[2006] FamCA 25

FAMILY LAW ACT 1975

IN THE FAMILY COURT OF AUSTRALIA
AT BRISBANE **No. (P) BRF 2723 of 2004**

BETWEEN:

W

Applicant Father

AND:

R

Respondent Mother

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE CARMODY

Date of Hearing: 17 October 2005

Date of Judgment: 30 January 2006

Appearances: Ms. Carew of Counsel, instructed by Carter Naughton Rice Family Law of Level 2/309 North Quay, Brisbane, Qld. 4000, appeared on behalf of the Applicant Father.

Mr. Michael Byrne of Counsel, instructed by Klar & Klar, Solicitors of PO Box 1027 Stafford, Qld, 4053, appeared on behalf of the Respondent Mother.

Name of Case: **W AND R**
File Number: **BRF 2723 of 2004**
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Coram: **Carmody J**

Catchwords: FAMILY LAW – PARENTING ORDERS – Proposal involving overseas relocation of children – Paramountcy principle – *Family Law Act 1975* (Cth) ss 60B, 61C, 64B(2), 65D(1), 65E, 65N, 65Y, 68F(2)

Legislation:
Care of Children Act 2005 (NZ), ss 4, 5, 16
Children Act 1989 (UK), s 13
Divorce Act 1985 (RSC), s 16(8)
Family Law Act 1975 (Cth), ss 43(b), 60B, 61B, 61C, 61D, 64B, 65D(1), 65E, 65M, 65N, 65Y(1), 65Z(1), 67ZC, 68B, 68F(2), 114(3)

Cases considered:
A and A: Relocation Approach (2000) FLC 93-035
A v A (Child: Removal from Jurisdiction) [1980] 1 FLR 380
AMS v AIF (1999) 199 CLR 160
B and B: Family Law Reform Act 1995 (1997) FLC 92-755
Belton v Belton [1987] 2 FLR 343
Bolitho and Cohen (2005) FLC 93-224
Carter v Brooks (1990) 2 O.R. (3d) 321
CDJ v VAJ (1998) 197 CLR 172
Chamberlain v De la Mare (1983) 4 Fam Law R 434
Cooper v Cooper 491 A.2d 606 (1984)
Craven and Craven (1976) FLC 90-049
D v S [2002] NZFLR 116
D v SV (2003) FLC 93-137
D'Onofrio v D'Onofrio 365 A.2d 27 (1976)
Driscoll and Valentine [2004] FamCA 830
Fortin v Fortin 500 N.W.2d 229 (SD 1993)
Fragomeli and Fragomeli (1993) FLC 92-393
Gordon v Goertz [1996] 2 SCR 27
Gronow and Gronow (1979) 144 CLR 513
H and T [2004] FamCA 200
Holmes and Holmes (1988) FLC 91-918
I and I (1995) FLC 92-604
K and Z (1997) FLC 92-783
Lane v Schenck 614 A.2d 786 (1992)
Lapointe v Lapointe [1995] 10 WWR 609
Lonslow and Hennig [1986] 2 Fam Law R 378
Lorenz v Lorenz 788 P.2d 328 (1990)
MacGyver v Richards (1995) 11 RFL (4th) 432
Martin and Matruglio (1999) FLC 92-876
Mathieson and Mathieson (1977) FLC 90-230
Mize v Mize 621 So. 2d 417 (1993)
Nash v Nash [1973] 2 All ER 704
Paskandy and Paskandy (1999) FLC 92-878
Payne and Payne [2001] 1 FLR 1052
PJ and NW [2005] FamCA 162
Poel and Poel [1970] 1 WLR 1469
Re B (Leave to Remove: Impact of Refusal) [2005] 2 FLR 239
Re C (Leave to Remove from Jurisdiction) [2000] 2 FLR 457
Re G (Removal from Jurisdiction) [2005] 2 FLR 166
Re L (Contact: Domestic Violence) and Ors [2000] 2 FLR 334

Re Marriage of Burgess (1996) 13 Cal 4th 25
Re Marriage of Carlson (1991) 229 Cal.App.3d 1330
Re Marriage of Elser 895 P.2d 619 (1995)
Re Marriage of Lamusga 88 P.3d 81 (2004)
Re S (Contact: Promoting Relationship with Absent Parent) [2004] 1 FLR 1279
Re S (Removal from Jurisdiction) [2003] 2 FLR 1043
Rice and Asplund (1979) FLC 90-725
Skeates-Udy and Skeates (1995) FLC 92-626
Stadniczenko and Stadniczenko [1995] NZFLR 493
Sullivan v Sullivan [2002] 38 VaApp 773
Taylor v Taylor 849 S.W.2d 319 (1993)
Tropea v Tropea 665 N.E.2d 145 (1996)
Tyler v Tyler [1989] 2 FLR 158
U v U (2002) 211 CLR 238
Weiss v Weiss 418 N.E.2d 377 (1981)

The parties, originally from New Zealand, commenced cohabitation in 1992, married in 1999 and finally separated in early 2003. There were three children of the marriage, aged 11, 8 and 5 at the date of trial.

The parties entered into interim consent orders in November 2004 providing that the children reside with the mother on the condition that she did not relocate to another country with the children. In June 2005, however, the father filed an application seeking a reversal of the residence orders on the basis of the mother's intention to relocate to New Zealand with the children.

In her response, the mother sought to retain the status of residence parent. She preferably sought to reside with the children in New Zealand but, in the alternative, sought an order preserving the status quo.

Held:

1. Freedom of movement and the right of parents to decide where they live, including outside Australia, are highly important social values which are not to be interfered with lightly, especially where the relocating parent is the established and unchallenged primary carer of the children with a proven record of meeting their needs in performing that role.

2. However, parents enjoy only as much freedom as is compatible with the obligations they have in relation to their children and international mobility and (where applicable) the right of a residence mother to equal treatment without discrimination before the law do not take precedence over the best interests of the child(ren).

3. Accordingly, parenting orders made under the *Family Law Act 1975* may contain conditions affecting where a residence parent may live with their child(ren).

4. The issue in a parenting application involving a proposal to relocate with the child(ren) is – should the child(ren) live with the relocating parent in his or her new location or with the other parent in theirs?

5. The best interests of the child(ren) is the paramount but not the sole consideration. The general quality of life and economic, cultural and psychological welfare of both parents, but particularly the residence parent, are relevant and important. The difference between the circumstances and needs of women and men should be taken into account so that both are treated equally and fairly.

6. Neither the object nor principles in s 60B or the provisions in s 61C lay down absolute rules in relation to the rights of children to maintain personal relations and 'direct' contact with 'both' parents. Account should be taken of the anomalous effects that enforcing these rights can often have on women. Nonetheless, the strength of the statutory policy in favour of shared parental

responsibility and the weight to be accorded to the object and principles in s 60B should not be underestimated.

7. The needs and well-being of the primary carer or resident parent should not be given a priori benefit at the expense of a continuing relationship and regular direct contact between the child(ren) and the non-resident parent on the basis of the assumption that the welfare of a child depends upon the emotional and psychological stability and security of its primary carer or residence parent more than it does on the nature and overall quality, including the duration and frequency, of existing contact arrangements.

8. Equating the happiness and contentment of residence mothers with the rights, wants and needs of their child(ren), as the English decision in *Payne and Payne* [2001] 1 FLR 1052 essentially does, is likely in many cases to contravene s 65E by obscuring or overshadowing the child(ren)'s best interests and making the cooperative parenting model envisaged in ss 60B and 61C practically impossible.

9. Courts exercising the family jurisdiction in Australia should take the wide, all-factor, child-centered approach emphatically and unanimously endorsed by the appeal division of the Family Court in *B and B: Family Law Reform Act 1995* and favoured in New Zealand and Canada rather than follow the *Payne* guidelines.

10. In each case, the court must consider what parenting orders, if any, to make in order to promote the best interests of the child(ren). It is not limited to choosing between the proposals put up by the parties but is bound to identify or, if necessary, devise a set of residence/contact arrangements that properly provides for the needs, adequately protects, and otherwise accords with the best interests of the child and promotes the object and principles in s 60B and the provisions of s 61C.

11. In this case, the mother, a part-Maori woman, was the primary carer prior to separation and had acted as interim parent since then. Her proposal to return to her home country of New Zealand more than two years after final separation was found to be a bona fide and reasonable one. However, remaining in Brisbane was considered to be most likely to achieve the object in s 60B and secure the children's overall best interests, including their right and need to be effectively fathered as well as mothered.

Introduction

1. This is a defended parenting case involving an international relocation proposal. At issue is with which one of their parents (and where) the children of the marriage should reside in the future and how much contact they should have with the other.

Brief facts

2. The parties commenced cohabitating in 1992 and married in 1999. The mother is part-Maori. The father is of European descent. There are three children, TE aged eleven, TA aged eight, and E aged five. The parties separated temporarily at the end of 2000 but reconciled in mid-2001. The family moved to Brisbane and settled in the northern suburbs in early 2002.

3. Final separation occurred in January 2003. On 8 September 2004, the father lodged a final orders application conceding principal residence to the mother on condition that she did not remove them to another country and seeking joint long term parental responsibility with regular defined contact. The mother subsequently responded accepting to offer of residence, proposing contact as agreed or ordered and seeking permission to take the children overseas. Interim orders were made by consent in November 2004 providing for residence to the mother and joint parental responsibility with mid-weekly overnight contact from Wednesday after school until Thursday before school, alternate weekends from Friday afternoon until Monday morning and, in respect of TE, an additional overnight each week to coincide with football training during the football season and at other times each Thursday night.

4. The father and children have had contact with each other in line with those orders from then till now.

5. On 31 March 2005, a court counsellor with the court mediation service issued a short form Family Report recommending against relocation.

6. On 29 June 2005 the father filed for a reversal of residence order in the event of the mother relocating and proposed contact for half the Christmas school holidays, the Easter and September school holidays in 2006 and each alternate year thereafter; the mid-year school holidays in 2007 and in subsequent alternate years, in addition to reasonable telephone and e-mail contact with travel costs to be shared equally. Alternatively, he contended that even if the mother decided to stay the current contact regime should be converted into shared residence on a rotating weekly basis with handovers on Fridays after school.

7. In her Response of 8 August 2005 the mother sought to retain the status of resident parent preferably in New Zealand, with regular blocks of school holiday contact to the father at defined times in every school year, (with costs to be shared) plus an additional contact for a week of his choice and at his sole expense in either country and at any other time that he is in New Zealand as agreed on two weeks' written notice, as well as reasonable telephone, e-mail and web-cam contact. Alternatively, the mother wants the status quo preserved.

8. There is no realistic prospect of the mother leaving Australia without the children or the father agreeing to transfer to New Zealand.

9. All three children are currently in primary school. The two older children have been at the same school since arriving in Brisbane in 2002. TE is currently in grade 6. TA is a grade 3 student and E attends pre-school. All three children excel academically and socially. School reports are glowing in their comments about them.

10. The children are well settled where they are. They have established friendship groups at school and in the local neighbourhood.

11. None of the mother's relatives live in Australia. A life-long friend of hers has recently moved to Sydney and she has a "handful" of close friends in Brisbane.

12. TE is a keen football player with international aspirations. He also plays cricket and enjoys track and field athletics. The two girls are also very good at sports. TA is a netballer. She attends an athletics club with E every week. Both parents are heavily involved in the children's school, sporting and community based activities. The father currently coaches TE's club football side.

13. The mother works part-time for a nursing organisation two days a week. The father is in the banking industry. His working hours are flexible enough to accommodate current contact arrangements. However, the children attend child-care for one hour after school every Wednesday before over-nighting at their father's. All other contact change-overs occur either at the former matrimonial home, where the mother continues to reside with the children, or the father's new house located in the same suburb about four or five minutes away from the mother's residence.

14. The father continues to pay the mortgage and other outgoings on the former matrimonial home and pays agreed child support.

15. Neither party has re-partnered but the father has a steady girlfriend, who spends a lot of time at his place but does not live in. She is well-acquainted with the children but, as is common, they are emotionally ambivalent towards her.

16. The mother is not entitled to Australian social security payments and apart from her own small part time income is economically dependent on the father.

17. The children are closely attached to both parents. The indications are that they are all well-balanced, resourceful, resilient and adaptable children. They would probably thrive in any learning or living environment in Brisbane or New Zealand and are likely to quickly re-establish friendships and social networks if they moved to New Zealand with their mother.

18. The father could, but does not want to, return to New Zealand. He has a stable relationship and secure job here and does not think that his prospects in New Zealand would be as good because of down-sizing in the industry. However, he admits that he has not really investigated the possibility.

19. The father has applied for permanent residence in Australia and, I am told by both counsel, success is virtually assured.

The competing proposals

20. Both parties put up alternative proposals raising four possible outcomes. They are: the children reside in Australia (1) with the father (2) with the mother (3) both of them on a shared or rotational basis or (4) with the mother 2,500 kilometres away in New Zealand.

21. The mother wants to return to New Zealand to gain some financial independence, self-determination, be closer to family and re-connect with the lifestyle, culture and tribal traditions of her ethnic group. She is not as happy here as she thinks she would be there and believes that it would be better for the children if they grew up closer to their paternal grandparents, other members of her extended family on both sides and her wider ethnic community.

22. She proposes to accept an offer of employment as an office manager of a sporting organisation in New Zealand. The company is owned by a close friend, Ms L, and her husband.

23. The conditions of employment (annexed to the mother's affidavit) provide for a gross annual salary of $30,000 for a total of 30 hours per week between 9.00 am and 3.00pm, Monday to Friday, at $19.23 an hour. The place of work could alter from time to time depending on operational needs. After six months' continuous employment the mother would become entitled to five days' sick leave a year.

24. Although the mother meets some of the minimum requirements for the position, it is clear that the offer was made predominantly because of her close friendship with Ms L and her "personality . . . and motherly organisational skills": (cf. Ms. L's affidavit at par 6).

25. The draft employment contract is only written for a period of 12 months. The mother would not become entitled to any paid holiday leave during this period which means that the children would have to be cared for by relatives or their paternal grandparents when the mother was at work and they were not at school or on contact with their father.

26. The mother testified that from 2007 she wanted to undertake a six year part-time course studying midwifery at a polytechnic about an hour's drive from where she plans to reside in New Zealand. This has always been her dream.

27. I infer from this that her employment with the sporting organisation would only be temporary and that thereafter she would maintain herself and the children with child support payments, casual employment and government subsidies.

28. The position with the sporting organisation comes with a three bedroom staff house for $60 per week. The mother is willing to move into this accommodation "site unseen".

29. On the basis of the assumption that her application succeeds, the mother proposes block holiday contact with the father in Australia from 2006 every alternate Easter, half of the three end of term breaks and four weeks at Christmas. She also offers additional contact in New Zealand for a minimum of one week and other times on two weeks notice to be agreed. Twice weekly telephone and other indirect contact, including e-mail and webcam is also provided for.

30. She envisages that contact costs, including air-travel, would be shared equally.

31. In the event that the mother relocates to New Zealand and the children reside with him, the father proposes that the mother have contact in 2006 and each alternate year thereafter over the Easter, Christmas and September school holidays, and in 2007 and each alternate year for the mid-year school holidays, plus reasonable telephone and e-mail contact. He also proposes that costs associated with contact travel be borne equally by the parties.

32. If the mother stays here in Brisbane, she wants to retain the current residence - contact arrangements whereas the father wants the children to spend alternate weeks from Friday to Friday with each parent.

The law

33. In Australia matters concerning children are governed by Pt VII of the *Family Law Act 1975* (the Act).

34. The express object of Pt VII which is set out in s 60B(1) is "to ensure that children receive adequate and proper parenting to help them achieve their full potential and to ensure that parents fulfil their duties and meet their responsibilities concerning the care welfare and development of their children".

35. Under s 60B (2)(c) and (d), parenting after separation or divorce is seen as a shared legal responsibility. In the eyes of the law the parent who has less time with the child is no less important in his or her life. Moreover, s 60B(2)(a) and (b) expressly recognise the right of children (except when it is or would be contrary to their best interests) to *know and to be cared for* and have regular contact with both parents and significant others.

36. Section 65D(1) which is in Div (6) enables this Court, subject to the requirements of procedural fairness and other relevant provisions elsewhere in the Act, to make such parenting order as it thinks proper in that small minority of cases where parents, for one reason or another, are simply unable to reach agreement.

37. There are three relevant species of parenting orders. A residence order which determines the parent *with whom* the child is to live[1], a contact order defines contact between a child and another person or other persons[2], and a specific issues order which deals with any other aspect of parental responsibility for a child[3].

38. Parental responsibility is defined by s 61B of the Act to mean:

> *"All the duties, powers, responsibilities and authority which, by law, parent have in relation to children".* [4]

39. Section 61C vests parental responsibility in each of the parents despite any changes in the nature of the relationships between them. This reflects the emphasis given to joint parental responsibility for the

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1 s 64B(2)(a) & (3).

2 s 64B(2)(b) & (4).

3 s 64B(2)(d) & (6) : The relevant concept of "parental responsibility" including what it is and who has it is dealt with in Division 2.

4 The definition deliberately omits any reference to parental rights. The term "duties" implies mandatory obligation and "powers" encompasses discretionary entitlements. Whether "responsibilities" and "authority" add anything of substance to the term "parental responsibility" is doubtful : A Dickey, Family Law, 4th ed, Law Book Co. (2002) at p 332.

upbringing and development of children in Art. 18 of the UN Convention on the Rights of the Child in 1989.

40. The effect of s 61C is that in the absence of a specific issues order to the contrary, residence does not give a parent sole decision-making power for day to day matters[5] or take away any aspect of the non-resident parent's responsibility for the long term welfare of the child. It simply identifies the person *with whom* the children will live.

41. Under s 61D(2) a parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for that child except to the extent expressly stated and necessary to give effect to an order.

42. A specific issues order can be used to designate the parent who is to be responsible for controlling such specific matters as the child's education, religion, and medical treatment. It can also cover broader aspects and confer responsibility on one or other (or both) of the parents (or another person) for the long term or day to day care, welfare and development of the child. It can convert the shared parental responsibility in s 61C into a joint or even sole obligation. The parent (or parents) with responsibility for long term issues is normally responsible for choosing the place *where the child is to live*, name and other matters of ongoing importance[6].

43. The role of the court in making orders concerning children in the context of family breakdown is to ensure that residence and contact arrangements properly reflect the right of children to have and develop a meaningful relationship with both parents and that, as far as possible, each parent share and co-operatively discharge their parental responsibility.[7]

44. It is not the proper function of the court to micro-manage every aspect of the post-separation relationship of two estranged parents who cannot agree about children's issues. The court intervenes as little as possible and only to the extent that the welfare or interests of the child requires it. It does its best to avoid needless interference with parental autonomy and responsibility.[8] However, conditions may be placed upon a residence parent as to where a subject child may reside in its best interests.[9]

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5 s 64B(3).

6 See e.g. *Martin and Matruglio* (1999) FLC 92-876 at 86,411

7 s 60B(1).

8 cf Lisa Young, who says: "The Family Court's job is to decide disputes based on the evidence before it. It was not created to engineer parents' daily lives – in ways unacceptable to them – so as (hopefully) to improve the lives of Australia's children. This is the heart of the issue. The process of dispute resolution entrusted to the Family Court must be informed by the best interests of the child. It is an entirely different proposition to say that the Family Court must set about trying to secure what it considers are the best family arrangements possible for children. This is what those who advocate restrictions on movement are in essence arguing. And this is what the High Court is permitting: *U v U: The High Court Reconsiders Relocation in the Family Court* (2002) 6 University of Western Sydney Law Review 248 at p 251.

9 *Skeates-Udy and Skeates* (1995) FLC 92-626; *AMS and AIF* (1999) 199 CLR 160 per Kirby J at 210.

45. Parenting orders must be complied with until they are formally varied by the court either by consent or further order and not just if the circumstances of the parties or those of the children or some other person change. Separated parents face heavy penalties if they break a parenting order or breach a statutory obligation.

46. The general obligations created respectively by residence and contact orders are dealt with in s 65M and the following section, 65N.

47. Neither a party or any other person can remove the subject child from the care of the resident parent; refuse or fail to return the child to that person; or otherwise interfere with the exercise of parental responsibility. Similarly, nobody is entitled to hinder or prevent court ordered contact between a child and his or her parent.

48. Although there is no precise statutory provision or binding authority on the point, the correct view seems to be that most contact orders create mutually and legally enforceable duties on both parties, with the resident parent being obliged to facilitate contact and encourage a close and continuing relationship between the child and the other parent.

49. It is an offence under s 65Y(1) for a party to concluded parenting proceedings, or any other person acting on his or her behalf, to take or send the child concerned out of the jurisdiction without the sanction of the Court or consent in writing of all other parties to the proceeding. The penalty for breach is up to 3 years imprisonment. The same applies where residence or contact proceedings are pending.[10]

50. The Act does not expressly deal with relocation in any discrete sense or as a special category. A residence parent seeking to relocate would normally seek an order modifying the existing contact arrangements to take account of the necessary changes as a result of the proposed move pursuant to the rule in *Rice and Asplund*.[11]

51. However, applications to restrain a person from relocating with a child are often made pursuant to the provisions of s 67ZC which provides the general power of the Court to make orders relating to the welfare of children. This section could arguably also be used by a person seeking to relocate. Section 68B allows the Court to make such order or grant such injunction as it considers appropriate for the welfare of a child. Section 114(3) also provides the Court with an even wider power to grant injunctions in relation to children.

52. Regardless of how they are brought to court, relocation cases are governed by the provisions of Part VII in exactly the same way as any other matter relating to the parenting of children. [12]

53. In determining a parenting case involving a proposal to relocate the residence of children either within Australia or overseas the court has to look at the considerations stated in s 68F(2) and elsewhere in the Act, including, in particular, sections 43(b) and (c), 60B(1) and (2), 61C and 61D, in coming to a decision

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10 s 65Z(1) Div 6 Part VII of the Act.

11 (1979) FLC 90-725

12 *B and B: Law Reform Act 1995* (1997) FLC 92-755 at 84,176.

about the matter. The aim and essential issue is always how to achieve the best interests for each child affected.[13]

54. Beyond these statements of legal principle, however, lies the discretionary realm of uncertainty and unpredictability. Best interests are values, not facts, they are not susceptible to scientific demonstration or conclusive proof. The same body of evidence may produce opposite but nevertheless reasonable conclusions from different judges. There is not always only one right answer. Sometimes, the least worst situation may be the best available. Most cases are finely balanced with the only option being a choice between two or more imperfect alternatives. Predictions, perceptions, assumptions and even intuition and guesswork can all play a part in search of the best interests solution. [14]

55. Relocation applications – especially those involving international destinations – are among the most difficult cases a Family Court judge has to deal with. People feel passionately about this vexed question. There are usually no easy answers and both sides of the argument often have compelling claims. A wrong decision can have serious long term consequences for all concerned. For these reasons, the parties are entitled to have their dispute resolved through litigation in a timely, principled, coherent and consistent way.

56. It has been said[15] that first instance judges, especially those under pressure in the family justice system, usually prefer to direct themselves by reference to guidelines laid down by the appellate courts rather than finding their own way through the reported cases. However, the Full Court of the Family Court of Australia last cut through the thicket of the law of international relocation nearly a decade ago in *B and B: Family Law Reform Act 1995* [16]. The topic has been reconsidered by the High Court and the Full Court itself a number of times since then but, regrettably, without any real guidance or much practical assistance being given to the trial division. There have also been legislative changes and new developments, both here and overseas, in the inter- vening period. Accordingly, I am left with little choice but to conduct my own examin- ation of the relevant authorities, both foreign and domestic, and do the best I can to identify (a) the principles to be applied, (b) the approach to be taken, and (c) the factors to be considered in the search for the "best interests" outcome for these three children.

The Australian authorities [17]

57. In *B and B: Family Law Reform Act 1995*[18], the resident mother of two children aged nine and eleven brought proceedings to vary contact orders so that she could take the children from Cairns to live in Bendigo with her new partner.

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13 s 65E.

