute family violence. The father was deemed to have shown maturity in removing the child from the mother's care because of her inability to live separately from her drug addicted parents, while at the same time treating her respectfully and facilitating her access to the children. These acts were taken as an indication the father could look after the child's best interests.[188]

In *H.(S.T.)*, both parents had a history of drug use, and one of the children was born drug addicted as a result. Both parents had taken active steps to get clean, and had been for a year or so. The relationship between the mother and father was, however, explosive at times. The mother had dated violent men since the separation, a factor that had ultimately forced the removal of the child. The mother had also inappropriately spanked the other child due to an inability to deal with that child's behavioural challenges. The court found that "neither parent [was] impaired in their ability to care for the children or meet their needs due to family violence."[189] The inappropriate spanking was not a factor because the mother had learned from her mistake and she had also made a clean break from her previous violent relationship. The parents' drug use was not a factor and the potential for poor judgment in the future could be mitigated with counselling and professional help.[190]

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185 *Ibid.* at paras. 125-126. The term "consensual" was used by the trial judge and placed in quotation marks by the appellate court.

186 2013 BCPC 134, 2013 CarswellBC 1696, [2013] B.C.J. No. 1194 (B.C. Prov. Ct.).

187 *Ibid.* at para. 65.

188 *Ibid.* at para. 66.

189 *H.(S.T.)*, above note 7 at para. 139.

190 *Ibid.* at para. 138.

These cases appear to stand for the principle that exposing the children to drug use does not necessarily constitute family violence under the *FLA*. They also appear to support the idea that it is important to preserve children's relationships with their guardians even when those guardians have repeatedly shown an inability or unwillingness to protect the child from harmful activities. Both mothers had exposed the children to drugs and to criminal behaviour multiple times, showing a lack of judgment and an inability to put the children's interests first. There was substantial risk that the parents would begin using drugs in a way that compromised their capacity for parenting. Researchers have found a "strong association between the severity of childhood trauma and parental alcohol and drug abuse."[191] Recent studies suggest that parental substance abuse can undermine the stability of a child's environment, making children's needs secondary to the parents' drug addiction, which can lead to various levels of neglect, maltreatment and abuse,[192] as well as increased risk of the child using drugs in the future.[193] Despite this research, there was no discussion by the court of the potential psychological harm done to children by their parents' drug use. In these cases, the court appeared to believe that a continued relationship with parents in this fragile state was more in the children's interests than removing them from their parent's lives until they had cleaned up and stabilized their own lives.

Indeed, some research suggests that the court's approach may be viable and preferable for mothers and children, provided proper supports are available.[194] The debate in the research highlights the difficulty in determining whether child exposure to parental drug use should qualify as family violence. There is little doubt that such exposure can have harmful effects on children, if parents' drug use is not adequately addressed through seeking treatment and additional parenting support where necessary. Minimizing the harmful effects of child exposure to drug use should be an important goal when determining parenting arrangements.

Also of note in the recent case law is that solitary or infrequent acts of violence have not been considered "family violence" by the courts. Section 38 of the *FLA* directs decision-makers to consider factors such as the frequency of the family violence and the nature and seriousness of it. In *P. (C.) v. C. (B.)*,[195] an incident of violence occurred following separation. The father was very intoxicated and called the mother derogatory names, forced his way inside the house, accused her of having another man, grabbed her face, and pushed her against the counter. The court found that the act of violence was a singular one and that there was no evidence that it indicated impairment in the father's ability to care for the child and meet his

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191 Chris Taplin et al, "Family History of Alcohol and Drug Abuse, Childhood Trauma, and Age of First Drug Injection" (2014) 49:10 Substance Use and Misuse 1311 at 1314.

192 Marina Barnard & Neil McKeganey, "The Impact of Parental Drug Use on Children: What is the Problem and What Can Be Done to Help?" (2004) 99:5 Addiction 552 at 553.

193 *Ibid.* at 555.

194 Susan C Boyd, *From Witches to Crack Moms: Women, Drug Law, and Policy* (Durham, North Carolina: Carolina Academic Press, 2004) at 128–131.

