IN THE MATTER OF : B AND B: <<FAMILY LAW REFORM ACT>> 1995 Appeal No. NA 35 of 1996 No. TV 1833 of 1996 Number of pages - 91

IN THE FULL COURT OF THE <<FAMILY>> COURT OF AUSTRALIA

NICHOLSON CJ, FOGARTY AND LINDENMAYER JJ

BRISBANE, 18 February and 21-22 May <<1997 (hearing), 9 July 1997>> (decision)

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Mr Hamwood, instructed by Hemming & Hart, Solicitors, appeared for the appellant husband.

Ms Pagani, instructed by Farrellys, Solicitors, appeared for the respondent wife.

Mr Williams, Attorney-General, QC, with Ms Mullins, Australian Government Solicitor's Office, Canberra, intervened.

Mr Rose, QC, appeared for the intervener, The Human Rights and Equal Opportunity Commission.

1. The appeal is dismissed.

2. (a) The wife is to file and serve on each other party her written submissions as to the costs of this appeal within twenty-one (21) days; (b) The other parties are at liberty to file and serve on each other relevant party any written submissions as to costs, being either in response to the submissions of the wife or otherwise, within fourteen (14) days thereafter; (c) The wife and any other party are at liberty to file and serve on each other relevant party any written submissions in reply within seven (7) days thereafter.

NICHOLSON CJ, FOGARTY AND LINDENMAYER JJ

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1. INTRODUCTION

1.1 This is an appeal by the husband against orders which were made by Jordan J on 20 September, 1996. The effect of his Honour's orders was to vary orders of this Court of 10 May, 1993 so as to permit the wife to relocate her residence and that of the parties' two children from Cairns, Queensland, to Bendigo, Victoria.

1.2 The orders made on 10 May, 1993 had continued the parties' guardianship of the children, granted the wife the custody of those children and granted the husband regular weekend access. Some of the argument before us proceeded on the basis that, as a consequence of the <<Family Law Reform Act 1995 (the "Reform>> <<Act>>"), the wife now has a residence order and the husband has a contact order. That <<Act>> came into operation on 11 June, 1996. Whilst we will deal in detail later with the provisions of the <<Reform Act>>, it should be noted at this stage that the effect of the transitional provisions to that <<Act>> is that the wife has a residence order and a specific issues order that she be responsible for the day to day care, welfare and development of the children and the husband has a contact order.

1.3 This appeal raises important issues in relation to these parties and their children. It also raises important issues about the effect of amendments made to the <<Family Law Act 1975 by the Reform Act>> both generally and in relation to what are usually referred to as relocation cases.

1.4 There is no doubt about the jurisdiction and power of the <<Family>> Court to make the orders in question or orders to a like effect either in this case or generally. There is a clear discretionary power to do so. The issue in this appeal is whether the trial Judge properly exercised that discretion. An examination of that issue necessarily involves a detailed consideration of the provisions of the <<Reform Act>>. In addition, having regard to the width of argument and the importance to the Court, practitioners and the public of clarification by this Court of the provisions of the <<Reform Act>> at an early stage of its operation, we shall consider not only the legal position in this case but the position more generally in cases under Part VII of the <<Act>> as now amended so as to provide guidance in the negotiation and adjudication of cases in the future: see Norbis (1986) 161 CLR 513, (1986) FLC 91-712; M v M (1988) 166 CLR 69, (1988) FLC 91-979; Department of Health and Community Services v JWB and SMB (Marion's case) (1992) 175 CLR 218, (1992) FLC 92-293 and McLay (1996) FLC 92-663 at 82,901. Relocation cases are not a special category. They are governed by the provisions of Part VII in the same way as any other case relating to parenting orders for children (other than child maintenance orders).

1.5 Pursuant to <<s.91(1) of the Family Law Act>> the Attorney-General intervened in these proceedings and presented argument. The Human Rights and Equal Opportunity Commission ("the Commission")

sought leave to intervene under <<s.92>> of that <<Act>>. That application was opposed by Mr Hamwood, who appeared for the husband.

1.6 <<Section 11(1)(o) of the Human Rights and Equal Opportunity Commission Act>> <<1986>> provides that a function of the Commission is, where it considers it appropriate to do so and with the leave of the Court, to "intervene in proceedings that involve human rights issues". Having regard to the width and nature of some of the issues raised in this appeal, we considered that it was appropriate to grant leave. The intervention of the Commission was of value in our consideration of some of the issues raised.

2. FACTS AND LITIGATION HISTORY

2.1 In his judgment Jordan J set out in detail the background facts and litigation history of this case. There was no challenge to his Honour's findings of fact and they can be summarised as follows.

2.2 The parties commenced to live together in September 1983 in Cairns and married there on 21 April, 1984. They have two children, namely J. who was born on 6 August, 1985 and who is now aged almost 12, and E. who was born on 22 May, 1987 and who is now aged 10. There were several separations during the marriage and the parties finally separated in February 1991. The children were then aged 5 and 3 years respectively. Since the separation the children have lived with their mother in Cairns and have had regular contact with their father. The parties were divorced by a decree of this Court on 3 February, 1993.

2.3 The parties lived together for approximately 8 years. But his Honour concluded that:- (Appeal Books vol.1 p.12)

"...the relationship was never a fulfilling or happy one for either of the parties. They were incompatible and appeared to have had little affection for one another from a very early stage in the relationship. There were many strains between them, and many separations."

2.4 The parties have now been separated for almost 6 1/2 years. But his Honour concluded that there has been "significant conflict during the long period since separation", that the parties seemed to have "limited insight into and appreciation of the other's points of view, and they have remained in disagreement on a fairly regular basis" over that period (Appeal Books vol.1 pp.14-5).

2.5 However, in relation to the children, his Honour pointed out that the parties:- (Appeal Books vol.1 p.15)

"... have managed to override their personal differences in that, notwithstanding these differences they have continued to co-operate so as to ensure that their children have been very well cared for and have continued to enjoy close relations with each of their parents."

2.6 In the period from the separation in February 1991 until the orders in May 1993 the husband had regular contact with the children, mainly two weekends out of three or three weekends out of four. On 10 May, 1993 consent orders were made by this Court. These dealt with the parties' financial relationship by the approval of a <<s.87>> agreement and, as previously referred to, provided that the parties continue to be the guardians of the two children, that the wife have their custody, and that the husband have access "as mutually agreed between the parties save that there shall be a minimum of one weekend every two weeks from 5.00p.m. Friday to 5.00p.m. Sunday". Since that time the husband has continued to have access but, by agreement, on a more liberal basis than that provided for under the orders. Otherwise the children have over that 6 1/2 year period lived with and been looked after in a general day to day way by their mother.

2.7 In 1994 the wife renewed association with W., a man she had known prior to her marriage to the husband, and in September 1995 they agreed to marry. W. resides in Bendigo. His Honour accepted that it was not viable for W. to move to Cairns to live due to his business and other commitments and there was no challenge to that either at trial or before us. W. had previously been married and has two boys aged 15 and 17 who live with him.

2.8 In February 1996 the wife informed the husband that she intended to marry W. and live with him in Bendigo with their two children. The husband opposed the children leaving Cairns. In March 1996 both parties instituted proceedings in this Court. The husband sought the custody of the two children. The wife sought variations to the previous access order so that she could take the children to Bendigo but the children could continue to have regular contact with their father, namely, that the orders be varied from weekend access to school holidays and other like periods.

2.<<9>> When the matter came on for hearing before Jordan J in September 1996 the issues had been clarified and the <<Reform Act>> had come into operation. The wife indicated that she would not move from Cairns if she was unable to take the children with her. The husband indicated that he did not seek an order for residence if the wife remained living with the children in Cairns. Thus the essential issue was whether his Honour should make orders enabling the wife to live in Bendigo with the two girls.

2.10 His Honour made a number of important findings in relation to the parties and their children. These findings can be summarised as follows.

2.11 The husband is a solicitor practising in Cairns, is in receipt of a "comfortable income" (Appeal Books vol.3 transcript p.46), and is now aged 47. In 1995 he formed a relationship with L. They have resided together since mid 1996 and intend to marry in <<1997. L. has a daughter who is aged 9>> and who lives with her. His Honour described the husband as a "confident, reasonable, articulate and successful man" who was "very secure and settled in his life." (Appeal Books vol.1 p.27). He proposed to continue to live near Cairns and continue his legal practice in that city. His wider <<family>> also lives in the Cairns area. His Honour (Appeal Books vol.1 p.28) described the husband as being:-

"... a caring and capable parent. He also enjoys a warm and loving relationship with his children and has much to offer them."

2.12 The wife is now aged 45. She was born in Sweden but has lived in Australia since the early 1970s. She lives in Cairns with the two children who attend local schools. She is a full-time parent but it appears that she does a small amount of part-time or casual work. Otherwise she supports herself and the two children from social welfare payments and child support which the husband pays. It appears that her total income, including child support, is approximately $455 per week: (see Appeal Books vol.1 p.71 and vol.2 p.120).

2.13 His Honour said that at the time of the trial the wife was a "very unsettled person", and he found that because she was prevented from moving to Bendigo she was "very distressed" and "feels powerless and has feelings of anger and persecution". He described her as a "warm spontaneous and articulate person" and as "a parent of exceptional quality and her children are her life". (Appeal Books vol.1 p.27)

2.14 His Honour noted that the wife had always been the primary carer of the children and that during their marriage the husband:-

"was a busy professional man who had to juggle his responsibilities as a father with his responsibilities as a provider and as a solicitor and as a matter of logic the bulk of responsibility for the day to day care of these children both prior to and subsequent to separation has fallen upon the wife. She is a very involved parent. The mother and her daughters enjoy a reciprocal loving and caring relationship. The children appear to relate well to her and appreciate her openness and honesty." (Appeal Books vol.1 p.27-8)

2.15 His Honour also said of the wife:- (Appeal Books vol.1 p.28-<<9>>)

"I find that whatever decision is made in this case, the wife does in fact respect the husband's position as the children's father and genuinely acknowledges the importance of the relationship between the children and their father and that she will continue to foster and support that relationship.

[...]

I am satisfied that no matter what order is made in this case, the wife will not seek to undermine the relationship between the children and their father and to that extent her move to Bendigo is not part of any hidden agenda in that direction."

2.16 His Honour (Appeal Books vol.1 p.14) described the children as "two delightful, intelligent, talented and well adjusted young girls who love and are much loved by each of their parents."

2.17 The children's perceptions and wishes about moving to Bendigo were an issue at trial and were explored by the Court counsellor in the <<Family>> Report. His Honour recorded his conclusions about this in the following passage (Appeal Books vol.1 p.28):-

"In their answers to questions relating to their wishes, whilst the children were careful not to choose between their parents and indeed sought the Court's assistance in that regard, in the central issue relating to their place of residence, the children did, in their answers, lean towards any solution to the current impasse which would enable them to remain living with their mother."

