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A GENDERED APPROACH TO "QUALITY OF LIFE" AFTER SEPARATION UNDER THE BRITISH COLUMBIA *FAMILY LAW ACT* RELOCATION REGIME

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ABSTRACT

As established in existing literature, the separation of spouses has gendered consequences. Women are likely to suffer more severely, financially, from the dissolution of a relationship and are more likely to experience family violence. Mothers in heterosexual relationships are more likely to have care of children after separation than are fathers. In the face of those challenges, many guardians will apply to relocate for reasons that include seeking out emotional support from extended family and new partners, better financial opportunities, and housing affordability and availability. This article charts and analyzes British Columbia court decisions made under the Division 6 Relocation provisions of the *Family Law Act*. In Division 6, legislators have directed courts to consider the effects of a proposed relocation on a child's quality of life and that of the guardian who proposed relocation. This article examines how courts have engaged with the many gendered aspects of quality of life following separation. It finds that courts' recognition of family violence's repercussions is uneven and recommends the explicit inclusion of family violence in the Division 6 quality of life provision. It identifies the following as areas for further judicial education: first, family violence and its connections to courts' assessment of female applicants' credibility and to barriers to accessing housing and, second, potential biases in assessments of new female versus new male partners of applicant parents in heterosexual relationships.

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INTRODUCTION

When a child's guardian applies for a court's permission to relocate after separating from their spouse, it is often part of the broader work of reconfiguring life for themselves and their children after separation. Separating from a spouse has financial ramifications. To maintain two households, parties may need to retrain to seek out higher-paying jobs or work outside the home. In some cases, those opportunities will not be available where they lived during the relationship. In addition to seeking to relocate for educational or employment opportunities, a person might also seek to move somewhere with a lower cost of living or because more housing is available there. For some couples, separation will also mark the end of serving as a source of emotional support or community for a spouse. Therefore, a person might seek to relocate to where they have a network of friends, extended family, or the support of a new partner. Where a person's spouse is abusive, relocation may also be a part of attempting to secure housing and a new community away from their abuser.

Relocation is, therefore, a gendered issue in at least two senses. First, because it is still more common for mothers than for fathers to have substantially more parenting time and responsibilities following separation, the majority of guardians seeking to relocate with their children are mothers.[1] Although under British Columbia's *Family Law Act* ("*FLA*"), a guardian must give notice of their planned relocation even if they do not intend to bring the child or children with them,[2] such moves are less likely to be contested. In all 56 discrete cases examined for this paper, the guardian was seeking to move with the child or children. Second, relocation factors tied to financial need and family violence are, in general, more acute for women post-separation than for men. The "Gender-Based Statistical Report" prepared for Statistics Canada in 2018 found that "women typically experience marked declines in family income after union dissolution, compared with men."[3] Canadian women are also

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1 Dan Fox & Melissa Moyser, "Women in Canada: A Gender-based Statistical Report – The Economic Well-Being of Women in Canada" (May 16, 2018), online: Statistics Canada <www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54930-eng.html> [https://perma.cc/5P7M-NQE8]; and Part II of this paper. This paper examines applications for relocation made under British Columbia's *Family Law Act*, SBC 2011, c 25 [*FLA*] and will use language specific to the *FLA*. The *FLA* defines a "relocation" at s 65(1) as a "change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with (a) a guardian, or (b) one or more other persons having a significant role in the child's life." In the *FLA*, a child's guardian(s) are the people who have "parental responsibilities" with regard to the child (which refers to decision-making authority for the child as defined at s 41 and includes "making decisions respecting where the child will reside") and "parenting time" with the child (which refers to time that the child is with a guardian and during which the guardian generally has day-to-day decision-making authority and the "care, control and supervision of the child," as set out at s 42). It is a child's guardian who may object to a relocation of a child by another guardian (s 68). S 39 of the *FLA* establishes that "parents are generally guardians," if both parents lived together with the child prior to separation. If, however, one of the parents has never resided with a child, that parent will not be a guardian of the child unless there is a parentage agreement that establishes that they are a parent under s 30 of the *FLA*, the parent and the guardian(s) of the child have an agreement that establishes the parent as a guardian, or "the parent regularly cares for the child" (s 39(3)).

2 *FLA*, *supra* note 1 at s 66(1).

3 Fox, *supra* note 1.

more likely to experience violence at their spouse's hands than are men.[4] Therefore, both the high incidence of mothers seeking to move with their children, and the specific factors that motivate relocation, are reflections of the gendered consequences of separation on the quality of life of women and their children.

The relocation regime in Division 6 of the *FLA* explicitly directs courts to consider the effects of the proposed relocation on the child's quality of life and that of the guardian who proposed relocation. In light of the gendered effects of separation on quality of life, I will assess the impact of gender and gendered concerns on how courts have assessed those quality of life factors by looking at the applications of mothers and fathers, respectively. By making quality of life following separation an explicit part of the analysis, legislators created a space within the relocation analysis where courts could be particularly attuned to gender-based ramifications of separation. Conversely, the analysis also leaves space for existing biases against female applicants to be introduced. The research question at the core of this paper pertains to how courts have used that space since the introduction of the *FLA* in 2013. It asks whether the combination of the quality of life provision and judicial education has facilitated decisions that take into account the particular disadvantages that women face following separation and, if not, what areas for improvement the trends in the application of the provision suggest.

Based on the cases considered for this paper, I argue that courts have been uneven in how they have treated family violence's relevance to relocation. Thus, I argue that explicitly including family violence in the Division 6 quality of life factors would help produce better decisions. Similarly, given the prevalence of housing as a cited motivation for relocation, and the particular barriers to acquiring housing faced by separated mothers and mothers who have experienced family violence, housing merits particular attention as a motivation for relocation. Lastly, the courts' pattern of lauding the new female partners of fathers applying to relocate while making less positive findings regarding mothers' new male partners is a trend to be monitored, and a topic on which further research and judicial education would be helpful.