195 2013 BCPC 112, 2013 CarswellBC 1339, [2013] B.C.J. No. 3033 (B.C. Prov. Ct.).

needs.[196] However, the court did limit the father's parenting time, ordering that it proceed slowly and consistently, in accordance with the child's wishes. The court stated that section 37 of the *FLA* "provides a general direction to 'ensure the greatest possible protection of a child's physical, psychological and emotional safety'."[197] The fact that the child expressed severe anxiety in his father's new home indicated that the court should take such measures. The order was for the father to have parenting time one day a week and alternating Sundays, with unlimited telephone contact as desired.

In *Van Kooten v. More*,[198] there was evidence of repeated heated arguments during the parents' relationship. While each parent loved the child, the child was caught between them in their battle, and was left conflicted and anxious due to the tension between the parents.[199] The father had verbally violent episodes which, the evidence indicated, occurred only twice. The court found that these incidents did not place the child at risk.[200] Apparently, the child's anxiety regarding his father, stemming from the repeated arguments between the parents, was not sufficient to constitute family violence. In and of itself, family conflict resulting in periodic verbally abusive behaviour was not considered to be family violence of the kind that endangered the child, even though the child had expressed anxiety and emotional turmoil stemming from the conflict.

It is also important to note that despite the new and enlightened approach to family violence, judges have been reluctant to terminate guardianship rights, even when they find that violence has occurred. Termination seems to be a last resort measure. In *D. (C.E.) v. L. (C.L.)*,[201] the court noted that the key question is whether the risks of family violence are manageable by the victimized party with the assistance of a court order in a way that will protect the safety, security and well being of the child.[202] The court found that despite an "unfortunate history of high conflict and a theme of domestic violence in the relationship between the Mother and the Father, that that had not necessarily impaired the ability of either to care for the Child and to meet the Child's needs."[203] This ruling was made despite the fact that the mother was working in the sex trade and had shown a pattern of being involved in abusive relationships since the separation, and the father had shown a tendency of violence towards and manipulation of the mother.[204]

In *R. (N.C.) v. C. (K.D.)*,[205] the court found that the father had physically abused and/or attempted to physically abuse the mother on some occasions. In addition there was emotional and psychological abuse in the form of intimidation and

196 *Ibid.* at paras. 104, 106.

197 *Ibid.* at para. 108.

198 2013 BCSC 1076, 2013 CarswellBC 1829, [2013] B.C.J. No. 1305 (B.C. S.C.).

199 *Ibid.* at para. 33.

200 *Ibid.* at para. 34.

201 2014 BCPC 34, 2014 CarswellBC 694, [2014] B.C.J. No. 812 (B.C. Prov. Ct.).

202 *Ibid.* at para. 93.

203 *Ibid.* at para. 94.

204 *Ibid.* at para. 89.

205 2014 BCPC 9, 2014 CarswellBC 361, [2014] B.C.J. No. 273 (B.C. Prov. Ct.).

threats against her and her property, unreasonable restrictions on her personal autonomy, and intentional damage to her property. The child was also exposed to the violence, both directly and indirectly.[206] The court nevertheless declined to either terminate guardianship or issue a Protection Order, being "confident any further behaviours on his part which could amount to family violence will no longer occur."[207] This conclusion was drawn despite the fact that the father had not made any efforts to address his anger and control issues.[208] The court felt more comfortable giving him the opportunity to do so and to attend family dispute resolution to schedule parenting time. This decision reveals an optimistic approach to abusive behaviour that is sometimes taken too lightly and that can create risks in some situations.

The belief in maximum contact as being beneficial for child development seems to be playing a role, even though it is not mentioned in the *FLA* definition of best interests of the child. One of the assumptions underpinning the *B.(M.W.)* decision discussed earlier appeared to be that a connection with their father was the most important factor in serving the children's best interests. Mr. Justice N. Brown also felt that the father was better able to facilitate contact with the mother, and that the inverse would be unlikely to occur,[209] showing that the analysis of family violence can be influenced if it is conducted through the prism of the maximum contact/friendly parent principle found in the *Divorce Act*,[210] but not the *FLA*.