2.18 The counsellor, who was not cross-examined, also referred in her report to conflicts between the parents since separation in 1991 and the negative impact of that on the children which if continued would be "ultimately destructive for the girls' emotional development" and that "movement way from Cairns by (the wife) must serve to cool this situation, and therefore be of ultimate benefit to the children." (Appeal Books vol.3 pp.239-240)

3. BACKGROUND TO THE <<FAMILY LAW REFORM ACT>> 1995

3.1 The <<Reform Act>> commenced on 11 June, 1996, the Bill having been passed with amendments in late November 1995. As the text of the <<Reform Act>> itself, together with the extrinsic material tendered on this appeal, namely, explanatory memoranda to the various Bills leading up to the <<Act>> and Parliamentary debates (see <<s.15AB of the Acts Interpretation Act 1901>> (C'wth)), makes clear the major objectives of the <<Reform Act>> were the replacement of Part VII of the <<Family Law Act 1975>> with provisions which, inter alia, emphasised parental responsibilities rather than rights, removed the terms of guardianship, custody and access and replaced them with what were regarded as the more easily comprehensible terminology and concepts of residence and contact and which were to emphasise the importance of co-operative post separation parenting rather than the ownership and control of children, and enabled parents to enter into their own agreement about their responsibilities for their children by means of parenting plans which could be registered with the Court.

3.2 The importance and value of non litigated solutions were also emphasised by amendments to Part III of the <<Act>> which introduced the concept of "primary dispute resolution". This, rather than the previously used term "alternative dispute resolution", was seen as providing a more accurate picture of a system which has consistently highlighted conciliation, and more recently mediation and arbitration, rather than litigation. These amendments, although very important to the scheme and philosophy of the <<Reform Act>>, are not of direct relevance to the matters before us on this appeal.

3.3 The origins of the new Part VII are to be found in a number of Australian and overseas developments, including the UK Children <<Act>> which commenced operation in October 1991. Another source appears to be the United Nations Convention on the Rights of the Child (UNCROC) which Australia ratified in December 1990 and which entered into force as a declared instrument under s.47(1) of the Human Rights and Equal Opportunity Commission <<Act>> 1986 on 13 January, 1993.

3.4 The extrinsic material referred to above indicates that the Convention was specifically referred to in the <<Family Law Reform>> Bill (No.2) 1994 in the equivalent of s.60B(2). In the second reading speech of the Minister in the House of Representatives on 8 November, 1994 (Hansard p.2759) the Minister stated:-

"In December 1990 Australia ratified the UN Convention on the Rights of the Child. That convention contains a number of basic rights in the raising and development of children towards adulthood. The

objects clause to the new part VII of this bill gives recognition to such rights by specifying a number of such rights that should be observed in any agreements or decisions concerning children."

3.5 The second reading speech to that Bill in the Senate on 28 November, 1994 was in identical terms (see Hansard p.3275).

3.6 The Explanatory Memorandum in the House of Representatives (No.70790) and in the Senate (No.71147) stated:-

"The Bill will insert an objects clause into Part VII of the <<Family Law Act>>1975 which will provide that children should 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. The Bill makes it clear that this object is based on principles which are consistent with the UN Convention on the Rights of the Child."

See also the Explanatory Memorandum to the Bill No.54904.

3.7 In the debate on the Bill in the House of Representatives on 8 November, 1994 several speakers supported the reference to the Convention: see Hansard at pp.2843 and 2957.

3.8 The extrinsic material provided to us does not appear to make clear when it was in the passage of the legislation through the two Houses of the Parliament between November 1994 and November 1995 that the explicit reference to the Convention was deleted. But specific references were made to the Convention in Senate debates on 25 October, 1995 (Hansard pp.2427-8) and on 14 November, 1995 (Hansard p.2841). The Bill, as finally passed, did not contain any reference to the Convention. In accordance with the developed practice arising after the amendment to the <<Acts Interpretation Act in 1984 to include s.15AB, Acts>>, as finally passed, indicate the relevant second reading speeches to that <<Act>>: see <<Reform>> of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials: P Brazil (1988) 62 ALJ 503 at 510. In the <<Family Law>> <<Reform Act 1995>> the references are to the second reading speeches in the House of Representatives on 8 November, 1994 and in the Senate on 28 November, 1994 referred to above.

3.<<9 In a wider sense the private law provisions of the Children Act>> were heavily influenced by the United Kingdom Law Commission's Review of Child Law and Guardianship and Custody (1988), as were the Part VII <<reforms>> in Australia subsequently by the <<Family>> Law Council's Report, Patterns of Parenting After Separation (1992), and its Letter of Advice to the Attorney-General (1994).

3.10 Given the impact of the provisions of the <<Family Law Act>>, the social context in which Australian <<families operate, and the centrality of family>> life in a civil society, it is appropriate that <<family>> law be the subject of review and monitoring. The <<Family Law Act>> 1975 has received considerable public scrutiny and comment throughout its 21 years of operation, commencing in 1980 with the report of the first Joint Select Committee on the Operation and Interpretation of the <<Family Law Act>>. In the intervening years research material and policy comment conducted by bodies such as the <<Family>> Law Council, the Australian Institute of <<Family Studies and the Australian Law Reform>> Commission have informed the Parliament and the public, and contributed to major amendments to <<the Act>> in 1983, 1987 and 1995 and to numerous minor amendments in other years. Overseas research findings have also been valuable, human nature and behaviour patterns being similar in western industrialised countries despite there being some variance in the legal systems and legislation of those countries when compared with Australia.

3.11 The <<Reform Act>> is not the first or only significant amendment to the <<Family Law Act provisions in relation to children since 1976. In the 1975 Act>> the relevant terms were guardianship, custody, access and care and control. Custody was interpreted in a way which covered most of what would generally be regarded as guardianship and custody: see <<Family>> Law Council Report 1982 - known as the Watson Committee Report, esp. at p.5 where this is discussed. The prevailing orders at that time were

usually custody and care and control and because of the interpretation given to the term custody this gave the custodian very wide powers in relation to the children and very little to the other parent.

3.12 The Watson Committee recommended the use of the terms guardianship, custody and access, with guardianship defined to cover the responsibility for the children's long-term welfare, and custody defined to cover the daily care and control of the children. Those recommendations were adopted in the 1983 amendments. They continued to apply until the <<Reform Act>> came into operation in 1996. The practice of the Court during that period was to continue the guardianship of both parents other than in exceptional circumstances and to make orders for custody and access. Custody in this sense had a narrower meaning than it had pre-1983, but it still gave to the custodian significantly greater powers than the access parent had.

3.13 In 1987 the <<Family>> Law Council's Report, Access - Some Options for <<Reform>> - acknowledged that concepts of custody and access tended to encourage a win/lose mentality in which parents may appear to be pitted against each other to the detriment of the children. A recommendation emanating from this report that a legislative direction was required to counteract the notion that a non-custodial parent had a prima facie right of access to a child was not implemented.

3.14 In March 1991 the second Joint Select Committee was appointed to inquire into and report on the <<Family Law Act>>. Its Terms of Reference included "the proper resolution of custody, guardianship, welfare and access disputes". Its 1992 report dealt with a number of matters under that heading, including whether there should be changes in the terminology of custody and access, complaints by non-custodial parents of difficulties in obtaining and enforcing access orders, and issues relating to the relocation of the custodial parent and children.

3.15 As to the first, it recommended against changes in the terminology of custody and access until clear evidence of a positive nature in favour of such changes was available. It referred the second matter to the <<Family>> Law Council.

3.16 In relation to the third matter, the Committee set out in its report submissions which it had received and conclusions at which it arrived in relation to the relocation of children by the custodial parent (see par.6.72 to 6.79). It noted that it had received a number of submissions raising concerns about difficulties faced by non-custodial parents in gaining access where the former spouse moved with the children interstate or otherwise a significance distance away from the access parent. The submissions referred to the costs and travel involved and suggested that the custodial parent should be required to pay or share in those costs. It also received submissions which claimed that it would be unjust to prevent a custodial parent from moving or to make that parent pay the costs of the travel involved.

3.17 The Committee referred to several Australian cases on this issue of relocation and stated:-

"... the Committee notes that in contrast to English Courts, which have primarily supported the custodian's right of freedom of movement, the <<Family>> Court of Australia has taken the approach that in each case where an application is made by the custodial parent seeking leave to move interstate with the children, the facts should be assessed against a number of general criteria."

3.18 The conclusions of the Committee on this aspect were that:-

"In general, it is fair to expect that the custodial parent who moves a long distance away from the non-custodial parent should be required to contribute to the cost and travelling involved in access. However, the Committee knows that there may be cases in which it may be inappropriate to require the custodial parent to expend an equal share of the cost and time involved."

3.19 The Committee went on to say that, along with other types of disputes surrounding access, "it is important to take the facts of each case into account, rather than imposing rigid requirements that may be inappropriate or unjust in individual cases."

3.20 The Government response to that report was delivered in December 1993, by which time support in Australia for the terminology and conceptual changes in the UK Children <<Act>> had increased, largely as a result of two contributions made by the <<Family>> Law Council which are discussed below.

3.21 The second Joint Select Committee was still obtaining information for its inquiry when the <<Family>> Law Council provided its major report, Patterns of Parenting after Separation to the Minister in April 1992. The report based its 16 recommendations on the premise that the <<family>> law system, as it then operated in Australia, had failed to encourage co-operative parenting whereas such parenting would be likely to provide positive and beneficial effects for the children. Its first conclusion was that:-

"Most children want and need contact with both parents. Their long term development, education, capacity to adjust and self esteem can be detrimentally affected by the long term or permanent absence of a parent from their lives. The well-being of children is generally advanced by their maintaining links with both parents as much as possible."

3.22 Other conclusions referred to research findings about the association between single parenting and poverty, the importance of both co-operative parenting and non-litigated solutions to disputes involving children, difficulties associated with joint custody presumptions and the usefulness of parenting plans. The conclusions recognised that on-going contact with a child would not advance his or her wellbeing where abuse has occurred or where serious <<family>> violence existed.

3.23 A further conclusion was that:-

"In the end result, the division of post separation parental roles into custody vs access reinforces the win/lose attitude and discourages ongoing parental responsibility."

3.24 In March 1994, following the delivery of the Government's response to the Joint Select Committee's Report and at the request of the then acting Attorney-General, the Council provided a letter of advice which, inter alia, supplemented the information contained in the Patterns of Parenting after Separation Report. The request had been precipitated by the Government's suggestion that it had a "predisposition to depart from the current regime of guardianship, custody and access and to enact provisions based upon those contained in the Children <<Act>> 1989 (UK)".

3.25 Part of the work undertaken by the Council at this time involved the collection of information about the operation of the U.K. legislation. The advice referred to the main provisions of the <<Family Law Act>> which would require review should the anticipated amendments be acted upon. The Council identified many of the objectives of the U.K. Children <<Act>> as being consistent with those expressed in its Patterns of Parenting Report. However it disagreed with the "no order" principle which is a feature of that legislation, and which it described as 'too inflexible', and also argued that the welfare principle should be replaced with the best interests principle. Both these recommendations were ultimately accepted.