14 *CDJ v VAJ* (1998) 197 CLR 172 at 218

15 *Re S (Removal from Jurisdiction)* [2003] 2 FLR 1043 per Thorpe LJ

16 (1997) FLC 92-755

17 The paper presented by Anne-Marie Rice, *Relocation Cases - An Australian Perspective*, at the 10th National Family Law Conference, Melbourne, March 2002 greatly assisted me in writing this section. Any errors, of course, are mine.

18 (1997) FLC 92-755 at 84,176.

58. The father opposed the application on the grounds that amendments to the Family Law Act placed a heavier emphasis on contact between children and the absent parent, and correspondingly restricted the freedom of movement of the resident parent which up to that point had been an almost absolute right.

59. He argued that the Reform Act placed an onus on a relocating primary carer to give a valid reason as to why the child or children's interests would be better served by moving than staying where they were.

60. It was also contended that the relocation cases decided before 1995 were no longer valid. Those cases concede the mobility within modern Australian society and recognise that, within that context, there may be various reasons why it may be necessary or desirable for a residence parent to move from one location to another and his or her right to do that provided that the best interests of the children were seen as the ultimate determinant[19].

61. The Full Court dismissed the father's appeal and rejected the notion that either party bore any persuasive (as distinct from evidentiary) onus. The Court identified the general right to freedom of movement exercisable by the parent who had the daily care of the subject child as a central theme[20] and recognised that the issue of maintaining contact becomes more acute where international relocation is contemplated but emphasised that the basic principles remain the same.[21] The Court reaffirmed that the basic enquiry in relocation disputes, as in other children's matters, remained focused on the best interests of the child. Those interests, the court held[22], are determined by having regard to both the object and principles in s 60B, together with those factors in s 68F(2) which appeared to be relevant.

62. Section 60B was said to be "important in this exercise as it represents a deliberate statement by the legislature of the object and principles which the court is to apply in proceedings under Part VII . . . " but "does not purport to define or limit the full scope of what is ordinarily encompassed by the concept of best interests".

63. The Court confirmed the continuing relevance of pre-law reform decisions, such as *Holmes and Holmes* [23], noting that an inquiry into the bona fides of the application was a necessary first step in applying the paramountcy principle.

64. The concerns underlying that requirement were explained in *Holmes* as ensuring that resident parents do not misuse relocation as a means of frustrating contact. The court said:

> "*One often has cases where the conclusion to be drawn is that the desire to depart interstate or overseas is not bona fide but for the purpose of adversely affecting the other party by unjustifiably cutting him or her off from association with the children. Even more often the concern is that although the party may have a good reason to go interstate or overseas, once they have distanced themselves from the*

19 at 84,198.
20 ibid at 84,202
21 at 84,196
22 at 84,219-220.
23 (1988) FLC 91-918.

non-custodian they will not comply with the access orders and/or there will be difficulties in enforcing them".[24]

65. The fact that the proposed move is genuine is, of course, not sufficient in itself.[25]

66. Their Honours acknowledged that moving house and changing environments away from neighbourhood friends, family members and familiar schools are a common and growing feature of contemporary life in Australia. Families routinely move, even during marriage, from one place to another. They do so for a range of purposes and not always willingly. It is sometimes unavoidable for financial reasons or necessary to start over. Transfers in employment are a common reason. So, too, is lifestyle or remarriage[26]. Irrespective of the cause, all members of the family, no doubt some more reluctantly than others, have to adjust and learn to cope as best they can.

67. The Court discussed the difficulty human beings have with change and their natural preference for the security of familiar and existing circumstances. However, common experience is that after a period of disruption and adjustment the lives of children ". . . are often advanced, even enriched, by . . . changes"[27].

68. The Court observed that the interests of the children might be beneficially affected by relocation in two broad ways. Firstly, the move may improve the lifestyle of the family unit in a direct way. Secondly, in some cases it will relieve significant pressures upon the resident parent and increase his or her capacity to cope and thereby enhance the children's quality of life.

69. A very important aspect of a child's best interests, their Honours observed, is to live in a happy home environment. That, the Court noted, may be significantly impacted upon where the resident parent is required to live in circumstances which tend to diminish his or her long term future in either an economic or social sense.

70. Obvious negatives for children living with a relocating parent include, disruption to schooling and sporting activities, loss of established friendships and close neighbourhood ties, reduced contact with the other parent and, perhaps, members of the extended family on both sides.

71. The Full Bench specifically discarded the contention that the freedom of movement and the right of a woman having the role of a primary carer to equal treatment without discrimination before the law under international instruments or their legitimate interest in improving their generally poorer economic and social positions following separation and divorce, might take precedence over the best interests of the child.

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24 at 76,660

25 *B and B: Law Reform Act 1995* at 84,197; cf *Payne v Payne* [2001] 1 FLR 1052 per Thorpe LJ.

26 Some of the common reasons given for relocation were mentioned at pars 7.12 – 7.16, such as advances in employment with resultant economic benefits for both the parent and children, re-marriage or re-partnering, reunion with family or country of origin, health issues and to escape violence or abuse.

27 *B and B*: *Family Law Reform Act 1995* (1997) FLC 92-755 at para. [43].

72. Their Honours made it clear[28] that conditions may be placed on a resident parent concerning where he or she may live where this is in the best interests of the child, and that where the freedom of the parent to move impinges upon or is inconsistent with the best interests of the child or children, the former must give way to the later.

73. After referring to leading authorities from New Zealand, the United Kingdom and Canada, the appellate division identified some of the matters normally arising for consideration in relocation cases as including, in addition to the bona fides of the application:

- the residence parent's freedom of movement and his or her prima facie right to choose where to live;
- the resident's parent's ability to function effectively; [29]
- the extent to which the child or children's welfare will be affected, adversely or beneficially, if the resident parent's movements are restricted;
- whether undue interference by the court with the way of life the resident parent legitimately proposes to adopt will give rise to frustration and bitterness to the detriment of the child or children; [30]
- relevant economic factors and the unequal position of women, and the extent to which they are dependent on social security or a former spouse; [31]
- the question of the importance to the children remaining with the resident parent in relocated circumstances, weighed against the changes to the children's environment, and more particularly against any loss of or reduction in contact with the contact parent, having regard to the degree and quality of the existing relationship with both parents and the contact history;[32]
- the reasons for relocating; [33]
- the effect on the child, both positive and negative, of the proposed relocation;
- the distance and permanency of the proposed change;
- dislocation from other aspects of the children's former environment, such as schools, friends and extended family;
- the age and wishes of the children;

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28 at 84,222

29 *Craven and Craven* (1976) FLC 90-049 at 75,042.

30 *Fragomeli & Fragomeli* (1993) FLC 92-393 at 80,023.

31 *I and I* (1995) FLC 92-604 at 82,028.

32 Notably, in its examination of s 60B(2)(b) and the significance of the recognised right of a child or children to have "contact, on a regular basis, with both their parents", the court held[32] that "regular" in this context meant "as frequently as is appropriate".

33 It is important to note, however, that the genuineness or validity of the relocating parent's reasons has limited significance in light of the High Court's 1999 decision in AMS and AIF.

- the feasibility and costs of travel and adequacy of alternative forms of contact.[34]

74. The Full Court stated that as a matter of proper practice and to ensure that the essential task is performed, judges adjudicating a relocation case would be expected in the judgment to identify s 65E as the paramount consideration, and then identify and consider each of the paragraphs in s 68F which appear to be *relevant* and discuss their significance and weight, and perform the same task in relation to the matters in s 60B which appear to be relevant or which may guide the overall exercise. The adjudicating judge should then, the Court said, evaluate all the relevant issues in order to reach a conclusion which is in the child's best interests.

75. No presumption applies either way because, their Honours held, such devices have the potential to impair the search for the best interests solution.

76. The High Court had its first opportunity to consider relocation issues two years later in *AMS and AIF* [35]. The proposed move there, as in *B and B*, was within Australia rather than overseas. The residence mother sought to relocate with the parties' child from Perth to Darwin.

77. The court delivered four separate judgments and by a six : one majority (Callinan J dissenting) allowed the mother's appeal against the initial refusal of her application on the ground that her reasons for moving had more to do with her own happiness than the welfare of the child and were not sufficiently compelling to alter the "ideal situation" in Perth.

78. The matter was remitted for rehearing with the majority emphasising the need not to impose any impediment upon the freedom of interstate movement of either party *greater than that reasonably required to achieve the objects of the legislation*. [36]

79. The trial judge asked firstly who should have residence and, having decided in favour of the mother, turned to the resulting question of whether or not she should be permitted to relocate, and answered that question by reference to three main factors :

(1) Was the application a bona fide one?

(2) Is the mother likely to comply with contact orders and maintain the relationship between the child and the non-contact parent?; and

(3) What was the overall effect on the welfare of the child of granting or refusing the application?

80. In other words, he applied the three tiered test laid down in *Holmes' Case* and approved in *B and B*.

81. This was found by Gaudron J to be a fundamental error [37] amounting to a complete failure to determine the issues because it required the mother to justify her proposal to move but not the father's decision to stay put and meant that the mother's case that she should have residence regardless of her place of

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34 at 84,222.
35 (1999) 199 CLR 160.
36 at 180.
37 at 191.

residence was simply not dealt with[38]. Kirby J [39] (with whom Gleeson CJ, McHugh and Gummow JJ concurred) and Hayne J [40] agreed.

82. Dissecting the issue into two discrete questions obscured the real issue which was, of course, should the child live with the relocating parent in their proposed location or with the other parent in their proposed location?[41].

83. The majority of the High Court held that the most appropriate approach was to compare and contrast the parties' competing proposals and weigh one against the other with a view to determining which of them best promotes the overall interests of the child concerned. And in the case of interstate moves, at least, alternative contact options should be more fully explored.

84. Gaudron J found that the mother's case was one which permitted only two possible outcomes. The first was that she should have custody regardless of where she lived. The second was that she should have custody only for as long as she resided in Perth. Each of those possibilities had to be assessed against the alternative for which the father contended, namely, that the child live with him. A decision then had to be made as to which of those possibilities was preferable, the welfare of the child being the paramount but not the only consideration to which regard was to be had in making that decision.[42]

85. Kirby J held[43] that requiring a resident mother to demonstrate compelling reasons to relocate was not warranted by the paramountcy principle or the practicalities affecting parents. His Honour made the salient point that parents enjoy as much freedom as is compatible with their obligations with regard to the child.[44]

86. His Honour went on to say that, even where the proposal is made to remove the child to another country, it will not necessarily be restrained, despite the inevitable implications for the child's contact with the other parent.[45]

87. In such a case proof that the resident parent had " . . . remarried and wishes to join a new spouse overseas; wishes to return to a supportive family in the land of origin, or has a well thought out and reasonable plan of migration"[46] *may suffice* (emphasis added) to convince the court that the best interests of the child favour continuance of the residence arrangement in another jurisdiction but with different orders as to contact.

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38 at 192.
39 at 223.
40 at 231 - 232.
41 at 210.
42 at 191 - 192.
43 at 224.
44 at 209.
45 at 210.
46 id.

88. His Honour recognised that relocation cases have long presented special problems for judicial decision makers in parenting cases in Australia. He noted that two features of modern Australian society had added to the number, variety and urgency of relocation decisions[47].

89. The first is that, overwhelmingly, of single parent families, the mother is the resident parent in approximately 84 per cent of cases. Accordingly, in practical terms, court orders restraining movement of the resident parent ordinarily exert inhibitions on the freedom of movement of women not men. The other feature is the very large proportion of the population born overseas with family links to which a party to the marriage or relationship which has broken down may understandably want to return with the child.

90. His Honour acknowledged that relocation cases are hard to decide because they involve conflicting values and interests, such as, for example, the child's right to know and have regular contact with each parent, and the "high measure of freedom of movement" enjoyed by members of society, including those with the responsibilities of parenthood".

91. Thus, because most primary carers were in fact women, an approach which required the primary carer to justify their move would adversely affect the right of women disproportionately to men.

92. Kirby J suggested that the following principles should be applied when resolving the conflicting interests of the parents and children in a so called relocation case:

93. Firstly, each case depends on the applicable legislation and its own facts. Secondly, no single factor is decisive. The paramount consideration is the child's best interests, but this is not the same as the "sole" or "only" consideration. The relevance of the list of best interests factors will depend on the circumstances of the particular case. Pre-conceived notions as to the weight which must be given to particular factors are incompatible with individual justice.

94. Thirdly, the legitimate interests and desires of the parents are not to be ignored but, in the case of conflict, the child's welfare and rights have priority and must prevail.[48]

95. Fourthly, freedom of movement and the right of adults to decide where they live are highly important social values which are not to be interfered with lightly, especially where the relocating parent is the established and unchallenged primary carer of the children and has a proven record of meeting their needs and her responsibilities in performing that role.

96. His Honour made it clear that, while the child's welfare and best interests have the highest ultimate priority, they do not expel every other relevant interest from being given its due weight.[49]

97. Bitterness towards the former spouse or partner generated by unwarranted interference in the resident parent's life may be transmitted to the child or otherwise impinge on the happiness of the resident parent in a way likely to affect the welfare or best interests of the child. That said, the touchstone for the ultimate decision must remain the welfare or best interests of the child and not, as such, the wishes and

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47 at 206.

48 at 207.

49 at 208.

interests of the parents. *Holmes and Holmes* [50] and *B and B* [51] must be disregarded to the extent that they suggested otherwise.

98. Fifthly, the principles in s 60B do not lay down an absolute rule in relation to the rights of children to maintain personal relations and direct contact with both parents. The court should take account of the anomalous effects of the enforcement of this right on women and account needs to be taken of whether a resident mother is unfairly disadvantaged or prejudiced by being effectively immobilised.[52]

99. There is no universal rule that the resident parent (usually the mother) is obliged to reside in close proximity to the other parent (usually the father) so as to facilitate contact.[53] His Honour observed that one of the objects of modern family law statutes, including the *Family Law Act, 1975*, is to enable parties to a broken relationship to start a new life for themselves, to control their own future destinies and, where desired, to form new relationships free from unnecessary interference from a former spouse or partner or from a court. [54]

100. However, there is no presumptive deference in favour of the right of the resident parent to live where she or he decides unless there is a good welfare based reason to the contrary.[55]

101. Sixthly, a more relaxed attitude should be adopted to relocation within Australia than overseas because of the ready availability of reliable transport and telecommunications, social and cultural factors and the relative safety of Australia compared to other parts of the world. But, even in international relocation cases, the balance of the best interest factors may favour continuance of the residence arrangements in another jurisdiction, with different orders as to contact where, despite the inevitable implications for the relationship between the child and the other parent, the non-resident parent has '. . . remarried and wishes to join a new spouse overseas; wishes to return to a supportive family in the land of origin, or has a well thought out and reasonable plan of migration . . . '.[56]

102. Seventhly, conditions may be placed upon a resident parent as to where the child may reside according to its best interests. [57] Equally, disturbing established residence arrangements with the collateral effect of altering an existing contact regime, the parent seeking the change *must demonstrate that the proposed new arrangement is for the welfare or the best interests of the child*.[58] This includes any adjustment to existing contact orders, such as less frequent but longer block holiday periods as opposed to regular but shorter contact at other times.

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50 at 76,664.

51 at 84,197.

52 at 209.

53 at 208.

54 at 208

55 cf the majority and minority decisions in the Canadian decision of *Gordon v Goertz* (1996) 134 DLR (4th) 231 at 338-340 per McLachlan J and at 370-371 per L'Heureux-Dubé.

56 at 210.

57 *Skeates-Udy and Skeates* (1995) FLC 92,626.

58 The way this is expressed, however, is suggestive of the onus on a relocating resident parent expressly rejected by the Full Court in *B and B*: *Family Law Reform Act 1995* at 84,220.

103. Eighthly, the practicality of sharing parental responsibility as a norm under s 61C may have to be reviewed.[59]

104. And ninthly, a large element of judgment, discretion and intuition is involved in making decisions and appellate courts should not be overly critical or pernickety in analysing the underlying reasons of the primary judge.

105. Hayne J held that the issues for decision depended on the orders sought by the parties which was *not* an order directed to regulating where the mother was to live. It was an order regulating who would have custody of, and access to, the child, and on what terms. [60]

106. An important, probably essential, step in the enquiry into who should have residence of and contact with the child, according to his Honour, is to identify where the residence parent intends to live for that will affect what level of contact the child can have with the other. But that is not to say that it is for the court to decide where the custodial parent may live: that decision is to be made by the parent. [61]

107. Similarly, the fact that the mother would rather stay in Perth than move to Darwin if having residence of the child depended on it, does not mean that the question for the court is whether she should be "permitted" to move to Darwin.[62]

108. Rather, the proper focus is which is better for the child - to be in the custody of the father (in Perth) or to be in the custody of the mother (in Darwin)? [63] That, according to Hayne J, requires attention to what benefits will the child have, and what detriments will the child suffer from being in the mother's custody in Darwin. If the mother had wished to move to marry and establish a new family in Darwin, or to take up a new and better employment or training there, it may have been possible to conclude *that in all the circumstances the child's welfare would be advanced by his being committed to the mother's custody*.

109. His Honour said that the circumstances to be considered include, not only the fact of relocation, but also all the consequences that would follow - separation from the non-custodial parent, the creation of a new family in which the child would thereafter live (with all the concomitant advantages and disadvantages), the better economic position of the custodial parent, and so on.

110. In that sense, inquiring about why the mother wished to move was relevant, but it was only one inquiry among the many that go into deciding the ultimate question. The inquiries are all directed to ascertaining what is in the best interests of the child.

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59 This betrays a recognition of the tension between mobility rights and the provisions of s 61C as well as s 60B

60 at 231.

61 id.

62 id.

63 at 232.

111. Hayne J noted that the mother's attitude – "I will go unless I cannot have custody" –added to the complexity and difficulties of the enquiry because, when a parent's intention to move is conditional on residence, there are then three competing possibilities for consideration.[64]

112. In those circumstances, to focus on the reasons for the mother's wishing to move may have wrongly reduced the enquiry to two competing possibilities (of the mother having custody in Darwin or in Perth) but, more importantly, it turned it into an investigation about whether the mother should be *permitted* to move (if her reasons for doing so were good enough), which (wrongly) diverted attention away from what would promote the welfare of the child. [65]

113. The Full Family Court considered the implications of the decision in *AMS and AIF* in the context of an international move from Perth to Hungary in *Paskandy and Paskandy*. [66] The parties in that case were both Hungarian citizens. The father immigrated to Australia in 1980 and the mother in 1995. The only child of the marriage was less than a year old at the date of separation in 1997. The mother, as interim resident parent, applied for liberty to remove the child permanently to Hungary.

114. The trial judge refused her application. He found that the mother had no interest whatsoever in fostering a relationship between the father and child and had no strong attachment to Hungary. His Honour concluded that, despite assurances to the contrary, the mother would not facilitate contact if allowed to take the child to Hungary.

115. His Honour observed that the child, being male, needed a countervailing male influence in his life, which could best be provided by his natural father. He also thought that the child would benefit from a continuing relationship with his older half-sibling in Australia. The father's input to matters concerning the long term welfare of the child was also regarded as an important consideration.

116. The Full Court upheld the mother's appeal, finding that the trial judge had implicitly - and impermissibly - adopted a methodology akin to the compelling reasons approach rejected by the majority of the High Court in *AMS and AIF*. Their Honour's did not accept the contact father's argument that the principles enunciated by Kirby J in *AMS* should be restricted to cases where (a) the child is old enough to remember the contact parent if contact decreased or ceased altogether; or (b) contact is likely to be promoted by the resident parent or the financial position of the parents does not, as a matter of practice, preclude contact should the resident parent relocate. [67]

117. Instead, the Court held [68]:

> " . . . *The child's right to maintain personal relations and direct contact with each parent is a proper matter to be considered but . . . is not the sole consideration . . . In deciding what is in the best interests of the child, the court*

64 id.
65 id.
66 (1999) FLC 92-878.
67 at 86,456.
68 at 86,457.

> *must consider the arrangements that each parent proposes for the child to maintain contact with the other and, if necessary, devise a regime which would adequately fulfil the child's right to regular contact with the parent no longer living permanently in close proximity. If the court is not satisfied that suitable arrangements have been made for the child to have contact with the other parent it may be necessary for the court to order a regime which would best meet the right of the child to know and have physical contact with both its parents*".

118. *Paskandy* adheres to the High Court's approach in *AMS* generally and, in particular, affirms the proposition that a trial judge must not separate the issue of relocation from that of residence or the best interests of the child or children.

119. In *Martin and Matruglio* [69], the resident mother of two children aged ten and six wanted to relocate with her new partner to Sydney from Canberra. The father sought an injunction on the grounds that he had a strong and close relationship with both sons which would be needlessly damaged by relocation.

120. The mother's case was that living in Sydney would enable her to (a) reside with her partner and create a new life in another city; (b) spend more time with her dying father; and (c) benefit herself by improved employment prospects and give the boys a better education.

121. The trial judge found that the relocation was not "imperative" and would inevitably diminish the relationship between the children and their father.

122. The Full Court allowed the mother's appeal and remitted the matter for rehearing because of the apparent over-emphasis placed on the mother's reasons for moving at trial.

123. The joint judgment makes it plain that the reasons and genuineness of motives for relocating were likely to be relevant considerations, but faced with the views expressed by Kirby and Hayne JJ in *AMS and AIF*, suggested that it may not be appropriate to examine the state of mind of the relocating parent "to any significant degree".

124. Their Honours said :

> *"Once it becomes apparent that such a move is bona fide the only other basis on which it may be appropriate to examine the reasons for the move would be to ascertain the likely effect upon the residence parent and/or the child if the move was unable to take place".*[70]

125. The Full Court[71] held that instead of looking for good or cogent reasons for why the resident parent ought be allowed to relocate the trial judge should have assessed how the best interests of the children would be advanced, taking into account the right of the wife to move, the economic, social and emotional detriment she would suffer were she not allowed to move and its concomitant effect upon the children,

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69 (1999) FLC 92-876.

70 at 86,408.

71 at 86,411.

and then balancing those against the deterioration (if any) in the relationship the children would suffer by reason of moving from Canberra to Sydney. [72]

126. Twelve months later, the Full Court issued suggested guidelines for determining parenting cases where one party proposes to relocate with a child or children in its reasons for judgment in *A and A*: *Relocation Approach* [73]. The decision drew on the various statements of principle made by its own earlier decision in *B and B*: *Family Law Reform Act 1995* and the High Court decision in *AMS and AIF*.

127. The parties were married in 1990 and separated in 1994. Their only child was nine at trial. The mother's daughter from a previous marriage resided with her father in Portugal. The father had enjoyed regular defined access under 1995 orders.

128. The mother terminated contact in 1999 on the basis of alleged "inappropriate" behaviour by the father and applied to relocate to Portugal. She failed and appealed on various grounds, including that the trial judge had failed to adhere to the *AMS and AIF* approach.

129. The Full Court (Nicholson CJ, Ellis and Coleman JJ) noted at the outset that there was a narrow ratio decidendi regarding the relocation aspect to be found in the four separate judgments delivered in *AMS and AIF*, and because there were matters on which there was no express agreement by a majority of members of the High Court bench the statements adopted in the subsequent Full Court decisions of *Paskandy*, and *Martin and Matruglio* were strictly obiter.

130. The trial judge was found to have erred by failing to properly evaluate the three rival proposals and giving insufficient consideration to s 60B and 68F(2) matters, as well as implicitly requiring the mother to discharge a non-existent onus to justify relocation.

131. The Full Court set out the preferred method to be adopted in resolving interstate and international relocation cases as follows:

- the welfare or best interests of the child or children remains the paramount but not the sole consideration[74]
- a court cannot require the applicant to demonstrate 'compelling' or 'valid' reasons for the relocation contrary to the proposition that the welfare of the child would be better promoted by the status quo.[75]
- it is necessary for a court to evaluate each of the proposals advanced by the parties[76].

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72 In her essay *Relocation Cases - An Australian Perspective*, op. cit. at p 17, Anne-Marie Rice argues that in practice this would probably offend the High Court's injunction in *AMS and AIF* against separating the issues of residence and relocation and conducting an enquiry about whether the mother should be permitted to move instead of focusing on the children's best interests.

