

Child Focused Issues In Federal Legislation

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Manitoba Court of King's Bench Family Division

Presentation for the Nunavut Law Society

What
legislation?

Divorce Act, R.S.C.
1985, c. 3

An Act respecting First
Nations, Inuit and Metis
children, youth and
families S.C. 2019, c. 24

Divorce Act: What changed for children?

- Not much
- The amendments to the Divorce Act changed language primarily
- Custody Order became Parenting Order
- Parenting time
- Decision Making Responsibility
- Contact – person other than a spouse
- Factors to be considered in determining best interests s. 16(1)(3)
- Mobility

Divorce Act: What stayed the same?

- Best interests of child s. 16(1)(a)
- Confirmed by SCC that this is the only test
- No presumptions in favour of either parent



Mobility: Change in Place of Residence

- Section 16.8
- Notice requirements
- Any move
- Notice in writing
- Date of change
- Address of new residence and contact information
- Exceptions: the court may on application provide that the requirements in subsections do not apply or may modify them, including where there is a risk of family violence

Mobility: Relocation

- Section 16.9
- Notice requirements
- Content of notice
- Court may provide exceptions
- Presumptions:
 - No objection you can move
 - Court order you can move
- Best Interests of child – additional factors

Mobility: Relocation

- Additional factors to be considered when determining whether or not to authorize a relocation:
 - Reasons for relocation
 - Impact of relocation on the child
 - Amount of time child spends with each person who has parenting time and level of involvement in child's life
 - Compliance with notice requirement
 - Existence of order that specifies where child is to reside
 - Reasonableness of proposal to vary parenting time, decision making or contact after the move;
 - Compliance with obligations under legislation, an order or agreement

Mobility: Relocation

- Do NOT consider: will the person go without the child or not
- Burdens of proof s. 16.93 To show the relocation is in the best interests of the child
 - (1) equal time, on party who wants to relocate
 - (2) vast majority of time with party who wants to relocate, burden on objector
 - (3) in any other case, the parties have the burden of proving whether relocation is in the best interest of the child

Mobility

Examples:

#1 Notice of Change of Residence – Moves across town

- The mother has majority parenting time. The father has alternate weekends.
- The mother is planning to move from her current house on Poplar Street to a new home on Maple Street. The distance is 4 kilometers.
- What are the requirements for the mother?
 - Notice. Section 16.8(1) and (2) the mother must give notice to the father in writing, shall set out date of the change and the address of the new place or residence.
 - Exception. S. 16. 8(3) the court may allow move without notice

Example

#1: Part Two

- What are the requirements for the father to move?
 - Notice under s. 16.8(1) and (2)
 - Where are you going and when?
 - Applies equally to both parents to provide notice of changes of residence.
- Ensure that both parents are aware of their obligation to notify the other parent of ANY move.

Mobility

Example #2: Relocation

One town to the next

- The father has majority parenting time, and the mother has supervised parenting time for 4 hours a week.
- The father has remarried and has been offered a job in a different community, accessible by road.
- What are the requirements for the father?
 - S. 16.9(1) Notice to the mother at least 60 days before the relocation
 - S. 16.9(2) Notice must set out expected date, address and proposal for parenting time and any other information in the regulations
 - S. 16.9(3) Exception court may dispense with notice.

Example #2

-Relocation

One town to next

- S. 16.91(1) If the father gives notice as required to relocate with the child he may move if:
 - (a) court order
 - (b) the following conditions are satisfied:
 - (i) the mother does not object within 30 days after the notice by setting out their objection in
 - (A) a form prescribed by the regulations, or
 - (B) an application to oppose the move
 - (ii) there is no order prohibiting the relocation
- The court order giving the father majority parenting time does not address residence or relocation, the mother does not object, can the father move?
- All conditions of s. 16.91 are met and the presumptions are in his favour.

Mobility

Example#3:

Far far away

- What is far far away?
- In Nunavut it could mean across the territory.
- In Canada it could mean across the country or around the world.
- The mother and father share parenting time equally. The mother has been offered a new job with more money and greater responsibility. The father was recently given a buyout by his company and is looking for new opportunities. Mother wants to relocate from Iqaluit, Nunavut to Winnipeg, Manitoba.
- What would happen?