3.26 But the Council was realistic in its assessment that changes in terminology would not result in 'separating parents who previously were unable to cooperate ... cooperating with one another overnight'. However, information from the United Kingdom suggested to it that, in the absence of any formal evaluation, the changes there were positive and had been well received.

3.27 There are many similarities as well as many differences between the <<Reform>> <<Act and the Children Act>>. In addition to the absence of the best interests principle (the welfare test is retained in the UK legislation) and the presence of a 'no order' principle in the Children <<Act>>, the differences can be listed briefly as follows:-

- parental responsibility under the Children <<Act>> varies according to whether the children concerned are nuptial or ex nuptial, whereas since the referral of powers in Australia in 1987 no distinction is made on the basis of parental marital status.

- parental responsibility under the Children <<Act>> is able to be exercised by either parent independently of the other parent, while the <<Reform Act>> contains some ambiguity, which is referred in Section <<9(b) of this judgment.

- the Australian legislation is more obviously influenced by UNCROC.

- The Children Act>> is significantly concerned with public law, most specifically child protection and the role played by local authorities, registered children's homes and voluntary organisations in caring for children. Its unification of the two areas of private and public law appears to provide a coherent and systematic view of child related law which is absent in this country despite the advantages which would be likely to be provided by cross-vesting and/or the referral of powers. The fusion of both systems would minimise risks to children and avoid the dangers of overlapping or lacunae in legislation and services. The absence of possibly competing and inconsistent State and Federal laws offers many advantages: see the discussion of this by the Full Court in Re Z (1996) FLC 92-694.

- The English legislation contains no reference to parenting plans. However, in the Australian context this initiative, introduced by the <<Reform Act>>, has become somewhat hollow due to last minute amendments which require an elaborate procedure for the registration of those plans to allow them to be given the effect of consent orders. As a consequence, parenting plans have been largely ignored by practitioners and parents, and there are currently recommendations for the repeal of the registration provisions.

3.28 The <<Reform Act>> employed a new form of drafting which is different from that found previously in the <<Family Law Act>> or related legislation. In an apparent effort to ensure that its philosophy is explicit, <<s.60B>>(1) is expressed to provide an object, and <<s.60B>>(2) sets out four principles underlying that object. <<Section 60B>>(2)(a) and (b) reflect articles from UNCROC, while <<s.60B>>(2)(c) and (d) provide what may be described as exhortations to those caring for children to <<act>> in a manner which is consistent with those children's best interests.

3.29 The section reads as follows:-

"60B(1) The object of this Part 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.

60B(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests: (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and (d) parents should agree about the future parenting of their children."

3.30 The influence of terms used in UNCROC is apparent, and the more directly relevant articles appear to be as follows:-

"Article 2.1: - States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 3.1: - In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3.2: - States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

"Article 7.1: - The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article <<9>>.3: - States Parties shall respect the right of the child who is separated from one or both parents 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.

Article 18.1: - States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

3.31 The <<Reform Act>> exceeds the standard referred to in article 3.1 that the best interests of a child shall be "a primary consideration". Consistently with the long established position in Australia it provides that it must be the paramount consideration. Further, in contrast to the inclusion of reference to 'rights' of a child's parents in article 3.2 and other articles of the Convention, the <<Act>> omits all such references.

3.32 There are a number of other articles which appear to have had an impact on the <<Family Law Act or are in any event reflected in the wording of that Act>>. These include article <<9>>.12 (the right of children to be heard and express their views freely) and article 5 (the requirement that the responsibilities, rights and duties of parents and others responsible for children be provided to them in a manner which is consistent with their evolving capacities). Article <<9>>.1 seeks to ensure that in situations where parents have abused or neglected their children or where the parents are living separately the children should not be separated from their parents against their will, except where competent authorities, subject to judicial review, determine that such separation is necessary for the best interests of the children.

3.33 At a late stage of the legislative process (see Senate debates, 14 November, 1995, Hansard p.2819) the words "except when it is or would be contrary to a child's best interests" were inserted by amendment into s.60B(2), apparently as a consequence of a recommendation in the second report of the Senate Legal and Constitutional Legislation Committee. It also appears from the debates that a government amendment along similar lines had already been proposed: see House of Representative debates, 21 November, 1995, Hansard p.3303. It was inserted at the commencement of s.60B(2) rather than qualifying the section as a whole. But it is clear that s.65E ensures that the children's best interests apply to the whole of the section (see Section <<9>>(b) of this judgment).

3.34 To give flesh to s.60B, the definition section (s.60D) is of relevance insofar as it refers to contact orders (s.64B(4)), parenting orders (s.64B(1)), parental responsibility (s.61B), residence orders (s.64B(3)) and specific issues orders (s.64B(6)). However, the result is a rather circuitous one, because in all instances the section directs the reader to other sections of the <<Act>> (as appears in the brackets) and, in the case of contact and parental responsibility, no useful definition exists. These provisions are discussed in more detail in Section <<9>>(b) of this judgment.

3.35 It is central to the new Part VII provisions that in deciding whether to make a particular order in relation to a child, a court must regard the best interests of the child as the paramount consideration. This principle is set out in s.65E. This is a change in terminology from "welfare" under the previous Part VII to "best interests". The Explanatory Memorandum to the Bill indicated that the intention was that the substantive law remained unchanged, despite the change in phraseology, although the wording in that memorandum - "the change is not intended to invoke the presumption that a change in wording must mean that a different concept was intended. The term 'best interests' is used as a more appropriate description in

accordance with the advice of the <<Family>> Law Council" - is perhaps not as clear as might be wished. This matter is discussed further in Section <<9>>(b) of this judgment.

3.36 Section 68F(1) and (2) set out a list of matters which the Court must consider in determining what is in the child's best interests. It repeats the matters listed in the repealed Part VII but that list has been added to by the <<Reform Act>> to include:-

- the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; [s.68F(2)(d)];

- the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant; [s.68F(2)(f)];

- the need to protect the child from physical or psychological harm caused, or that may be caused, by: (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person; [s.68F(2)(g)];

- any <<family violence involving the child or a member of the child's family>>; [s.68F(2)(i)].

- any <<family>> violence order that applies to the child or a member of the child's <<family>> [s.68F(j)].

4. LAW APPLIED BY THE TRIAL JUDGE

4.1 After setting out the facts summarised above, his Honour examined the law to be applied in this case. The <<Reform Act>> had come into operation shortly prior to this trial and his Honour was conscious of the significance of those amendments. In particular, he noted the following general submission for the husband about their effect (Appeal Books vol.1 pp.17-8):-

"It is submitted that the emphasis on knowledge of and contact with both parents and the shared responsibility of parenthood as set out in the objects in Part VII of the <<Act>>, must result not only in a rethinking of the principles to be applied in relocation cases, but a reversal of the onus once weighted in favour of freedom of movement, to one now weighted in favour of preserving the integrity of the relationship with a contact parent and the quality of the contact itself. It is said that the amendments impose upon the applicant to relocate a heavy onus to satisfy the Court that the objects of (Part VII) are not compromised by the relocation and that such a move is in the best interests of the children."

4.2 His Honour referred to a number of the leading cases in this Court which had dealt with relocation issues and discussed the principles to be drawn from them to assist in the exercise of the discretion involved in those cases. As we will later examine those cases in Section 7 of this judgment, it is unnecessary to repeat his Honour's discussion. We consider that his Honour accurately reflected the trend of authority in this country.

4.3 His Honour then set out his conclusions about the principles to apply in such cases. As it is the fundamental submission for the husband in this appeal that his Honour misapplied the law, it is important to record what his Honour said.

4.4 Firstly, he said that (Appeal Books vol.1 p.22):-

"In my view, the objects and principles as they appear in subdivision B of (Part) VII, reflect the desire of parliament to ensure that the welfare of the children remains an essential issue to be addressed in all cases affecting children."

4.5 His Honour then referred to s.60B (the text of which we have set out above) and concluded (Appeal Books vol.1 pp.23-4):-

"The stated principles in section 60B, subparagraph 2 are expressed to be subject to the child's best interest in that the assumptions emerging from the statement of principles are said to prevail: "Except when it is or would be contrary to the child's best interests."

Further, an order relating to the residence of children is a parenting order under Section 65E. In deciding whether to make a parenting order a Court must regard the best interests of the child as the paramount consideration.

It is to be noted that those stated principles place an emphasis upon the child's rights rather than those of the parent and they do focus upon matters such as the rights of children to know and be cared for by each parent and to have regular contact with both parents and significant other people."

4.6 His Honour expressed his final views in paragraphs thereafter. He prefaced that by saying that:- (Appeal Books vol.1 p.24)

"In my view, in all cases past and present, the essential inquiry remains much the same. That is, in determining whether to accede to a relocation application, the Court must regard the best interests of the child as the paramount consideration. However, I am of the view that the effect of the amendments is to ensure that the Court gives proper weight to the rights of children to have regular contact with and a relationship with each parent."

4.7 His Honour concluded that the principles emerging from the case law and legislation could be summarised in a number of propositions. As these may represent the essential conclusions of his Honour about the law to be applied and are central to the challenge before us, it is desirable to set them out in full:- (Appeal Books vol.1 pp.24-6)

"1. The best interests of the children remains the paramount consideration.

2. In considering such application, the Court must have regard to and give proper weight to the principles and objects of the <<Act>> as set out in subdivision B of division 1 of part VII.

3. In considering what is in the best interests of the children, the Court must have regard to those matters set out in <<Section 68F of the Family Law Act>> and, in my view, on the facts of this case, those subparagraphs of that section which have most bearing upon my deliberations at this time include subparagraphs (a), (b), (c), (d) and (k). Further, and related to those matters, in my view it is essential that the Court have regard to the ages of the children and the quality of the relationship between the children and the parent from whom they will become separated upon relocation and the capacity of that relationship to be properly sustained notwithstanding such separation.

4. In determining whether to make orders facilitating a relocation by a parent, and his or her children, the following matters should be considered: (i) Is the application to remove the children from their previous environment made bona fide? If it is not then that would usually be the end of the application. (ii) If it is bona fide, can the Court be reasonably satisfied that the residential parent will comply with orders for contact and other orders to ensure the continuance of the relationship between the children and the contact parent. (iii) The general effect upon the welfare of the children in granting or refusing the application.

5. Although, subject to the best interests of the children and the principles and objects of <<the Act>>, the following matters may also be relevant and should, in appropriate cases, be given proper weight, that is: (i) The wishes and interests of each of the parents together with the notion that parties should ordinarily be free to pursue a new life subject to meeting their responsibilities as parents. (ii) The fact that one parent has been the unchallenged primary caregiver of these children for a long time. (iii) The fact that the move proposed by the wife in this case is a move interstate."