73 (2000) FLC 93-035.

74 This is a binding principle of law established by the majority of the High Court in *AMS and AIF*.

75 So too is this.

- a court cannot proceed to determine the issues in a way which separates the issue of relocation from that of residence and the best interests of the child. There can be no dissection of the case into discrete issues, namely a primary issue as to who should have residence and the further or separate issue as to

  whether the relocation should be 'permitted'.[77]

- The evaluation of the competing proposals properly identified must weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child's best interests.[78]

- It is necessary to follow the legislative direction espoused in ss 60B and 68F of the Family Law Act, 1975. The wording of s 68F(2) makes clear that the court must consider the various matters set out in (a) - (l) of that subsection.[79]

- The object and principles of s 60B provide guidance to a court's obligation to consider the matters in s 68F(2) that arise in the context of the particular case.

- It is to be expected that reasons for decisions will display three stages of analysis and:

  1. the court will identify the relevant competing proposals;

  2. for <u>each</u> relevant s 68F factor a court will set out the relevant evidence in the submissions with particular attention to how each proposal is said to have advantages and/or disadvantages for the

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76 The Full Court in *Paskandy* expressly adopted this starting point in view of the remarks of Gaudron J (at 190), Kirby J (at 226), and Hayne J (at 231-232) in *AMS and AIF*.

77 This was the formulation expressed in *Paskandy*. The proper nature of the enquiry is described by Hayne J in *AMS and AIF*.
Notably, their Honours distanced themselves from the majority judgment in *Martin and Matruglio*, to the extent that it is inconsistent with Hayne J's formulation, and par 46 of *Paskandy*. The Court reiterated the need to identify and evaluate the competing proposals and to undertake the systematic examination of them even in a case where it is common ground that the parent proposing the relocation of the child should be the residence parent and it is only the issue of relocation that is in dispute. There was, however, that no competing residence issue in *Martin and Matruglio* because the mother was the unchallenged resident parent.

78 This accords with Hayne J's treatment of the issue to be determined in *AMS and AIF*.

79 This guideline was drawn from the earlier decision in *Paskandy* at 86,456 par 52.

factor and make findings on each factor as the court thinks fit having regard to s 60B;

- as one, but only one of the matters concerned under s 68F(2), the reasons for the proposed relocation as they bear upon the child's best interests will be weighed with the other matters that are raised in a case, rather than treated as a separate issue. The ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges on those interests it must give way.[80]

- Even where the proposal is made to remove the child to another country courts will not necessarily restrain such moves despite the inevitable implications they have for the child's contact with and access to the other parent.[81]

3. on the basis of the prior steps of analysis determine and explain why one of the proposals is to be preferred having regard to the principle that the child's best interests are the paramount but not sole consideration".[82]

- The process of evaluating the proposals must have regard to the following issues:

(a) Neither the applicant nor the respondent bear the onus to establish that a proposed change or continuation of an existing situation will

best promote the best interests of the child[83]. That decision must be made having regard to the whole of the relevant evidence.

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80 The Court acknowledged that par [9.63] of *B and B: Family Law Reform Act* 1995, is no longer an accurate statement of the law in light of *AMS and AIF*. It is beyond doubt that the party advancing the relocation proposal is *not* required to demonstrate "compelling reasons" (save perhaps for where the new location is found to present dangers to the safety of the child – Kirby J at 224-225, par [191]).
The reasons for the proposed relocation should only feature in the trial and in the judgment to the extent of their impact, if any, upon the child's best interests and the appropriate point at which to consider disputed facts and arguments as to the reasons for the proposed relocation lies in s 68F(2)(1) unless they are seen by the court as otherwise relevant.
Thus, the motivations for the proposed relocation are one, but only one, best interests consideration under s 68F(2) to be weighed with the other matters raised in the case rather than treated as a separate issue.

81 This statement comes from *B and B: Family Law Reform Act 1995,* par [9.65] and the observations of Kirby J in *AMS v AIF* at 224, par [191].

82 This was the approach suggested by Kirby J in *AMS v AIF* at 209-210 par [147].

83 The Full Court saw an apparent inconsistency between the comments made by Kirby J in *AMS v AIF* in his seventh principle (at 208) and interpreted those comments as saying no more than that a party proposing to relocate the residence of a child must present his or her case with a focus on the impact such a move will have on the best interests of the child.

(b) The importance of a party's right to freedom of movement.

Orders must be congruent with the parties' constitutional rights, where applicable[84].

The arrangement that each parent proposes for the child to maintain contact with the other must be considered and, if necessary, the court should devise a regime which would adequately fulfil the child's' rights to regular contact with a parent no longer living permanently in close physical proximity and to meet the right of the child to know and have physical contact with both its parents

(c) Matters of weight to be explained.[85]

A Court must consider all relevant matters referred to in ss 60B and 68F(2) and then indicate to which of those matters it has attached greater significance and how those *relevant matters* (emphasis added) balance out.

No single factor should determine the issue of which proposal is referred by a Court[86].

132. In summary, the Full Court in *A and A* spelt out the stages and level of analysis it expected a decision on relocation to encompass. The first stage involves identifying the relevant competing proposals of the parties; the second requires dealing with the evidence and submissions in relation to each statutory 'best interests' factor; and the third demands a determination and explanation of which proposal is to be preferred 'having regard to the principle that the child's best interests are the paramount but not sole consideration'.

133. In *U v U* [87], the most recent and leading High Court of Australia authority on the subject, the mother made an application for permission to take her daughter to India, and the father had made a cross-application for a parenting order under s 64B(2) for the child to live with him in Australia or, alternatively, with the mother in Australia. Both parents were originally from India. The mother had family there and her economic future, she argued, would be enhanced by the move.

134. The mother, who was highly intelligent, well educated and a qualified import broker, stopped work just before the birth and subsequently found it difficult to re-enter the workforce, except at casual clerical level.

If, however, Kirby J was suggesting that there is an onus on the party proposing relocation, the court respectfully disagreed and preferred not to adopt his view as to there being an onus on the parent proposing the relocation, adopting instead the no onus position in *B and B: Family Law Reform Act* 1995.

84 This was adopted from the decision in *Paskandy*.

85 This comes from *AMS and AIF* per Kirby J at 207, par [143], and the requirement to provide reasons that those matters in ss 60B and 68F(2), to which greatest significance is attached and how those matters balance out should be indicated.

86 *Paskandy* at 86,457 at par [65].

87 (2002) 211 CLR 238; (2002) FLC 93-112. See generally L Young, *U and U:The High Court Reconsiders Relocation in the Family Court* (2002) 6 University of Western Sydney Law Review 241. J Roebuck *U and U; A Chauvinistic Approach to Relocation?* (2003) 17 Australian Journal of Family Law 208; J Behrens *U v U:The High Court on Relocation* [2003] Melbourne University Law Review 20.

135. The mother had very few friends, family or other support in Australia and was extremely unhappy living here. India was a completely different proposition. She had accommodation there with her mother, who was very financially secure, and much better employment prospects. She had a strong network of family and friends, including the father's extended family.

136. The mother abducted the child to India on separation in 1995. Consent orders were made in Bombay for the child to reside with the mother and have regular contact with the father. He travelled to India five times in the four years between 1995 and 1998. The mother and child returned to Australia in 1998 to unsuccessfully attempt reconciliation. She became stuck in this country because the father had taken the precaution of placing the child's name on the airport watch list.

137. The mother applied for residence on the basis that she would live in India with the child. She proposed unlimited, though supervised, contact in India and two months of uninterrupted contact a year in Australia. She offered to pay half the travel costs and receive reduced child support in lieu. By the time the matter came on for final hearing the mother had amended the contact proposal to two visits by the father to India each year and two visits by the child to the father in Australia annually.

138. The father cross-applied seeking residence of the child with specified contact to the mother or, alternatively, if the mother was granted residence of the child she be restrained from leaving the Sydney – Wollongong area of New South Wales.

139. The High Court's decision in *AMS and AIF* was delivered shortly before the commencement of the trial.

140. At the hearing, the father conceded that it would be best for the child to live with the mother. However, in response to a question put to her during cross-examination, the mother conceded that if she was not allowed to relocate to India with the child she would reluctantly stay in Australia. This concession was then mistakenly treated by the trial judge as an alternative proposal by the mother of residence with her in Australia. This was the one he ultimately favoured as being in the child's best interests.[88]

141. O'Ryan J found that the child had a stronger bond with the mother than the father and that she was the established primary carer. He accepted that the mother's unhappiness and isolation in Australia would have a negative impact on her capacity to cope and probably reduce the general quality of life in her home. This was not a case where the proposal to relocate was motivated by spite or out of a desire to harm the other parent, but his Honour was sceptical about the mother's commitment to complying with contact orders and encouraging a meaningful relationship between the father and the child.[89]

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88 It also accorded substantially with the status quo and the interests of the father.

89 According to Barbara Anne Hocking and Scott Guy, *Contemporary Issues in Australian Family Law: Do We Need a More Unified and Interventionist Judicial Model?* (2004) Singapore Journal of Legal Studies 76 at 88 [89] :

> "The logic behind the decision (of O'Ryan J) is consistent with that which was held to be erroneous in AMS v AIF, namely that where the existing parenting arrangement between the parents enables the child to have liberal contact with each parent and where in the circumstances that is in the best interests of the child, the court will choose not to disturb the status quo".

142. The Full Court held that a misunderstanding by the Judge of the counsellor's opinion concerning the level of contact was insufficient to vitiate an otherwise “unimpeachable” judgment.

143. The mother appealed to the High Court on six grounds but the outcome really turned on the merits of the first viz., that his Honour had addressed the ultimate issue of whether the mother should be "permitted" to move the child from Australia instead of properly evaluating her proposal of living in India. This, she argued, ignored her human right to freedom of movement and effectively confined her to living in a place she did not like, for the convenience of the father, who was not interested enough in maintaining contact with the child to offer to move to India. In short, it was claimed that O’Ryan J had failed to properly identify and give consideration to the case of each of the parties. Instead, his Honour made an order which was quite different from the proposals of each of the parties.

144. The mother also placed heavy reliance on the recently published English Court of Appeal decision in *Payne v Payne*[90] that the primary judge and the Full Court failed to recognise and guard against the dangers of underestimating the impact upon a child of a refusal by a court to make an order allowing a parent who wishes to do so to relocate.

145. *Payne* was decided in February 2001; that is, after both *A and A: Relocation Approach* and *AMS and AIF*. It was not published when the decisions of the primary judge and the Full Court in *U v U* were delivered.

146. The High Court dismissed the appeal 5:2. The majority decision is found in the joint reasons of Gummow and Callinan JJ, with which Gleeson CJ, Hayne J and McHugh J all agreed.[91] Hayne J expressed some additional views with which Gleeson CJ and McHugh J also adopted.

147. In the majority's view, the trial judge was faced with a finely balanced case. He was not bound by any of the proposals put forward by the parties and was perfectly entitled - and perhaps even obliged - to devise a better option from the evidence – including the mother's concession in cross-examination. Consequently, the majority felt that the first ground of appeal had an "air of artificiality" about it and found that it was not made out because the trial judge had not applied a "compelling reasons" test but had, on the contrary, properly addressed his mind to the over-arching question of the best interests of the child.

148. Their Honours considered that whatever weight should be accorded to a right of freedom of mobility of a parent, it must defer to the expressed paramount consideration, the welfare of the child, if that were to be adversely affected by the movement of the parent.

149. In dealing with the *Payne* ground, Gummow and Callinan JJ acknowledged the desirability of a child being brought up in a "stress free" environment, but this was still only one of a multiplicity of considerations to be weighed in parenting cases and O’Ryan J had done that.

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90 [2001] 1 FLR 1052

91 Gleeson CJ, McHugh and Gummow JJ had concurred with Kirby J in *AMS* in finding that the trial judge there had mistakenly required the mother to present "compelling reasons" before being permitted to relocate.

150. Of the three stage process which the Full Court of the Family Court mandated by the Family Law Act in *A and A*, their Honours said:

> *"We do not doubt that the Family Court is obliged to give careful consideration to the proposed arrangements of the parties. Whether the court is obliged or will be able in every case to treat each of the three steps as discrete and in the suggested order may be another question. But the court is not, on any view, bound by the proposals of the parties. . . . The object is always to achieve the child's best interests".*[92]

151. In strong dissents, Gaudron and Kirby JJ, gave separate reasons for upholding the mother's first ground of appeal.

152. Gaudron J accepted that there were three proposals for parenting arrangements to be considered: the mother's proposal to live in India, the father's main proposal that the child live with him in Australia, and his alternative proposal (wrongly identified at trial as the mother's alternative proposal) that the child live with her mother in Australia.

153. Her Honour held that all three proposals had to be separately evaluated and a choice made between them or a modified version of one or other of them. She also made it plain that the court ought to have considered the possibility that the father relocate himself in order to fulfil the child's right to contact. The failure by the trial judge to explore that possibility in this case, particularly given the father's origins, professional qualifications (an accountant), and family links in India, seemed to Her Honour to be "…explicable only on the basis of an assumption, inherently sexist, that the father's choice as to where he lives is beyond challenge in a way that a mother's is not".[93]

154. Gaudron J noted, with regret, that:

> " *. . . stereo-typical views as to the proper role of a mother are still pervasive and render the question whether a mother would prefer to move to another state or country or to maintain a close bond with her child one that will, almost inevitably, disadvantage her forensically. A mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child runs the risk of not having her reasons for relocating treated with the seriousness they deserve.*"[94]

155. The trial Judge, according to Gaudron J, had not really evaluated the father's proposal that the child live with him in Australia at all and, notwithstanding that it was ultimately held to be preferable, there was little, if any, evaluation of his alternative proposal that the child reside with her mother in Australia. [95] This, her Honour thought, had almost certainly resulted from misconstruing the counsellor's report to mean that contact was more important than any other consideration.

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92 at 260; 89,094. Apart from casting doubt on the Full Court's attempt to indicate a clear approach to these cases and to give guidance to trial judges, the High Court provided little with which to replace it, a failure which Juliette Behrens says continues a trend in decision-making in family law matters by the High Court: op cit, at p 23.

93 at 254; 89,081.

94 at 248-249; 89,082.

95 id.

156. Importantly, Gaudron J conceded that a finding that frequent contact with both parents was more important than any other matter could properly have been made by the trial judge but only after separately evaluating each of the proposals.

157. Kirby J began his judgment by acknowledging that the problems of determining parenting orders and of deciding the residence arrangements for children of failed relationships are amongst the heaviest responsibilities of the Family Court performing its duties under Pt VII of the Family Law Act.

158. Inescapably, he said, any relocation to another country of the parent with whom the child ordinarily resides has implications for the maintenance of physical contact between the child and the other parent and, where applicable, with that other parent's family.[96]

159. Nevertheless, his Honour reached the conclusion that the first instance judge had made an error of principle which invalidated his reasoning and fatally distracted the discretionary process.

160. His Honour concluded that if O'Ryan J had directed his mind to the parties' documentation filed by the parties in the court, he would have realized that there were actually three separate proposals namely, the mother's for the child to reside with her in India, the father's that the child reside with him in Australia and have reasonable contact with the mother and, alternatively, the child reside with the mother in Australia.

161. According to Kirby J, when properly interpreted, the competing applications presented a contest in relation to which parent would have the primary responsibility for the residence of the child and the related question of the prohibition of the mother relocating with the child to India.[97]

162. Correctly analysed, the mother's application sought an order for the residence of the child with her permanently in India not Australia.

163. His Honour found that a trial Judge was not permitted to go beyond the relief claimed in either of the parties' applications. It is unsurprising, therefore, that the disposition of the case miscarried here due to O'Ryan J's misconstruction of the relief sought by the parties.

164. Kirby J thought that once the primary judge had designated the proposition that the mother would continue to live in Australia as an alternative proposal, there was no real choice for him to make. Like the *deus ex machina* [98], the "alternative proposal" had removed his painful dilemma. There was then no real need to choose between the parents' proposals because the "alternative proposal" constituted, in effect, a capitulation by the mother to the father's proposal. His Honour said:

> *"The failure of a primary judge to give separate and full consideration to the true proposal of a mother as designated primary carer and residence parent to discharge her assigned responsibilities overseas following her return to her family in India therefore constitutes a serious injustice to the proper evaluation of that application. The burden of such injustices will ordinarily fall, as here, on the wife. It will be she, not the husband, who will usually be confined, in effect, in her personal movements, emotional environment, employment opportunities and*

96 248-249; 89,082.

97 at 272; 89,096.

98 An unlikely development deliberately introduced into a play or film as a device to resolve the plot.

> *chances of re-marriage, re-partnering and re-parenting. Effectively, as here, it is she who will be controlled by court orders that require her to live, and make the most of her life, in physical proximity to the husband's whereabouts. In this way, inconvenience to the husband is minimised. But the effect on the wife may be profound.*
>
> *As has been noted by this court and courts in other jurisdictions significant effects on the mother's emotional, residential, economic, employment and personal life have an inevitable impact on the happiness and best interests of a child*". [99]

165. Kirby J also held that treating the mother's refusal to abandon her child and willingness, if necessary, to stay in Australia to retain her status as resident parent suggested that a parent who opted for relocation in preference to maintaining a close bond with the child ran the risk that she would be seen as selfishly preferring his or her own interests to the child's. Whereas the one who chose to stay with her child ran the risk of not having their reasons for relocating treated with the seriousness they deserved. It also required, in effect, that parent to show "good" or "compelling" reasons to relocate, given that doing so will always make it more difficult (and in some cases virtually impossible) for physical contact between the other parent and the child to be maintained. This stacks the cards unfairly against the custodial resident parent and also tends to constitute an unjust burden on women. It is precisely the approach held to have been erroneous in *AMS and AIF*.

166. It is not enough his Honour said that the decision-maker avoids explicit reference to the need for such a parent to show "good" or "compelling" reason for wanting to move. By treating the maintenance of the status quo as a third alternative "proposal" advanced by the wife when it was not, much the same result ensues. The mother never really had her application, as made, determined on its merits. How could it have been if she was "proposing" an "alternative" which maintained the advantage of bi-weekly, face to face contact between the child and the husband?

167. Contact, in modern times, according to Kirby J does not have to be exclusively face to face or physical if the cost of insisting on such physical contact is to impose serious deprivations upon the human rights of custodial parents who are mostly women. To take the contrary view, he suggests, is "to entrench gendered social and economic consequences of care giving upon women in a way that is contrary to the Convention on the Elimination of All Forms of Discrimination against Women, to which Australia is a signatory." If *excessive* weight were to be given to a child's wish or need to maintain regular physical face to face contact with a non-resident father who is loving and attentive, as important as it is, it would be given, in his Honour's view, at too high a price both in terms of the impact of its consequences on the wife and thereby in the long term on the child herself.

168. His Honour went on to expressly adopt as "correct" the approach taken by the English Court of Appeal in *Payne and Payne*. [100] He would have set aside the judgment and remitted it for reconsideration consistently with that in *Payne* and with other English decisions.

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99 at 275; 89,099.

100 [2001] 1 FLR 1052 (UK)

169. While Australian courts are not bound by the decisions of foreign courts on this or any other subject, Kirby J thought that taking into account the course of judicial authority in a country where, as here, legislation is similar was an obviously sensible thing to do.

170. Ensuring consistency within the "wider field of international family law" is a particular reason in Kirby J's view why the High Court, in establishing principles and approaches that will be followed by the Family Court of Australia, should consider the way that such cases are dealt with in England quite apart from the similarity of the legislative provisions. [101]

171. Hayne J added some very interesting and important qualifications to this majority view. Whilst agreeing that the court was not bound to consider only the proposals put up by the parents, he did not see this as permitting some "roving enquiry about the matter unfettered by any regard for the evidence led and the matters which the parties seek to contest". [102] Due account must be taken of the fact that the proceedings are conducted in a framework of adversarial procedure familiar to the common law.

172. His Honour conceded that international relocation cases present difficult questions stemming from the fact that to take a child from a place where one of the parents lives, and in some cases works, to some distant place will, if the other parent does not move, necessarily affect the way in which the child's relationship with that other parent can be maintained and allowed to develop.

173. It follows that the needs and wishes of *each* parent and the needs of the child (and, if of sufficient age, the child's wishes) all bear upon the questions to be considered by the Family Court.

174. The best interests of the child are the paramount consideration but that does not deny the fact that there are at least *three* persons who will be affected by the order that is made: two adults and the child, and very often, of course, there will be other relatives as well.

175. Nonetheless, Hayne J stressed it is the interests of the *child* which are paramount, not the interests or needs of the parents, let alone the interests of one of them.[103]

176. In the circumstances, his Honour held it would be quite wrong to treat the decision to be made as confined to a choice between whatever may be the particular proposals that the parents may make for the residence of and contact with the child. To so confine the enquiry would (a) ignore relevant evidence led about what the mother would do if it were decided that the child should live in Australia rather than India and, more fundamentally, (b) it would limit the court's enquiry to what the *parents* suggested would be in the best interests of the child, regardless of whether those suggestions were informed or even wholly dictated by the selfish interests of one or other of them and (d) disobey a fundamental requirement of the

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101 The *Children Act 1989* (UK), s 13(1)(b) requires a parent wishing to remove a child permanently from the United Kingdom to obtain either the written consent of all people with parental responsibilities to the child or the leave of the court. In determining an application for leave, the court's paramount consideration has to be the child's welfare and it has regard to a "welfare check-list" in s 1(3), which includes factors similar to but not exactly the same as those in s 68F(2) of the Australian legislation.

102 at 285; 89,103

103 at 286; 89,103

Act viz., that the court regard the best interests of the child as paramount. Those interests may, or may not, coincide with what one or both the parents put forward.

177. Hayne J observed there were only three outcomes which were raised by the parties in the proposals which they made and in the way in which the matter was conducted at trial.

178. While all of them (possibly for good and valid reasons)[104] assumed that the father would remain in Australia and would not contemplate moving closer to the proposed new residence to facilitate contact, his Honour emphasised that *the premise is not one which in relocation cases should be accepted as a matter of course* and the validity of any assumption that the other parent will not move should be ordinarily examined with
the grounds being fully explored in evidence.[105]

179. Otherwise, the principles underlying the objects of Pt VII of the Act viz., the right to know and be cared for by both parents and the right of contact on a regular basis with both of them could not be given effect.

180. Just as, in this case, the mother was asked what she would do if she could not have the child reside with her in India, so too his Honour said the father should be asked what *he* would do if the mother were to have the child reside with her in India. Questions of this sort are not mere forensic tests of parental devotion, to which only one answer is seen as being satisfactory proof of being a loving parent. Rather, they are no more than a prelude to a deeper enquiry about where the best interests of the child may lie and what arrangements will best serve those interests.

181. These particular comments were expressly accepted by Gleeson CJ and McHugh J and (given the overall tenor of their remarks) Gaudron and Kirby JJ appear to implicitly agree with Hayne's comments. That means that five out of seven High Court judges holding that it is not appropriate to ask one thing of relocating residence parents and another of contact parents in these cases.

182. Juliette Behrens[106] expresses disappointment at the particular outcome of *U v U* and claims that the decision is unsatisfactory because it *leaves the area of law less clear than it has ever been* and fails to

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104 There was simply no evidence on this point.

105 Of this, Lisa Young, op cit at p.250, remarks "It will be interesting to see how decision-makers view future applications that seek to govern where contact parents live. Perhaps such applications will help judges come to grips, as Gaudron and Kirby JJ have, with the wider implications of the Family Court seeking to intervene in family life in a way no-one would endure for intact families. Certainly, disputes between parties must be resolved. In some cases, notably where child protection is a significant issue, it is appropriate for a court to look seriously beyond the proposals put by the parents. But as a general rule, the Family Court should not be in the business of crystal ball gazing as to what hypothetical alternative arrangements might advance the welfare of the children. Nor should it be deciding on what are essentially lifestyle choices for parents. This is a well accepted principle where religion is concerned, for example. One can imagine a whole array of orders the Family Court might make that could improve a child's environment. Choosing where the parents live is just one of those matters and it should normally be left to the parents to decide for themselves. The Family Court can then play its part in deciding where the child shall live, when the parents cannot agree".

clarify the appropriate approach to relocation cases *in a way that would advantage those seeking to relocate*.