In *L. (D.N.) v. S. (C.N.)*,[211] the mother had had primary care of her eleven year old daughter for several years and at the time of divorce. The child had been in the middle of conflict since she was born. She had strong ties to her mother and, while she loved her father, she experienced anxiety and emotional distress in his company. The father repeatedly discussed the litigation with his daughter, and referenced the mother negatively, saying that she was in therapy and implying that she was responsible for the parties' failure to communicate with each other.[212] He also made derogatory remarks toward the daughter regarding her weight and appearance. The court found that when angry, the father had made ill-considered comments toward the child and that these comments amounted to psychological abuse.[213] Nevertheless, while this behaviour was determined to be family violence, it was found that the father did not "intend" to harm the child, and he was able to exercise parenting responsibly when he applied himself. Mr. Justice Pearlman then referred to the maximum contact principle as indicating that the child should have as much parenting time with each parent as possible, as long as it protected her

206 *Ibid.* at para. 116.

207 *Ibid.* at para. 118.

208 *Ibid.* at paras. 116, 128.

209 *B.(M.W.)*, above note 167 at para. 210.

210 *DA*, above note 71, s. 16(10).

211 2013 BCSC 809, 2013 CarswellBC 1212, [2013] B.C.J. No. 954 (B.C. S.C.) [*L.(D.N.)*].

212 *Ibid.* at paras. 34–37.

213 *Ibid.* at para. 58.

emotional safety, security and well being.[214] This often criticized principle[215] was cited as justification for the position that it was in the best interests of the child's emotional and psychological well being that she develop a stable relationship with her father. However, it was acknowledged that the father's inconsistent and insensitive behaviour toward her would make this difficult. Despite the child's expressed preference not to spend overnights with her father, the court continued one overnight every two weeks on the basis that overnights were required to develop a stable relationship with him.[216]

This case appears to be an example of the invocation of the maximum contact principle in a manner that does not fully acknowledge the harm of psychological abuse. Parents who commit psychological abuse can be permitted continued and substantial access to their children, provided they have shown they can be capable parents on some level. Emphasizing maximum contact more heavily than the well-being of children is potentially problematic from a child development perspective and has caused significant problems in jurisdictions such as Australia.[217]

Another example arises in *R. (B.T.) v. A. (U.)*,[218] where there was evidence of both parents perpetrating violence against their two daughters, A and T. A was 15 years old and T was 9 years old at the time of trial. The Supreme Court found on the evidence that both parents had engaged in physical acts against one or the other child.[219] These incidents included the father hitting T in a restaurant, to the point where a patron called the Ministry of Children, and the mother engaging in a violent hair pulling altercation with the A. There was also evidence of both parties inflicting emotional abuse on the children, particularly during the litigation.

Justice Masuhara held that "neither has the higher ground in terms of parenting child T. Neither is a perfect parent. The acrimony in this dispute has amplified the negative characterization of the parties . . .. Recognizing that with some finality in the litigation, the tensions between the parties usually moderate; the best interests of child T would be served by an equal parenting regime where the child is parented on an alternating weekly basis."[220] Both parties retained guardianship of T. The father was granted primary residence and decision making power regarding A, while T was to spend equal time in both residences with the mother having final decision making authority.[221] The judge also advised the parents to seek guidance on how to parent without physical violence.[222] Separating the children from each other and keeping them with the parent with whom they had a better relationship,

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214 *Ibid.* at para. 60.

215 Jonathan Cohen & Nikki Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" (2001) 19 Can. Fam. L.Q. 121.

216 *L.(D.N.)*, above note 211 at para. 63.

217 Rhoades, "Legislating to Promote Children's Welfare", above note 31.

218 2014 BCSC 1012, 2014 CarswellBC 1595, [2014] B.C.J. No. 1127 (B.C. S.C.).

219 *Ibid.* at para. 90.

220 *Ibid.* at para. 99.

221 *Ibid.* at para. 103.

222 *Ibid.* at para. 97.

while advising the parents to seek treatment for their violent behaviours, was seen as preferable to temporary removal or placing the children with relatives.

