

# BC FAMILIES IN TRANSITION

formerly Separation and Divorce Resource Centre

## THE 'EX' FILES

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### Considerations For Moving With Children After Separation

#### **If I'm separated (or divorced), am I allowed to move and take my child with me?**

There is no simple answer to this question. In the event that parties are unable to resolve this question by themselves, or through alternative dispute resolution such as mediation, there are a lot of things that a judge would need to think about before deciding whether or not such a move could take place.

The basic rule of court "the best interests of the child", that governs decisions about custody and access, is also used by judges when relocation disputes arise. Also for consideration by judges is whether there is a "material change in circumstances".

In order to meet the material change test, the applicant must show: "(1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order."

In order to begin proceedings if there is a non-removal clause in the initial custody order, the custodial parent would have to apply for a variation to eliminate that term from the custody order. The onus then would be on the custodial parent to prove that there has been a material change in circumstances. In the absence of a non-removal clause it would be up to the access parent to apply for a variation and to show that there has been a material change in circumstances.

After a relocation or mobility case involving *Gordon v. Goertz* (1996), 19 R.F.L (4th) 177 (S.C.C.) at p, 201, the court reviewed the post-*Goertz* cases on mobility and set out 12 factors that courts have considered in determining the best interests of the child. These are:

- the parenting capabilities of and the children's relationship with parents and new partners;
- the employment security and prospects of the parents and, where appropriate, new partners;
- the access to and support of extended family members;
- the difficulty of exercising the proposed access and the quality of the proposed access if the move is allowed;
- the effect on the children's academic situation;
- the psychological and emotional well-being of the children;
- the disruption of the children's existing social and community support and routines;
- the desirability of the proposed new family unit for the children;
- the relative parenting capabilities of each parent and the respective ability to discharge those responsibilities;
- the children's relationship with both parents;
- the separation of siblings; and
- the retraining or educational opportunities for the moving parent.

#### **What does the law require if a parent plans to move with children after separation or divorce?**

The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

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4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interests of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, *inter alia*:<sup>1</sup>
  - (a) the existing custody arrangement and relationship between the child and the custodial parent;
  - (b) the existing access arrangement and the relationship between the child and the access parent;
  - (c) the desirability of maximizing contact between the child and both parents;
  - (d) the views of the child;
  - (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
  - (f) disruption to the child of a change in custody;
  - (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community.

The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

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<sup>1</sup> among other things

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