183. She goes on to argue that, on balance, Mrs U had a very strong case for relocation:

> *There were certain factors which lean towards a decision restricting relocation. In particular the fact that this was a case where the mother wanted to move overseas rather than inter or intra-state was significant.*
>
> *Another factor which weighed against relocation in* U and U *was that the mother had unilaterally taken the child back to India on one occasion and had tried to do so on another. Also the trial judge found that the father had a close and loving relationship with the child.*
>
> *Most of the other factors in this case however tended to favour relocation. For example, the mother had always been the primary caregiver of the daughter. The father and mother were both born in India and the mother had lived with the child in India for two and a half years after the initial separation. During that time she had provided regular and unrestricted contact with the father who continued to live in Australia. There was no financial impediment to the father availing himself of the significant periods of contact both in India and Australia that the mother was proposing. The mother's work prospects were much better in India than Australia where she was dependent on social security. The mother is isolated with few friends and no family in Australia but has significant family support in India. A counsellor reported that the mother would be distressed at being forced to stay in Australia and transmit that to the child.*
>
> *The mother also alleged that the father was emotionally and physically abusive while they lived together in Australia.*

184. Likewise, as Hocking and Guy point out[107] the Full Court in *B and B*: *Family Law Reform Act 1995* considered that the prospect of significant advance in employment and the associated economic benefits for the parent and child is a compelling reason for relocation. Another is reunion with family as this allows for the parent to escape an otherwise isolated lifestyle after marriage breaks down. In *U v U* both these factors were present and arguably qualified as "compelling reasons" for relocation. Yet, Mrs U failed what might be seen as the less stringent test formulated in *AMS and AIF*. The premise that the status quo will not be disturbed in the absence of compelling reasons to the contrary may be less inhibiting for a primary carer than the precedent set by *U v U*.

185. The next case to be considered is the Full Court decision in *H and T*,[108] where the mother sought to relocate from Perth to the United States with the one and only child of the marriage due to a relationship the mother struck up with an American gentleman via the internet. The mother proposed that the father have contact with the child in Perth at least once a year, with all other contact by telephone.

186. The father, in opposing the mother's application, asserted that due to an already fragile relationship between the father and the daughter, allowing relocation would further damage that relationship. He also alleged that the wife did not encourage the daughter to have contact with him.

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106 op. cit., at pp 21-22.

107 op. cit. at p. 91

108 [2004] FamCA 200.

187. Penny J in the Family Court of Western Australia rejected the wife's application due predominantly to her failure to encourage contact in the past and the consequent unlikelihood of the mother encouraging a future relationship with the father should she be allowed to relocate.

188. The Full Court commenced by affirming the principles handed down previously by the Full Court and the High Court in relation to relocation, including *U v U, AMS and AIF, B and B: Family Law Reform Act 1995, A and A: Relocation Approach*, and *D and SV*.[109]

189. The Court then made the following statement at [62]:

> *"For present purposes it is sufficient to say that in the light of the legislation and the authorities above it is necessary for a trial Judge to evaluate each of the proposals advanced by the parties and such evaluation of the competing proposals (properly identified) must weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child's best interests."*

190. In relation to the decision at first instance, the Full Court said at [66]:

> *"Unfortunately, in the judgment her Honour failed to carry out this task. Our reading of the approach taken by her Honour was that she highlighted repetitively the reasons that militated against allowing the move, namely that contact between [B] and her father would effectively cease for the foreseeable future given both the tyranny of distance and the wife's lack of enthusiasm in encouraging contact. Nowhere does her Honour weigh up these disadvantages with the positive benefits that might flow from the proposed move, nor does her Honour appear to pay any regard for the wife's right to get on with her life as best she sees fit."*

191. Further at [69]:

> *"…The authorities emphasise that in cases such as the present it is essential to give careful consideration to the benefit to the child from the flow on effect that is inherent in the happiness of her primary caregiver and the potential economic advantages of living in a household not dependent upon social welfare as the principal source of income."*

192. In concluding that the appeal should be allowed, the Full Court then sought to re-exercise the discretion of the trial Judge and made the following general comments regarding the difficulties involved with relocation cases at [95]:

> *"This is not an easy case to decide. It highlights the 'tug of love' that relocation cases bring into sharp focus. Each party has a valid claim to the position they adopt. Each outcome is exquisitely unfair to the person who does not receive the result they contend for. Ultimately we must choose between two unpalatable alternatives focusing on [the child's] welfare as our paramount concern."*

193. In the end, the Full Court permitted the mother to relocate to the USA with her daughter.

194. The Full Court cautioned against making orders restricting the residence parent from intra-state moves in *D and SV*[110] and then went on to say:

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109 (2003) FLC 93-137

> *"Where a move interstate or overseas requires a dramatic and drastic change in the nature of the manner in which the parents share in their children's lives, much emphasis must be given to the deleterious effects of such a move on the relationship with the other parent."*

195. In *PJ and NW*[111] the Court refused to disturb the decision of the trial judge to allow a family to relocate from Geelong to Darwin, finding that it would be possible for the father to maintain a close though different relationship with the children via substantial blocks of contact and through telephone calls, letters and e-mails.

196. In *Driscoll and Valentine*,[112] the father appealed against orders made by Moore J allowing the mother to relocate to Guam with the two children of the marriage, aged 9 and 7 years. Following the parties' divorce, the mother entered into a relationship with a United States serviceman who, after failing to find suitable employment in Australia, accepted a posting to a military base in Guam. The mother sought to join him there with the children.

197. Kay J (with whom Holden & Guest JJ agreed) commenced by repeating the difficulties of relocation cases that were stated by Hayne J in *U v U*. His Honour then went on to look at a couple of American cases which also highlighted the difficulties associated with relocation and at [8] made the following comments:

> *"…(I)n an American case of Shaw v Hoover (1995) CDOS 8867 Anderson P of the Californian Supreme Court First Appellant District said:*
>
> > *'Child custody move away cases come in many shapes and sizes, those in which relocation is prompted by the hard economic realities facing one parent in a successful shared parenting arrangement pose some of the most difficult and painful decision-making challenges for our Family Law Courts. When both parents are equally caring and competent the Solomonic dimension becomes palpable'.*
>
> *"In Tropea (1996) 87 NY 2d 727…the New York Court of Appeal said at paragraph 30 per Titone J with whom the other members concurred:*
>
> > *'Relocation cases…present some of the knottiest and most disturbing problems that our Courts are called upon to resolve'."*

198. His Honour then said at [9]:

> *"Relocation cases are difficult and there is no mutually satisfactory answer to them. It is the unhappy lot of judges of this Court to decide between generally two very good claims of right and to make a decision that is going to leave one party bitterly disappointed. In this case her Honour has carefully and thoroughly put forward in her reasons for judgment all of the arguments properly put before her in relation to the conflict. In my view, the judgment appears to be complete, thorough and sensitive. It acknowledges the agony of the decision making process, analyses the strengths and weaknesses of each case put before her and rationalizes the orders that were ultimately made as part of that difficult process."*

199. The husband's appeal failed.

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110 (2003) FLC 93-137.

111 [2005] FamCA 162.

112 [2004] FamCA 830.

200. The Full Court of the Family Court has most recently revisited the High Court's decision in *U v U* in the appeal of *Bolitho and Cohen*. [113]

201. In that case, the father, an Italian citizen, residing in Japan with his new wife, wanted his two children from a former marriage, aged 12 and 10, to relocate from Australia to live with him in Japan. The mother was an Australian citizen. The children had resided with her in Sydney since consent orders were made in 1999. The parties separated in 1997.

202. The father's case was based on a significant change in the parties' circumstances since the consent orders were made in 1999, being difficulties which had developed in the mother's relationship with the children and the children's expressed wish to live with him in Tokyo.

203. The trial judge took the unusual step of allowing the relocation on an interim or trial basis. The wife appealed. She claimed that the trial judge erred in finding that a change in the children's wishes with respect to residence was sufficient to indicate a significant change in circumstances warranting variation to the existing parenting orders. She also contended that the trial judge failed to properly consider the impact of relocation to Japan on the children's welfare, including the fact that Japan was not a signatory to The Hague Convention.

204. An all female Full Court (Bryant CJ, May and Boland JJ), dismissed the mother's appeal, finding that there were valid reasons for re-opening the parenting question and that the trial judge had correctly followed the proper approach to be adopted in a relocation case. He considered and weighed all the relevant factors raised by each of the parties as likely to have either a positive or negative effect on the children if they relocated.

205. In dealing with the submission that his Honour failed to follow the direction of the Full Court in *A and A* their Honours set out the second step of the process and referred to Gummow and Callinan JJ's comments in *U and U*.

206. Their Honours then said:

> "*We accept that while in some cases each s 68F(2) factor may be relevant in determining what is the best interests of a child, in other cases a more limited examination of s 68F(2) factors may be appropriate as being the only* relevant *(our emphasis) factors to the particular issue to be determined.*
>
> *We discern that the decision in U and U has ameliorated the somewhat rigid and/or formulaic suggested approach set out in A and A. In U and U the High Court said that the proper approach to be adopted in a relocation case is a weighing of competing proposals having regard to relevant s 68F(2) factors and consideration of other relevant factors including the right of freedom of movement of the parent who wishes to relocate, bearing in mind that ultimately the decision must be one which is in the best interests of the child*".[114]

207. This makes it clear that the requirement to apply the *A and A* approach needs to be viewed in the context of the particular case. It is not absolute. There is no legislative requirement for a judge to spell out in

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113 (2005) FLC 92-224.

114 at 79,699

each case exactly the findings about each sub-section nor the weight to be given to such findings. The findings and weight given to the various factors required to be considered under s 68F(2) can often readily be discerned when the judgment is read alongside the transcript.

208. Their Honours added:

> "*The requirement (flowing from U and U) to look beyond the proposals of the parties highlights the fundamental difference in litigation involving the welfare of a child and ordinary inter partes litigation. This unique requirement may necessitate a trial judge crafting orders which are outside the proposals presented by either party, subject to the caveats expressed by Hayne J set out above. This task requires a trial judge to afford the parties procedural fairness by indicating and inviting comment on changes to the parties' own proposals, for example, by way of additional or different contact to that proposed by the relocating party, or a limitation to a period of restraint in removing a child from its present geographical location*".[115]

209. The Full Court relied on this to find that the trial judge was entitled to make an interim order for the children's relocation to live with the father in Japan on an experimental basis, notwithstanding that neither party had sought such an order.

The English cases

210. Where a residence order is in force, a parent who wishes to remove their child permanently from the UK requires the leave of the court unless the other parent consents in writing.[116]

211. The former President of the Family Division of the English High Court of Justice Dame Elizabeth Butler-Sloss explained the principles applied to relocation issues in the UK since the commencement of the *Children Act 1989* in a paper – *Children Crossing Frontiers – Perspective of the English Courts* – she gave at the 11th Commonwealth Law Conference in Vancouver, Canada, in August 1996. What Her Ladyship said there was referred to by the Full Court of the Family Court of Australia in *B and B: Family Law Reform Act 1995*[117] and is worth repeating here.

> [The] principles [*P vP*][118] have been generally applied since 1970. The circumstances in which an applicant parent has *not* been given leave have related to the inadequacy of the proposed plans rather than the need to keep in touch with the other parent. Lack of a job or adequate finances, lack of accommodation, no arrangements for schooling, doubts as to the motivation for leaving, or their suitability of the custodial parent have been the main reasons for refusing leave to remove permanently from the jurisdiction. Other possible reasons might be special medical needs of the child unavailable in the proposed country, the genuine opposition of the child concerned, or perhaps an unusually close relationship with the other parent which might lead to a change of primary carer by a change of residence order. On making the order, where there has been sufficient money, conditions have been imposed requiring the return of the child to England for holidays or provision of funds to enable the other parent to fly out, at the expense of the custodial parent, to visit the child. An undertaking to return the child if called upon by the Court is usually required. An applicant who is the obvious

115 at 79,701

116 s 13(1)(b) of the *Children Act* 1989.

117 at 84,204-84,205.

118 (1971) WLR 1469, sub nom *Poel v Poel* [1970] WLR 1469.

> primary carer with well thought out and reliable plans is likely to obtain leave, even if the move is to the other side of the world, and even if there is no money available for return visits . . .
>
> This approach might be thought to be at odds with the increased importance attached in the Children Act to contact with the non custodial parent, but the alternative would be to deprive the parent with whom the child lives from making a new life by, for instance, a new job or a new marriage. The welfare of the child remains paramount but is seen to *be best placed by allowing the child to go with the custodial parent. This is, in my view, a pragmatic resolution of irreconcilable interests.*(emphasis added)

212. In *Payne and Payne* [119] the father appealed against an order giving the mother leave to remove her four year old daughter permanently to New Zealand. He argued that the principles applied by the court to applications for leave created a presumption in favour of the applicant parent which was in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 ("the European Convention") and in conflict with the *Children Act 1989*.

213. The trial judge had found that the mother's reasons for her desire to return to New Zealand were appropriate and entirely understandable. Her situation in England was not a happy one. The judge found that the effect of her being forced to stay in England would be devastating. He found that her unhappiness, sense of isolation and depression would be exacerbated to a degree that could well be damaging to the child. The father, who has had a close relationship with his daughter, would be able to afford to visit her or have her visit him two or three times a year, which mitigated the loss to the child and to him.

214. The Court of Appeal (Butler-Sloss P, Thorpe and Robert Waller LJJ) held that the trial judge had applied the relevant case law and found that the move would be in the child's best interests because it would make her mother happy.

215. Thorpe LJ noted that relocation cases often involved a number of common factors, including, for instance :

(a) the applicant is invariably the mother and primary carer;

(b) the motivation for the move generally arises out of her remarriage or urge to return home; and

(c) the father's opposition is usually founded on reduction in contact and influence.

216. His Honour reiterated that relocation cases had to be decided upon the application of the following two propositions :

(1) The welfare of the child is the paramount consideration; and

(2) Refusing the mother's reasonable proposals for relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore, her application to relocate

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[119] [2001] 1 FLR 1052. The decision was discussed by Kirby J at length and with approval in *U v U* (2002) 211 CLR 238 at 284.

will be granted unless the court considers that it is incompatible with the welfare of the children.

217. However, he found that there was no legal presumption in favour of the reasonable proposals of a primary carer[120] and, accordingly, concluded that there was no conflict between the English case law and either the European Convention or the *Children Act, 1989*.

218. His Lordship held that there is a danger if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption and that, to guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare, suggested the following approach before reaching a final conclusion:

(a) Pose the question: Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?

Then ask: Is the mother's application realistic, by which I mean founded on practical proposals both well-researched and investigated?

If the application fails either of these tests, refusal will inevitably follow.

(b) If, however, the application passes these threshold tests, then there must be a careful appraisal of the father's opposition: Is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and the future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

(c) What would be the impact on the mother, either as a single parent or as a new wife, of a refusal of her realistic proposal?

(d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as a paramount consideration directed by the statutory checklist insofar as appropriate.

219. His Lordship added that great weight must be given to the emotional and psychological well-being of the primary carer.

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120 In the earlier case of *MH and GP (Child: Emigration)* (1995) 2 FLR 106, Thorpe LJ had said that there was a " . . . presumption that reasonable proposals from the custodial parent should receive the endorsement of the court".

In *Payne* he explained that he was using the word "presumption" in that case in a "non-legal" sense and made it clear that he did not think that such concepts of presumption and burden of proof had any place in parenting litigation because the court exercises a partially inquisitorial function. Kirby J was also forced to clarify his position on the "presumption" in favour of relocation in *U v U* at 282; 89,101.

220. His Lordship suggested that where there was a real dispute as to which parent should be granted a residence order, and the decision as to which parent was the more suitable was finely balanced, then the future plans of each parent for the child were clearly relevant and a proposed removal of the child from school, surroundings and other family might be another important factor. However, where, *as there*, the residence issue was clear, then plans for removal from the jurisdiction would not be likely to be significant in the decision over residence.

221. Thorpe LJ thoroughly reviewed the modern law relating to the emigration of children, beginning with the decision in *Poel and Poel* [121].

222. *Poel* involved a case where a mother of a two-year-old boy, who was the resident mother with reasonable access to the father, had remarried and was expecting a child by her second husband. The boy was happy with the mother and her second husband and custody arrangements were working satisfactorily. The mother and husband proposed to immigrate to New Zealand where her husband had good prospects. The judge refused the mother's application for leave to take the boy out of the jurisdiction on the ground that it would cut the boy off from contact with his father[122].

223. Allowing the appeal, the primary consideration was held to be the welfare of the child. However, regard had to be had to the welfare of the parent who had custody since if he or she became unhappy it might adversely affect the child and, therefore, there should be no interference with any reasonable mode of life selected by the parent having custody unless it was absolutely essential.

224. It was decided that the resident parent was entitled to choose to order his or her way of life in any reasonable manner they please. The court in *Poel* did not weigh the interests of the adults against the interests of the children but rather had weighed the effect on the children of imposing unreasonable restraints on the adults.

225. Sachs LJ stated:

> *"Once . . . custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by the parent to whom custody has been rightly given. Any such interference may . . . produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of the child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has been given custody may well have to bear, even though one has every sympathy with the latter on some of the results".*

226. The trial judge had not considered the effect of a refusal of leave on the mother's new life and had therefore come to an erroneous decision.[123]

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121 [1970] 1 WLR 1469.

122 *Poel* was examined in Kirby J's reasons in *AMS v AIF* with which, on the decisive point, Gleeson, McHugh and GummowJJ agreed.

123 at 179.

227. In *Nash v Nash* [124], where the custodial mother of a 6-year-old girl wanted to accept a university post in South Africa over the objection of the strongly anti-apartheid father, Davies LJ said:

> *"...when one parent has been given custody it is a very strong thing for this court to make an order which will prevent the following of a chosen carer by the parent who has custody*".

228. The following statement by Ormrod LJ in *A v A (Child: Removal from Jurisdiction)* [125] effectively established the approach that has endured in England ever since:

> *"It is always difficult in these cases when marriages break up where a wife who, as this one is, is very isolated in this country feels the need to return to her own family and her own country; and although (counsel for the applicant mother) has argued persuasively for the test which was suggested in the case of Poel (1971) WLR 1469, the test which is often put on the basis of whether it is reasonable for the mother to return to her own country with the child I myself doubt whether it provides a satisfactory answer to this question. The fundamental question is what is in the best interests of the child; and once it has been decided with so young a child as this that there really is no option so far as care and control are concerned, then one has to look realistically at the mother's position and ask oneself the question : where is she going to have the best chance of bringing up this child reasonably well?"*

229. Ormrod LJ's dictum was questioned by Balcombe J in the Family Division case of *Chamberlain v De la Mare* [126]. In that case, the custodial mother of two children applied to take them to New York with her new husband for his job requirements. Balcombe J referred to *Poel* but saw his duty as having to regard the welfare of the child as the first and paramount consideration and then weighing each factor one against another with no one factor having primacy or taking priority.

230. He decided that the welfare of the children required that the mother remain in England with them so as to maintain contact with their father.

231. Balcombe J's decision was reversed in the Court of Appeal on the ground that he had misdirected himself in questioning whether the earlier decisions were consistent with statute. Ormrod LJ said:

> "*The reason why the court should not interfere with the reasonable decision of the custodial parent, assuming, as this case does, that the custodial parent is going to be responsible for the children, is as I have said the almost inevitable bitterness which such interference by the court is likely to produce. Consequently, in ordinary sensible human terms the court should not do something which is, prima facie, unreasonable unless there is some compelling reason to the contrary. That I believe to be the correct approach*".[127]

232. *Belton v Belton*[128] was an application by a mother to remove and resettle a child of two to New Zealand which was her country of origin. The Court of Appeal allowed an appeal against the decision of the trial judge to adjourn the decision whether to give leave for two and a half years until the child reached the age of five, and gave leave to remove permanently.

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124 [1973] 2 All ER 704 at 706.
125 [1980] 1 FLR 380 at 381-382
126 (1983) 4 Fam Law R 434.
127 at 443.
128 [1987] 2 FLR 343.

233. Purchas LJ said:

> *". . . the authorities in the law which dictate the hard and difficult decision which must be made once it is established that the custodial parent genuinely desires to emigrate and, in circumstances in which there is nothing adverse to be found in the conditions to be expected, those authorities are quite clear in the course the court must take, whatever the hardship and distress that may result".*[129]

234. In *Tyler v Tyler*[130], the Court of Appeal upheld the decision of a circuit judge refusing to permit a mother to immigrate to Australia where her family lived. In that case, the judge found that there was a close bond between the children and their father and that contact between them would cease after emigration. He found that the mother's wish to remove the child was unreasonable and that she would be able to cope with her disappointment without adverse effect upon the children.

235. Having been referred to virtually all the reported cases to that point in which the issue of relocation had arisen, Kerr LJ noted that there had not been a reported case in which an application to remove a child permanently from the jurisdiction had been refused by the Court of Appeal.. But each case depended on its own facts. His Lordship concluded:

> *". . . this line of authority shows that where the custodial parent herself, it was the mother in all of those cases, has a genuine and reasonable desire to emigrate then the court should hesitate long before refusing permission to take the children".*[131]

236. According to Kirby J in *U v U* [132] the hesitation referred to in *Tyler* does not rise to the level of a legal presumption that the resident parent has a right to reside where he or she decides unless good reason, relevant to the welfare or best interests of the child, can be shown to the contrary but it does evince a greater attention to the realities of the position of the primary carer (overwhelmingly female) and allows a proper consideration of the factors affecting the carer's life, such as the freedom of movement, association, employment and personal relationships. These are to be weighed against any negative impacts of relocation, such as reduced contact. However, this last factor should not dictate the result, any more than should the carer's desire for relocation.

237. Returning to the issues in *Payne* itself Thorpe LJ questioned whether changing perceptions of child development and welfare in the interim undermined or eroded Ormrod LJ's earlier expositions. His Honour rejected a submission that the comparative importance of contact between the child and the absent parent had greatly increased over the last 30 years. He said that had always been an important ingredient in any welfare appraisal. Furthermore, practicalities were all against the submission. International travel is comparatively cheaper and more competitive than ever before. Equally, communication is relatively inexpensive and the options are more varied and accessible.

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129 at 349.

130 [1989] 2 FLR 158.

131 at 160-161.

132 (2002) 211 CLR 238 at 281; (2002) FLC 93-112 at 89,101.

238. Nor, in His Honour's opinion, did the introduction of either the *Children Act* in 1989 or the *Human Rights Act* 1998 change the substance of the decision to be made or require a reformulation of the rationalisation advanced by Ormrod J in his judgments. This was because:

> *". . . reduced to its fundamentals the court's approach is and always has been to apply child welfare as a paramount consideration. The court's focus upon supporting the reasonable proposal of the primary carer is seen as no more than an important factor in the assessment of welfare. In a united family the right to family life is a shared one. But once a family unit disintegrates the separating members separate rights can only be to a fragmented family life. Certainly the absent parent has the right to participation to the extent and in what manner the complex circumstances of the individual case dictate".*[133]

239. His Honour held[134] that, in a broad sense, the health and well-being of a child depends upon emotional and psychological stability and security which come from the child's emotional and psychological dependency on the primary carer.

240. The extent of that dependency his Lordship noted will hinge on many factors, including its duration and the extent to which it is tempered by or shared with other dependencies. For instance, is the absent an important figure in the child's life? What is the child's relationship with siblings and/or grandparents and/or step-parent? In most relocation cases, the judge will need to make some evaluation of these factors.

241. Thus, according to Thorpe LJ in almost every relocation case the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability.

242. Logically, in his Honour's view, and as a matter of experience, the child cannot draw emotional and psychological security and stability from the dependency unless the primary carer herself is emotionally and psychologically stable and secure. The parent cannot give what she herself lacks.