I proceed through those arguments in four parts. In Part I, I outline the law around relocation, as set out in the *FLA* and interpreted by the courts. In Part II, I address gender-based trends in relocation applications under Division 6 and guardians' stated motivations for relocation. In Part III, I address the cited incidence of family violence in the cases and the degree to which it figures in the relocation analysis. In Part IV, I look at the significance of affordability and availability of housing as a financial motivator for female applicants and at the barriers to securing housing that they are particularly likely to face. I conclude with comments on areas for improvement.

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4 See Shana Conroy, Marta Burczycka & Laura Savage, "Family violence in Canada: A statistical profile, 2018" (December 12, 2019), online: *Juristat, Canadian Centre for Justice Statistics, Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00018-eng.pdf?st=zvttOx9r> [https://perma.cc/4MYN-JL3N]. The most recent Statistics Canada profile on family violence in Canada is from 2018. Its writers found that 8 out of 10 victims of intimate partner violence were female (79%).

METHODOLOGY

To assess the gendered implications of British Columbia courts' quality of life analysis, I used LexisNexis and CANLII to search for the cases in which, as part of the relocation analysis, the court drew specifically on the quality of life factors in Division 6, section 69(6), of the *FLA*. Since the *FLA* came into force in 2013, there have been 58 recorded decisions that meet this criterion. Because this paper aims to chart how the courts have grappled with the section 69(6) quality of life factors, I have limited the research parameters to those 58 cases, which are a subset of the 130 decisions made since 2013 that deal with Division 6. The British Columbia Court of Appeal decided two of the 58 decisions on the basis of the standard of review. Those decisions are therefore not included in the trends charted in Part II of this paper. Of the other 56 decisions, 32 were made by the British Columbia Supreme Court ("BCSC") and 24 by the British Columbia Provincial Court ("BCPC").

My research methodology meant that I used reported decisions only. Given the proportionately higher number of oral decisions given in the BCPC than in the BCSC and the lower rate at which they are transcribed and made publicly available, the trends recorded here more accurately reflect practices at the BCSC than the BCPC. Furthermore, trial decisions do not address the experiences of people facing similar conditions but who settled out of court or, through choice or lack of access, did not enter the legal system at all. Interviews with individuals in those situations are beyond the scope of this paper but would be a helpful basis for further study.

I. THE LAW: GOOD-FAITH REASONS FOR RELOCATION AS PART OF THE *FLA* RELOCATION REGIME

Guardians who seek to relocate make their applications under the *Family Law Act* if they and their spouse have not been married.[5] Married spouses may also make applications under the *FLA* and will be required to do so if they seek to make their application at the BCPC, as opposed to the BCSC, as the former does not have jurisdiction over the *Divorce Act*.[6] If a guardian wishes to relocate once there is already an agreement or order regarding parenting arrangements, they apply under the "Division 6 – Relocation" section of the *FLA*. Division 6 differs in several ways from both the approach to mobility cases adopted by the courts when applying the *Divorce Act*, and the approach set out at section 46 of the *FLA* for situations in which there are not existing agreements or orders regarding parenting arrangements. What is pertinent to this paper is that it is only in Division 6 of the *FLA* that legislators provided the

5 While the *Divorce Act* applies only to married couples (*Divorce Act*, RSC 1985, c 3 (2nd Supp), s 2(1)), the *Family Law Act* applies both to unmarried parties in a marriage-like relationship and to married parties, to the extent that it does not conflict with the provisions of the *Divorce Act* (*FLA*, *supra* note 1, s 3(1)).

6 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91-92, reprinted in RSC 1985, Appendix II, No 5

courts with specific aspects of quality of life to consider in their relocation analysis.[7] Section 69(6)(b) of Division 6 sets out the applicable quality of life factors "including increasing emotional well-being or financial or educational opportunities." The court is to consider those factors when deciding whether the applicant's proposed relocation is in good faith. Given the explicit reckoning with those gendered factors that courts undertake in their section 69 analysis, it is the formal relocation regime under Division 6 that is considered in this paper.

Under the Division 6 Relocation regime, whether the guardian decided to relocate in good faith is an influential part of the analysis. To permit a move, the court must be satisfied on three points: first, that "the proposed relocation is made in good faith;" second, that "the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life;" and third, that the relocation is in the best interests of the child.[8] Per the legislative intent of the *FLA* as a whole, the "overriding factor" is the "best interests of the child."[9] However, where one guardian has the substantial majority of the parenting time, the proposed relocation will be presumed to be in the best interests of the child if the court accepts that the application was made in "good faith" and is satisfied that the proposed arrangements are "reasonable and workable."[10] Relocating guardians with substantially equal parenting time to that of the remaining guardian(s) do not benefit from that presumption and bear the onus of satisfying the court on all three points.[11]

There has been some disagreement in the case law over whether "good faith" and "reasonable and workable arrangements" are threshold requirements. The language of the individual sections read alone would suggest that they are threshold requirements. In contrast, the construction of the *FLA* as a whole suggests that the best interests of the child remains the deciding factor for all decisions made under Part 4 of the Act, including section 69.[12]

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7 When making mobility decisions under the *Divorce Act*, the courts have turned to the leading case, *Gordon v Goertz*, [1996] 2 SCR 27, 1996 CanLII 191 (SC). In that case, the court established that when deciding on mobility under the *Divorce Act*, courts are to apply the best interests of the child assessment but are not, except in exceptional circumstances, to consider the parent's reasons for the move (para 49). Note, though, that the amended *Divorce Act* will, when it comes into effect in 2021, include the "reasons for relocation" as an additional best interests of the child factor for courts to consider in relocation decisions (Bill C-78, An Act to amend the *Divorce Act*, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act, SC 2019, c 16, cl 16.92(1)(a)). The amended *Divorce Act* still will not include specific quality of life factors as seen in Division 6. S 46 of the *FLA* applies when an application for relocation is made without there first having been an agreement or order regarding parenting arrangements in place. Under s 46 of the *FLA*, judges are to consider the relocating guardian's reasons for the proposed relocation along with the best interests of the child.