In *F. (N.A.) v. M. (C.D.)*,[223] the father applied for interim joint custody and guardianship of their two children, pending a final determination on the issue of custody. The mother had moved the children from Squamish to Kelowna without providing notice to the father. She justified her unilateral decision by arguing that the father had history of abusive behaviour. Under a section of the judgment titled "Maximizing Contact", Master Scarth noted that while the mother had been primary caregiver, "[t]he evidence is that the children have a good relationship with both parents", and the father "had a significant role in the children's lives."[224]

In its analysis of the alleged family violence, the court found that "[t]he differences in the parties' evidence as to the incidents of violence cannot be resolved on this application. The question is the extent to which the undisputed incidents are relevant to [the father's] ability to parent the children, or support a conclusion that it would not be in the children's best interests to be in [the father's] care."[225] Because of the mother's suggestion that she feared for her own safety but not the children's,[226] and because some of the evidentiary conflicts could not be resolved on this application, the court concluded that the move was driven by the mother's "own agenda" and that "she did not take into account the disruption to the children"[227] of the loss of access to their father. Master Scarth granted interim joint custody and guardianship and ordered the children moved back to Squamish.

This case raises interesting issues concerning the court's approach when faced with conflicting evidence on interim applications, and with regard to the mother's right to her own safety. There will doubtless be many instances in which courts are faced with conflicting evidence regarding abusive behaviour, and are forced to make quick decisions in terms of living arrangements for the children. This case indicates that courts will sometimes be willing to effectively "punt" the issue, preferring to wait until trial to resolve the evidence before making major changes to parenting arrangements. While perhaps prudent from a legal perspective, this approach is not necessarily practical or desirable from the standpoint of families who are facing potentially dangerous situations. The fact that the children were not found to be in direct danger of exposure to abuse from the father is noteworthy. However, this situation was assumed on the basis of conflicting evidence, which may have been incomplete at the least. To err on the side of the alleged abusive party in these instances runs the risk of exposing vulnerable parties to dangerous circumstances while awaiting the conclusions at trial.

Leaving aside the evidentiary conflict, there was still uncontested evidence of a physically violent incident towards the mother. Master Scarth made note of the fact that the violence "could have been addressed by an order limiting contact between [the parties], and an order for exclusive occupancy of the family home."[228]

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223 2013 BCSC 2294, 2013 CarswellBC 3904, [2013] B.C.J. No. 2835 (B.C. S.C.).

224 *Ibid.* at para. 30.

225 *Ibid.* at para. 47.

226 *Ibid.* at para. 47.

227 *Ibid.* at para. 50.

228 *Ibid.* at para. 48.

Yet that order was not made here. Joint guardianship was ordered until the Judicial Case Conference the following week, where parenting terms were to be discussed.[229]

The assumption flowing from the order is that even uncontested evidence of an episode of violence towards a spouse does not necessarily inhibit a parent's capacity to parent. The early jurisprudence indicates that occasional acts of violence towards a spouse will usually not be enough for courts to consider limiting a child's exposure to the violent parent, unless the child is a target of that violence. The emphasis on maximum contact and its perceived benefits to child development seems to be alive and well, even where the possibility exists for children to be indirectly exposed to violence between their parents.

That said, it should be noted that where evidence of violence is consistent and overwhelming, the courts have acted to protect the child, provided independent evidence corroborates a potential guardian's risk to a child. In *M. (L.J.S.) v. S. (L.T.)*,[230] the mother and father had a toxic relationship, during which family violence repeatedly took place in the presence of the children. The daughter stated she did not want to stay overnight with the father. The mother alleged that the daughter had told her that her father sexually abused her. Medical opinion admitted at court corroborated that the father was a sexual abuse risk towards girls. The father's access to his daughter was limited to daytime access only at the request of the daughter, and on neutral territory such as a restaurant. The father was also barred from contacting his daughter via telephone.

Cultural considerations have also influenced judicial determination of what constitutes family violence. In *G. (B.K.) v. G. (H.S.)*,[231] the family involved was Sikh and both parents were born in India. The marriage had been arranged. They met for the first time just a few days before the wedding. The relationship was short-lived and post separation, the child had gone with the mother to live in Surrey, British Columbia while the father remained in Calgary. The child, now five years old, was perceived by the court to be happy and healthy living with the mother. The mother alleged family violence on the part of the father, specifically that he would occasionally hit her and the child, that the father sexually abused her, and undermined her financial autonomy. The parents had resided together for only a few months.