243. His Lordship observed:

> *"The mother who emerges with the responsibility of making the home for the children may recover her sense of wellbeing (after the disintegration of a family unit) simply by coping over a passage of time. But often the mother may be in need of external support whether financial, emotional or social. . . . Alternatively, the disintegration of the family unit may leave the mother in a society to which she was carried by the impetus of family life before its failure. Commonly, in that event, she may feel isolated and driven to seek the support she lacks by returning to her homeland, her family and her friends . . . In these cases refusal is likely to destabilise the new family emotionally as well as penalise it financially. In the case of the isolated mother, to deny her the support of her family and a return to her roots may have an even greater psychological detriment and she may have no-one who might share her distress or alleviate her depression".*[135]

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133 at 1064.

134 at 1062.

135 at 1063.

244. President Butler-Sloss pronounced that the decision in *Poel* set out the general concepts and precepts to be followed and also held that the implementation of the *Children Act* in 1989 did not affect the traditional approach to relocation.

245. The President suggested some considerations that, while not exhaustive, were likely to be helpful in resolving the difficult task that relocation cases (in which residence was not at issue) presented:

(a) the welfare of the child is always paramount;

(b) there is no presumption in favour of the applicant parent;

(c) the reasonable proposals of the parent with the residence order wishing to live abroad carry great weight;

(d) consequently, the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end;

(e) the effect of a refusal of leave on the applicant parent and the new family of the child is very important;

(f) the impact upon the child of the denial of contact with the other parent and in some cases his family is very important;

(g) the opportunity for continuing contact between the child and the parent left behind may be very significant.[136]

246. However, where there is a real dispute as to which parent should be granted a residence order, and the decision as to which parent is the more suitable is finely balanced, the President accepted the future plans of each parent for the child were considerably more relevant.

247. If, for example, one parent intends to set up a home in another country and remove the child from school, surroundings and the other parent and his family, it may in some cases be an important factor to weigh in the balance. But in a case where (as in *Payne* itself) the decision as to residence is clear the plans for removal from the jurisdiction would not be likely to be as significant.

248. The approach advocated in *Payne* has since been endorsed by the Court of Appeal, including Thorpe J, in *Re S (Remove from Jurisdiction)*[137], *Re B (Leave to Remove: Impact of Refusal)* [138] and *Re G (Removal from Jurisdiction)*.[139]

249. In *Re S* two unrelated appeals, both involving a mother wishing to relocate to join a new spouse in another country[140], initial refusals were overturned in both cases. The reasoning of the Court is set out in

136 at 1079.
137 [2003] 2 FLR 1043
138 [2005] 2 FLR 239.
139 [2005] 2 FLR 166.

the judgment of Thorpe LJ[141]. In summary, the court held that the "natural gravitation" of the new family had an important bearing on the outcome of cases[142].

250. Thorpe LJ stated:

> *" . . . I would, in the light of recent experience of applications and appeals in relocation cases, offer the following extension to sub-para (c) of par 4 [*of the *Payne* guidelines] *where the mother cares for the child or proposes to care for the child within a new family, the impact of refusal on the new family and the step father or prospective step father must also be carefully evaluated."*

251. That consideration, his Lordship noted, would apply with greater force where the child's step father is a foreign national.

252. His Honour went on:

> *"If the Court frustrates that natural emigration it jeopardises the prospects of the new family survival or blights its potential for fulfilment and happiness. That is manifestly contrary to the welfare of any child of that family. That is a reality that the Court determining an application for relocation simply has to recognise. Often there will be a price to be paid in welfare terms of the diminution (or severance) of the child's contact with their father and his extended family. But the Court's power to ensure children's continuing contact with both parents after separation or divorce is necessarily "circumscribed" (presumably by the context of the case)."*

253. Thorpe LJ went on to say how important it was for the Court, in exercising its paternalistic jurisdiction to recognise the force of "the tides of chance in life" and not frustrate international movements unless they are shown to be contrary to the welfare of the child.

254. In *Re B* a residence mother wanted to relocate from the UK to Australia with her two children, over the objection of the contact father, to pursue a new life there with her new husband. She had been there before and had immediate family living in Australia. That she placed great emphasis on the emotional significance to her of the move and her possible difficulties in coping with a refusal were referred to in a counsellor's report.

255. The application was refused at first instance because of the judge's concerns about the mother's failure to offer the father contact beyond that required by the existing orders and her failure to answer a hypothetical question about what she would do if the children failed to settle after relocation.

256. Thorpe LJ again revisited the four stages of the guidelines in *Payne* and concluded that, in retrospect, the layout was unhelpful in the sense that it did not emphasise the importance of the emotional and psychological wellbeing of the primary carer enough in the evaluation of the child's best interests and the impact of refusal on the mother.

257. His Lordship rejected the suggestion that there was a new exceptional sub-class of case developing, namely the "lifestyle choice" category which required some different treatment. His Honour pointed out

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140 South Africa and the Philippines respectively.

141 at 1045-1047.

142 District Judge Glenn N Brasse *"The Payne Threshold: Leaving the Jurisdiction"* [2005] Fam Law 780 at 782.

that *Lonslow v Hennig* [143] considered precisely a lifestyle choice situation and, without hesitation, applied the principles emerging from *Poel*.[144]

258. In the later case of *Re G* his Lordship emphasised the importance of judges properly directing themselves in assessing the impact of refusal on the mother. He noted, however, that recent appeals had demonstrated that the judge's assessment of this very important factor had been hampered by an absence of clear evidence from the applicant as to what would be the emotional consequence of refusal.

259. In that case, an Argentinean sought permission to remove five and a half year old twins permanently from the UK to South America. The parents had separated in 2001 and regular contact had taken place between the children and their father, both by consent and under court order in the four years since separation.

260. The mother proposed to forego periodical child support payments so that the father could apply the same amount to the cost of travelling to see the children. She intended sending the children to a bi-lingual school. The children could speak both English and Spanish.

261. The mother failed because she had not established that the consequence of refusal would be psychiatric damage and would probably only involve initial disappointment and transient distress because she was a resilient woman who would adapt to her situation because of her strength of character.

262. The trial judge found that any adverse emotional reaction of the mother would be short-lived and, again, because of her personal discipline, would keep her unhappiness to herself and probably not transfer it to the children.

263. His Lordship decided that the trial judge had significantly understated the impact on the mother and the likelihood of its transference to the child. His Honour noted that the "…balance of authority in this area shows that almost inevitable is the transference of unhappiness from the primary carer to child".

264. Thorpe LJ held that the trial judge was wrong to conclude that the mother's plans to support herself by setting up business in Argentina were ill conceived and could not be criticised for failure to produce evidence in relation to her proposed business activities since she had not yet embarked upon them.

265. A finding that the mother's plans were over-optimistic and insufficiently researched – he thought – ignored the substantial capital she would have as a result of property settlement.

266. Alison Perry [145], an academic at the University of Wales, argues that an examination of *Payne* and subsequent judgments gives a picture that in the Court's view, a child's welfare in an international relocation case will best be served by:

(a) being brought up in a happy, secure, family environment;

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143 [1986] 2 Fam Law R 378.

144 *Nash v Nash* was also a lifestyle/career based move.

145 *Payne v Payne: Leave to Remove Children from the Jurisdiction* (2001) 13 Child and Family Law Quarterly 455 at 460.

(b) by a happy, unresentful mother and, where present, stepfather;

(c) maintaining contact with his father where possible; by

(d) losing contact with his father if that is necessary to achieve (a) and (b) above.

267. She goes on:

> *"While many may baulk at (d), it is submitted that this is an accurate summary of the approach of the Court, albeit perhaps expressed more candidly than is usually the case. This conception of what is in a child's best interests, stands in marked contrast to the view prevailing in purely domestic cases, for the child's welfare is best served by maintaining contact with both parents, irrespective of whether this may cause anxiety or upset to the residential parent."*

268. Joanne Roebuck suggests that an even more straightforward approach which could be taken in the UK consistently with the authorities and the welfare principle is: "Once it has been decided which parent can best provide for the child's daily care, Ask: where can this parent have the best opportunity of bringing up this child?"[146]

The New Zealand position

269. The general trend in relocation cases under the *Guardianship Act 1968 (NZ)* until its repeal[147] earlier this year was for the courts to deny relocation. The superseded Act provided for joint guardianship, that is, custody of a child subject to any order to the contrary by a court. Custody is defined as the right of possession and care of a child included a right of control over his or her upbringing including education and religion. The Act provided that "no parent is to be deprived of the guardianship of his or her child unless the Court is satisfied that the guardian is, for some grave reason, unfit to be a guardian of the child or is unwilling to exercise the responsibilities of a guardian". Disputes between guardians on any matters concerning the exercise of their guardianship and between parents sharing custody of a child on any matter affecting the welfare of the child were determined by the court as it thinks proper. In determining either category of dispute, the Court was required to regard the welfare of the child as the first and paramount consideration.

270. Unlike the current English statute there was no specific provision permitting an application for relocation to be made. Parents who wished to relocate with their children had to apply for a custody order under s 11. Alternatively, they could apply for the issue to be determined as a guardianship or parenting dispute.

271. The leading authority decided under the old Guardianship Act is *D v S* [148]. The Court made a joint custody order in 1997 granting care of three boys to their Irish mother for 60 per cent of the time and their New Zealand father for 40 per cent of the time, with a condition that the children would not be removed from New Zealand without leave of the court or the agreement in writing of both parents.

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146 op. cit., at 213. This is admittedly based on the seminal judgment of Ormrod LJ in *A and A* [1980] 1 FLR (UK) 380 at 381-2.

147 The *Care of Children Act 2004* replaced the *Guardianship Act* on 1 July 2005.

148 [2002] NZFLR 116.

272. The mother subsequently decided to return to live in Ireland and appealed to the High Court against the condition attaching to the joint custody order.

273. The mother testified that although it would make her very unhappy she would, if worst came to worst, remain in New Zealand with her children rather than abandon them. The trial judge put weight on the importance for the children of having a regular and ongoing qualitative relationship with both parents, which would not be possible if the mother relocated. He found that the advantages of the stable lifestyle they were enjoying in New Zealand outweighed the potential benefits (and risks) of moving them to Ireland. His Honour referred to research establishing the importance of the father's role in the social and emotional development of boys as being an important factor.

274. The mother appealed to the High Court which admitted an affidavit by the mother deposing to her decision to return to live in Ireland whatever the outcome for her "own well being and sanity". Panckhurst J followed the English Court of Appeal decision in *Payne* in preference to the leading New Zealand Court of Appeal case on the issue, *Stadniczenko and Stadniczenko*[149]. In doing so, his Honour conceded that the "simplest, safest and least disruptive" answer would be to leave the boys where they are settled and contented", but decided that their best interests were in accompanying their mother to Ireland because of their "need for a mother".

275. The father took the matter to the Court of Appeal. The children had been living in Ireland with the mother for five months when the majority ordered a rehearing in the Family Court based on a finding that Panckhurst J was wrong to put too much emphasis on the wellbeing of the custodial parent in line with *Payne* instead of following *Stadniczenko*[150] which was binding on him.

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149 [1995] NZFLR 493. This case was reviewed in detail by the Full Court in *B and B: Family Law Reform Act 1975* at 84,203. The mother wanted to move from Wellington to Auckland with the two children of the marriage. She was given provisional permission to do so by the Trial Judge. The husband appealed to the High Court which reversed the decision and granted custody to the mother on condition that she resided with the children in Wellington. The mother unsuccessfully sought leave to appeal to the Court of Appeal. In the course of its judgment, that Court extensively discussed the law to be applied by reference to earlier New Zealand and overseas cases including *Craven; Holmes; and Kuebler* in Australia, *Poel and Nash* in England and the Canadian decision of *Carter v Brooks (1990) 77 DLR (4th) 45*. The Court of Appeal emphasised that the governing principle was the welfare of the child and subject to that (at 500):

> "*The rights of the custodial parent to pursue his or her own life or career and the rights of the non-custodial parent to access can be taken into account. The choice of residence and rights of access are not solely a matter of the rights of parents, however. As is shown by the cases cited, they may also be important consideration in the impact on the welfare of the child*."

150 By the time the matter was finally reheard under the remitter, the children's wishes and the father's attitude had changed materially. The children were ordered to return to New Zealand. The mother's appeal to the High Court was heard by two Judges who allowed the appeal and granted the mother sole custody in Ireland subject to access to the father twice a year on holidays because by now the boys had been in Ireland for nearly a year (apart from a Christmas holiday in New Zealand) and were well settled and progressing satisfactorily there; see Henaghan *"Can you feel the law tonight?"* [2003] Otago Law Review 1.

276. The Appeal Court concluded that the orders made in the judgment must in due course be quashed for error of law. It re-asserted that in determining any child dispute in New Zealand, the child's welfare is the first and paramount consideration and then made a number of additional points, including :

- the relevant provisions of The United Nations Convention on the Rights of the Child, 1989 must be taken into account, including Article 9.3, providing that parties are required to respect the child's right 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests';
- s 23(1A) of the *Guardianship Act* was designed to dispel any gender-based assumptions as to whose parental care will best serve the welfare of the child; and
- decisions of courts outside New Zealand are likely to be of limited assistance as the social and cultural landscape in which the overseas statute is applied will not replicate New Zealand's local circumstances, including the growth and degree of involvement of both parents in family care and a clear move to shared care.

277. In considering *Payne*, the Court noted the welfare of the child as the paramount consideration is the *governing* requirement under New Zealand law and not simply a *proposition* to be weighed alongside the potentially detrimental impact on her children's welfare.

278. Richardson P comprehensively reviewed the history and function of the welfare principle. He drew attention to the statutory status of parents as "joint" guardians and noted that the parent's "rights" as guardian are "rights against others, not against the child" and were to be exercised in the shadow of the welfare principle. His Honour held that there can be no justification for isolating one factor and according it presumptive effect and emphasized that all aspects of the child's welfare or best interests must be taken into account and a "predictive assessment" of what the child's best interests requires must weigh all relevant factors in the balance.

279. The Court refused to follow the English approach because it was seen as being inconsistent with the "wider or all factor child centred" approach required under New Zealand law and gave a priori favour or primacy to the wants, needs and wellbeing of the primary carer and gave insufficient emphasis to the need of the particular children generally and in particular, for a continuing relationship with both parents.

280. The Court of Appeal also declined to provide any formal set of decision-making guidelines on the basis that this was not their proper role.

281. Nonetheless, the Court rated three factors as being particularly "important" in relocation cases. One is that the award of day to day care to the custodial parent shows that the child's best interests prima facie lie with the well being of that parent. Another important factor is the nature of the relationship between the child and the contact parent because the reasonableness of a parent's desire to relocate with the children has to be assessed in relation to the disadvantages to the children of reduced contact with the other parent, alongside all other *relevant* factors. The closer the relationship and the more dependent the

child is on it for his or her emotional well being and development, the more likely an injury resulting from the proposed move will be. Third, the reason for and the distance of the move.

282. The Court of Appeal extracted the following seven points of principle from the Act and previously decided cases.

1. The child's welfare is not the only consideration and freedom of movement is an important value in a mobile community;
2. The approach mandated by the Act and the emphasis on the parent's responsibilities for the wellbeing of the child are wholly consistent with New Zealand's obligations under the International treaties.
3. All aspects of welfare must be taken into account.
4. No gender based assumptions as to parental care can – and an overall assessment must – be made.
5. The choice of residence and relocation may be affected by the nature and duration as well as the likely impact of altering the existing custodial arrangements.
6. Decisions of Courts outside New Zealand are likely to be of only limited assistance even in similar legislative contexts because of the difference in the "social landscape" and cultural diversities.
7. The Court must deal with the difficult issue of relocation on a "case by case personalised assessment" of the welfare of each particular child.

283. The child's views were also acknowledged as being relevant.

284. Other relocation cases decided at around the same time of, and since, *D v S*, show that in the absence of some special reason or justification, permitting relocation has been the exception rather than the rule in New Zealand, particularly where the parents have joint custody.[151]

285. Unlike its predecessor, the *Care of Children Act 2004* gives express guidance as to what should be taken into account in considering the welfare of the child in relocation cases.

286. The welfare of the children remains the first and paramount consideration both in regard to the parents joint and shared parenting responsibilities and post separation circumstances and arrangements.

287. Section 16(1) of the new legislation describes the duties, powers, rights and responsibilities of a guardian in detail but not exhaustively. Those basic duties are to be exercised by both parents as joint guardians (s 16(5)) subject to the welfare and best interests of the child (s 4(1)). The relevant welfare and best interests principles are set out in s 4(5)(a) and s 5 of the Act. These are not exclusive and none have presumptive force or outrank any others.

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151 A. Worwood, *International Relocation – the Debate* [2005] Fam Law 621 at 625; cf The Hon. BD Inglis, *"The Care of Children Act and Separated Parents* [2005] The New Zealand Law Journal 233.

288. The impact on the *Care of Children Act* on relocation cases is yet to be determined, but the principles in s 16 and best interests or welfare factors in s 5 are likely to have a limiting rather than expanding effect. The crucial change, according to Chief Family Court Judge Peter Boshier, is the emphasis placed on the child having a relationship and parenting input from *both* parents. This, the Judge suggests, indicates that parents " . . . should not relocate if to do so would have a detrimental impact upon the relationship with the other parent, despite considerations that may be allowed for relocation under the Guardianship Act."[152]

289. His Honour goes on to make the obvious point that it is not only the parent's relationship with the child that needs to be considered but family relationships are also to be preserved and strengthened. Section 5(b) accentuates the right and need of a child to " . . .have continuing relationships with *both* parents". Chief Judge Boshier also hints that the joint nature of guardianship responsibilities under the C*are of Children Act* and the overall aim of promoting a continuing role for both parents in the upbringing of children even after separation both point away from allowing relocation. So too may the greatest emphasis under the *Care of Children Act* on shared parenting responsibility and custody rather than on primary and secondary households.

290. However, if the experience in Australia after the introduction of the *Family Law Amendment Act 1995* is any indicator, greater emphasis on shared parental responsibility and the express recognition of the right of a child to develop a meaningful relationship and have contact on a regular basis with both parents may not necessarily result in any substantive change in approach to relocation because (as the Full Court of the Family Court noted in *B and B: Law Reform Act 1995*) while statutory objects and underlying principles are useful guides they are unlikely to be of great value in the adjudication of individual cases and the welfare of the child remains the essential premise and final determinant.

Canada

291. The courts in Canada generally consider applications to relocate on a province by province basis.[153] However, the leading Supreme Court authority *Gordon v Goertz* [154] was discussed by the Full Court of the Family Court of Australia in considerable detail in *B and B: Family Law Reform Act* 1995.[155]

292. Before *Gordon v Goertz*, the relocation principles and parental mobility law generally had been the subject of confusion and inconsistent provincial decisions.

293. The two decisions most often discussed came from the Ontario Court of Appeal. The first was the so-called anti-move decision in *Carter v Brooks*[156]. The Court held there that the custodial parent did not have the right to move a child from the jurisdiction. The central principle was the best interests of the child which must prevail over any conflicting parental interest. The mother failed to discharge the

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152 *Relocation Cases : An International View from the Bench*, a paper delivered on 20 May 2005 to the Association of Family and Conciliation Courts.

153 A. Worwood, op cit., at 625.

154 [1996] 2 SCR 27.

155 at pars 7.63 – 7.85.

156 (1990) 2 O.R. (3d) 321.

evidentiary burden of showing that a move to British Columbia would be better for the child, even though her second husband of five years had been offered a promising business opportunity there. The Court felt that the move was not in the child's best interests because there was "no real need" demonstrated for the move. The stepfather was already in secure employment in Ontario and any improved prospects he may have elsewhere where overshadowed by the profound negative effect it would have on the relationship between the biological father and his son.

294. In 1995, the Ontario Court of appeal delivered a conflicting judgment in *MacGyver v Richards*[157] to the effect that there should be a presumptive deference in favour of the wishes of the custodial parent with the onus shifting to the access parent to establish on a balance of probabilities that the move was not in the best interests of the child. This "pro-move" decision favoured relocation unless there was substantial evidence that the primary caregiver's decision to do so impaired the child's (not the access parent's) long term well being.

295. According to Abella JA in a contest between the needs of the custodial parent and the wishes of the access parent, the former should succeed over the latter.

296. The Manitoba Court of Appeal subsequently supported the *MacGyver* approach in *Lapointe v Lapointe*[158] while *Carter* was preferred by the British Columbia Court of Appeal.[159]

297. In *Gordon v Goetz*, the mother had been the custodial parent of the 7-year-old child of the marriage since separation in 1990. The father saw the child frequently following separation. The mother wanted to move to Australia to study orthodontics. The father applied in the alternative for custody or an injunction. The mother cross applied to vary the contact provisions of the custody order to allow the relocation.

298. There was unanimous agreement that the mother should retain custody of the child in Australia with the modification as to the terms of the father's access. But the Court was split on the appropriate test. Seven of the nine Justices rejected the *Payne* "presumptive deference" type approach. They saw the custodial parent's views on the issues of relocation as entitled to a great deal of respect, but that the issue should be decided on the basis of the overall best interests of the child, taking into account *all* relevant factors and not on the basis of any predetermined assumptions.

299. The majority opinion summarises the law that applies where the custodial parent wishes to move inside or outside Canada 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.

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157 (1995) 11 RFL (4^{th}) 432

158 [1995] 10 WWR 609.

159 See B. Perminder, *Gordon v Goertz : The Supreme Court Compounds Confusion over Custody and Access* (1998) 61 Sask L Rev 159 at 162.

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 ability of respective parents to satisfy them.

3. This inquiry is based on the finding of the Judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with the 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 and the particular circumstances of the case.[160]

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly, a judge should consider *inter alia*:

    (a) the existing custody arrangement and relationship between the child and the access parent;

    (b) the existing access arrangement and the relationship between the child and the access parent;

    (c) the desirability of maximising contact between the child and both parents;

    (d) the views of the child;

    (e) the custodial parent's reason for moving only in exceptional cases where it is relevant to the 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 upon removal from family, schools and the community he or she has come to know.

The ultimate question in every case is: "What is the best interests of the child in all the circumstances, old and as well as new?"[161] In the final analysis, the importance of the child remaining with the parent to whose custody it has become accustomed to 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.

300. Justice La Forest concurred with L'Heureux-D'ube J's minority opinion that the "presumptive deference" approach should be adopted to protect the "mobility rights" of custodial parents. Their Honours found

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160 The *Divorce Act 1985* (RSC) s16(8) provides "In making an order under this Section, the court shall take into consideration only the best interests of the child of the marriage, as determined by reference to the condition, means, needs and other circumstances of the child". The emphasis placed on the "best interests" in Canada, therefore, is arguably heavier than in Australia post the High Court decision in *AMS v AIF* which made it plain that the child's best interests was not the "only" relevant consideration or legitimate interest to be taken into account cf Kirby J at 207.

161 at 341-342 per Madame Justice McLaughlin.

that the notion of custody under the Canadian *Divorce Act* encompassed the right to choose the child's place of residence including a change of residence subject to the right of the non custodial parent to oppose. This, they said, is because the "attribution of custody" to one parent carries with it the presumption that that parent is the most suitable and able to ensure the best interests of the child, including the geographical location of their usual residence.

301. The desirability of maintaining maximum contact between child and both parents is an important factor but in the minority view the Court must also balance such considerations as the child's physical, emotional, social and economic needs in light of the quality of his or her relationship with both parents, their respective ability to look after the child's welfare and where the child is old and mature enough, his or her wishes and preferences.

302. The assessment of the child's best interests also involves a consideration of the particular role and emotional bonding the child enjoys with his or her primary caregiver. In determining the best interests of the child, the focus must be on the impact of the change of residence on the existing custody order, and the appropriate modifications to access as the case may be. The best interests of the child are rightly presumed until the contrary is shown to lie with the custodial parent. This is a rebuttable presumption of fact. In other words, the choice of residence by the primary carer and custodial parent is *prima facie* in the child's best interests.