8 *FLA*, *supra* note 1 at s 69(4).

9 Susan B Boyd & Matt Ledger, "British Columbia's New Family Law on Guardianship, Relocation, and Family Violence: The First Year of Judicial Interpretation" (2014) 33 Can Fam LQ 317 at 337.

10 *FLA*, *supra* note 1 at s 69(4).

11 *FLA, supra* note 1 at s 69(5).

12 Scott Booth et al, *Family Law Sourcebook for British Columbia*, ed by Jennifer M Hicks (Vancouver: BC CLE, 2019) at ch 2 s 2.55, online: <pm.cle.bc.ca/clebc-pm-web/manual/42801/book/view.do#/C/1395843> .

In one of the earliest cases on relocation under the *FLA*, *LJR v SWR*, the court reasoned that the language of the statute made "failure to satisfy either precondition under s 69(4)(a) ["good faith" and "reasonable and workable arrangements"] fatal to the application to relocate."[13] The court would, therefore, have to turn to its *parens patriae* jurisdiction to make the best interests of the child the determinative factor.[14] However, later that same year, the court in *Hadjioannou v Hadjioannou* ("*Hadjioannou*") held that it would be "inconsistent to interpret s 69 in a way that would preclude the court from assessing the child's best interests." The court in *Hadjioannou* ruled that even where the "good faith" and "reasonable and workable arrangements" factors are not made out, the court is to carry on to consider whether the relocation might still be in the best interests of the child.[15] Courts have continued to cite the approach set out in *Hadjioannou* with approval and have described the *Hadjioannou* approach as being in line with the "modern approach" to statutory interpretation of reading the "words of an Act" together in their "entire context."[16] In practice, findings on good faith and on the best interests of the child are, in the majority of cases, consistent. The court's finding on good faith was consistent with its best interests of the child finding in 82 percent of the cases assessed in this paper, and thus with the final decision on whether to permit or prohibit relocation.[17]

The courts have interpreted the good faith analysis as involving two main steps. In the first step, the court considers whether, subjectively, the relocating guardian made a good faith decision. This is a credibility-based analysis in which the judge considers "whether the reasons asserted by [the relocating guardian] for the proposed relocation are the real reasons for the move."[18] In the second step, the court is to consider objectively whether "the reasons for seeking to relocate are reasonable."[19] The reasonableness assessment is an informal one in which the judge is to decide whether the stated reasons "accord … with common sense."[20] I turn in the following parts of this paper to cases where the courts have found the reasons for the move credible and how the courts have assessed what moves are reasonable.

II. TRENDS IN THE APPLICATIONS FOR RELOCATION

A. Gender-based Trends

This paper provides data on 56 BCSC and BCPC cases, decided between 2013 and 2020, in which a guardian sought to relocate. In 48 of those cases (86%), it was the mother who sought to relocate. The predominance of applications by mothers is in line with the broader

13 *LJR v SWR*, 2013 BCSC 1344 at para 85.

14 *Ibid* at paras 85, 86.

15 *Hadjioannou v Hadjioannou*, 2013 BCSC 1682 at para 17 [*Hadjioannou*].

16 *CMB v BDG*, 2014 BCSC 780 at para 71.

17 In only 10 of the 56 cases were relocation proposals found to be in good faith but were not permitted, or vice versa.

18 *Pepin v McCormack*, 2014 BCSC 2230 at para 69 [*Pepin*].

19 *CC v RV*, 2016 BCPC 477 at para 15.

20 *Kowalchuk v Dass*, 2016 BCSC 1857 at para 40 [*Kowalchuk*].

trend in relocation cases that is recorded in the secondary literature.[21] However, the data recorded here are specific to the subset of British Columbia Division 6 Relocation cases in which the court dealt explicitly with the good faith analysis.

Gender Role of Guardian Seeking to Relocate	Gender Role of Guardian Opposing Relocation	Number of Applications
Mother[22]	Father	47
Mother	Mother	1
Father[23]	Mother	8
Father	Father	0

In 26 of the 56 cases (46%), the court permitted relocation. Of the total 48 attempts to relocate by mothers, the court permitted 23 (48%). There were eight attempts to relocate made by fathers. Three were successful (38%). Given the small numbers involved, the fact that fathers' rate of success was 10 percent lower than that of mothers cannot bear the weight of much analysis.

	Applications by Mothers	Applications by Fathers
Relocation Permitted	23	3
Relocation not Permitted	25	5

A more significant divergence is evident between the cases of relocating mothers and fathers in the percentage of cases in which mothers or fathers had a substantially greater share of parenting time. It remains the case that where one guardian has substantially more parenting time, it is likely to be the mother. Of the 48 cases involving mothers seeking to relocate, 26 involved mothers with substantially more parenting time (54%). In contrast, only two of the eight fathers seeking to relocate had substantially more parenting time (25%).

As discussed in Part I, the factors that the court considers are the same whether one guardian has substantially more of the parenting time or the two guardians have substantially equal parenting time. In both situations, the relocating guardian must be found to have proposed relocation in good faith, proposed "reasonable and workable arrangements," and proposed a relocation that is in the best interests of the child. However, if one guardian has substantially

21 See Nicholas Bala et al, "Study of Post-Separation/ Divorce Parental Relocation" (2014), online: *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/spsdpr-edpads/spsdpr-edpads.pdf> [https://perma.cc/7UA4-4G2Z] for Canadian trends from the period of 2001 to 2011; See also Boyd & Ledger, *supra* note 9 for discussion of the first year of the implementation of the *FLA* relocation provision regime.

22 In 36 of the applications where a mother was seeking to relocate, she made the application. In 13 others, it was the other guardian (the father, in all but one case) who made an application opposing the mother's planned or realized relocation, and the mother was the Respondent.