5. CONCLUSIONS OF THE TRIAL JUDGE

5.1 At an earlier stage of his judgment his Honour summarised the case of each party as seen through their eyes. It is convenient to repeat this before discussing his Honour's final conclusions as it encapsulates in lay terms the essential issues in this case:- (Appeal Books vol.1 pp.15-6)

"On the issues before the Court, it is my view that each of the parties have an understandable and personally legitimate point of view. The wife has dedicated herself to the care of her children to this time and she has provided the husband with regular and generous contact in the five years since separation. She now wants to be allowed the opportunity to pursue her relationship with (W.). She perceives that there are benefits for herself and the children in that she believes the relationship will enhance her happiness and enable her to get on with her life, and that it will help reduce the strains and unhappiness she continues to experience whilst resident in Cairns.

From the husband's point of view, he loves both of his children dearly and he does not want to be separated from them. He would like to have the opportunity to continue to see his children regularly and he would like to be afforded the opportunity of regularly taking an active role in their care. Further, the husband is, I accept, genuinely of the view that it is in the best interests of the children to remain in Cairns where they have spent their whole lives and he is concerned about the impact on the children of being removed from their school and their friends, their activities and their extended <<family>>, especially their paternal grandmother, and, of course, his new partner and (her daughter)."

5.2 His Honour said that whatever decision was made "the relationship between the daughters and their mother will continue to thrive". On the other hand, he pointed out that if the children were allowed to move to Victoria they would be denied regular contact with their father and that they would be likely to miss:-

"... the benefits of the spontaneity of having their father on the spot to talk to on a regular basis, to share experiences with on a regular basis as and when they occur. There is no doubt the children will miss the regular contact and the good times they have with their father if such an order is made." (Appeal Books vol.1 pp.29-30)

5.3 His Honour said that, having regard to the nature of this relationship, their ages and their level of maturity, "their knowledge of and relationship with their father will not be unduly adversely affected by the proposed move." (Appeal Books vol.1 p.30) In relation to the proposals for regular school holiday access, he said:- (Appeal Books vol. p.30)

"... whilst this is clearly not as desirable as the current access regime, it does represent some form of compensation in that the children would have regular contact with their father every two months or so."

5.4 His Honour referred to what he described as the "largely ambivalent" wishes of the children and to the "apparent marginal preference of the children" to remain living with their mother if she moved to Bendigo. He also referred to the circumstance that in addition to the loss of frequent contact with the father, the children would be required to leave their schools, the environment in which they have been born and raised, and their friends, and would be required to adjust to a new life with their mother, W and his <<family>>, changes which his Honour described as very significant for children of that age. However, his Honour accepted the evidence of the counsellor that the children were "particularly resilient" and that they would be able to "cope intellectually and emotionally with such a move, particularly if it had the support of both their mother and their father". (Appeal Books vol.1 p.31)

5.5 His Honour then discussed the financial implications of contact by the husband if the children lived in Bendigo and indicated that he would make an order that the wife meet half the costs of the airfares. As there was no challenge specific to that order we need not consider it further. It appears to us to be a fair conclusion if it is appropriate for the wife to take the children to Victoria.

5.6 Referring specifically to the three criteria identified in Holmes (1988) FLC 91-918, and which he largely adopted in par.4 of his summary of principles, above, his Honour said that he was satisfied that the

proposed move by the wife was bona fide, that she would comply with orders for contact and that she "would in all other respects continue to foster the relationship between the children and their father." (Appeal Books vol.1 p.32)

5.7 His Honour then turned to what he regarded as the most significant issue, namely, "the general effect upon the welfare of the children in granting or refusing the application". (Appeal Books vol.1 p.32) He made reference again to some of the disadvantages that he had previously identified and which we have set out above. He went on to say:- (Appeal Book vol.1 pp.32-3)

"On the other side, I am greatly persuaded by what I regard as an overwhelming feature of this case. The mother is desperately unhappy at the present time. She has been unhappy since separation and I have observed her giving evidence and I have observed her in court. I have had regard to the contents of the Welfare Report. I accept the assessments of the counsellor and include my own observations to the effect that the wife genuinely does feel powerless. She genuinely does feel persecuted. She is distressed and she is angry. I am not satisfied that objectively there is absolute foundations for all of those sentiments or that the husband should be in some way held responsible. The fact of the matter is that the circumstances of the parties have produced those outcomes and the wife has endured an increasing level of unhappiness for a long time. I accept that she genuinely perceives that (W.) and Bendigo represent something of a personal salvation and that, objectively, that is not an unreasonable point of view to hold.

I accept that she would be much happier in Bendigo. I also accept the evidence of (the Court counsellor) that the wife would be devastated by a refusal to be allowed to leave at this time and that she would suffer trauma and a long period of grieving. In my view it is entirely predictable that a refusal to allow the wife to move to Bendigo would increase the strains between the parties and increase the scope for antagonism which the wife might continue to find difficult to contain. It is entirely predictable that the wife would be resentful of the husband's role in denying her the opportunity to pursue her relationship with (W.)."

5.8 In that passage his Honour was largely concentrating on the effect upon the wife of the refusal of her application.

5.<<9>> His Honour then related that to the essential issue, namely the best interests of the children, in the following passage:-(Appeal Books vol.1 p.34)

"I have a concern that the wife in some senses is at the end of her tether and that she could deteriorate significantly if she were not able to move to Bendigo. I am concerned that the fine balance that the parties have been able to maintain in the five difficult years since separation which has ensured that the children have progressed so well to this time, might be compromised or destroyed and that the children, who up to this time, have been aware of the animosity, might, in the future, be drawn into it and this might produce an adverse effect upon their relationship with one or both parents.

I regard this potential as a most concerning one because of the current presentation of these children and one would be loathe to unnecessarily expose the children to risks of a deterioration in their development.

In essence, I seriously question the mother's capacity to cope with a decision which would deny her the opportunity to travel to Bendigo. I am of the view that it would have a significant adverse effect upon the quality of her parenting and that that would be a tragedy for these children. It would not be fair to these children to deny them what their mother has to offer."

5.10 He then connected the threads which ran through these passages. He said that he accepted that "the happiness of one parent can never be the sole determinant in these cases" but:-(Appeal Books vol.1 p.35)

"At the same time I accept that the happiness of parents, as was suggested by (the counsellor), is fundamental to the happiness of their children, and in my view, in this case, the result which is most likely to produce the level of happiness which will most benefit these children is an order allowing the wife to move to Bendigo."

5.11 His Honour underlined the importance of this approach with its ultimate emphasis upon the best interests of the children in the following and concluding paragraph:- (Appeal Books vol.1 p.35)

"In my view, meeting the interests of the children in a way which coincides with the interests of the wife, are such, on the facts of this case, as to not compromise the principles and objects of <<the Act>> for the reasons I have outlined and, in particular, having regard to the quality of the relationship between the girls and their father and the mother's capacity to ensure that that relationship is not compromised and that there is regular contact of the type proposed by the wife."

5.12 The orders which his Honour made required the children to remain in Cairns until the completion of the 1996 Christmas school holidays for the purposes of completing their schooling for 1996 at their then school and so that the husband could have his usual Christmas school holiday contact. The orders provided that thereafter the husband was to have contact with the children at all reasonable times as may be agreed and failing agreement for four weeks each Christmas school holiday period and all other school holidays and an order that the wife meet half the costs of airfares.

5.13 Subsequently, these orders were stayed pending the determination of this appeal.

6. SUBMISSIONS

The submissions for the parties and interveners may be summarised as follows:-

(a) Father

6.1 Mr Hamwood submitted that the <<Reform Act>> and in particular s.60B represented a "sea change" in the "culture" of <<family>> law in Australia because it imports into and prescribes for the first time specific rights of children who are the subject of Part VII. He submitted that the Parliament had in effect set out a "mini charter" in relation to rights of children and that it had done so to give partial effect to Australia's obligations as a signatory to UNCROC and also to give effect to an intention to make a major and significant change in the culture of <<family>> law. He submitted that children moved from being the object of the right of, for example contact, to being the subject of that right and that this was a change which had not been anticipated by previous decisions of the <<Family>> Court. In this context and generally he referred, by way of extrinsic material, to the second reading speech of 8 November, 1994 to the <<Family Law Reform>> Bill 1994, and to the Explanatory Memorandum and Supplementary Explanatory Memorandum to that Bill. He submitted that that change, together with the changes in nomenclature, indicated that Parliament had determined to move the focus of <<family>> law from it being a balancing process between the rights of parents to an emphasis upon the "primary and irreducible rights" of the child in s.60B. He submitted that the intention of the legislature was to make those rights of children predominant unless it can be shown that the current situation was contrary to their best interests. He submitted that was the correct approach even though that may be "grossly inconvenient" to a particular parent or both parents. He made it clear that these submissions applied to both a resident and a contact parent so that the contact parent could be inhibited by court order from relocating.

6.2 He submitted that the principle of the best interests of the child (s.65E) was in effect a "defeasance provision" to the rights in s.60B. He conceded that the rights of children in s.60B were not absolute but that they would only be defeated (for example by a change of location) if it was shown that the continuance of their existing rights would be contrary to their best interests.

6.3 He submitted that the entire focus of Part VII had been deliberately changed by Parliament and that s.60B now constitutes a set of defined, normative criteria. Consequently, the Court must start from an examination of those rights, and where the application involved a change there was an evidential onus upon that party to persuade the Court that those rights should be changed and in that task it was necessary to demonstrate that the continuance of the children's existing rights would be contrary to their best interests. He submitted that in this context a parent is a "hostage to fortune", the rights of children were superior to and, where necessary, extinguished any right which a parent, as a private individual, may enjoy.

6.4 He submitted that the "checklist" contained in s.68F(2) is subsidiary to this exercise, that it was a guide to the Court in ascertaining whether or not the rights set out in s.60B were being met.

6.5 He submitted that previous relocation cases were no longer of assistance partly for those reasons and also because they were determined within the context of the applicant being a custodian with the additional powers which flowed from that, which powers did not apply where the parties held orders for residence and contact and where the legislature intended that parental responsibilities be more evenly shared.

6.6 Mr Hamwood submitted that the term "regular contact" in s.60B should be understood as involving the enjoyment of contact by the non-resident parent in a meaningful and frequent way, and that "regular" was not to be understood as confined to regularity but included concepts of frequency and that articles 7 and <<9>> of UNCROC provide support for this view.

6.7 He submitted that the fundamental error of the trial Judge was to conclude that the essential inquiry remained the same as it had been under the previous legislation and authorities. He submitted that instead of the three tiered test in Holmes' case which his Honour had referred to, the proper test was firstly to ascertain how the children's rights were currently being met, secondly, whether the application would reduce, diminish or curtail those rights, and thirdly whether it was shown that the full enjoyment of the existing rights would be contrary to the child's best interests.

6.8 He submitted that the <<Reform Act>> was "child centred" and the right of either parent to relocate or to form new relationships existed only to the extent that that person can persuade the Court that the exercise of the children's existing rights would not be adversely affected. He submitted that s.60B was to be given greater status and importance than the objects provisions in ss.43 and 66B because it was designed to comply with the Commonwealth's obligations under UNCROC.