303. The minority held that the non custodial parent bears the onus of showing that the proposed change of residence will be detrimental to the best interests of the child to the extent that custody should be varied or, exceptionally, where there is cogent evidence that the child's best interests could not, in any reasonable way, be otherwise accommodated that the child remain in the jurisdiction and the non custodial parent adduces cogent evidence that the child's relocation with the custodial parent will prejudice the child's best interests and, further, that the quality of the non custodial parent's relationship with the child is of such importance and significance to the child's best interests that prohibiting the change of residence will not cause detriment to the child that is compatible to or greater than that caused by an order to vary custody.

304. In his article *Gordon v Goertz – The Supreme Court Compounds Confusion over Custody and Access*[162] Basran Perminder argues that the minority position should be preferred over the majority view on the ground that the former relies on an undefined and unclear test for determining the best interests of the child, whereas the latter, at least, offers adequate legal test which is both clear and easily applied.

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[162] (1998) 61 Sask L Rev 159 at 165. Kirby J has also expressed the view that the "objective of the minority was understandable … (but) … the reasons of the majority is preferable": *AMS v AIF*, supra, at 209.

The United States decisions [163]

305. Appeal Courts in United States jurisdictions have recently reassessed the issue of relocation and, as in Canada, a central concern has been whether there should be a presumption against allowing a move, a presumption in favour of allowing a move, or a best interest test with no presumption [164].

306. Most of the State Supreme Courts of the United States currently adopt the approach of the Californian Supreme Court 6-1 majority decision in *Re Marriage of Burgess*[165] which held a custodial parent has a presumptive right to change children's residence which can be overcome only if the other parent demonstrated that changing custody from the relocating parent to the objecting parent "is essential or expedient for the welfare of the child" because of a detriment he or she would otherwise suffer from the relocation[166].

307. California family law resolves parental custody disputes according the child's best interests[167]. However, section 7501 of the Californian Family Code [168] expressly states that:

> *"[a] parent entitled to custody of a child has a right to change the residence of the child subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child."*

308. A series of Court of Appeal decisions pre *Burgess* had held that the general legislative policy endorsing frequent and continuing contact between a child and both of its parents and the best interests focus of section 3020 of the code had the effect of overriding the specific relocation principles in section 7501.[169]

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163 The information under this heading is mostly drawn from a long and scholarly treatment of the subject by C Bruch and J M Bowermaster, *"The Relocation of Children and Custodial Parents: Public Policy, Past and Present"* (1996) 30 *Family Law Quarterly* 245. It assisted greatly. See also: M. May, *Children on the Move: Review of relocation cases: 2001* at Annexure 1, paper delivered at the Family Court of Australia, 25th Anniversary Conference, July 2001.

164 M. Bailey, *The Right of a Non-custodial parent to an order for return of a child under the Hague Convention* (1996) 13 Canadian Journal of Family Law 287 at fn 54

165 R. Spon-Smith, *Relocation Revisited* [2004] Fam Law 191 at 196

166 (1996) 13 Cal 4th 25

167 Cal. Family Code section 3020, 3040 (West 1994)

168 This is a restatement of 19th century relocation case law[168] and the draft Civil Code of New York (1865) – "A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." The statute reflects the vital importance of stability in the primary parenting relationship over geographical proximity to both parents and the generous ambit of parental discretion in decisions affecting children and where they should live. Court interference is clearly discouraged and limited to those cases where "prejudice to the rights or welfare of the child" can be firmly established. This requires "…far more than inconvenience or harm to the non-custodial parent or a mere change to the visitation schedule or in time share patterns." See Bruch and Bowermaster, op cit., at p 255.

169 See for example *In re Marriage of Carlson* (1991) 229 Cal.App.3d 1330.

309. The majority in *Burgess* emphasised the "paramount need for continuity and stability in custodial arrangements" restored the custodial parent's presumptive right to relocate subject to the best interests principle. In delivering the leading opinion Justice Mosk said:

> *"The trial court must – and here it did – consider, among other factors, the effects of relocation on the 'best interests' of the minor children, including the health, safety and welfare of the children and the nature and amount of contact with both parents. We discern no statutory basis, however, for imposing a specific additional burden of persuasion on either parent to justify a choice of residence as a condition of custody."*[170]

310. Mr and Mrs Burgess agreed that the sole physical custody of their two pre-school aged children should be the responsibility of Mrs Burgess with legal custody to be shared and for the children to spend six days a week with Mr Burgess so long as they remain in the same community and work rosters. Mrs Burgess was later permitted by the trial court to move with the children to another community about 40 miles away to take a better paying job which meant that the regular contact the children were having with Mr Burgess was curtailed. A divided Court of Appeals reversed the decision reasoning that Mrs Burgess had not established that the move was necessary rather than merely convenient because she was able to commute. This test applied, in the majority's view, because of the detrimental impact the move had on the children's relationship with their father as a result of the drop in contact.

311. The Supreme Court overruled that decision and held that a parent seeking to relocate after dissolution of marriage is *not* required to establish that the move is "necessary" in order to be awarded physical custody of a child. Similarly, a parent who already has physical custody under an existing order:

> *"...has the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights and welfare of the child."*

312. Justice Mosk noted the "paramount need for continuity and stability in custodial arrangements" and observed that the statutory policy promoting "frequent and continuing contact with both parents" does not limit "the trial court's broad discretion to determine, in the light of *all* the circumstances, what custody arrangement serves the best interests of minor children. His Honour pointed out that the Family Code does not specify and preference for any particular form of 'contact' nor does it require either parent to justify a residential choice.

313. The same principle applies irrespective of whether the relocation question arises when residence is being decided for the first time post-separation or on a variation application on the basis of a change in circumstances.[171]

314. In rejecting the argument that the parent who wishes to change the residence of a child bears the burden of proving the move is "necessary" the court in *Burgess* noted that such a rule would encourage costs of litigation and would "require trial courts to 'micromanage' family decision making by second guessing reasons for every day decisions about career and family." Once the trial court determines that the mother

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170 *Burgess* at p 34.

171 cf. our own rule in *Rice and Asplund* (1979) FLC 78,905-6, which is to a similar effect.

is not relocating in order to frustrate the father's contact with the children but for sound 'good faith' reasons the wisdom of her decision is immaterial.[172] However, the reasons for a proposed leave may be relevant to the assessment of best interests where there is an element of bad faith or pretext.[173]

315. The *Burgess* decision was affirmed by the Supreme Court of California in *Re Marriage of Lamusga*,[174] and recently enshrined in legislation by an amendment to Family Code section 7501 which now declares that the ruling represents "the public policy and law of this State."

316. In the State of Virginia relocation matters are determined pursuant to the Virginia Code Arts 20-107.2. A final custody and visitation order cannot be changed unless there is either a change of circumstances under Arts 20-108; or proof that the child's best interests under Arts 20-1024.3 will be served by a variation or modification of existing orders.[175]

317. In all other cases, that is, where there is no final parenting order in place, relocation issues are determined according to the best interests principle. A trial judge is required to weigh the advantages and disadvantages on both sides of the issue and come up with the best interests solution. Relocation is likely to be denied where the evidence establishes that the non-custodial parent has been an active participant in the child's life both before and after separation. Although relevant, the relocating parents' best interests are not automatically equated with those of the child.

318. In *Sullivan v Sullivan*[176] the trial court allowed a residence mother to relocate with her child and new husband to South Carolina so that she could be a full-time stay at home mother and her new husband could pursue better employment prospects and be closer to his child from a previous marriage. The State Court of Appeals overturned the decision on the ground that the relocation reflected the preferences of the mother and step-father rather than the interests of the child. The move was "not necessitous" or compelled by other circumstances. Moreover, it was inconsistent with the child's best interests because it would disrupt the positive involvement and influence of the father in the child's life. The court confirmed that trial judges should not grant relocation requests unless there were identifiable benefits to the child and no substantial damage to the relationship with the non-custodial parent.

319. Demonstrable net harm is required. This is a standard significantly higher than a "best interests" or a "detriment" test.

320. Florida's counterpart to the California Family Code[177] expressly adopts a "frequent and continuing contact" policy similar to s 60B(2) of the Australian Family Law Act. In *Mize v Mize*[178] however, the Florida Supreme Court adopted a presumption that the custodial parent can relocate outside the state

172 *Burgess*, at p36, fn5.
173 cf. *Burgess* at p 36, fn 6; *Cassidy v Signoreli* (1996) 49 Cal App 4th 55 at 60-61
174 88 P.3d 81 (2004).
175 A. Worwood, op. cit at p 6222.
176 [2002] 38 VaApp 773.
177 Fla. Stat. Ann. 61.13(2)(b) West Supp 1995.
178 621 So.2d 417 (1993).

with the children without risking loss of custody even where parental responsibility for the children had been shared after divorce and notwithstanding the clear pro-contact policy of the statute.

321. The Supreme Court of Montana also interpreted its statutory provision[179] as creating a presumption that the custodial parent (including the primary physical custodian of the child in a joint legal custody situation as well as the sole physical custodian) may move out of the state with the child despite and express legislative statement without "it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage…".[180]

322. South Dakota's statutory provision is virtually identical to California's section 7501. The State Supreme Court has interpreted it as creating a presumption that the custodial parent has a right to remove the child's residence out of the state unless it is contrary to the child's best interests.

323. In *Fortin v Fortin*[181] the Court said that the removal should generally be permitted so long as the custodial parent has a good reason for living in another state and the move is consistent with the best interests of the child. The court emphasised that a new family unit consisting of the children and the custodial parent is formed after divorce and that the children's best interest is closely related to the best interest of the custodial family unit. Only in the context of what is best for this custodial family unit should changes in the nature in terms of visitation for the non-custodial parent be considered.

324. Echoing the sentiments in *Burgess*, the South Dakota Supreme Court made it plain that opportunities for a better and more comfortable lifestyle for the custodial family unit should not be sacrificed to maintain weekly visitation by the non-custodial parent where reasonable alternative visitation is available. Less frequent visits of longer duration are a reasonable alternative.

325. When they are in conflict the best interests of the children and their new family unit must prevail over a non-custodial parent's visitation privileges.

326. In 1992 the State Supreme Court of Vermont holding that it was improper to base custody orders on mother's expressions of their ultimate choice to forego the benefits of the move rather than lose custody of their child, stated[182] that its standard for resolving relocation disputes should assume that the custodial parent will relocate and ask whether the child would be better off with the custodial parent in the new location or the non-custodial parent in the old one. The non-custodial parent in that case had specifically questioned whether the mother's move could be reconciled with Vermont's statutory "frequent and continuing contact" policy.[183] The court noted the role of custodial parent had been assigned to the mother in this case at divorce and that the custodial role included deciding questions central to child rearing including where the custodial family unit would reside. The court then concluded

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179 Mont. Code Ann. 40-6-31 (1993).

180 *Lorenz v Lorenz*, 788 P.2d 328 (1990) at 331, Mont.Code Ann.40-4-222 (1993), cf, however, *in Re Marriage of Elser* 895 P.2d 619 (1995).

181 500 N.W.2d 229 (S.D. 1993) SD Codified Laws Ann 25-5-13 (1992).

182 *Lane v Schenck*, 614 A.2d 786 (1992) at 791.

183 Vt.Stat Ann ti2. 15 650 (1989).

"while the policy promoting visitation must be considered, concerns relating to it must not overshadow the proper role of the custodial parent."[184]

327. The State of Illinois authorises relocation consistently with the best interests of the child but expressly places the burden of proving that removal is in the best interests of the child or children on the relocating party.[185]

328. The New Jersey statute governing relocation relevantly provides:

> *"When the superior court has jurisdiction over the custody and maintenance of the minor children of parents divorced separated or living separated and such children are natives of this state, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order.*[186]

329. In *D'Onofrio and D'Onofrio*[187] the New Jersey Supreme Court noted that "children, after the parents divorce or separation, belong to a different family unit than they did when the parents lived together".[188] The court viewed this new family unit as consisting of the custodial parent and the children and expressed the belief that what was advantageous to this new family was also in the best interests of the children. Where geographical proximity allowed, some variation of weekly visitation had traditionally been viewed as being most consistent with maintaining the child's relationship with the non-custodial parent. But where the custodial parent could demonstrate a "real advantage" in moving their residence to a place so distant as to render weekly visitation impossible, the court should weigh specific factors to determine whether to allow the removal, such as: (1) the likelihood that the prospective move would enhance the general quality of life for both the custodial parent and the children; (2) the motive of the custodial parent in seeking to move; (3) the motive of the non-custodial parent in resisting the move; and (4) whether a realistic and reasonable visitation schedule could be arranged that could provide an adequate basis for preserving and fostering the child's relationship with the non-custodial parent.

330. The New Jersey test involves balance and a shifting burden. First, it is incumbent upon the parent seeing removal to establish that there is a "real advantage" to that parent in the move and that the move is not detrimental to the best interests of the children.[189] However, the court made clear that the advantage to the custodial parent need not be substantial. Rather, the custodial parent must demonstrate only a "sensible good faith reason to move."[190] If the custodial parent establishes this threshold requirement, the burden then shifts to the parent resisting the move to demonstrate that "a

184 614 A.2d at 789-91.
185 Ill.Ann Stat., Ch.40 para 609, Supplement to Historical and Practice Notes at 65 (Smith-Herd Supp. 1992).
186 N.J.Rev Stat Ann 9:2-2 (West 1993).
187 365 A.2d 27 (1976).
188 365 A.2d 27 at 29.
189 *Cooper v Cooper* 491 A.2d 606 (1984).
190 id at 613.

proposed alternative visitation schedule would be impossible also burdensome as to effect unreasonably and adversely his or her right to preserve his or her relationship with the child."[191]

331. Based on comments in *Weiss v Weiss*[192] relocation cases used to be decided by the New York Court of Appeals according to the so called "exceptional circumstances" standard. The typical formula involved a three step analysis. First, it had to be determined whether the proposed relocation would deprive the non-custodial parent of "regular a meaningful access to the child". If not, the custodial parent was generally allowed to move. If so, the second step applied of presumption that the move was not in the best interests of the child. To overcome the presumption and justify the move the custodial parent seeking to relocate was required to demonstrate exceptional circumstances. That burden was usually met only by showing economic necessity or health related benefits. A new marriage was usually insufficient.

332. This approach put New York significantly out of step with other states on the relocation issue.

333. The New York Court of Appeals replaced the "exceptional circumstances" requirement with a wide ranging "best interests" based approach in *Tropea v Tropea*.[193]

334. The Court indicated that the impact of the move on the relationship between the child and the non-custodial parent although still a central concern should not be given such disproportionate weight as to predetermine the outcome. The Court of Appeals emphasised that:

> *Each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child.*

335. It recognised the existence of cases where the loss of mid-week or every weekend visits may devastate and perhaps even destroy the relationship between the non-custodial parent and the child but also remarked that:

> *"There are undoubtedly many cases where less frequent but more extended visits over summers and school vacations would be equally conducive or perhaps even more conducive to the maintenance of a close parent child relationship since such extended visits give the parties the opportunity to interact in a normalised domestic setting."*[194]

336. The test reflects much greater concern for the wellbeing of custodial parents than was evident under the old standard. Although economic necessity or specific health related concerns were seen as particularly persuasive grounds for permitting proposed moves, other justifications, including the demands of a second marriage and the custodial parent's opportunity to improve his or her economic situation were also viewed as valid.

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191 ibid at 614.

192 418 N.E.2d 377 (1981).

193 665 N.E.2d 145 (1996).

194 id at *6.

337. Indeed, the court suggested that in proper cases where the custodial parent's reasons for wanting to relocate were valid, a parallel move by an involved and committed non-custodial parent might be seen as an alternative to restricting the custodial parent's mobility.

338. Finally, commenting on the balance of factors in these cases, the court remarked:

> *"Like Humpty Dumpty the family once broken by divorce cannot be put back together in precisely the same way. The relationship between the parents and children is necessarily different after a divorce and accordingly it may be unrealistic in some cases to try to preserve the non-custodial parent's accustomed close involvement in the children's every day life at the expenses of the custodial efforts to start a new life or to form a new family unit."* [195]

339. In *Taylor v Taylor* [196] the Supreme Court of Tennessee attempted to clearly enunciate the legal principles and policies for trial Courts to consider when deciding whether removal is in the child's best interests. The Court held that where there is no order restricting movement of the child from the jurisdiction the non-custodial parent bears the burden of demonstrating that removal as adverse to the best interests of the child. Where there is a prior restriction on removal the burden is instead on the custodial parent to show that removal is in the best interests of the child although this burden can be shifted by a prima facie showing of a sincere good father reason for the move and a prima facie showing that the move is consistent with the child's best interests.

340. The court's main focus, however, was to authoritatively pronounce principles and policies that give appropriate weight to a preservation of the existing custodial family unit in relocation cases: (1) custody is not subject to *de novo* review unless the petition cites reasons other than removal as grounds for a modification; (2) there is a strong presumption in favour of continuity of the original custody award; (3) the welfare of the child is affected by the welfare of the custodial parent; (4) removal of the child from the jurisdiction may require rescheduling of the non-custodial parent's visitation but is not in itself a change of circumstance sufficient to justify modification of custody; (5) courts must be sensitive to the non-custodial parent's effort to maintain his or her relationship with the child and visitation should be arranged in a manner most likely to enhance that relationship; and (6) the management of the custodial parent in making the move must not appear to be intended to defeat or deter visitation by a non-custodial parent.[197]

341. There are too many other States to discuss in detail. Overall, however, their Supreme Courts have dealt with relocation disputes in much the same way as many of those already considered and generally support the ability of custodial parents to relocate with their children whether under statute or common law. The custodial parent's decision about where the child will live is a child rearing matter that should be entitled to deference. The relationship between the child and its custodial parent is central to the child's wellbeing and many have also noted that the custodial parent's decision about where the child

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195 ibid at *7.

196 849 S.W.2d 319 (Tenn1993).

197 ibid at 332.

shall live is a child rearing matter that should be entitled to deference.[198] Restraints or custody transfers from one parent to the other are usually imposed only if the contact parent establishes, first, that the child's relocation with the custodial parent will prejudice the child's welfare and, further, that altering the child's primary custodian is likely to be less harmful for the child than the relocation.[199]

The European jurisdictions [200]

342. Separated or divorced parents who wish to relocate from France with their child(ren) require leave of the Court as do the English counterparts. The criteria is welfare-based and similar to the welfare factors taken into account in England.

343. Shared residence orders are commonplace in France with the role of each parent generally being considered to be of equal importance. However, like England, the emerging trend is for leave to be granted more often than not[201] where it is sought by the primary carer.

344. German courts determine relocation applications on the basis of the best interests of the child being the first and paramount consideration. The outcome depends on whether the proposed change has a net benefit for the child. There is no general rule or presumption in favour or against the relocating parent.

345. In Spain the child's interests are usually separately represented and the wishes of children aged 12 or over are highly influential. Both parents, whether married or not, have joint parental authority and responsibility over and for their children under the Spanish civil code. The Courts act on best interests considerations and apparently normally " . . . authorise a reasonable proposal by the mother provided that there will be generous contact between the child and the father".[202]

346. Swedish judges are prone to refuse permission to relocate a child in favour of maintaining a stable living environment and existing levels of contact with the absent parent.[203]

Analysis

347. The foregoing review shows that despite similar traditions and legislation there is a marked division in judicial thinking and difference of approach across the world in relation to the international relocation question. The way cases are disposed of reflects the nature of the application that is being made. How the problem is presented often dictates the response. In England, for example, the application is usually for leave by the primary carer, usually the mother. In Australia and New Zealand, by contrast, there is

198 C Bruch and J M Bowermaster, op cit., at 302. The forensic method apparently used throughout North America for preventing relocation is to make an order of custody conditional upon the residential parent residing in the same location as the contact parent on the basis of the assumption that the residential parent will abandon a proposed move rather than risk the loss of primary custody.

199 C Bruch and J M Bowermaster, op cit, at 303.

200 This survey of the law relating to relocation in the non common law based family courts as largely informed by two articles written by Anna Worwood, family law partner at Manches and Co. The first is *International Relocation – the Debate* [2005] Fam Law 62. The other is entitled *International Relocation of Children – Are our Courts too Mother-suited?* appearing in (2005) THE REVIEW 9.

201 A. Worwood, *International Relocation – the Debate* [2005] Fam Law 621 at 626.

202 Ibid at 627.

203 A. Worwood, *International Relocation of Children - are our courts too mother centred* –THE REVIEW 9 at 11.

often no final parenting order already in place and the relocation issue has to be determined as part and parcel of a primary parenting application by one or other parent. In Canada and the US, the issue seems to crop up most in connection with an application to vary existing custody arrangements.

348. There is a presumption in favour of relocation in the USA. The New Zealand and Canadian courts tend to resist it. In England, the child's welfare is seen as being served best by allowing mothers to choose the geographical proximity between the children and their father. This is based on the theory that a happy mother means a happy household and if the only way that can be achieved is at the expense of contact then, regrettably, that is how it must be. Thus, the trend of reported decisions both before and since *Payne* is that "…the judicial enquiry usually arrives at the same conclusion; rarely will other welfare factors outweigh the importance the reasonable decision of the carer (usually the mother) to move to another jurisdiction."[204]

349. Countries in which joint legal custody or shared parental responsibility[205] is genuinely encouraged and enforced, either as a matter of policy or by legislation, appear to favour the preservation of the status quo over disruptive or speculative relocations. The reverse is more likely where the commitment to the ideal is not as strong as other considerations.

350. Self-evidently, relocation cases inevitably come down to the contest between mobility, on the one hand, and continuity on the other. The residence parent's freedom of movement has to be reconciled somehow with contemporary notions of joint parental responsibility and contact rights. How that is done currently varies from jurisdiction to jurisdiction.

351. International uniformity is clearly preferable to divergence. The question is whether there is a consensus model for accomplishing it in a way that is (a) compatible with Australia's existing parenting laws, including the paramountcy of the best interests principle, (b) consistent with relevant public policy criteria and contemporary social values, and (c) meets community expectations and standards.

352. The so-called pro-move position of the US courts does not have much support here or elsewhere in the world. Both Kirby J in *U v U* [206] and Thorpe LJ in *Payne* [207] have expressly disavowed the notion of preferential or presumptive relocation rights for residence parents.

353. The *Payne* type approach is a pragmatic and practical solution to a difficult and often irreconcilable problem. It has the advantage of simplicity and certainty. It also has highly respected and influential judicial backers, including, for example, the enthusiastic endorsement of Kirby J in *U v U*. However, the other members of the majority were luke-warm at best. They did not fully support the emphasis on the

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204 District Judge Glenn Brasse *The Payne Threshold; Leaving the Jurisdiction* [2005] Fam Law 780 at 781.

205 The terminology varies in different countries. The *Children Act 1989* (UK) and *Family Law Act 1975* both use the term "parental responsibility" to define the rights and obligations parents have in relation to their children and to imply co-operative decision making. Married parents automatically share parental responsibility unless otherwise ordered, i.e. where consensus is impossible or impracticable.

206 at 282.

207 at 1055.

importance of a stress-free environment, indicating only that it '…is still only one of the multiplicity of considerations to be weighed in parenting cases'.

354. There are well-informed detractors too. Anna Worwood, a family law partner at Manches and Co., Solicitors, says that there has been concern for a number of years in England that too much weight is being given by the Court of Appeal to the applicant parents' wishes in international relocation cases. [208] At a Resolution[209] debate in London on 29 September 2005, seven out of ten out of an audience of 106 i.e., 73% backed the view that the courts are getting things wrong by making it too easy for separated parents - usually mothers - to gain permission to take children to live in another country.

355. As most applications in the UK are made by the primary carer or residence parent (invariably the mother[210]) the specific concern is that the reasonable proposal of the mother takes precedence over the child's relationship with the father.

356. The *Payne* conception of what is in a child's best interests in relocation cases appears to be completely at odds with the distinctly pro-contact stance of the UK courts in purely domestic cases.