23 In six of the applications where a father was seeking to relocate, he made the application. In two others, it was the mother who made an application opposing the father's planned or realized relocation, and the father was the Respondent.

more of the parenting time, the move is presumed to be in the best interests of the child so long as the court is satisfied on the issues of good faith and workable arrangements. In those cases, guardians opposing relocation bear the onus of refuting that presumption.[24] On the other hand, relocating guardians with substantially equal parenting time bear the onus of proving all three factors.[25]

In the cases examined for this paper, having substantially more parenting time did not guarantee that a guardian's relocation application would be successful. Neither of the two fathers who had substantially more parenting time was permitted to relocate, and 11 of the 26 mothers (42%) who had substantially more parenting time were not permitted to relocate. However, of the 23 mothers who were allowed to relocate, 15 of them (65%) had substantially more parenting time. Therefore, the proportionately higher number of applicant mothers with substantially more parenting time is one possible explanation for mothers having a higher rate of successful applications. However, as set out above, given the small number of applications by fathers, the difference between the rate at which fathers' applications succeeded (38%) and mothers' applications succeeded (48%) is not necessarily significant.

	Applications by Mothers	**Applications by Fathers**
Relocating Guardian had Substantially More Parenting Time	26	2
Successful Applications by Relocating Guardian with Substantially More Parenting Time	15	0
Unsuccessful Applications by Relocating Guardian with Substantially More Parenting Time	11	2
Relocating Guardian had Substantially Equal or Less Parenting Time	22	6
Successful Applications by Relocating Guardian with Substantially Equal or Less Parenting Time	8	3
Unsuccessful Applications by Relocating Guardian with Substantially Equal or Less Parenting Time	14	3

24 *FLA*, *supra* note 1 at s 69(4).

25 *Ibid* , s 69(5).

B. Factors Prompting Relocation

Under section 69(6)(b), judges are to consider whether the proposed relocation would increase the quality of life of the relocating guardian, as well as that of any children. Specifically, they are to look to factors "including increasing emotional well-being or financial or educational opportunities."[26] Most parties cite a number of those factors. There were only seven cases in this study where the relocating party relied on a single factor to justify their move.[27]

Financial opportunity is the motivation for relocation most often cited by both mothers and fathers. Drawing on the specific motivations for relocation emphasized by applicants, I have broken down financial opportunity into employment opportunities and affordability. Post-separation, applicant guardians frequently sought to relocate either for higher-paying employment,[28] or for flexible employment that would allow them to take on childcare duties themselves.[29] In keeping with existing literature on the negative financial ramifications of separation, over a third of cases involved parties seeking to relocate to lower their living expenses or find less expensive housing.[30] The general presumption expressed by judges in the cases assessed for this paper is that increases in financial opportunities for a guardian, especially a guardian with whom the children live primarily, will have a direct and positive impact on children. The court expressed that common understanding particularly clearly in *Hansen v Ferguson*, in which it held that, "[a]s the primary caregiver, this improvement in the mother's general quality of life will also benefit the children."[31]

The second most common motivation for relocation is emotional support, either from a party's extended family or a new partner. Canadians are increasingly mobile, and many people who have separated from a spouse find themselves far from the support network that their extended family could offer them.[32] Others have entered into new relationships and seek to move to share a home with their new partner. As with financial gains made by a guardian, the courts have recognized that increases in a guardian's emotional well-being have positive effects for the guardian and their child and can "translate into a positive family environment for the child."[33] How the courts have addressed the benefits and risks of relocating for the financial or emotional support of family or new partners is addressed in Part IV of this paper.

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26 *Ibid*, s 69(6)(b).

27 Those seven cases, and the corresponding factors, are: *JPL v CMM*, 2014 BCPC 302 (employment opportunities); *MM v CJ*, 2014 BCSC 6 (employment opportunities) [*MM v CJ*]; *NLS v CRT*, 2017 BCPC 125 (employment opportunities) [*NLS v CRT*]; *AP v JC*, 2018 BCSC 1381 (emotional support of extended family); *BH v RS*, 2016 BCSC 1027 (emotional support of new partner); *CJC v MDC*, 2016 BCSC 472 (affordability) [*CJC v MDC*]; and, *RDD v INA*, 2015 BCPC 264 (employment opportunities).

28 See e.g. *AV v MD*, 2014 BCPC 252 and *LK v MM*, 2013 BCPC 225.

29 See e.g. *Pepin*, *supra* note 18 and *BDH v SNH*, 2014 BCSC 2010.

30 See Part IV for further discussion of the cases pertaining to affordability and availability of housing.

31 *Hansen v Ferguson*, 2015 BCSC 588 at para 48 [*Hansen*].

32 Linda C Neilson, "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases", Canadian Legal Information Institute, 2017 CanLIIDocs 2, <http://www.canlii.org/t/ng> at 16.1.

33 *TC v SC*, 2013 BCPC 217 at para 70 [*TC v SC*].