Mr. Justice Verhoeven stated that the mother's "evidence has to be approached with a great deal of caution" as it was "likely exaggerated."[232] He also noted that while the allegations regarding the husband's behaviour and influence on her financial autonomy likely contained some truth, it had to be regarded in a cultural context: "I was not surprised to hear that the father was concerned about the modesty of his wife's attire. Many things in the relationship were governed by cultural traditions. The marriage itself was arranged of course."[233] Verhoeven J. then stated: "I think it is likely that [the mother] was simply very unhappy, and wanted

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229 *Ibid.* at para. 52.

230 *M.(L.J.S.)*, above note 71.

231 2013 BCSC 1942, 2013 CarswellBC 3541, [2013] B.C.J. No. 2522 (B.C. S.C.).

232 *Ibid.* at paras. 30, 31.

233 *Ibid.* at para. 34.

to leave and live somewhere distant from her husband and his family, who she very clearly does not like."[234] This invocation of "culture" to diminish the mother's concerns was made despite the fact that the court accepted evidence that the father was upset his child was female, and had cancelled both the mother and child's immigration sponsorship upon learning that the mother had lied about having gotten genetic testing for the child as requested by him. The father had also failed to provide full financial disclosure, harassed the mother via phone and made a suicide threat following their separation. Despite this evidence of controlling behaviour, the court held there was no evidence the father had harmed the child, or that any of his actions constituted violence or were indicative of serious psychological dysfunction.[235] The mother was awarded sole custody under the *Divorce Act*, but both parties remained guardians under the *FLA*. The father had unsupervised but limited parenting time and if the parents could not agree on significant decisions, the mother had the right to make them.

When it comes to defining the boundaries for family violence, the decision in *G.(B.K.)* carries the implication that practices that are assumed to be "cultural" may be respected with little interrogation and regardless of whether they are consistent with equality concerns. Apparently no expert evidence was offered on the cultural norms. From the perspective of the *FLA*, it seems that the husband's actions could have been found to constitute family violence. The father revoked the child and the mother's immigration sponsorship upon learning that the mother had not submitted to genetic testing. When combined with his other behaviours, these actions qualify as undermining her financial and personal autonomy as well as being contrary to the best interests of the child. The court seemed willing to dismiss these acts as being expected to some degree in Indian culture, and therefore not indicative of family violence. Following the separation, the husband's subsequent mental instability and dishonesty was treated as an isolated incident, rather than as indicative of a pattern of behaviour.

This case raises the spectre of cultural relativism, and whether some courts may, in an effort to place cases in their proper context and to respect the practices of various cultures, undermine the impact of the new *FLA* norms on family violence. The *G.(B.K.)* case is even more troubling when contrasted with cases where the courts have determined that family violence existed under the *FLA*. The courts have expressly noted that the definition of family violence includes psychological and emotional harm, including intimidation, harassment, coercion, or threats. Damage to property and unreasonable restrictions on a person's autonomy are also included, as is the indirect exposure of a child to violent behaviour.[236]

5. CONCLUSION

At this early stage, it would be premature to suggest with any degree of authority how interpretation of the *FLA* provisions on guardianship, relocation, and family violence will proceed, given the paucity of appellate authority. Nevertheless, this review of the first year of jurisprudence suggests that the courts are reluctant to

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234 *Ibid.* at para. 38.

235 *Ibid.* at para. 53.

236 *B.(M.W.)*, above note 167 at para. 194.

decline guardianship to parents and are more likely to fine-tune the parameters of parental responsibilities and parenting time in order to deal with concerns about parenting ability or quality. As for relocation, it appears that the new burden of proof provisions may not make as much difference as might have been expected, with judicial discretion under the best interests of the child still playing a key role and generating some indeterminacy in outcomes. Finally, while the detailed new provisions on family violence are being interpreted quite broadly, they are not always applied in a way that offers optimal protection of the safety of children and their caregivers, and a focus on maximum contact still appears to play a role, despite it not being mentioned in the legislation.