6.<<9>> He submitted that the legislation had determined that the matters in s.60B be used to overcome the indeterminacy which is inherent in the best interests principle. The provisions of s.68F(2) are descriptive (with the possible exception of par. (g)) rather than normative.

6.10 He submitted that article <<9>> of UNCROC and s.60B(2) give rise to a presumption that, unless otherwise demonstrated, the normative position corresponds with the best interests of the children involved. He adopted the submissions for the Commission as to the applicability of articles 3, 7 and <<9>> of UNCROC. Otherwise he submitted that its submissions were "essentially peripheral to the matters before the Court. It was not in contest that either party is free to move anywhere within Australia. It was not suggested that the Court at any stage sought to restrain the wife from herself moving to Bendigo".

6.11 He contended that the evidence in this case established no more than the wife's inability to put her children's needs ahead of her own and continue to carry out the duties and responsibilities which s.60B required, that her case was that as she would be unhappy if she were unable to go to Bendigo the Court should make the order she sought. He submitted that this was the sort of consideration which s.60B was designed to make irrelevant. He submitted that the effect of the legislation was that the rights of children under s.60B overrode any wishes or rights of either parent the exercise of which was contrary to those rights.

6.12 Mr Hamwood submitted that there was insufficient evidence to justify his Honour's finding about the adverse impact upon the wife if she were not entitled to move and the consequent impact upon the children, and that he had failed to evaluate the uncertainties involved in the children moving to a relatively unknown environment. He submitted that the economic arguments presented for the wife on this appeal had not been raised at trial and, in any event, they had no application in this case.

(b) Mother

6.13 Ms Pagani submitted that the essential basis of the argument for the husband was that the rights of parents were subservient to the rights of children contained in s.60B, but this ignored the circumstance that s.60B(2) was specifically expressed to be subject to the "child's best interests".

6.14 Ms Pagani placed emphasis upon Canadian authority, particularly Gordon v Goertz (1996) 134 DLR (4th) 321, which she submitted was apposite in Australia. (Those cases, which are important to a consideration of the issues in this appeal, are referred to in Section 7(e) of this judgment.)

6.15 She submitted that the amendments do no more than to restate conclusions which Australian and overseas Courts had already reached about the rights of children and their best interests. She submitted that the legislation did little more than place additional emphasis upon these considerations, and submitted that at best s.60B could be regarded as a starting point and as an indication that Parliament intended that the Court specifically identify those matters and give them proper weight. However, they were to be weighed against all other relevant matters including those set out in s.68F(2), and ultimately the paramount consideration is the best interests of the child (s.65E).

6.16 She submitted that it was artificial and inappropriate to consider the rights of a child in a vacuum, that the child is a member of a <<family>> and that included the rights of the parents, one of which was to move the location of that <<family>> if circumstances dictated that course. She emphasised the high mobility of Australian society and illustrated that by reference to situations where a parent was obliged as part of employment or other responsibilities to move home. She submitted that it would be absurd to suggest that, for example, members of the defence forces, police officers, teachers and who are parents separated from their spouses would not be able to accept a posting unless they could demonstrate that that posting satisfied the test suggested by Mr Hamwood.

6.17 In relocation cases proper regard was to be had to the principles in s.60B as well as to the matters set out in s.68F but it was a balancing exercise dependent upon the circumstances of each case, including the importance of the children remaining with the parent with whom they were accustomed to live even if that involved a reduction in contact with the other parent and a change of environment. She submitted that these considerations involved no substantive change to the law, that in cases such as Brown and Pedersen (1992) FLC 92-271 the Court had made clear that parents had no proprietary rights in children and that the issue was to be determined having regard to the rights and best interests of the children.

6.18 She submitted that any consideration of the best interests of children must include the parents' rights to freedom of movement pursuant to domestic law and as a human right recognised by the International Covenant on Civil and Political Rights (ICCPR), by Australia's obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and under UNCROC, and which, she submitted, where relevant to the interpretation of Part VII.

6.19 Ms Pagani submitted that in the adjudication of relocation cases the Court should take judicial notice of the economic and social consequences to women generally which may result from preventing relocation: see Moge v Moge (1992) 43 RFL (3d) 345; [1992] 3 SCR 813, and Mitchell and Mitchell (1995) FLC 92-601. Her submissions on this aspect (which were largely adapted from submissions made by the Women's Legal, Education and Action Fund to the Supreme Court of Canada in Gordon v Goertz, supra) may be briefly summarised as follows:-

- the largely private nature of child care responsibility;

- the greater domestic child-care responsibility borne by women, whether or not also in paid work;

- that such responsibility for children has socially defined women as secondary earners who are likely to limit their paid workforce participation for that reason;

- this division of labour has exacerbated women's inequality in the paid workforce by contributing to systemic pay and employment inequality;

- upon separation, women are more likely to have custody of children of the relationship; and that

- single parent mothers are far more likely to live in poverty than mothers raising children with a male partner.

6.20 She submitted that the trial Judge had properly exercised his discretion. He had correctly set out the principles, he made no error on issues of fact, and he had considered all relevant issues. In particular, he took into account the wishes and concerns of the wife because of their impact upon the best interests of the children. Those findings were open and were supported by the evidence of the counsellor. She also submitted that the requirement of "regular contact" would be satisfied in this case. She submitted that Mr Hamwood's submission that the children must continue to enjoy access to the extent previously enjoyed means in reality that it would be virtually impossible for either parent to change their existing arrangements despite substantial changes in their circumstances.

(c) The Attorney-General

6.21 The Attorney-General submitted that the enactment of the <<Reform Act>> provided a fundamental shift in the approach to the resolution of disputes about children, that shift receiving overt recognition from the four principles in s.60B(2). He submitted that the effect of that sub-section was that in making orders the Court must start from the position that the child has a right to regular contact with both parents and anyone significant to the child's welfare and that both parents share a responsibility for the child's care, welfare and development. He submitted that the focus of the Court's inquiry should be on the likely effects on the child of the possible range of orders rather than the likely effect on the parents, and determine what residence and contact arrangements are in the child's best interests.

6.22 He submitted that another fundamental shift was in parental roles and this was exemplified by the difference between the old notions of custody and the new emphasis upon joint responsibility. The intention of the legislature was to remove concepts of custody along with its proprietorial notions and to emphasise shared parental responsibility.

6.23 He submitted that in any application for a parenting order, s.65E requires that the Court must regard the best interests of the child as the paramount consideration. In determining that the Court must consider the matters set out in s.68F(2), the Court's consideration of those matters being "guided" by the principles set out in s.60B(2). Those guiding principles inform the Court of the rights of the child which must be respected in making a decision which is to be in the child's best interests. Those principles give "guidance" to the Court as to what values apply in considering the matters in s.68F(2) and in determining what weight should be given to particular matters in each case. The matters in s.60B(2) were in effect "guideposts" to be followed except to the extent that they are incompatible with the child's best interests, but the Court should aim to achieve the objects and principles set out in that section.

6.24 The proviso to s.60B(2) recognises that strict adherence to those principles may not always serve the best interests of the child. In addition, s.65E makes the best interests of the child the paramount consideration in any event.

6.25 He submitted that in a relocation case the question for the Court is - what residence and contact orders and arrangements in respect of parental duties and responsibilities are in the best interests of the child having regard to the proposed residence arrangements of both parents? That question is answered by determining what is in the child's best interests having regard to the matters in s.68F(2) in the context of the objects in s.60B(2).

6.26 He submitted that the effect on the parent who wishes to relocate but who would not do so if the child did not continue to reside with that person may be relevant to the extent that it affects matters in s.68F(2). He submitted that this is particularly the case where it is in the child's best interests to continue to reside with that parent. He referred, by way of example, to the case where the detriment suffered by that parent may affect the economic and psychological capacity of that parent to provide for the needs of the child. He submitted that the ultimate inquiry always remained focused on the likely effects on the child of the possible range of orders. He submitted that the inquiry must commence from the position that the child has the right to regular contact but the party proposing change did not bear any onus of showing that the change

was in the best interests of the child or that the status quo was not in the best interests of the child. He submitted that no presumption or onus applied either way in the determination of such proceedings.

6.27 He submitted that the range of orders is not to be determined in isolation from the parents' circumstances. Otherwise parents who were employed in industries where mobility was required (such as the defence forces and the mining industry) would be disadvantaged if questions of residence, contact and specific issues were determined in isolation from their particular circumstances.

6.28 He submitted that in relocation cases "if the Court adopts the correct approach by saying that these are the proposed circumstances, what is in the best interests of the child, but, in general terms, there is a right of a person to shift from one place to another, then I think the question becomes a simpler one. The legislation does not assume that a court will be looking to make injunctions to restrain the parents, either contact or resident, from moving." He assented to the proposition that the Court has in these cases to give "sensible recognition to the circumstance that Australia is a highly mobile society and one or other or both parents may, for good reason, need to or wish to relocate at some point of the lives of their children and that the (Court) cannot, in a practical sense, disregard that circumstance". He submitted that "a practical approach" would be "to say that in every case the Court has to stand back and say not what rights have been acquired but, given the circumstances and the proposed circumstances, what is in the best interests of the child and if the (resident parent) resident in Cairns wants to move to Bendigo then that is a new circumstance to which regard must be had and what is an appropriate order for contact will be made in the context of the proposed new circumstances."

6.29 He submitted that the degree and nature of contact between a child and each parent would depend upon what is in the child's best interests. He submitted that "regular" contact does not necessarily require face to face contact and does not necessarily mean frequent.

6.30 He submitted that prior decisions of the Court should now be approached with caution because they did not deal with the issue of relocation in the way in which it should be dealt with as a result of the <<Reform Act>>. He submitted that, prior to the <<Reform Act>>, the Court was concerned with the relocation of the custodial parent who then had rights to daily care and control whereas under the present legislation it is the resident parent, both parents sharing other duties and responsibilities. He submitted that some prior decisions of the Court placed inappropriate emphasis upon the legal consequences then flowing from a custody order.

6.31 Although the Attorney-General indicated that he did not wish to make any submissions as to the merits of the appeal, he contended that the trial Judge was in error in holding that the "essential inquiry" remained the same as it had been prior to the <<Reform Act>>. He further submitted that the trial Judge was in error in giving weight to (a) the wishes and interests of each of the parents, together with the notion that parties should ordinarily be free to pursue a new life subject to meeting their responsibilities as parents, and (b) the fact that here the wife had been the unchallenged primary caregiver of the children for a long time.

6.32 The Attorney-General did not support the submissions of the husband as to the interpretation and inter-relationship of the relevant sections of Part VII. In particular, he submitted that existing parenting orders were not immutable.

6.33 He submitted that the submissions for the wife were also in error in that they suggested that the Court should continue to apply existing principles. This ignored the enactment of s.60B.

