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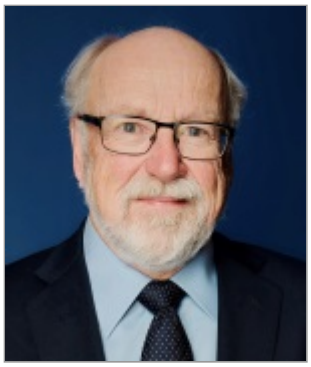
Relocation burdens: Are they working? | Rollie Thompson

By **Rollie Thompson**

Law360 Canada (January 22, 2024, 9:58 AM EST) -- The *Divorce Act* relocation amendments state burdens of proof in analyzing best interests, creating a three-way split at the outset of the analysis:



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1. If the parents share "substantially equal time" under their order or agreement, the burden of proof is allocated to the relocating parent (s. 16.93(1));
2. If one parent has the child for the "vast majority" of the time, the burden of proof is allocated to the parent opposing the relocation (s. 16.93(2)); or
3. In any other case, "both" parents have the burden of proof (s. 16.93(3)) or, more accurately, both have the burden of leading evidence about relocation and the child's best interests.

The first two burdens clearly reverse the "no burdens" approach of the majority in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. The statutory burdens also differ from the "burden-less" common law approach espoused in *Barendregt v. Grebliunas*, 2022 SCC 22 at paras. 122-123.

The purpose of the burdens is to give some structure to the best interests analysis, to reflect the case law and our current understanding of the social science literature, and to give greater guidance to parents in relocation matters. For more on the relocation amendments, see Thompson, "Legislating About Relocating: Bill C-78, N.S. and B.C.," *Canadian Family Law Quarterly*, 2019, Vol. 38 (2), p. 219. Burdens of proof can be rebutted by the party with the burden of proving that the facts of *this* particular case mean it is or isn't in *this* child's best interests to relocate.

Almost two years later, how have these statutory burdens been treated? The divorce amendments came into effect in March 2021. Mirror amendments have been made to provincial family law statutes in Ontario, Saskatchewan, New Brunswick, P.E.I., Nova Scotia and Manitoba, expanding the impact of the changes.

I've read over 170 relocation cases under these statutes and some clear trends emerge.

1. There has been a very quick consensus on the meanings of "substantially equal time" (40 to 50 per cent of parenting time) and "vast majority" (80 per cent or more), provided that the lower bounds are not treated rigidly, say the courts, so burdens can apply for 37 to 38 per cent or 77 to 78 per cent of the time.
2. The burdens require that the parents "substantially comply with an order, arbitral award or agreement." The "agreement" doesn't have to be in writing; it can be an oral or *de facto* agreement.
3. The "substantial compliance" requirement is not about intermittent parenting time denials or failures. It's about the general pattern of parenting time complying with that set out in the order or agreement.
4. If the "vast majority" burden applies, the relocating parent is allowed to move in 87 per cent of the cases, no surprise. Courts do say "no" where the "vast majority" parent has a poor

relocation plan.

5. If the "substantially equal time" burden applies, only 16 per cent of relocations are allowed, again no surprise. Moves are allowed on unusual facts in these cases.
6. If "both" parents have the burden, 60 per cent of relocations are allowed. Most of these cases involve interim orders, of which more below.
7. There is a separate category of cases, cases where a parent seeks to relocate on an interim or temporary basis, where 47 per cent of moves are permitted. Almost all these cases are in Ontario. The statutory burdens are complicated by the conventional law placing a substantial burden on a parent seeking to move a child before trial.

There are other trends, trends that are disturbing. A surprising number of judges just ignore the statutory burdens and go straight to the best interests factors. A few judges wrongly apply *Barendregt* as if it were the law, rather than the statutes.

Too many judges have been too quick to apply the opt-out discretion in s. 16.94, to not apply the burdens where the existing order is an interim order. Even for interim orders, the starting point is that the burdens do apply and they should apply in many of these cases. Some interim orders reflect a longer-standing, post-separation status quo. Some interim orders reflect the parents' child-caring patterns while cohabiting.

On the other hand, interim orders are often makeshift, without prejudice orders. To date, in my view, judges have not thought carefully enough about interim orders and relocation burdens.

When a parent proposes to relocate before trial, the analysis becomes complicated. The pre-existing law placed a substantial burden upon the parent seeking to relocate, typified by *Plumley v. Plumley*, [1999] O.J. No. 3234 (Ont.S.C.) or, more recently, *N.P. v. D.H.*, [2022] O.J. No. 5108. That burden on the moving parent applies easily in the "substantially equal time" setting, where the statutory burden is already on the relocating parent. The interim burden also works in cases where the burden at trial would be on "both" parents. It's the "vast majority" cases that have caused problems.

Some Ontario judges have said that the interim burdens cancel out in "vast majority" cases, so "both" bear the burden. That's wrong. There is a better way to view their interaction. There is a substantial burden on the moving parent for an interim relocation. Under *Plumley*, one of the three factors is "a strong possibility of success" at trial. If a parent has the "vast majority" of the parenting time, the statutory burden of proof means just such a "strong possibility."

Interestingly, an analysis of the Ontario interim relocation cases reveals: 14 of 16 "vast majority" moves allowed, but only one of six "substantially equal time" cases, and 6 of 19 of cases where "both" had the burden.

Lawyers and judges need to start the best interests analysis in a relocation case by considering the applicable burden of proof. This step should not be skipped. Interim orders can and often should give rise to burdens, more often than has been true so far. In general, the statutory burdens are working as intended by the amendments.

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