The third most common motivations are educational opportunities for the relocating guardian and for the child. Although section 69(6)(b) separates educational opportunities from financial opportunities, a relocating guardian's educational opportunities are often tied to their employment and financial goals. While 13 mothers cited their educational opportunities as a reason for relocation, none of the applicant fathers drew on the factor. Those numbers fit with the existing research into the particularly deleterious financial effects of separation experienced by women and related efforts by women to retrain to improve their financial prospects.[34]

A number of relocating guardians highlighted the educational opportunities that would be available to their children in their chosen relocation destination. Judges were loath to accept the reasoning that children's education was necessarily better in a metropolitan area as opposed to more rural districts, or vice versa.[35] In the few cases in which they found educational opportunities for the children to be sufficiently divergent to have weight in the analysis, the educational opportunities had specific relevance to the identity of either the relocating guardian or the guardian opposed to relocation. For example, in *NLS v CRT*, the court found it important that relocation would mean a move away from the child's francophone school, which provided her with an important entry point to the francophone culture of the non-relocating guardian.[36] Cultural and ethnic identity arose again in two applications in which the applicant guardian argued that the need to connect the child with their traditional culture militated in favour of relocating to their country of origin or Indigenous territory.[37] Neither of those applications was successful. However, in another case, the importance of preserving the child's Indigenous culture by remaining in their traditional community became central at the best interests of the child stage of the assessment. As a result, although the application was found to be in good faith, the best interests of the child test was not satisfied, and the court held that the child was not to be relocated.[38]

In just 4 of the 56 decisions was family violence considered in the quality of life analysis. Women made all four of those applications. In a number of other decisions, the court notes the presence of family violence, but found it not to be relevant to the quality of life assessment or to the relocation decision at all. See Part III of the paper for discussion of the inconsistent treatment of family violence in these relocation decisions.

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34 Fox, *supra* note 1.

35 *MDG v CJG*, 2016 BCPC 298 at para 32 [*MDG v CJG*].

36 *NLS v CRT*, *supra* note 27 at para 8.

37 *MS v DE*, 2019 BCPC 182; *MH v AM*, 2018 BCPC 401 [*MH v AM*].

38 *LA v DT*, 2019 BCPC 181.

Quality of Life Factors relied on by Relocating Guardian	Mothers	Father	Total
Employment opportunities	31	5	36
Emotional Support and Community (with extended family)	24	5	29
Emotional Support and Community (with new partner)	21	3	24
Affordability (cost of living and housing)	18	3	21
Educational opportunities for the guardian	13	0	13
Educational opportunities for the child	6	2	8
Distance from abusive ex-spouse	4	0	4
Availability of housing	3	0	3
Ability of child to connect with traditional culture	0	2	2

III. FAMILY VIOLENCE AS A MOTIVATION FOR RELOCATION

Parts III and IV of this paper build on the analysis that was set out in Parts I and II of the legal framework for relocation and cases decided under it. Parts III and IV address the gaps in the relocation provisions and their implementation. I begin this part by considering the role that family violence plays in the reported decisions examined in this paper and its inadequate integration into the good-faith analysis. I recommend the explicit inclusion of family violence as a factor in the good-faith analysis. Family violence is a more significant aspect of relocation than would be suggested by the low number of decisions charted above in which courts explicitly recognized it as a motivation for relocation. Understanding the pervasive effects of family violence helps to inform the analysis of housing and the barriers in accessing it that follows in Part IV.

The existing literature makes it clear that family violence is a significant reason for guardians to relocate. As Linda Neilson notes in her report, "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases," the perpetration of family violence in a relationship may function on one hand to motivate the perpetrating guardian to threaten to relocate as another means "to retaliate, to intimidate, to regain control." On the other hand, it may also motivate the targeted guardian to relocate as a "response to fear and the overpowering need for community support, safety, stability and freedom from control."[39]

39 Neilson, *supra* note 32.

That need for safety and freedom from family violence may persist well after the time of separation. In addition to the risk of long-lasting psychological and physical repercussions stemming from family violence, separation, and related litigation have themselves been proven to be common triggers for family violence.[40]

Of the cases considered for this paper, there is one in which the court identified the proposed relocation as part of the perpetrating guardian's pattern of alienation and family violence.[41] The court was quick to deny that proposed relocation on the grounds that "the Court should not condone such misconduct."[42] In four cases, the court identified a targeted guardian's experience of family violence as a part of their motivation to relocate. In 15 other decisions, the court referenced family violence but either assessed it separately from the good-faith analysis or considered it irrelevant to the relocation analysis as a whole. This section of the paper addresses that inconsistent framing of family violence in the cases and argues that the inclusion of family violence in the good-faith analysis could help the court take into account the long-lasting effects of such violence.

In the decisions considered for this paper, the courts noted family violence in far more instances than the four in which they considered it as a quality of life factor. In *SMK v SK*, for example, the court provided a detailed analysis of the family violence perpetrated by the guardian opposing relocation,[43] but it did not reference that family violence when addressing the quality of life factors or whether relocation would be in the best interests of the child.[44] Rather, the court in *SMK v SK* found first that relocation should not be permitted. Only after making that finding did the court in *SMK v SK* then return to the issue of mitigating the father's anger management issues to facilitate co-parenting while both guardians remained in the same city.[45] In structuring its decision in that way, the court appeared to give little weight to the relevance of family violence to the best interests of the child and the quality of life assessments that underpin the relocation regime.

Similarly, in several other decisions in which the court considered family violence solely in its best interests of the child analysis, it focused on the question of whether there were, or were likely to be, current or recurring instances of family violence.[46] In those decisions, where the court interpreted the family violence as being in the past, it held it to be irrelevant to the

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40 *Ibid* at 4.5.1. See also Crystal Bruton & Danielle Tyson, "Leaving Violent Men: A Study of Women's Experiences of Separation in Victoria, Australia" (2018) 51:3 Australian & New Zealand J Criminology 339; Brittany E Hayes, "Indirect Abuse Involving Children During the Separation Process" (2015) 32:19 J Interpersonal Violence 2975.

41 *Silverman v Silverman*, 2015 BCSC 236.

42 *Ibid* at para 37.

43 *SMK v SK*, 2017 BCSC 1242 at paras 23–28 [*SMK v SK*].

44 *Ibid* at paras 119, 131.

45 *Ibid* at paras 134–141.