357. This discrepancy is 'surely inevitably' and justified, in Alison Perry's view, by the context in which the best interests principle has to be applied. She says:

> *'To argue that 'inconsistency' of this sort is objectionable involves closing the concept of the 'welfare of the child' with more substance than is desirable. For, although one may not always agree with the court's view of what is in the child's best interests in a particular context, the attraction of the concept of the welfare principle, if it has one, beyond ensuring that the interests of the child rather than those of the parents or others are considered, lies in its ability to allow a different weight to be given to different factors, depending on the context in question.'* [211]

358. In other words, the best interests standard in the UK becomes more pliable with distance. This seems a strange argument. How can geography or distance determine what sort of personal relationship a child needs to develop and maintain with an absent parent or how much contact he or she requires to satisfy his or her best interests? The comments by both Dame Elizabeth Butler-Sloss P and Thorpe LJ on the topic in *Payne* are difficult to reconcile with those they made in *Re L (Contact: Domestic Violence) and Ors* [212] about the value of contact in a domestic setting between the child and absent parent, even in cases of serious abuse and family violence.[213]

359. In *Re L*, the court relied on the opinions of two leading psychiatrists to affirm the centrality of the child as all-important and the promotion of his or her welfare and well-being as the key issues amid the tensions

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208 *"International Relocation - The Debate"* [2005] Fam Law 621

209 Resolution is an association of over 5,000 specialist family law practitioners in the UK.

210 In fact Thorpe LJ remarked in his judgment in *Payne* that he had never himself encountered a relocation application brought by a father and, for the purposes of the judgment, assumed that relocation applications were only ever brought by maternal primary carers.

211 op. cit., at 460-461.

212 [2000] 2 FLR 334.

213 Dame Elizabeth's judgment in *Re: S (Contact: Promoting Relationship with Absent Parent)* [2004] 1 FLR 1279 (with which Thorpe LJ expressly agreed, especially at 1284-1289) should also be read against their Honours' statements in *Payne*.

surrounding adult disputes. Their Honours, rightly in my view, explain that any decision about contact should be child-centred and related to the specific child in its present circumstances.

360. Their Honours clearly acted on the basis that, unless otherwise stated, the legal and psychiatric principles of contact coincided. The functions of contact were identified by the experts as including the sharing of information and knowledge; curiosity is healthy; sense of origin and roots contribute to the personal identity which is also important as a part of self-esteem; maintaining meaningful and beneficial relationships (or forming and building up relationships which have the potential for benefiting the child); reparation of broken or problematic relationships opportunities for reality testing for the child – children need to balance reality versus fantasy and idealisation versus denigration. The benefits of contact to a father as distinct from a mother were acknowledged and set out in detail, including his importance as one of the two parents, the child's sense of identity and value, the role model provided by a male and its relevance to the child's perception of family life as an adult.

361. Contact allows a child to develop and maintain an independent relationship with other relatives including any half and step-siblings after marital breakdown and to grow up in reality rather than fantasy, to avoid feelings of blame or resentment later on in life.

362. Contact is also usually beneficial to both parents. For non-residential parents, it enables them to rebuild or repair damaged relationships with their children. For residence parents, it can relieve them of the sometimes stressful demands of the day to day care of children, especially young ones. It gives them the chance of sharing the burden as well as the joys and responsibilities of parenthood.

363. Australian Law Reform Commission and Family Law Council research shows that most children want and need contact with each parent and that their long term development, socialisation, adjustment and general well-being are advanced by having as much contact with each parent as possible. Contact is beneficial to children in providing continuity and deepening attachment, retention of genetic, cultural and gender identity, a balanced influence of both sexes and respite from the residential or dominant parent.[214]

364. Surely, from the child's point of view, their need for, and the benefits gained from, contact with *each* parent are the same regardless of the country they live in.

365. In *B and B: Family Law Reform Act 1995* [215], the Court held that s 60B principles might be decisive, in some cases not merely because of their existence but because they happen to accord with might be the best interests of particular child. Thus:

> *'Where there are no countervailing factors, the Court may normally be expected to conclude that it is in the best interests of the children to have as much contact with each parent as is practicable.'*

366. Their Honours also observed [216] that although the issue of maintaining contact becomes more acute where interstate or overseas relocation is being contemplated, the basic principles remain the same. The difference, they said:

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214 ALRC Report No. 73, *For the sake of the kids - complex contact cases and the Family Court*, 1995.

215 (1997) FLC 92-755.

'...is that the consequences are greater and the court is required to factor that in as a significant circumstance in determining the ultimate questions – whether to permit relocation and on what terms.'

367. However, as Kirby J rightly reminds us in *AMS v AIF*, the maintenance of personal relations and direct contact with each parent on a regular basis is not an absolute rule.[217] It will often be necessary to adjust contact orders to suit new residence arrangements by offering '…new and different facilities of access and contact such as longer periods of residence with the other parent during school holidays and at other times'. The 'tyranny of distance' is the limiting or prohibiting circumstance which dictates the form, frequency, duration and cost of contact. [218]

368. Admittedly, it is not always possible or realistic for non-resident parents to have the same relationship with their children as they did before separation or divorce and, in an age of electronic mediums contact, long distance alone will not present an insurmountable barrier to relocation, but it is naïve to think and misleading to suggest that just because international travel and telecommunications are now more accessible and cheaper that they are virtually the same as, or a satisfactory substitute for, regular face to face contact. An image on a screen or a voice over the phone is no substitute for a tender embrace or a firm hand when it is needed.

369. Equally, treating 'contact between child and absent parent … as an important ingredient in any welfare appraisal'[219] is arguably not enough to comply with the requirements of international law requiring Courts and all actions concerning children to regard the best interests as the primary consideration.[220]

370. The weight to be given to the child's contact rights in determining where best interests lie depends on the nature and quality of the relationship with the contact parent as much as his or her dependence on the residence parent. A strong relationship with regular contact may mean that the child's right to contact will be given great weight, while the significance of this right may recede where a poor relationship exists.

371. Another shortcoming of the *Payne* analysis, according to Robin Spon-Smith[221], is that it is based "…purely on the instinctive feeling of the judges of the Court of Appeal that, by and large, an interference with the reasonable ambitions of the residential parent and (where applicable) her new partner involves a greater risk to the welfare of the child than a serious interference with the nature, facility and frequency of the child's contact with the non-residential parent".

372. In practice, psychiatric or psychological evidence concerning the impact that permitting or disallowing relocation is likely to have on the parent/child relationship is rarely adduced by either party and what international literature there is available on the subject is equivocal.

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216 at par [7.1].

217 at 209-210.

218 *B and B: Family Law Reform Act 1995* at par [7.10], per Nicholson CJ, Fogarty and Lindenmayer JJ.

219 *Payne v Payne* [2001] 1 FLR 1052 at par [29].

220 The European Convention for the Protection of Human Rights and Fundamental Freedoms and the UN Convention on Rights of the Child, 1989.

221 *Relocation Revisited*, op cit., at 196.

373. According to Bruch and Bowermaster[222] there is no scientific substantiation of claims or assertions that maximising the non-custodial parent's time with the child is necessary to preserve that parent's influence and the child's welfare. To the contrary, research reveals the quality of the non-custodial parent's relationship with the child is not a function of duration or frequency of visits[223]. More importantly, neither increased duration nor frequency of visits has a measurable, favourable effect on the child's emotional wellbeing at least so far as anyone has been able to ascertain thus far[224]. A negative has, however, been clearly established. There is a broad consensus, for example, that "…the central importance of the primary relationship has been convincingly demonstrated while no similar support has been found for the visiting (contact) relationship."

374. Bruch and Bowermaster contend that[225] even if it was to be assumed that contact is *vital* to a child's wellbeing it is not determinative of best interests in relocation cases. A move often changes the child's contact with *both* parents but, the authors contend, 'a net detriment to the child's best interests results only if at least two conditions are met: (1) advantages to the child stemming from the move, however great, are insufficient to offset the decreased influence of the non-custodial parent, and (2) prohibiting the proposed relocation will not cause comparable or greater detriment to the child'.

375. If residence is reversed because the original primary carer takes the unusual stance of preferring her own interests over retaining residence, there will be, they say, a concomitant and drastic reduction in contact between the child and the relocating parent. The impact of this on the child is highly relevant when weighing up the so called 'custody transfer' option against permitting relocation, especially, having regard to the child's right to be cared for and have regular contact with *both* parents. Moreover:

> *In the context of relocation, the child will rarely be endangered in any demonstrable significant fashion and equally rarely will removal from the primary care giver's care alleviate the perceived dangers. Rather a change in custody will inevitably replace the harm of increased distance from the non-custodial parent with increased distance from custodial parent – usually an even more harmful result.*[226]

376. However, new research casts doubt on the central importance of preserving the primary relationship at all costs and suggests that the assumptions underlying the *Payne* approach may not be as sound as many believe.

377. The results of a recent study of 600 sons and daughters of divorced parents attending the same American university designed to elicit the effect of relocation on the respondents and their relationship

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222 op. cit. at 262.

223 *See eg Judith S Wallersetin, Children of Divorce: Report of a 10 year follow up of early latency-aged children* 57 AMER.J orthopsychiat *199, 208 (1987)*.

224 *See eg. Judith S Wallerstein and Shauna B Corbin Daughters of Divorce: Report of a 10 year follow up*, 59 AMER.J orthopsychiat *593, 601 (1989)*.

225 op cit at 260.

226 C Brusch and J M Bowermaster op. cit., at 269

with each of their parents are contained in an article published in the American psychological association's journal in 2003.[227] They are summarised by Spon-Smith as follows [228]:

> *'As compared with divorced families in which neither parent moved, students from families in which one parent moved received less financial support from their parents (even after correcting for the differences in the current financial conditions of the groups), worried more about that support, felt more hostility in their interpersonal relations, suffered more distress related to their parents' divorce, perceived their parents less favourably as sources of emotional support and as role models, believed the quality of their parents' relations with each other to be worse, and rated themselves less favourably on their general physical health, their general life satisfaction, and their personal and emotional adjustment…In some cases, the differences although significant, are relatively modest. But in other cases they seem substantial.'*

378. Acknowledging that their data cannot conclusively establish that moves cause children substantial harm, the scientists conclude, however, that there is no empirical justification for a legal assumption that a move by a custodial parent to a destination she (it is usually the mother) plausibly believes will improve her life will necessarily confer benefits on the children she takes with her.

379. The researchers infer that the most likely explanation for the data is that both moving per se tends to be harmful to children and families with characteristics that are harmful for children also tend to move.

380. Another article referred to by Spon-Smith[229] discusses the relocation of young children and custodial parents from a child development and parent/child relationship perspective. The respected authors suggest that:

> *'Especially where young children are involved, decision makers need to be familiar with research on the formation and maintenance over time of parent-child relationships and on the consequences of disrupting important attachment relationships."*

381. They add that:

> *'Unfortunately, as recommending or deciding custody and visitation awards often do not appear to understand what sort of interaction is needed to consolidate and maintain child-parent relationships and as a result their decisions seldom ensure either sufficient amounts of time or adequate distributions of that time (overnight and across both school and non-school days) to promote health parent-child relationships.'* [230]

382. These results tend to undermine the theory inherent in both the US and UK approaches viz., that children benefit from moving whenever and wherever their residential parent decides. The starting point in both countries seems to be based on the dubious belief that most moves, even distant ones, do not usually involve sufficient harm to warrant judicial intervention or interference with parental responsibility.

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227 S.L. Braver et al, *'Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations'* (2003) 17(2) Journal of Family Psychology 206.

228 [2004] Fam Law 191 at 197.

229 op cit at 196.

230 JB Kelly and ME Lamb *'Developmental Issues in Relocation Cases Involving Young Children, when, whether and how?'* 2003 17(2) Journal of Family Psychology at 193.

383. Susan Melton Hill - a proponent of the *Payne* approach - recently put forward a set of guidelines (which she admits would benefit from further enhancement) to assist practitioners and judges in Australia resolve international relocation cases, especially finely balanced ones, and to achieve the conformity in international family law advocated by Thorpe LJ and Kirby [231] :

1. The benefits that children derive from the primary caregiver are recognised to be of paramount importance to their development and well being.

2. An application by the primary caregiver to relocate should be afforded great weight where such request is well grounded and reasonable.

3. If there is evidence that the motive for a relocation application is to remove or reduce the influence of the other parent in the child's development, such application should not be favourably considered.

4. In granting an application to relocate, where this makes contact with the other parent more difficult, this should receive particular attention when setting the conditions.

5. When allowing a relocation, special attention should be given to improving the quality of contact between the other parent and the child, and the mechanisms for facilitating this contact.

6. In considering applications to move, especially to overseas locations, careful consideration should be given to the nature and frequency of past contact between the child and the other parent.

7. Where there is evidence that past contact has been actively pursued by the other parent, and positively received by the child, Courts should give considerable weight to the impact on this relationship of any proposed overseas relocation. In the event that such relocation is approved, the conditions set should reflect these considerations.

8. Alternatively, where a relocation to an overseas destination is requested and there is little evidence of past meaningful contact between the other parent and the child, such applications should be more favourably considered.[232]

384. The problem with these propositions, however, is that while paying lip service to the paramountcy principle, they completely ignore s 61C, overemphasise the role of the primary carer and appear to underrate the importance of regular and meaningful contact. They also (wrongly, in my opinion) assume that there are adequate "mechanisms" for replacing or substituting frequent and direct contact between the stay-put non-resident parent and his or her relocating child without reducing the "quality" of the time

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231 *The Tyranny of Distance : International Relocation Re-examined* (2005) 18 Australian Family Lawyer 5 at 11.

232 A somewhat surprising omission from the Melton-Hill list – also missing from the combined statement of factors of both Dame Elizabeth Butler-Sloss P and Thorpe LJ in *Payne* – is any reference to the wishes and views of the child.

they get to spent together under the new set of arrangements or substantially weakening the emotional attachment that has grown up between them through a lifetime of close personal proximity.

385. Even in England the strength of the relationship between the non resident parent and a child has tilted the balance in favour of the status quo. In *Re C (Leave to Remove from Jurisdiction)*[233],for example, the mother of a six-year-old wished to join her husband in Singapore where he practised as a doctor. The father enjoyed contact every third weekend and shared the school holidays. Although the mother's relocation proposal was a reasonable one, and refusal would have meant forcing her to remain in England, the benefits of the move were found to be outweighed by the greater harm flowing from the severe reduction in the father's contact.[234]

386. While the *Payne* formula has the virtue of protecting residence mothers (and indirectly the children in their care) from the potentially damaging impact of restricting their movement on their psychological welfare, it tends to discriminate against fathers and jeopardises the emotional development of children by destroying or diminishing their relationship with the non-residence parent.

387. This feature of the *Payne* prescription runs counter to the unashamedly pro-contact stance that has characterised and distinguished Australian family jurisprudence in the decade since the enactment of the *Family Law Reform Act 1995*. Its other major disadvantage is that it under-emphasises the central importance of shared parental responsibility and appears to under-rate the significance of the benefits to children of having two parents - a father and a mother - playing different but active and equally significant roles in their lives.

388. The Australian version of the paramountcy principle is child not parent focused. The wants, needs and well-being of the children should override those of the parents. Equating the happiness and contentment of residence mothers with the rights and needs of the children, as *Payne* essentially does, is likely in many cases to contravene s 65E by obscuring or overshadowing the child's best interests, by-passing the provisions of s 61C by making co-operative parenting impossible in any practical sense, and ignoring the main object stated in s 60B. Accordingly, like their New Zealand and Canadian counterparts, the courts exercising the family jurisdiction in this country should, in my view, take (or continue taking) the wide, all factor, child-centred approach emphatically and unanimously endorsed in *B and B: Family Law Reform Act, 1995*. This is the only way of ensuring that the best interests of the child(ren) truly is treated as the paramount consideration in every case.

389. But as Kay J pointed out in his paper *International Relocation through the Prism of the Rights of the Child* [235], there remains a high degree of confusion about how to properly balance these multitude of

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233 [2000] 2 FLR 457.

234 District Judge Glenn Brasse *The Payne Threshhold : Leaving the Jurisdiction* [2005] Fam Law 780 at 782 and cf *Re H (Application to Remove from Jurisdiction)* [1998] 1 FLR 848 where a move by the mother to America to be with her new husband was allowed despite exceptionally high levels of prior involvement by the father of his five-year-old daughter.

235 Delivered at the 4th International Congress on Family Law and Children's Rights, Cape Town, South Africa, 20 - 23 March 2005.

factors against each other and maintain rigorous intellectual honesty in this vexing area of discretionary decision making.

390. So then, what are the forensic rules and procedure for properly determining a Part VII application involving a proposal to take a child from Australia? In my judgment they are as follows:

The governing principles

- It is not for the court to decide where a residence parent can or should live: that decision is to be made by the parent concerned.[236] Freedom of movement and the right of adults to decide where they live are highly important social values which are not to be interfered with lightly, especially where the relocating parent is the established and unchallenged primary carer of the children, and has a proven record of meeting their needs and his or her responsibility in performing that role.

  However, parents enjoy only as much freedom as is consonant with the obligations they have in relation to their children and international mobility and (where applicable) the right of a woman having the role of primary carer to equal treatment without discrimination before the law under international instruments or their legitimate interest in improving their generally poor economic and social position following separation and divorce do not take precedence over the best interests of the child. Accordingly, parenting orders may contain conditions affecting where a residence parent may live if the paramountcy principle requires it.[237]

- Neither party to an application has to show compelling or valid reasons for or against moving.[238] But the proposing party must present his or her case with a focus on the impact such a move might have on the interests of the child.[239]

- Each case turns on the applicable legislation and its own unique facts. The real issue is - should the child live with the relocating parent in his or her new location or with the other parent in theirs? Or, to put it another way, the essential inquiry is not who and then where, nor, conversely, where and with whom? Rather, it is who in the light of where but regardless of whether it is here or there.

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236 *AMS v AIF* per Hayne J at 231.

237 *B and B: Law Reform Act 1995* at 84,197.

238 As Bruch and Bowermaster point out:

> *'Just as people marry divorce attend school or change jobs for reasons that others might question, they may choose to move for idiosyncratic reasons. From the child's perspective the question remains the same: if the parents are to live further apart with which of them should the child spend most of its time? Just as the question remains the same so does the answer: the child should reside with the person who has been providing its primary case unless for demonstrable reasons, its welfare will be harmed so substantially that a custody transfer is required."* op. cit., at p 264.

239 cf. the comments of the Full Court in *A v A: Relocation Approach* about the comments made by Kirby in *AMS v AIF* in his seventh principle (at 208).

The bests interests of the child(ren) concerned, both in the short and longer term, and not the interests or needs of the parents (let alone the interests of either one of them) are the paramount consideration.[240] However, they are not the sole factor. The general quality of life and economic, cultural and psychological welfare of both parents, but particularly the residence parent, are relevant and important[241]. Nonetheless, the child's best interests have statutory priority and prevail over the legitimate rights, interests and expectations of all others, including the parents, in the event of conflict.

A child's best interests are ascertained by reference to the matters in s 68F(2). Paragraph (l) extends the inquiry beyond the confines of the specified matters. A matter not expressly mentioned may nonetheless be important or even decisive in a particular case including, for instance, the child's happiness and contentment. In *K and Z* [242] the Full Court of the Family Court of Australia pointed out that, in practical terms, this means that:

> *'If both parents offer reasonable homes for a child with comparable standards of excellent child care, then the child's level of contentment and happiness in one household as compared with that in the other's, must become a most significant and almost determinative factor, in deciding with which parent the child should live. The Court should avoid the spectre of placing or leaving a child in a situation of sadness and continued unhappiness where it is able to do so consistently with otherwise meeting the best interests criteria [sic].'*

Other relevant circumstances under this head, of course, include the legitimate rights and interests of the parents, including the freedom of movement and their statutory and moral obligations to share parental responsibility under s 61C.

- Neither the principles in s 60B or the provisions in s 61C lay down absolute rules in relation to the rights of children to maintain personal relations and 'direct' contact with 'both' parents.[243] Account should be taken of the anomalous effects that enforcing this right can often (but now always) have on women. Nonetheless, the strength of the statutory presumption in favour of shared parental responsibility or the weight to be accorded to the object and principles in s 60B should not be underestimated. Section 61C is a key means of achieving the s 60B object. Thus, except to the extent that it would be contrary to a particular child's best interests or welfare, children have a right and are assumed to benefit from being cared for by and having as much regular contact as is practicable with each of their parents and significant others, especially grandparents and siblings.

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240 s 65E of the Act.

241 *U v U* (2002) FLC 93-112 per Kirby J at 89,101.

242 (1997) FLC 92-783.

243 This much is clear *AMS v AIF* at 206. Moreover, s 60B(2)(b) does not even use the word 'direct' in relation to contact. cf par (d) of s 68F(2), however, which does.

While it is true that the paramountcy principle cannot be applied in a vacuum or 'viewed in the abstract separated from the circumstances of the parent with whom the child resides' or is to reside,[244] the 'best interests' test in Australia is not quite the same as the English 'welfare' standard. Nor is it as flexible and pragmatic as its English counterpart appears to be. Unlike the position in England, the wants, needs and well-being of the primary carer or resident parent are not to be given a priori benefit at the expense of a continuing relationship and regular contact with both parents. Nor does it tolerate the inconsistency between the importance of contact in purely domestic settings compared with the apparent willingness to accept drastic reductions or, in many cases, the complete loss of contact in the context of applications by residence parents to leave the jurisdiction.

It is simply not possible in a practical sense for a non-residence parent living on the other side of the world to discharge his or her s 61C parental responsibility in the way envisaged by the law or to achieve the objects of s 60B(1) [245] or to satisfy any of the principles underlying them. Kirby J apparently recognised this in *AMS v AIF* [246] when he alluded to the courts' discretionary power to depart - where necessary - from the "modern norm" of

shared parental responsibility in relocation cases.[247] The exercise of the discretion, however, has to be consistent with the paramountcy principle and the fundamental objects of Australian family law which, among other things, is to ensure that separated parents fulfil their parental responsibility cooperatively and shoulder their fair share of the burden of bringing up

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244 *AMS v AIF* (1999) 199 CLR 160 per Kirby J at 208-9.

245 Although parental responsibility for an Australian born child continues to apply despite a change in his or her habitual residence, its exercise is governed by the law applying in the country of the new habitual residence - in this case New Zealand. See : s 111 CS(5)(a) and (c), *Family Law Act*, 1975.

246 at 210-211.

247 The provisions of the new *Family Law Amendment (Shared Parental Responsibility) Bill 2005*, which was tabled in the House of Representatives on 17 December 2005, are worth mentioning in this context :

The proposed changes are likely to become law when parliament resumes next month. They include compelling the Family Court to consider whether children embroiled in parenting disputes should spend equal time with both their mother and father. And there will be a presumption that parents will have equal responsibility for rearing their children.

The Bill introduces, for example, s 68F(2)(ba) – the so-called 'friendly parent' criterion – to the effect that the court must consider '[t]he willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent'. Section 61DA(1) of the Bill will require this court to apply a rebuttable presumption when making a parenting order that it is in the best interests of the child for his or her parents to have joint parental responsibility. While the presumption does not apply where there are contra indicators, such as family violence or abuse, it would have the practical effect of making separated parents to make joint decisions about major long term issues in relation to their children, including the location of the residence in which the child usually lives. Moreover, s 65DAA provides that the court must consider making an order that the child spend substantial time with each parent with joint parental responsibility where both wish to spend substantial time with the child and it is reasonably practicable for this to occur.

the children they helped bring into the world. Admittedly, a degree of common sense must be brought to bear in such cases. So too must the realities of separation or divorce. The nature and strength of the pre-separation relationship between a child and his or her non-resident parent cannot be preserved like apricots in a jar. As the Full Court pointed out in *B and B: Law Reform Act 1995*, relocations are sometimes unavoidable or desirable for a range of reasons, including economic, employment, lifestyle or remarriage. It is a growing feature of contemporary Australian life. And there is no universal rule requiring the residence parent (usually the mother) to reside in close geographical proximity to the contact parent (usually the father) for the purpose of facilitating direct regular contact.

However, appropriate recognition needs to be given to the fact that migration overseas will change the way in which parents share in their children's lives as a result.[248] The ability of a child to adjust and learn to cope with sole parenting does not mean that it is in his or her overall best interests to impose it by granting a relocation request.

Nonetheless, rigidity or preconception as to the relative importance of s 60B and s 61C is just as incompatible with individual justice as attaching to higher importance to freedom of movement and the right of adults to decide where they will live.