6.34 The Attorney-General provided the Court with extensive extrinsic material, being the Explanatory Memorandum to the <<Family Law Reform>> Bill 1994, Supplementary and Further Supplementary Memoranda to that Bill, the Report of the Senate Legal, Constitutional and Legislation Committee on the <<Family>> Law Bill and the <<Family>> Law Bill (No.2) 1994, the government response to the report of the Senate Committee, the second Report of that Committee tabled on 6 May, 1995 and the government's response to that tabled on 29 June, 1995, extracts from debates in the House of Representatives in relation

to the <<Reform>> Bill on 8 and <<9>> November, 1994 and 21 November, 1995, extracts from the Senate debates between 28 November, 1994 and 29 November, 1995.

6.35 The Attorney-General objected to reliance by the Commission, the wife and the husband upon UNCROC, and by the wife and the Commission upon the Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women, submitting that that material did not fall within <<s.15AB of the Acts Interpretation Act>>. He submitted that they had no relevance because the statute was comprehensive, stands alone and does not need assistance by anything that was only of general origin. He submitted that the general rule was that Australian legislation will be construed so far as possible to conform to Australia's obligations under treaties which Australia has ratified and that <<s.15AB>> gives effect to the principle that prima facie Parliament does not intend to <<act>> in breach of international law, but he submitted that in this case there was no ambiguity or obscurity in the legislation and that Part VII was "effectively" a code. He submitted that the circumstance that reference had been made to UNCROC in drafts of the Bill and in second reading speeches and explanatory memoranda was not relevant because the Convention was not referred to in the statute as finally passed.

6.36 He submitted that resort could not be had to the other two Conventions and that their scheduling to Australian domestic legislation did not alter that.

6.37 Other important matters raised by the Attorney-General included:-

- The change in <<s.65E>> from "welfare" to "best interests" made no change of substance.

- The description of "parental responsibilities" in <<s.61B>> was probably broader than what was contained in the concepts of guardianship and custody in the prior legislation. He submitted that it may pick up "all of the underlying and continuing common law and statute law that affects the relationship of parents and their children". However, he specifically expressed no view as to whether those powers of parents in <<s.61B>> must be exercised jointly or whether they could be exercised separately by each parent.

- The Court could in an appropriate case make a residence/residence order rather than residence/contact order.

- <<Section 60B>>(2) should not be seen as creating rights in children which were enforceable.

6.38 The Attorney-General did not seek to express any view on the question whether orders could be made under Part VII which had the effect of inhibiting a contact parent from relocating.

6.39 The Attorney-General referred in his submissions to several decisions of this Court given after the <<Reform Act>> came into operation. We will discuss that later in Section 11 of this judgment. He also made later written submissions about the Canadian authorities. We will refer to that in Section 7(e).

6.40 Ms Mullins, junior counsel to the Attorney-General, submitted, inter alia, that the appeal was about statutory construction and that "what is new is that there is a path now for the Court" or a "new process". The Court is given assistance by the legislature which it did not have before, the focus now being on the child and notions of shared responsibilities by parents, although s.60B does not define or confine the best interests of the child. The test established by the High Court in M v M (1988) 166 CLR 69; (1988) FLC 92-979 in relation to sexual and other abuse remains as valid after the <<Reform>> <<Act>> as it was before.

(d) The Commission

6.41 The principal contentions by Mr Rose, for the Commission were:-

1. The constitutional right of each adult to freedom of movement between the States.

2. That constitutional right by its nature must be afforded recognition and status no less than any other 'right' and/or 'principle' in s.60B(2).

3. The weight that that right is accorded will depend upon the facts in the particular case.

4. That right is no less than any other 'right' which is subject to: - the objects in s.60B. - the best interests of the child.

5. The recognition, status and, in a given case, weight afforded to the right to freedom of movement may promote the attainment of the object of the <<Act>> by ensuring proper parenting, enabling children to achieve their full potential and operate in the best interests of the child.

6. Conversely, the failure to recognise that right may derogate from the object of the <<Act>> and the best interests of the child.

6.42 In relation specifically to the question of freedom of movement, Mr Rose submitted:-

- <<Section 92 of the Constitution>> is a guarantee of personal freedom "to and fro among the States without burden, hindrance or restriction": Gratwick v Johnson (1945) 70 CLR 1 at 17; see also Cole v Whitfield (1987-88) 165 CLR 360 at 393.

A right to freedom of movement may also be implied from <<the Constitution>>, as flowing from the notion of a federal union and a free society governed according to the principles of representative democracy. This right of freedom of movement, particularly within a state, has been recognised in Australian law by the High Court in R v Smithers; Ex parte Benson (1912) 16 CLR 99. Higgins J, at 119, held that, as in the United States of America, citizens "as members of the same community must have the right to pass and repass through every part of it without interruption as freely as in their own states" (emphasis added). See also Buck v Bavone (1976) 135 CLR 110 at 137 and Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556. Generally, see also Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 per Mason CJ at p.138-139, 141-142, Brennan J at p.150, Deane and Toohey JJ at p.174 and Gaudron J at 212.

- The right to freedom of movement also underlies the common law rights to liberty and security of the person, freedom of peaceful assembly and procession, and to a democratic society respecting the rule of law. There are, of necessity, restrictions in terms of necessary protections such as the law of trespass and protection of matters affecting the security of the state: see Melbourne Corporation v Barry (1922) 31 CLR 174 at 206.

- The right to freedom of movement is also found in article 12(1) of the International Covenant on Civil and Political Rights which entered into force for Australia on 13 August 1980 and is defined as a human right in <<s.3>>(1) of the <<Human Rights and Equal Opportunity Commission Act>>. Having entered into force for Australia the Convention is a legitimate and important influence on the development of the common law: Mabo v Queensland [No 2] (1992) 175 at CLR 1 at 42.

6.43 Mr Rose further submitted that the effect of <<s.65E>> is to maintain the previously established position that the best interests of the children remain the paramount consideration in relevant proceedings under Part VII. He submitted that the Court should go firstly to <<s.60B and then to s.68F>>(2) to determine what is meant by or what is the content of the best interests of the child and then to <<s.65E>> which makes it clear that the Court cannot make an order unless it is in the best interests of the child.

6.44 Mr Rose submitted that the <<Reform Act>> had clearly drawn upon UNCROC. The Convention was specifically mentioned in an earlier drafts of the <<Act>> and in explanatory memoranda: (see Section 3 of this judgment). To the extent that there is any inconsistency or ambiguity in the operation of the <<Act>>, it should be resolved in a way that is consistent with international law: Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 38; The Minister for Foreign Affairs v Magno (1992) 112 ALR 529 at 534-5; Murray v Director, <<Family Services, ACT>> (1993) FLC 92-216 at 80,255; Teoh v Minister for Immigration, Local Government and Ethnic Affairs (1994-95) 183 CLR 273 at p.287; H v W (1995) FLC 92-598. Where a statute transposes a provision of a treaty into the statute, the prima facie legislative

intention is that the transposed text bears the same meaning in the domestic statute as it does in the treaty: A v Minister for Immigration and Ethnic Affairs 71 ALJR 381 p.383. The interpretation of international treaties requires a holistic but ordered approach which may involve a consideration of both the text and the object and purpose of the treaty: A v Minister, supra, at 383 and 396. The best interests of the child is an underlying consideration of UNCROC. Accordingly, in construing the <<Act>> an interpretation which recognises the paramountcy principle ought to be favoured.

6.45 He submitted that the relevance of UNCROC was substantial - it is part of the platform providing the underlying principles of the <<Reform Act>>. Its legal relevance is that because the <<Act>> does not clearly create a precedence of rights (other than that the best interests of the child are paramount), the Convention assists by providing a basis for construction that is consistent with international norms - something that is to be preferred if legitimately open to the Court. That is to say, s.60B, s.65E and s.65F are to be interpreted within the context of international human rights principles insofar as that interpretation is compatible with Parliament's express intention in the <<Reform>> <<Act>>. The first paragraph of the preamble to the Convention states that "in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal inalienable rights of all members of the human <<family>> is the foundation of freedom, justice and peace in the world". The preamble also states that the <<family>> "is the fundamental group of society and the natural environment of the growth and wellbeing of all its members and particularly children". The wellbeing of all members of the <<family>> and the freedom of a parent to exercise his or her human rights are factors in determining the best interests of the child.

7. RELOCATION CASES

(a) General Discussion

7.1 During the course of submissions there was discussion about previous decisions of this Court and of the courts of other countries relating specifically to the issues which arise where the party with whom the child is living proposes to move to another location. In Australia there have been a number of reported cases which have discussed this issue. His Honour discussed some of them in his judgment and applied principles which he said were to be drawn from them. Mr Hamwood, for the husband, submitted that these cases were no longer applicable having regard to the <<Reform Act>> and consequently his Honour was in error in his approach. The Attorney-General submitted that it was now "unsafe" to rely upon previous authorities.

7.2 We propose to discuss some of those cases both in Australia and overseas. But it is to be noted that relocation cases are not a separate category within the <<Family Law Act>>, to be determined by their own principles and rules. Each is a case under Part VII relating to the best interests of the children but within a particular context and, as with any other relevant case relating to children within the jurisdiction of this Court, is to be determined in accordance with the principles contained in that Part. However, over the years it has seemed helpful to develop concepts or guide-lines which are seen to be of assistance in determining the best interests of children in the context of relocation.

7.3 When the parents are living together a change in their home environment is not an uncommon circumstance in Australia. <<Families>> move from one suburb to another, from one town to another, or from one State to another, for a variety of reasons, including the dictates of employment, <<family>> and lifestyle, and in some cases a desire to move from their first home to a more comfortable second or third home. When the parents are living together these decisions are made by them, although in many cases they may be dictated by outside factors such as transfers in employment. The reference by both Ms Pagani and the Attorney-General to compulsory changes of residence involved in some occupations and the mobility which is required in some occupations represent examples of this. In this situation, at least in the short term, it may be said that the rights of children are in some cases adversely affected in that they may find themselves moved from the environment in which they have lived, with their schools, friends, members of extended <<family>>, and neighbourhood, and are required to commence a new life elsewhere. This occurs to many children in Australia during childhood, and experience indicates that there is usually a rapid adjustment and their lives are often advanced, even enriched, by these changes.

7.4 When parents separate the relocation of one or sometimes both is inevitable. Both parents do not continue to live in the same home. Often it is necessary for the house to be sold, requiring both to relocate. Sometimes they can do that within the same locality; often not. Various considerations determine choices which have to be made at that stage in the life of that <<family, including personal, economic, family>> and other considerations. Whether the change produces a situation where the parents still live close to each other or whether it produces a situation where they live a substantial distance from each other, it is inevitable that the rights of the children to "know and be cared for by both their parents" and the "right of contact, on a regular basis, with both their parents" will be affected. Almost inevitably the children will live for the much more substantial portion of their daily lives with one parent. Daily contact with and care by the other party may no longer be feasible.