46 The best interests of the child analysis set out at s 37 of the *FLA* includes two factors that pertain directly to family violence. S 38 sets out the factors used to assess family violence (as defined in s 1 of the *FLA*) in the context of the best interests of the child analysis, which include, amongst others, "how recently the family violence occurred" and its frequency.

relocation application.[47] For example, in *Burseth*, the court considered "the impact of any family violence on the children's safety, security or well-being," against whom the violence had been directed, and whether the family violence carried out by the father would "indicate" that he was "impaired in his … ability to care for the children and meet the children's needs."[48] The court tied the father's family violence to his "stress due to the breakdown in the relationship." Despite finding "ongoing conflict between the parties," the court held that "any family violence is firmly in the past, and there are no current family violence issues that affect the children's safety, security and well-being."[49] The court did not address any potential emotional concerns stemming from the family violence in its quality of life analysis. The court in *Burseth* did, however, find the financial reasons for moving sufficient to permit the move. As in *Burseth*, the court in *NLS v CRT* emphasized that the reported family violence was two years in the past.[50] Combined with the father's completion of a counselling program, that the family violence had not continued was one of the factors that led the court to hold that the best interests of the child would be served by preventing their relocation. Unlike in *Burseth*, that finding was not outweighed by other factors, and the relocation of the child was therefore not permitted.[51]

In contrast, several of the decisions in which the court integrated family violence into the quality of life analysis demonstrate a more expansive understanding of how past and present violence can motivate relocation. These decisions do not appear to include any significant acknowledgment by the courts of how family violence can recur or be sparked by events, including litigation. However, they do demonstrate greater regard for the ongoing effects of past family violence. *GH v MJS* is one of the four cases in which the court took into account in its quality of life analysis the family violence to which the other guardian had subjected the relocating guardian. As in the *Burseth* decision, the judge in *GH v MJS* did "not believe there is any real risk of family violence being repeated in the future."[52] However, unlike in *Burseth*, in *GH v MJS*, the court considered relevant the "emotional toll" that the conflict had on the mother. This finding led the court to hold that the Applicant would "enjoy more emotional stability when she has some distance from [the Respondent]" and that their child, "in turn, … will benefit."[53] Similarly, in *Dowell v Hamper*, the court conceived of the planned relocation as an "opportunity to recalibrate the relationship between the child and her father."[54] In another of the decisions in which the court considered family violence in its quality of life analysis, the court accepted the Applicant's view that she and her children would experience greater "emotional security" if permitted to move away from the remaining guardian, who was "cruel and abusive."[55]

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47 See *Burseth v Burseth*, 2017 BCSC 2076 at para 101 [*Burseth*]; *Campbell v Campbell*, 2018 BCSC 330 at paras 28, 62; *NLS v CRT*, *supra* note 27 at paras 11–18, 29–36; *Hadjioannou*, *supra* note 15 at para 83; and *Mercado v Sani*, 2016 BCSC 1724 at para 10 [*Mercado*].

48 *Burseth*, *supra* note 47 at paras 91–103.

49 *Ibid* at paras 98, 101.

50 *NLS v CRT*, *supra* note 27 at para 30.

51 *Ibid* at paras 35–37.

52 *GH v MJS*, 2017 BCPC 322 at para 95.

53 *Ibid* at para 25.

54 *Dowell v Hamper*, 2019 BCSC 1592 at para 25.

55 *JKC v BFGP*, 2016 BCSC 2392 at paras 21, 79, 88 [*JKC v BFGP*].

By considering family violence as part of the quality of life analysis, judges are simply ensuring that a relevant piece of a party's experience figures in the analysis. It remains open to the court to find that other factors outweigh their findings concerning family violence. *KW v LH* provides one such example. The decision is one of the four in which the court considered family violence as part of their quality of life analysis. In the decision, the court accepted that the mother's proposed move was, in part, "motivated by her desire to remove her son from the present difficult environment."[56] However, the court found that the proposed relocation carried with it too high a risk of "fracturing the relationship" between the father and child and that the mother's perception of the violence that she and the child experienced from the father in Vancouver was not sufficient to substantiate the need for relocation.[57]

As noted throughout the relocation literature and case law, relocation decisions require judges to make decisions with severe consequences for children and their guardians on the basis of their current knowledge of dynamic circumstances.[58] Existing decisions that consider family violence within the quality of life analysis provide a helpful framework for understanding past and current violence as part of the circumstances that underpin a guardian's desire to relocate. The nuance of those decisions supports the explicit inclusion of freedom from family violence as a factor in the quality of life analysis.

For the inclusion of a family violence factor to be effective, it would also need to be paired with broader judicial education on engaging with applicants alleging family violence. It is still the case that female applicants risk negative credibility assessments when bringing evidence of family violence before the court.[59] The court's assessment of an applicant's credibility is pivotal to its findings in any hearing. In relocation decisions, the court's assessment of a guardian's subjective intentions regarding the relocation is also part of its threshold assessment of good faith. The long-standing trend of courts penalizing female applicants who allege family violence telegraphs to applicants and their counsel that bringing forward such claims risks

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56 *KW v LH*, 2017 BCSC 1441 at para 34 [*KW v LH* SC].

57 *Ibid* at paras 57–59. The applicant mother appealed this decision of the BCSC. The BCCA found that the trial judge had erred in law in deciding the matter under Division 6 of the *FLA*. It ruled that, absent a pre-existing agreement or order regarding parenting arrangements, the matter would rightly be decided under s 46 (*KW v LH*, 2018 BCCA 204 at para 92–94 [*KW v LH* CA]). As a result, the appeal decision does not address the quality of life factors that are specific to Division 6 and is therefore not one of the decisions under consideration in this paper. Note, however, that the BCCA held on appeal that the trial judge was wrong to exclude deeper analysis of the family violence from the best interests of the child analysis (*ibid* at paras 123–125). The BCCA did not address whether the trial judge also erred in not taking family violence into account in the quality of life analysis.

58 See Nicholas Bala & Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" (2011) 30 Can Fam LQ 271; *Hansen*, *supra* note 31 at paras 31, 72; *TC v SC*, *supra* note 33 at paras 83–84.