The child's right to contact and the parent's right to freedom of movement may not necessarily be at odds. The s 60B rights and the idea of post-separation parental responsibility in s 61C are capable of being (but will not always be) upheld otherwise than via frequent face to face contact.

Alternative arrangements, including the possibility of the contact parent relocating, should therefore be seriously considered. The essential question in relation to both comes down to whether, in the light of the practical consequences of a fundamental change in the nature and overall reduction in the quantum and quality of contact with the non-residence parent, the proposal advanced by the relocating parent for substituted parenting arrangements and contact is acceptable or not having regard to the policy of the Act and the child's best interests, especially his or her ongoing emotional and developmental needs. There is no objection in principle, as acknowledged by Gaudron J in *U v U,* to a finding that frequent contact with both parents was more important than any other best interest consideration. It all depends on the factual context and result of the evaluation process.

- There is no room for any gender based assumption about whose parental care will best serve the welfare of the child.

  The suggested 'preferred' role of the mother has long been rejected as a norm in family law proceedings but it nonetheless remains a relevant factor, especially when, as here, young

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248 cf . *D & SV* (2003) FLC 93-137 at 78,282

children are involved.[249] Nor is the established pattern of residence and contact that has been built up to the date of hearing (the so-called status quo) of any special advantage to the father. It is, at best, a factor of "variable quality".[250] An applicant has no onus of showing that there is a positive benefit in disturbing or displacing it. Nonetheless, the continuity of existing relationships, surroundings and other influence are obviously material to the children's future development.

- Similarly, while none of the paragraphs in s 68F(2) expressly refers to the question of which parent had most immediate pre-separation care of the child, a number of them give implied support to an approach which prefers the primary caregiver in determining residence (including relocation) cases, viz., par (b) (the nature of the relationship between the child and each parent), (c) (the effects of change), and (l) (any relevant fact or circumstances).[251]

  All this really means, of course, is that the removal of children from the person who has otherwise been their full-time day to day carer for most of their lives should only be done for a good reason, such as, for example, where the main carer is not a fit parent or is acting contrary to their best interests.

- The differences between the circumstances and needs of women and men should be taken into account so that both are treated equally and fairly[252]. A mother's desire to relocate equates to a father's desire not to. Thus, where a mother, who is the resident parent, wishes to relocate with a child, and where the court considers the child would benefit from contact with both parents, equal consideration should be given to a proposal that the father, in order to maintain frequent and regular contact, relocate with them and his reasons for not wanting to do so should be examined.

The correct approach

- In each case, the court must consider what parenting orders, if any, to make in order to promote the best interests of the child. It is not limited to choosing between the proposals put up by the parties but is bound to identify or, if necessary, devise a set of residence/contact arrangements that properly provides for the needs, adequately protects, and otherwise accords with the best interests of the child and promotes the objects and principles in s 60B[253] and the provisions of s 61C. However, due account must be taken of the fact that the proceedings are conducted in a framework of adversarial procedure familiar to the common law. A trial judge must afford the parties procedural fairness by indicating and inviting comment on changes to their own proposals he or she may contemplate. The importance of a

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249 cf. *Gronow and Gronow* (1979) 144 CLR 513.

250 *Mathieson and Mathieson* (1977) FLC 90-230 at 76,222 per Fogarty J.

251 Parker S, Parkinson P and Behrens J, *Australian Family Law in Context – Commentary and Materials*, 2nd ed., LBC Information Services, 199 at p 907.

252 This was recognised by Gaudron, Kirby and Hayne JJ in *U v U*.

253 *U v U* (2002) 211 CLR 238.

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

- When considering the need to maintain stability it is important to bear in mind the geographical location may be as much a part of a child's stability as is the household. The first question a judge should ask should be, "What is the likely effect on the child of being removed from his or her current environment?" rather than, "Is the mother's application genuine or realistic?"[254]. An assumption (which is not based on expert evidence) that a child's psychological and emotional health as well as his or her developmental adjustment and socialisation depends on the quality, health and strength of the primary relationship with the residence parent but not with the absent parent and is not affected by the pattern, frequency or length of contact is dubious and may even be dangerous. It may also be contrary to the object and underlying principles stated in the Act. An applicant relying on this sort of argument would ordinarily be expected to adduce clear evidence as to what likely emotional consequences of refusal for both him or herself, the child and, where applicable, others who might be affected eg. a new spouse.

- The parties competing proposals must be compared and contrasted with a view to deciding which of them best promotes the overall interest of the child concerned. Dissecting the issue into two discrete questions obscures the real issue which is, of course, should the child live with the relocating parent in the proposed location or with the other parent in their proposed location? The evaluation of the competing proposals must weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child's best interests.

- A basic question is: where does the residence parent intend to live? This affects what level of contact the child can have with the other and enables the benefits and detriments for and to the child on each proposal to be compared and contrasted.

- The Court is not obliged in every case to adhere strictly to the three discrete steps referred to by the Full Court in *A and A: Relocation Approach*. There is no legislative requirement for a judge to spell out in each case exactly the findings about each sub-section in s 68F(2) nor the weight to be given to such findings. However, adequate reasons must be given for material decisions and findings and the process of reasoning should be transparent. Only the factors relevant to the particular circumstances of the case need to be considered and determined.

- The motive for relocating is a relevant consideration but once it becomes apparent that such a move is bona fide, the only other basis on which it may be appropriate to examine the reasons

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254 cf. Anna Worwood, *International Relocation of Children - Are our Courts too Mother Centred?*, THE REVIEW at 11.

for the move would be to ascertain the likely effect upon the residence parent and/or the child if the move is unable to take place. The relocating parent should not be required to justify her proposal to move any more than the other should be asked to justify the decision to stay put. However, a brief investigation of the bona fides of the application is necessary in applying the paramountcy principle and ensuring that resident parents do not misuse relocation as a means of frustrating contact.

The relevant considerations

391. Matters commonly arising for consideration in relocation cases, in addition to the bona fides of the application[255], include[256]:

- the primary parent's freedom of movement and his or her prima facie right to choose where to live;
- the effect on the child, both positive and negative, of the proposed relocation and of restricting the residence parent's movements. The residence parent's emotional health and the extent to which his or her parenting capacity or even happiness is likely to be affected by the outcome. [257] A very important aspect of a child's best interests is to live in a happy, stress free home environment. This may significantly be impacted upon if the residence parent is required to live in circumstances or under conditions which tend to diminish his or her long term future in either an economic or social sense. Obvious negatives for children living with a relocating parent include disruption to schooling and sporting activities, loss of established friends and close neighbourhood ties, plus reduced contact with the other parent and perhaps members of the extended family on both sides;
- whether undue interference by the court with the way of life the resident parent legitimately proposes to adopt will give rise to frustration and bitterness to the detriment of the child or children; [258]
- the desirability of maximising contact between the child and both parents;
- whether the relationship with contact parent can still be maintained at a good and functional level;
- the importance to the children remaining with the residence parent in relocated circumstances has to be weighed against the consequences of change to the children's environment, and more particularly against any loss of or reduction in contact with the contact parent, having regard to the degree and quality of the existing relationship with both parents and the contact history. The opportunities for continuing contact between the child and the parent left behind

255 It is important to note, however, that the genuineness or validity of the relocating parent's reasons has limited significance in light of the High Court's 1999 decision in *AMS v AIF*.

256 The list, of course, is not exhaustive.

257 *Craven and Craven* (1976) FLC 90-049 at 75,042.

258 *Fragomeli and Fragomeli* (1993) FLC 92-393 at 80,023.

may be very significant, including the feasibility and costs of travel and alternative forms of contact;

- the distance and permanency of the proposed change;
- the age and views of the child(ren);
- the need to remove conflict or tension between the parents and one or other of their new partners;
- the emotional economic and family benefits attainable in the new environment including access to extended family members and relatives;
- the attitude of the contact parent and underlying reasons; and
- the extent to which a relocating residence mother is dependent on social security or a former spouse; [259]

392. Factors telling against court-sanctioned migration of children of separated parents seem to be:

- the importance of the relationship with the contact parent and the effect relocation is likely to have on it in the short and long term;
- the need for a settled environment and the minimisation of disruption;
- opposition from the child(ren); and
- the uncertainty of a new environment.

393. Where there is a real dispute as to which parent should be granted a residence order, and the decision as to which parent is the more suitable is finely balanced, the future plans of each parent for the child are considerably more relevant than they might otherwise be.

394. Even in the UK, the inadequacy of the proposed plans rather than the need to keep in touch with the other parent may result in leave being withheld. Lack of a job or adequate finances, inappropriate accommodation, inadequate arrangements for schooling, doubts as to the motivation for leaving or the suitability of the custodial parent appear to be the main reasons for refusal. Other possible reasons might be special needs of the child unavailable in the proposed country, the genuine opposition of the child concerned, or perhaps an unusually close relationship with the other parent which might lead to a change of primary carer by a change of residence order.

The present application

395. All that remains to be done is for me to grasp the nettle and decide the quandary thrown up by the rival proposals in this case in accordance with the principles, approach and considerations identified above.

396. Needless to say, I have found this a difficult case to decide. But in the end have concluded that the children's best interests would be served by preserving the status quo. My reasons are :

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259 *I and I* (1995) FLC 92-604 at 82,028.

(a) The mother was the primary carer prior to separation and has acted as interim resident parent since then. No-one criticises her performance in either role. There is no doubt in my mind that the mother should retain those mantles. She is the more experienced, capable and available parent. She is best placed to meet the children's physical, emotional and other needs on a day to day basis. The father does not seriously contend otherwise. What he does say is that it would be better for the children if they stayed in Brisbane. I agree.

(b) Staying in Brisbane is most likely, in my opinion, to achieve the object in s 60B and secure the children's best interests, including their right and need to be effectively fathered as well as mothered. They are living in a safe, secure, settled and stable situation where they are. The evidence does not disclose any overall advantage in disturbing it. Thus, the mother's alternative proposal is more consistent with the children's welfare than either of the father's.

(c) This is a case where the mobility rights of the primary carer and most suitable residence parent can and should yield to the best interests of the children. Altering their present living environment (either by sending them to their father's place in Brisbane or to somewhere on the other side of the Tasman) at this stage of their development would be likely to disadvantage the children more than benefit them. The children need a father figure and adult male role-model in their lives. The father is the best and, possibly only, one available to fill that role. It would jeopardise the relationship they currently have with their father because it does not provide for enough contact which, to my mind, they need and deserve to meet their relevant emotional and developmental needs. Relocation also has the distinct disadvantage of seriously limiting the father's capacity to shoulder his fair share of the burden of parental responsibility.

(d) The children are well established in their neighbourhood, school and sporting activities. And, while they would probably adjust to a move to New Zealand, nothing was filed by the mother from the school she intends to send them to so as to allow me to compare and contrast what it offers with what the children are currently receiving. Moreover, the accommodation available to the mother is only temporary at best and no evidence was adduced about its standard or condition, its proximity to transport, sporting venues and other amenities, shops, schools, child-care facilities, the paternal grandparents, the sports academy or the mother's relatives.

(e) Although the mother complains about being financially dependent on the father, there is evidence suggesting that she could easily increase the number of hours she currently works. She could also apply for permanent residence in Australia, which in the likely event of success would, after a two year waiting period, entitle her to Centrelink and other payments.

In any case, I am not convinced that she would be any more economically independent or financially better off living in New Zealand than she would be in Brisbane. The job offer with the sports academy is a short-term one and involves longer working hours for about the same or perhaps slightly less than what she currently receives from all sources of income.

It would mean that she would be unavailable for the children during all of their 2006 school holidays and may involve more school term child-care than they are used to at the moment.

This is a substantial factor because both parents obviously place considerable value on the current level of the children's access to the mother after school and on non-school days, especially with their demanding extra-curricular and sporting schedules.

(f) The older boy, TE, is strongly opposed to the move. While only eleven, his stance is a material consideration. The court counsellor reports at par 27 that TE "…indicated that he is pretty happy with the current resident and contact arrangements" and at par 28 is "…now…very happy and settled here".

He views Brisbane as his home and believes that he has better friends here in Australia than in New Zealand. When asked if he would like to return to New Zealand to live some day, his answer was *a resounding no*.

TE informed the court counsellor (par 31) that if his mother moved back to New Zealand he would want to live with his father here in Brisbane and visit his mother. He indicated that he would not be happy about returning to New Zealand at all.

TA, who was able to recall moving to Australia, reported that she missed her cousins and parental grandparents and reflected that if she had to move back to New Zealand she would be "sad and happy".

E chose not to answer any of the counsellor's questions.

(g) The court counsellor recommends against relocation as contrary to the children's best short and long term interests. I was impressed with her approach to this dilemma. It is evident that in reaching her final recommendation she took into account the potential long term effect that thwarting the mother's personal and professional aspirations underlying her wish to return to New Zealand may have on her capacity in the longer term to emotionally support her children to the same extent and standard as she has up until now.

The court counsellor noted, however, at par 39, the mother has demonstrated that despite the emotional upheavals resulting from family breakdown and, more recently, the father's re-partnering, she has met her parental responsibilities in an exemplary way and carved out a new life for herself in Brisbane. She regularly attends gym and is, as I have already said, closely involved in the children's school and other activities.

I assess the mother, as does the court counsellor, to be a resilient woman who is capable and resourceful enough to make the best of her situation, whatever the outcome of these proceedings is, and to always act in the children's best interests. I am satisfied, having seen the mother, that she has the strength of character and personal assets needed to provide adequately for her children wherever she is. What she cannot do in New Zealand or anywhere else, for that matter, is father them.

The issue that concerns the court counsellor most is TE's reaction to relocation. She describes his conviction to remaining her in Australia, and more specifically Brisbane, as a strong one. She says that the boy is "…of an age where peer relationships begin to become very important" and during the interviews TE indicated that he has developed a significant attachment to his peers and indeed the social and sporting activities he shares with them. Adding to this the significant attachment to his father and their mutual love of sport, the court counsellor predicted that TE "…will react in a strong negative manner" if he is forced to relocate with his mother.

As the eldest child, TE would play a pivotal role in the mother's relocated household. The girls are considerably younger than him and the report writer noted that he demonstrated a strong sense of protectiveness towards them and "good age appropriate insight in regard to the family dynamic".

Any conflict between the interests of a parent and those of a child has to be resolved in favour of the child. The mother's happiness is a relevant factor but so, too, is TE's. One should not be traded for the other.

(h) There was no psychological evidence adduced by the mother on the question of the effect that refusal of the application is likely to have on the mother's emotional stability and parenting capacity. This is regrettable because it requires me to speculate on a crucial matter. I found her own evidence on the issue was more convenient than convincing. I am sure that the mother would be happier and more contented in New Zealand. For how long I cannot say. But I am not satisfied that she would be overly unhappy or inordinately stressed in Australia.

There is no reason to think that her reaction to my decision will be so extreme as to have detrimental effects on the children's emotional and psychological stability and security.

Any adverse response by the mother is likely to be short-lived. Because of her own insight into her children's needs and through self-discipline, she would no doubt do her best to keep her feelings to herself and take the necessary steps to avoid burdening the children with them.

(i) I am completely satisfied that the mother would continue to promote the children's relationship with their father as best she can through all available means of direct and indirect contact if she resided in New Zealand.

However, regular physical contact wherever it takes place is going to be expensive. The mother is willing to bear equal cost but does not have the same means as the father. The financial burden on her would be disproportionately greater. While this can be ameliorated by appropriate orders, the mother's contribution to air travel, whether precisely equal or not, is still going to be a significant recurrent expense for a household of limited and uncertain means.

(j) Another practical difficulty which will substantially affect the children's right to maintain personal relations and have direct contact on a regular basis with their father is his entitlement to only four weeks annual leave. This means that unless he can purchase more leave the father will be available to have face to face contact with the children for 4 out of 52 weeks a year. This is much less, both in terms of frequency and duration, than what they are used to getting and the family reporter expresses the unqualified opinion at par 41 that this is insufficient time to enable the girls to maintain a significant attachment to their father. The court counsellor believes that eight weeks would be the minimum amount of contact required for E and TA to maintain a significant attachment to their father having regard to their cognitive and emotional development and the strength of the existing bond between them.

This court is unapologetically pro-contact. The Family Law Act places heavy emphasis on the children's right and need to have regular contact with both parents. It also views parental responsibility as a shared, if not joint, obligation. These considerations need to be given real and not merely token weight. They are not empty aspirations. Realistically, pre-teenage children cannot maintain a meaningful relationship with the absent parent and parents cannot adequately fulfil his or her duties and properly meet the responsibilities concerning the care, welfare and development of their children, without spending substantial periods of time with them on a regular basis. The mother's proposal for less frequent but longer periods in the event of relocation is a poor substitute for the existing position for these particular children at this stage of their lives.

Accordingly, notwithstanding the mother's best intentions and efforts, relocation at this stage of the children's development is probably going to needlessly weaken and ultimately, perhaps, destroy the father - child bond.

The father has been an active participant and constant influence in the children's lives before and after separation. Their close relationship is a significant factor against relocation at this stage of their development. In different ways the children's emotional stability and overall wellbeing is as dependent on maintaining this relationship as it is on their attachment to their mother.

(k) The mother placed particular reliance on s 68F(2)(f) in her bid to relocate. She says that both she and the children are culturally isolated in Australia and that the children's need to maintain a connection with the lifestyle, culture and traditions of their ethnic culture is not being fulfilled in Australia.

This is undoubtedly true. However, technically speaking, the terms of par (2)(f) refer only to the Aboriginal and Torres Strait Islander cultures and do not expressly cover other races. However, I readily accept that the cultural background and other characteristics are relevant under par (2)(l).

Children of any indigenous origin have a right to enjoy their own culture. They have a right to maintain a connection with the traditions of their peoples and learn about their ancestors and other aspects of their heritage. This includes strengthening links with extended family members and having the support, opportunity and encouragement necessary to fully explore and develop a positive appreciation of their cultural heritage with other people who share that culture.

However, as Counsel for the father pointed out, neither parent placed particular importance on cultural issues in the four years they have spent in Queensland. The children were not exposed to any culturally significant experiences in Queensland when, presumably, there was an opportunity. There have been no attempts, for instance, by the mother to integrate the children into local ethnic communities or ceremonies.

(l) The parents share the same ambitions and have similar aspirations for the children. They share close and loving relationships with each child and have a proven capacity to provide for all their relevant needs. They have common standards and parental benchmarks. Each has demonstrated a positive and appropriate attitude to each child and either could effectively discharge the functions and responsibilities of resident parent. Both would only want the children to move to improve.

They made a joint decision to move to Australia in 2002 and in the process (at least inferentially) weighed the benefits against the potential detriments and decided, all things considered, including cultural ties, to move rather than stay. They considered the cultural aspects and benefits of life in New Zealand, including maintaining frequent contact and developing relationships with extended family members, as dispensable in 2002.

While the mother may, understandably, place more significance on family and other cultural matters, in the light of an unexpected and emotionally traumatic separation, it is the inherent value to the children, having regard to their current circumstances and the balance of the best interest factors, that decides the issue.

The children do not appear to be foregoing their right and need to maintain a connection with their culture to any greater extent now than what the parents as partners in 2001, and as separated spouses since 2003, have been willing to accept.

Accordingly, I think there is reason to believe that the mother's renewed interest in her roots and the children's heritage in New Zealand has more of a tactical dimension to it than she was willing to admit at the hearing.

(m) None of the mother's family members filed supporting affidavits. None of them appear to have visited the family in Australia in the last four years. The evidence was that even in New Zealand contact within the mother's family was regular but not frequent. None of her sisters,

for instance, who the mother would rely upon for transport and child-care, have confirmed a willingness on oath to perform this role.

The parties took the children back to New Zealand in September 2004 to attend an uncle's wedding. The children spent time with each parent and members of their extended families on both sides. They stayed for an extra two weeks in New Zealand with the mother after the father returned to Brisbane to meet work commitments.

Intermittent contact of this kind is likely to continue for family events wherever the mother resides.

397. Having decided in favour of the status quo in line with the mother's alternative proposal on a range of other grounds it became unnecessary for me to consider a move by the father to New Zealand in order to maintain frequent and regular contact. There is little evidence on the point and his reasons for not wanting to move back to New Zealand were not really examined. I have no way of knowing whether the father would be able to provide for the children, emotionally and financially, as well over there as he has been able to here. There is too much uncertainty and too little information available for me to reach any conclusion beyond speculation.

398. The father's application for shared parenting seemed to me to be more strategic than serious.[260] It was not raised with the children in the family report interview. TE made it clear that he was happy with current arrangements (including one extra night per week with his father without the girls) and did not indicate that he wanted more.

399. At this stage of their development and schooling the children would be better off, in my opinion, by continuing to have a principal place of residence. No investigation of how well the children, especially the two younger ones, would cope with a week about arrangement was undertaken.

400. The father's domestic situation is unsettled. No affidavit from his girlfriend was filed. TE's relationship with her is ambivalent at best.

401. Although the parents have done an admirable job in co-operating as separated parents, there is still an underlying tension and level of distrust (evidenced by their inability to agree about who should hold the passports) to leave me doubtful about their ability to share parenting time equally.

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260 The tactical advantages of these sorts of applications were discussed in *Payne* and referred to by Kirby J in *U v U* (at 89,098). Thorpe LJ suggested that experienced family judges are well-used to the tactics and are readily able to distinguish between the cross-application that has 'some pre-existing foundation and one that is purely tactical.' While I do not profess to have lengthy experience as a judge, my forensic instincts tell me that the shared parenting proposal was included in the father's application more for leverage than anything else.

402. I know that the court counsellor was not opposed to the week about proposition but I am not satisfied that there is sufficient evidence to allow me to conclude that there would be a benefit in such a variation at this stage and will, therefore, leave well enough alone.

403. I only have power to make a parenting order that I think is a proper one. I would not be doing that if I endorsed the relocation proposal. It is unreasonable in the circumstances and, for the reasons already given, is likely, in my view, to disadvantage the children more than benefit them.

404. I therefore propose to make the following orders:

(1) The children TE born 31 May 1994, TA born 26 March 1997 and E born 24 February 2000 ("the children") reside with the MOTHER.

(2) Both parents have the responsibility for the long-term care, welfare and development of the children.

(3) Both parties have the responsibility for the short-term care, welfare and development of the children when the children are in each party's respective care.

(4) The FATHER have contact with the children at all such times as agreed to in writing but, failing agreement, as follows:

(a) each Wednesday from after school to before school Thursday morning;

(b) each second weekend from after school Friday to before school Monday morning;

(c) in respect of the child TE:

(i) during the football season, overnight each week on the evening of the football training; and

(ii) at times outside the football season, from 5.00 pm each Thursday until the commencement of school on Friday morning and such contact commencing at the FATHER's residence with the MOTHER delivering TE to the FATHER;

(d) half of the gazetted school holidays provided that the father has the first half in 2006 and thereafter in alternate years and the second half in 2007 and thereafter in alternate years.

(5) Both parties bear the transportation costs associated with contact changeovers.

(6) Neither party change their residential address or telephone number without giving the other party 28 days' notice.

(7) The parties keep each other informed of any serious accident or illness suffered by the children at any time.

(8) The MOTHER authorise any educational institution attended by the children to forward directly to the FATHER, and without limiting the generality, school reports, newsletters and other information which the FATHER may reasonably require at the FATHER's expense.

(9) The FATHER be entitled to attend parent/teacher interviews, school functions and other activities involving any of the children.

(10) Each party authorise any health professional whom any of the children may consult to provide to the other any reasonable request for information but at the requesting party's expense.

(11) The Court retain possession of the children's passports unless otherwise agreed in writing by the parties or further ordered.

IT IS FURTHER ORDERED THAT:

(12) The matter be removed from the list of cases awaiting finalisation.

(13) Pursuant to Section 65DA(2) of the Family Law Act 1975, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders are set out in Annexure A and these particulars will be included in the orders that will issue.

I certify that the preceding 404 paragraphs
are a true copy of the Reasons for Judgment and proposed orders herein of the Honourable Justice Carmody.

…….
Associate
Date: 30 January 2006.