7.5 Unfortunately, separation, divorce, and single parent <<families>> are not uncommon in Australia. There are now over 48,000 divorces granted in Australia annually involving approximately 48,000 under-age children each year. These figures do not include the separation of parents who were not married. Single parent <<families constitute over 13 percent of families>> in Australia and of that 13 percent the mother is the resident parent in approximately 84 percent of them. In the discussion of cases like this the extent and timing of re-partnering of divorced spouses is of obvious relevance. Whilst statistics on informal re-partnering are by their nature unreliable, the Australian Bureau of Statistics provides comprehensive information on re-marriage. In 1993, the most recent complete statistical collection, 680 per thousand divorced men and 520 per thousand divorced women had re-married. Of those re-married men, the average period from divorce to re-marriage was 2.8 years, and for those re-married women the period was 3.2 years. In 1995 22 percent of grooms and 15 percent of brides had previously been divorced at the time of the marriage, and in 15 percent of marriages both had previously been divorced.

7.6 For most parents who are separating sensible pragmatic arrangements are made which enable the children to have contact with both parents as frequently as is practicable. It is a clear policy of the <<Reform Act>> to emphasise this obligation and encourage parents to reach agreements which reflect the provisions of Part VII.

7.7 However, even where the relocation only involves one or both parents moving from one suburb to another or to another nearby town, the degree of previous contact with the children is almost inevitably reduced or changed. Once it is accepted within our society that parents may separate and, if married, may divorce, this consequence inevitably follows. Even in cases where the distance between households is not great, practical considerations place restrictions upon the free contact which the children had previously enjoyed with one or other parent. Issues of availability of transport and its cost, the availability of the children because they are at school or at recreation, the availability of the other parent because he or she is employed, the ability to take leave from work to coincide with school holidays, the wishes of the children, all represent practical limitations. In the vast majority of cases parents reach commonsense arrangements and do the best they can to respect the rights of their children in an imperfect situation.

7.8 In a small number of cases the parties are unable to agree and this Court is required to adjudicate. The essential aim of the Court is to protect and advance the best interests of the children, and it makes orders which grapple with these practical difficulties as best as may be, commonly, where the children are of school age, focusing upon weekends and school holidays. As a result of the <<Reform Act>> the list of matters which the Court must consider includes "the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis" (s.68F(2)(d)). It is no doubt beneficial for the legislation to specifically emphasise this as a matter which both the parties and the Court are required to consider, but it is a matter to which the Court has over many years devoted considerable attention.

7.<<9>> Sometimes when parties separate they establish temporary accommodation until a more permanent home becomes a reality. This will often involve a move from one home to a better home within the same city but a different suburb. Where the children are living with that parent, this will again involve a change in their environment and a temporary dislocation in their day to day life. If it is the contact parent who moves this will often add to the practical difficulties of future contact and impact upon the rights of the

children to "contact, on a regular basis, with both their parents". It may require changes in previous contact arrangements, resulting in a reduction in or less frequent contact. Again it is difficult to contemplate the application to such changes of the principles suggested by Mr Hamwood; otherwise both parents would be frozen in locations which for various reasons seem to be inferior to their subsequent choices or are no longer viable.

7.10 In a small percentage of cases, of which this case is an example, one or sometimes both parties choose to move a greater distance away from their original or subsequently established environment. Australia is a highly mobile society. It is also a large country and the tyranny of distance develops by degree. Once the distance involved goes beyond a particular degree, it is likely to make a profound impact upon at least the frequency with which the children can have contact with the contact parent. That is, once the distance involved makes weekday or weekend contact impractical the realities begin to dictate that that contact has to be less frequent but for larger blocks of time - long weekends, school holidays. Other forms of contact may then need to be contemplated - telephone and letters - and cost becomes an important consideration. Once the interstate element intrudes that frequently dictates the need for air travel, and the cost of frequent visits then becomes substantial and, depending upon the financial position of the parents, may become a limiting or prohibitive circumstance. In this particular case the question of cost is not an issue but it frequently is. Parties often deal with these matters by agreement. Where they are unable to agree the Court is obliged to grapple with this cost issue in a pragmatic way, there being no ideal solution where the parties' financial positions are limited.

7.11 Obviously where the contemplated relocation is interstate or overseas the issue of maintaining contact becomes more acute, but the basic principles remain the same. The difference 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.

7.12 The reason why a resident parent may wish to move (interstate) with the children (or if Mr Hamwood's submissions are correct the contact parent without the children) are usually related to employment, <<family>>, or a new relationship. Some cases involve other reasons such as the health of a parent, the child, or perhaps a <<family>> member, but employment and new relationships are the usual reasons.

7.13 The prospect of a significant advance in employment or business, with economic benefits to that parent and the children in that household, are frequent and compelling reasons. In some cases the transfer is unavoidable in the sense that it is in the nature of the employment; and in other cases it may be theoretically voluntary but a refusal may result in loss of seniority or loss of employment. The current employment situation in Australia usually allows little choice. Even when it is voluntary in the more general sense the move may in practical terms be inevitable because it is seen to be financially advantageous, thus improving the overall financial position of the household, including the children. In some cases it may make the difference between on the one hand the <<family>> continuing to live in marginal financial circumstances, dependant upon welfare, and, on the other, being in paid employment with a more financially secure and thus better life for that household. Where the contact parent seeks to restrain the resident parent from taking up such an option, it is rarely suggested that he or she can or will make up the financial difference. Similarly, if Mr Hamwood's view is correct that the contact parent may be restrained, the same considerations apply as it may prevent that person from improving his or her financial position and thus directly or indirectly the financial and general situation of the children.

7.14 In a number of cases, of which this is one, the relocation is because of a desire by the resident parent to remarry. Mr Hamwood was inclined to discount this as the pursuit of the resident parent's own life at the expense of the children. Such a view is unjustified.

7.15 The forming of personal relationships, often within marriage, is an integral part of our society, and one which is encouraged at all levels. It is not simply that it fulfils the personal desires of the persons involved. It is an essential aspect of life in our society. <<Section 43 of the Family Law Act>>, which sets out principles which this Court shall apply in exercising jurisdiction under <<the Act>>, includes "the need to preserve and protect the institution of marriage" and to "give the widest possible protection and assistance

to the <<family>> as the natural and fundamental group unit of society." There is no reason to suggest that these principles apply only to first marriages.

7.16 In this case the parties' marriage terminated over six years ago. The husband intends to re-marry this year and the wife desires to do so. No doubt both of them see re-marriage as desirable personally and beneficial to their children. It is accepted that for the wife to fulfil that desire it is necessary for her to go to Bendigo, it not being practical for her fiance to live in Cairns.

7.17 As we have said, there are other reasons why a relocation to another town or another State is seen by the parent to be desirable, in some cases essential. That includes reunion with <<family>> from an otherwise isolated lifestyle after marriage breakdown, occasionally issues of health, and not infrequently to escape violence and abuse by the former partner.

7.18 The point of referring to these reasons is not to attempt an exhaustive list or to give them any particular validity in the abstract. The ultimate point in these cases is that often good, perhaps compelling, reasons exist to relocate. One of the tasks of a trial judge is to assess the genuineness and significance of those reasons, a matter emphasised in Holmes' case. Where the reasons lack validity - for example, to spite the other party by making contact difficult - the Court may be likely to inhibit such a step. The circumstance that the proposed move is genuine is of course not sufficient in itself. The Court is required to consider, amongst other matters in determining the ultimate issue of the best interests of the children, the degree of significance of the proposed move and the impact which that will have on the children, the other party, and the inter-relationship between all of them. In some cases the contact parent has had, either by choice or circumstance, little meaningful contact with the children; in other cases contact may be seen as of little value or even harmful. A change in the children's place of residence may in those circumstances cause little detriment.

7.19 In a sense almost any case relating to residence involves the children relocating from their previous environment. If the party who is not the residence parent seeks a residence order and that application is successful the children would live in another home. It is unlikely that that home will be in the same street or immediate area of the previous home of the children. Generally it involves the children living in another suburb or in a nearby town but in each case there is an element of relocation. Basically the children will cease to live in their previous home and will live in another home with a different environment and probably different schools and friends.

(b) Australia

7.20 We turn briefly to previous Australian decisions dealing with this issue. There are numerous reported decisions, many of which are well-known. In addition, a substantial number of these applications are heard each year at first instance but are not recorded in the reports and there are many more where the parties agree about relocation without court intervention.

7.21 In reading these cases now it is essential to bear in mind the changes in nomenclature which have occurred over the years. We have referred to this in <<Section 3>> of this judgment.

7.22 Of necessity the pre-1996 cases discussed child related issues, including the issues of relocation, in the terminology of the time, that is, pre-1983 or pre-1996. Mr Hamwood and the Attorney-General submitted that the earlier cases should now be disregarded or treated with caution because they attached significance to the circumstance that the person seeking to relocate was a "custodian" and thus had legal powers in respect of the child which went beyond what is now encompassed by "residence".

7.23 That argument would not assist Mr Hamwood in this case. As we pointed out earlier, the mother had a custody order prior to June 1996 and the transitional provisions in the <<Reform Act>> apply. However, it is undesirable to dismiss this essential argument of principle on that narrow basis.

7.24 Whilst in some of the earlier cases there are references which support these submissions, it is not, we think, correct of the essential thrust of those cases and the principles which they stand for. Firstly, it must

be recognised that they spoke in the terms of custody and access because they were the terms of that time and it could not be expected that they would have spoken in terms of residence and contact. Secondly, and more importantly, the significance of the use of those terms in discussions in most of those cases was the emphasis upon the circumstance that the person seeking to relocate was the person with whom the children habitually resided, that is, the applicant was the parent who had the daily care of the children, including providing the home where the children lived, sending them to school, and generally looking after their daily welfare. The emphasis was upon those considerations. It was convenient in that context to use the term custodian because that was the term of the times and it encompassed those aspects in one word.

7.25 Although residence is defined much more narrowly in the <<Reform Act>> than custody was either pre-1983 or pre-1996, the practical reality in many cases remains the same. In many cases, of which this case is one, the residence parent is the person with whom the children live in a day to day sense and is the person who performs the daily tasks which follow from that.

7.26 In the period since the <<Family Law Act>> came into operation in 1976 there have been a substantial number of reported cases dealing with these issues, including Craven (1976) FLC 90-049; Ryan (1976) FLC 90-144; Cattanach and Leavens (1977) FLC 90-246; Lamche (1977) FLC 90-272; Kuebler (1978) FLC 94-434; Fryda and Johnson (1979) FLC 90-634; Armstrong (1983) <<9>> Fam LR 402; R and R (1984) FLC 91-571; Rudolph and Dent (1985) 10 Fam LR 669; Dunshea (1987) 11 Fam LR 563; Holmes (1988) FLC 91-918; Lourie and Perlstein (1993) FLC 92-405; Fragomeli (1993) FLC 92-393; Skeates (1995) FLC 92-626, and I and I (1995) FLC 92-604.

7.27 Some of those cases, of which Ryan and Armstrong are examples, placed too much weight on the freedom of movement of the custodian as custodian and were criticised for this reason in cases such as Dunshea, Holmes, and Rudolph/Dent.