59 Deborah Epstein & Lisa A Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167:2 U Pa L Rev 399 at 431; Tara Carman, "Survivors of Domestic Abuse Told to Keep Quiet about it in Court or Risk Jeopardizing Child Custody", *CBC News* (27 September 2020), online: <www.cbc.ca/news/canada/domestic-abuse-custody-1.5738149> [https://perma.cc/58NT-KWRJ]; Susan B Boyd & Ruben Lindy, "Violence Against Women and the B.C. Family Law Act: Early Jurisprudence" (May 2016) 35:2 Can Fam LQ 101 at 112–113.

damaging their credibility in the court's eyes. That dynamic means that family violence was likely a factor in more of the applicant mothers' lives than was reported in the decisions or raised in court. I turn next to the courts' analysis of affordability and availability of housing as part of the quality of life analysis. As addressed below, family violence remains relevant in the context of housing.

IV. AFFORDABILITY AND AVAILABILITY OF HOUSING AS MOTIVATIONS FOR RELOCATION

Over a third of the cases considered for this paper involve parties relocating to seek better housing in a less expensive area or to share housing with family or a new partner.[60] Taken together, housing affordability and availability were at issue in 38 percent of the cases. The particular significance of housing for female applicants stems from a number of issues, including both that women are more likely to be left in a worse financial position following separation than are men and that women are more commonly the targets of family violence.[61] Women's options in securing housing are also limited by the court's pattern when dealing with heterosexual relationships of making less positive findings about women's new male partners than about men's new female partners. Those findings make the court more reluctant to allow women to relocate to reside with a new partner. It is therefore particularly important for applicant mothers that courts receive the necessary education to be attuned to their economic and social realities.

A. Affordability and Availability of Housing

Housing affordability and cost of living arise frequently in the relocation decisions considered in this paper. The court addresses those factors as facets of guardians' financial opportunities and emotional well-being. In a number of the cases, the relocating guardian sought to lower their cost of living by moving out of the Lower Mainland or out of the province.[62] While the court does require evidence of the relative affordability in the proposed destination for relocation, it is widely accepted that the cost of living in the Lower Mainland is high.[63]

In an additional three applications, the courts identified housing availability as a ground for relocation. Mothers brought forward all three. In two of the applications, the mother lived in a remote area where the only available housing was "off the grid" or a "rustic cabin rental", which the court held to be insufficient to her needs and those of the children.[64] In the third, the mother was in a metropolitan area, and the issue was one of combined affordability and availability limitations. The mother and children had a pet and, though the mother had searched diligently, she had been unable to find anywhere available that would meet the family's specific needs.[65]

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60 See the Quality of Life Factors table in Part II of this paper.

61 Fox, *supra* note 1; Conroy, *supra* note 4.

62 See *Hansen*, *supra* note 31; *Bonar v Bonar*, 2016 BCSC 2065; *JKC v BFGP*, *supra* note 55; *SMA v MLJ*, 2016 BCPC 174; *CJC v MDC*, *supra* note 27; *SAW v PJW*, 2018 BCPC 376 [*SAW v PJW*].

63 See discussion of required evidence in *JKC v BFGP*, *supra* note 55 at paras 74–76.

64 *CAP v MSP*, 2015 BCSC 183 at para 34; *SAW v PJW*, *supra* note 62 at para 5.

65 *CJC v MDC*, *supra* note 27.

B. Reliance on Relational Ties to Secure Housing

Many relocating guardians rely on extended family and new partners for housing. That a relocating guardian's extended family could provide both emotional and financial support is, like the high cost of living in the Lower Mainland, generally accepted in the case law.[66] The value of such support has been more contentious when it is provided by a relocating guardian's new partner. Judges note the challenges posed by these cases.

Courts noted in a number of decisions that the increased stability that a guardian expected to find in a new family unit would be beneficial for the children.[67] However, courts also recognized the concern frequently raised by the guardian opposing relocation that, in moving to unite with a new partner, the relocating guardian prioritized their interests over those of the children.[68] As a result of that inherent uncertainty, the courts' decisions on whether a proposed move to unite with a new partner is in good faith frequently seem to turn on judges' assessment of the new partner. The resulting analyses suggest a problematic trend.

In the decisions in which fathers proposed to relocate to join a new partner (all of whom happened to be female), the court viewed the women as positive influences. In *JJA v KAC*, for instance, the court noted with approval that the father's new partner "works only part time" and would therefore "have the time to assist in any reunification plan that the counsellors propose," and that she is "a caring, calm and thoughtful woman."[69] The descriptions of the fathers' new partners in *MM v CJ* and *NLB v CEB* were similarly positive.[70] Although this paper's sample size of the trend is small, the data are consistent with a more long-standing trend charted in the literature of courts privileging the applications of fathers who can provide a "mother figure" for the child and, in particular, one who will spend time at home with the children.[71]

In the case of the mother applicants' new partners, courts' assessments were more mixed. On an individual basis, some of the findings may seem intuitive. The fathers' new female partners were described as calm, caring, and highly invested in the children's lives. On the other hand, in some cases, the mothers' new partners (all of whom were male in the cases considered for this paper) were described as getting into confrontations with the children's father or as themselves being perpetrators of family violence.[72] The best interests of the child

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66 See *SMK v SK*, *supra* note 43; *Pepin*, *supra* note 18; *MH v AM*, *supra* note 37; *Burseth*, *supra* note 47.

67 See *TC v SC*, *supra* note 33 at para 77; *Kowalchuk*, *supra* note 20 at para 47.

68 *MDG v CJG*, *supra* note 35 at paras 34–35, 62; *Hansen*, *supra* note 31 at para 36.

69 *JJA v KAC*, 2017 BCPC 127 at para 280 [*JJA v KAC*].

70 *MM v CJ*, *supra* note 27 at paras 11, 84, 87; *NLB v CEB*, 2017 BCSC 1463 at paras 81, 130, 146, 154, 168 [*NLB v CEB*].

