



Relocation Advisory Guidelines — an idea whose time has come?

Rosemarie Boll

Law professor Nicholas Bala of Queen's University in Kingston, Ontario, took a close look at 750 Canadian cases¹ where one parent asked for the court's permission to move a child against the other parent's wishes. Even though mobility cases seem 'rule-less' and the decisions give the impression of being arbitrary, he did identify 13 patterns of evidence that tended to tip the scales either for or against the relocating parent. He published his findings in the [Canadian Family Law Quarterly](#)² Bala analysed those 13 patterns and identified the underlying principles. Then he used those principles to develop his Relocation Advisory Guidelines (RAGs). The RAGs are a series of presumptions that he believes Canadian judges are already applying in relocation cases. Bala does not say that his RAGs are what the law should be. He says they are the presumptions that are already guiding judges' decision-making. He hopes his RAGs spark a discussion about much-needed reform in relocation cases.

The RAGs are based on legal presumptions. A legal presumption works this way: if you prove a certain fact, then a judge can go ahead and presume another fact to be true, even though there is no specific evidence for it. For example, the fact that someone has completely disappeared for at least seven years lets a judge presume that the person is dead, even if there is no body or other evidence of death.

Bala says that judges are applying the following presumptions:

Relocation is in the child's best interest and should be permitted once the moving parent has proved that:

1. the other parent has been abusive. This goes beyond a mere allegation. The relocating parent must *prove* child abuse or spousal violence. If the violence or abuse happens after separation, it is an exceptionally persuasive fact. Once the relocating parent has proved abuse, the judge will presume that the move will be in the child's best interests because moving will give the parent and child some physical or emotional protection.
2. he or she has sole custody. 'Sole custody' doesn't depend on clauses in a court order – there needn't be a court order at all. Instead, the judge scrutinizes each parent's role in the child's life. If the child doesn't have a positive relationship or much involvement with the 'access' parent, the judge is more likely to presume that moving with the custodial parent will be in the child's best interests.
3. the child wants to move. If the child is mature enough (and this can be a hard fact to prove), the child's wishes matter. However, if the child seems to be manipulated, threatened or pressured by a parent, the judge may disregard the child's views.

Relocation is not in the child's best interest and should be denied when:

1. the judge is satisfied that the moving parent has significantly exaggerated or completely fabricated the abuse allegations. This behaviour raises all sorts of red flags. The judge will be concerned that the moving parent won't foster the child's relationship with the other parent. This justifies a presumption against relocation.
2. the parents have shared physical custody and the child is with the non-moving parent at least 40% of the time. The more the non-moving parent is involved, the greater will be the disruption and risk of emotional loss if the child is relocated.
3. the relocating parent has already moved the child. Parents should not move first and ask permission later. Self-help should be discouraged. A parent who has already moved must justify her behaviour or the presumption will be applied against her.
4. the child is mature and says she doesn't want to move. Bear in mind that a child should never be pressured by anyone to express an opinion or take sides.
5. the case is still at an interim stage. Relocations profoundly affect parents and children.

Judges do not like to make such important decisions without all of the evidence in front of them. Interim orders often turn into final orders – if a child already moved six months ago, how likely is it that a trial judge will disrupt her life again and order her returned? A relocating parent needs a very strong case to obtain permission to move before there's been a full trial.

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A judge should not apply either presumption when:

1. the moving parent has alleged abuse but the judge can't decide if the allegation is valid. Violence and abuse often occur without witnesses and behind closed doors. A victim who is unable to prove abuse shouldn't be penalized for raising the allegation (unless she is clearly exaggerating or making it up). When the situation is uncertain, there should not be a presumption for or against relocation.
2. the parents have joint legal custody. 'Joint legal custody' means that the parents have equal decision-making power. Because shared decision-making can continue even after a move, this arrangement does not raise a presumption either way. (Of course, there might be facts that slot the case into one of the other categories where there is a presumption.)

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What happens when there are conflicting presumptions?

Suppose a non-moving parent has the child more than 40% of the time and wants the child to stay, but the child says he wants to go. How does the judge balance the two presumptions?

This is a grey area. Some facts are more important than others. The highest-ranking fact is proven abuse. The judge will give it a lot of weight when assessing the case. The safety of victims of family violence is a top priority. The next most important fact is the custody arrangement. The others follow along in no particular order.

Where do we go from here?

Relocations are risky. It is impossible to predict how things will turn out whether a child stays or goes. The legal presumptions underlying the RAGs might help guide parents and judges faced with making difficult relocation decisions. Nevertheless, legal presumptions aren't facts – just because you haven't heard from me in seven years doesn't mean I'm not alive and well, sipping a cold drink on the sandy beach of a South Pacific island.

Notes

1. Cases written in English between 2001 and 2011
2. Nicholas Bala & Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" [2012] 30 CFLQ 271

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