Example

#3: Far Far Away

- Notice. The mother must give notice to the father 60 days before the proposed move. She proposes the move to Winnipeg and suggests that the father have all extended school breaks, summer, Spring Break and Winter Break. She proposes she will pay for travel. Alternatively, the mother proposes the father move to Winnipeg and they continue shared parenting.
- The father has shared parenting time. He objects and files an application to prevent the move.
- What presumption will apply?

Example #3: Far Far Away

- S. 16.93(1) Burden of proof - parent who intends to relocate child
 - In this case mother has the burden of proof.
 - The parents have substantially equal parenting time
 - Mother must show that the relocation is in the best interests of the child
- S. 16.93(2) Burden of proof – parent who objects to relocation
 - If the child spends vast majority of their time with relocation parent, party opposing has burden to prove relocation would not be in child’s best interest.
- S. 16.92(1) Best interests of child
 - Reason for relocation – employment
 - Impact on relocation on child – change of school, social circle, where is family?
 - Amount of time child spent with each parent?
 - Any order which specifies geographic area child to reside?
 - Reasonableness of the proposal by parent wanting to relocate, consider location of move, and travel expense?
 - Whether each parent has complied with parenting time ordered?

Example

#3: Far Far Away

- When parents have shared parenting time, and they are actually exercising their parenting time and there will be significant impact on the child the legislation is drafted in such a way to suggest that the request for relocation of child will be an onerous burden.
- What should you consider if you are the moving parent?
 - What are benefits to the child?
 - What are downsides of moving or not moving?
- What should you consider if you are opposing the move?
 - Same considerations
- Best interests. How does the move meet the child's needs?

Focus on Factors: Family Violence

- Section 16 (3)(j) any family violence and its impact on, among other things,
 - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
 - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child;

Focus on Factors: Family Violence

- Factors relating to family violence
- Section 16(4) In considering the impact of any family violence under paragraph 3(j), the court shall take the following into account:
 - (a) the nature, seriousness and frequency of the family violence and when it occurred;
 - (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
 - (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
 - (d) the physical, emotional and psychological harm or risk of harm to the child



Focus on Factors: Family Violence


- (e) any compromise to the safety of the child or other family member;
- (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
- (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
- (h) any other relevant factor

Focus on Factors: Family Violence

- Our understanding of family violence has changed;
- Our understanding of the impact of violence in the home has on children even when not directed to them has changed;
- Recommended Reading/Listening:
 - K.M.N. v. S.Z.M., 2024 BCCA 70
 - In Control: Dangerous Relationships and How They End in Murder
by Jane Monkton Smith
 - Podcast: Anna Maria Tremonti, Welcome to Paradise, CBC Podcase Series




Act Respecting First Nations, Inuit and Metis Children, Youth and Families

- Federal child welfare legislation;
 - Recognizes the rights of Indigenous children and their families;
 - Recognizes Canada's obligations under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
 - The Supreme Court of Canada has upheld the constitutional validity of the legislation 2024 SCC 5
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Dominant Purpose: SCC

- “the well-being of Indigenous children youth and families by promoting the delivery of culturally appropriate child youth and family services and in so doing advances the process of reconciliation with Indigenous peoples.”
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How do you use the Act?

- Plead the legislation: make sure that it is on the court's radar
- Focus on arguing the best interests of the child
- The Supreme Court introduced the metaphor of “braiding”
- Don't look at the legislation in isolation, the local territorial or provincial legislation does still exist.
- Remind the court of the principle of “cultural continuity” s. 9
- Remind the court of the factors to consider in determining the best interests of an Indigenous child s. 10
- Ensure that the Child Welfare Agency is providing services consistent with s. 11

Placement of Indigenous Child

- Section 16
- It is no longer acceptable to remove children from their parents, their homes and community.
- Ensure that the priorities set out in s. 16 have been explored



Laws of Indigenous Groups, Communities or Peoples

- Coordination and Application
- S. 20 Notice and Coordination Agreement
- The laws of an Indigenous group, community or people has force of federal law.
- The laws of an Indigenous group prevails to the extent of any conflict or inconsistency over provincial or territorial child and family services legislation. (s.22)
- The court must reconcile and be conscious of the priorities in considering the best interests of the child.
- If the child is Indigenous, the Act applies.

Thank you.

Questions or comments?