71 See Susan B Boyd, "Child Custody, Ideologies, and Employment" (1989) 3:1 Can J Women & L 111; Cheri L Wood, "Childless Mothers? The New Catch-22: You Can't Have Your Kids and Work for Them Too" (1995) 29:1 Loy LA L Rev 383. Of the applications by male applicants considered for this paper, *JJA v KAC*, *supra* note 69, exhibits most directly the privileging of what Boyd refers to as "female care" of the children. One would, however, expect courts' reliance on such considerations to continue to decline over time as societal mores change.

72 See *NLB v CEB*, *supra* note 70; *MDG v CJG*, *supra* note 35 at para 50.

are, of course, paramount, and there is no reason to second-guess the courts' findings on the best interests of the child in those cases individually. However, if it remains the case in a more expansive study of the case law that judges consistently regard new women in children's lives in significantly more positive terms than new men in their lives, then that would be a concerning trend. It is a trend to which applicants, their counsel, and the courts would need to be alive to and interrogate.

C. Affordability, Availability, and Family Violence

As already discussed, difficulties in finding affordable and available housing are relevant to female applicants, broadly. However, they are particularly relevant for women and their children who are leaving situations of family violence. As set out in the 2019 report on "Overcoming Barriers to Housing After Violence" prepared by the British Columbia Society of Transition Houses, the lack of affordable and available housing is putting women experiencing violence in a situation where they are "forced to trade safety for housing":

> Research shows that the lack of affordable housing forces women to make the difficult choice to return to a violent situation or face homelessness – both of which may put her safety and her children's safety at risk.[73]

The barriers posed by lack of affordable housing are further heightened by the "pervasive stigma against women who have experienced violence" perpetuated in private rental markets and in broader public responses to transition housing.[74] Furthermore, disturbance or damage caused by a violent former spouse can result in the eviction of women experiencing family violence from the accommodation that they had secured.[75]

The decisions made at the interstice of housing and family violence suggest the need for courts and the legislature to clarify the relevance of both factors to applicants' quality of life and to that of female applicants in particular. For example, in *Mercado v Sani*, the court found that family violence was not relevant to the relocation decision.[76] The court made that finding despite the applicant mother's move to a shelter following what the court described in mutualizing terms as the parties' "conflicts," and her attempt to relocate to somewhere with a lower cost of living.[77] In *KW v LH*, the court recognized that it was "rational" for the applicant to remain briefly in the same home as her abusive partner, given that "she had few friends to rely on in Vancouver, had begun training as a nurse, and was not employed."[78] However, the court then explained the respondent's abuse as resulting, in part, from the fact

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73 Tanyss Knowles et al, ed, "Getting Home Project: Overcoming Barriers to Housing After Violence" (2019) at 13, 14, online (pdf): *BC Society of Transition Houses* < https://bcsth.ca/wp-content/uploads/2019/06/Getting-Home-Project-Community-Needs-Assessment.pdf>[https://perma.cc/V3WE-DYV4].

74 *Ibid* at 15.

75 Leslie M Tutty et al, "I Built My House On Hope: Abused Women and Pathways into Homeless" (2014) 19:12 Violence Against Women 1498 at 1506.

76 *Mercado v Sani*, *supra* note 47 at para 10.

77 *Ibid*.

78 *KW v LH* SC, *supra* note 56 at para 32.

that the applicant had remained in the home.[79] In both cases, greater attention to the effects of housing and family violence on the applicants' quality of life would have helped the court gain a more fulsome appreciation of the applicants' motivations and their reasonableness.

CONCLUSION

This paper examined the 58 recorded decisions since the implementation of the *FLA* in which British Columbia courts grappled directly with the quality of life of relocating applicants and their children post-separation. As is evidenced in the existing secondary literature and in the trends charted in Part II of this paper, gender plays a role in post-separation quality of life. Mothers are more likely to have care of children after separation and are likely to suffer more severely financially from the relationship's dissolution. In the cases examined for this paper, there were six times more applicant mothers than applicant fathers, and over half of those mothers held the majority of the parenting time. For both applicant mothers and fathers, financial considerations were the most common motivations for relocation. For mothers, the need to relocate to seek out re-education was particularly acute. Women are also more likely to face family violence in a relationship. Although the court addressed family violence as part of its quality of life assessment in only 4 of the 58 decisions, there were another 15 decisions in which family violence was raised. Given the barriers that many women face when bringing family violence to the court's attention, it was likely even more prevalent in the cases than those numbers would suggest.

Therefore, the quality of life analysis as set out in Division 6 of the *FLA* is already gendered. As such, I conclude that courts and the legislature could make space in the analysis for attention to the gendered experiences of family violence and the socio-economic realities that many applicants, the majority of them mothers, face. In the decisions in which family violence was integrated directly into the quality of life analysis, courts' analyses demonstrated a more expansive understanding of family violence as a motivator for relocation. Although the courts have dealt explicitly with separated guardians' need to relocate due to housing constraints, applicant mothers appear to face more barriers when applying to relocate to live with new partners than do applicant fathers. Gaps also arose where the court did not consider in tandem the exigencies of housing affordability and availability, and the effects of family violence. Further judicial education on those topics would help fill such gaps.

When given specific factors by the legislature to be used in their analysis—"emotional well-being or financial or educational opportunities"—courts considered those factors directly in at least 58 out of the recorded 130 decisions. I therefore propose the inclusion of freedom from family violence as a specific quality of life factor. However, this analysis makes clear that for such a reform to be effective, it would need to be accompanied by further judicial education on the gender dynamics that underpin the situations of so many applicants.

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79 *Ibid* at para 33. The mother's appeal of the BCSC's decision was allowed, but on other grounds. The BCCA accepted the trial judge's finding that "the effect on both parties of continuing to live in the same house was profound" and, like the trial judge, noted that, "in hindsight, the Mother's decision to return to East 17th was most unfortunate" (*KW v LH* CA, *supra* note 57 at para 19).