7.28 Otherwise we think that a consistent pattern emerged from those cases, namely, the power to make or refuse to make the relevant order was not in doubt, it was an exercise of discretion within Part VII of the <<Act>>. Regard must be had to the individual facts of the particular case but the paramount consideration was the welfare or, now, best interests of the children. Within that context it was proper to recognise the mobility of our society and that there are various reasons why it may be necessary or desirable for a custodian (now 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. We think that those principles and discussion of them is essentially to be found in cases such as Craven, Kuebler, R and R, Fryda and Johnson, Holmes, Fragomeli, and I. We will not for the purposes of this discussion of principle deal in any detail with the facts of those cases or dwell upon their outcomes since the facts were often detailed and subtle and the outcomes depended upon the application of the general discretion to the myriad competing factors of each case. We should also say that the earlier cases drew upon a line of English cases referred to in part (d) of this Section.

7.29 Craven is one of the earliest of the reported cases on these issues. Although some passages in it have since been criticised for what may be too much emphasis on the right of the parent to move, it still remains an important decision as it sets out in clear terms the basic principles to be applied. It was a case where the mother, in breach of a court order, removed the children from Victoria to Queensland. At 75,204-5 the Full Court said:-

"... it seems to us that it is necessary in determining the issue to consider whether it is reasonable, and above all whether it is in the best interests of the children, that the mother be free to change her residence in such a way as to alter the access by the other parent to the children. Her freedom of movement and her right to choose freely where to live may itself be a factor in the welfare of the children. As the person responsible for the custody of the children her ability to function effectively is important to their welfare.

[...]

We cannot approve of the mother's conduct in taking the children away as she did and in failing to keep the father informed of her address.

[...]

This Court will always condemn a parent who seeks to destroy the relationship between the children and the other parent unless there are special reasons requiring such a breach in the child's interest. This is not such a case. This Court is always mindful of the need to protect children and to maintain their relationship with both parents. (sec.43). The Court's orders should be such as to encourage both parents to maintain relationships with the children; in this context the concepts of punishment and enforcement are not appropriate.

The welfare of the children should be uppermost in the Court's mind when it is called upon to consider whether to use its powers to restrain the parent with custody of children from removing the children away from the city or town where the other parent resides, thus affecting the opportunities for access to the children by that other parent. We note incidentally that this is not a case involving removal of the children from Australia and we are not dealing with the issues which could arise where they may be taken outside the jurisdiction of the Court."

7.30 In R and R the wife unsuccessfully appealed to the Full Court against an order preventing her from taking the child from Australia to live permanently in France. The Full Court judgment was largely concerned with issues relating to the child's permanent removal overseas and the unusual facts of that case. However, it was the first reported judgment after the 1983 amendments and the Court took the opportunity to discuss the earlier cases. It emphasised the power to make or refuse the order and the discretionary nature of such a judgment at 79,616 went on to say:-

"All of these statements of principle applicable to the circumstances of particular cases however must all be read now as subject to the express provisions of sec 64(1) of the <<Act>>.

The position we think was properly stated by Fogarty J in his unreported judgment Crossley v. Crossley 22 December 1980. After reviewing the then available English and Australian authorities his Honour said: "[Counsel] in his address maintained that the effect of those authorities was that it requires an exceptional case to refuse permission to a custodian to take the child where she reasonably chooses to take it and that such a right would only be denied where the welfare of the child clearly dictated that such a course was required.

Although that may be an interpretation of the authorities it does seem to me undesirable in dealing with cases of this sort, which involve the exercise of a discretionary power in relation to the particular circumstances of an individual case, to circumscribe that by reference to particular adjectives which only tend to be come ossified and thus to stultify the proper exercise of the discretion in the individual case. The Court is required to make a decision about who is the appropriate custodian of the child where a marriage has broken down. That decision is made and society through the Court then reposes in that person the obligation of bringing up that child in proper circumstances. That can in many cases be a very onerous obligation. Ordinarily the Courts would not attempt to circumscribe that by dictating to the person who is the preferred custodian where the person may live etc. Ordinarily a custodian should be free to choose the particular place in which the <<family>> of whom she has the custody will reside. It would in ordinary circumstances be a serious restriction upon the ordinary rights and freedoms of the individual for a Court to require somebody to live in a particular place when they wish to live somewhere else. However, and notwithstanding the fact that that person is chosen by the Court as the custodian, if the facts indicate that the welfare of the child requires such a condition, then that must be the case.""

7.31 The decision in Fryda and Johnson is a judgment at first instance and is valuable because it represents the understanding at first instance of the trend of the authorities and the principles to be applied. At 78,319, Connor J of the <<Family>> Court of Western Australia referred to the "right that a party has after a divorce to be able to live where he or she chooses" but, where children are involved "this matter must always be subordinate to the welfare of the children which is the paramount consideration." His Honour made it clear (at 78,320) that:-

"the more serious matter for consideration is the matter of the deprivation of regular access. As I have said the husband is in regular contact with the children, they are fond of him and his de facto wife. If they (the children) leave Australia they will probably only see him once in every year."

7.32 The decisions of the Full Court in Holmes and in I and I are generally regarded as the essential recent cases on these issues. Holmes was referred to by Jordan J in this case.

7.33 The judgment in Holmes contains a useful discussion of the principles which applied. It discussed most of the earlier decisions and emphasised that the 1983 amendments made no change to the established principles. It referred, as we have above, to the circumstance that some of the earlier cases had placed undue emphasis upon the "rights" of the custodian.

7.34 At 76,663 it restated the fundamental principle as follows:-

"The basal principle is clear: in any case under the <<Family Law Act>> involving children the ultimate determinant is the welfare of those children. The wishes or desires of one or both of the parents may of necessity have to give way to that."

7.35 It set out the following considerations as useful in considering these applications (at 76,663):-

"In applying that general principle it is often useful to consider the following aspects (although they should not be treated as exhaustive): 1. Is the application to remove the children from their previous environment made bona fide? We have already referred to aspects of this. If it is not, then that would usually be the end of the application.

2. If it is bona fide, can the Court be reasonably satisfied that the custodian will comply with orders for access and other orders made to ensure the continuance of the relationship between the children and the non-custodian? If the Court is not satisfied about this, this would be a weighty, although not decisive, matter against the success of the application.

3. The general effect upon the welfare of the children in granting or refusing the application. Such a consideration would include reference to the effect on the children of deprivation of, or diminution of, access and general association with the non-custodian and his <<family>>, and any disadvantages to the welfare of the children in the proposed new environment in isolation or in comparison with the previous environment. (see Kuebler (supra) at pp.77,205-77,206.)

In this context the genuine wishes of an unchallenged custodian is an important consideration. That is so partly because the unhappiness of the custodian is likely to impinge upon the happiness and welfare of members of that person's household, and partly for reasons that are expressed in a number of cases including the well known passage in the judgment of Sachs LJ in P v. P (1970) 3 All ER 659 at p.662: ..."

7.36 The Court then set out that well known passage in P v P (and which we will repeat in part (d) of this Section) and referred to in the judgment of Asche J in Kuebler which we do not think we need repeat.

7.37 The Court then discussed in more general terms the practical issues which arise in these cases and did so in the following terms (at 76,664):-

"In addition, in practical day-to-day terms in considering applications of this sort it is frequently necessary or desirable to draw distinctions between (a) interstate and overseas cases, and (b) cases where custody is genuinely in contest compared with cases where the applicant has been the long term or unchallenged custodian.

The explanation for the former is stated by the Full Court in Armstrong (1983) <<9>> Fam LR 402 at p.407 as follows: "But the broad homogeneity of Australian society coupled with the well established and continued pattern of interchange of substantial numbers of people from one State or Territory to another makes it difficult to sustain any argument that the welfare of the children who are moved from one part of

Australia to another will be detrimentally affected by that fact alone. Arguments against such a move must therefore normally be related to more particular circumstances of the children's welfare; and it is important that the court keep constantly in mind the principle that a custodial parent has, in general, a legitimate right to personal choice of residence in Australia, and may have legitimate demands (constituted, for instance, by employment prospects or a new marriage), to move to another part of the country. In each case when such a question arises the proper needs wishes and requirements of all concerned must be afforded adequate weight."

Those views are not to be taken as suggesting that in interstate cases such applications must be successful, but they indicate that the proposed move may attract less concern than the case where the proposal is to go to another country."

7.38 The Court emphasised at 76,659-60:-

- "the maintenance of the husband's relationship with the children, was ... a central aspect";

- "It is a matter of ordinary, common experience that long term unhappiness experienced by a custodian is likely to impinge upon the happiness and welfare of children who are part of that household";

- The custodian's "bona fides and ... preparedness to comply with any orders for access ... is often an important, and indeed critical, aspect in cases of this type."

7.39 Finally, in the Australian context we refer to I and I, the most recent reported decision of the Full Court, a case in which the Court reversed the decision of the trial Judge which had restrained the wife taking the children from Australia to the United Kingdom.

7.40 The Full Court, after reference to the then recent decision of the Full Court in Fragomeli, supra, stated the following propositions at 82,024:-

"We agree that the approach to be taken, based upon Fragomeli's case, is first, that the welfare of the child or children concerned is the paramount consideration; (s 64(1)(a) <<Family Law Act>>).

Secondly, and subject to the above, a custodial parent and particularly one with sole guardianship of a child should be free to order his or her own life without interference from the other party or the Court (Fragomeli's case at 80,022).

It is true that in the present case, unlike Fragomeli, no marriage is contemplated, but there can be little doubt that to require the wife to remain in this country will produce considerable strains which, in turn, can be expected to reflect upon the welfare of the children. These strains are likely to be further exacerbated by the husband's obsessive behaviour in the present case, which must of itself seriously inhibit the wife's capacity to form a new relationship.

Thirdly, conditions may be placed on a custodial parent concerning where he or she may live where this is in the best interests of the child; (at 80,023, citing Fogarty J in In the Marriage of Crossley, unreported, delivered 22 December 1980)."

7.41 The Court discussed in some detail English and Canadian cases but we will deal separately with those cases in parts (d) and (e) of this Section.

7.42 The Full Court also referred to a number of important general principles. It emphasised the particular position of a woman who is dependent upon social security, the importance of each case being determined upon its own particular facts, the paramountcy of the child's welfare and the importance of balancing the facts of the particular case without any preconceived notions. Their Honours (at 82,028) said:-

"However, in relation to the Canadian cases, we note and agree with the concept that economic factors and the unequal position of women are relevant to the issue of children's welfare. Indeed in this case, if the

wife was required to remain in Australia, she is dependent on social security, has little or no opportunity to retrain and is, to an extent, under the control of a potentially violent husband.

In a sense, however, each of these cases is different and must be approached from the point of view of its own particular facts, bearing in mind the paramountcy of the child's welfare. The present case is, in a sense, a stronger one than most from the point of view of the mother, in that the learned trial Judge saw fit to make her sole guardian as well as the custodian of the child. He did this for good reason having regard to his findings as to the behaviour of the husband. The mother's sole responsibility for guardianship and custody is not dissimilar and in fact stronger than the situation in Wolfe and Wolfe (Full Court of the <<Family>> Court of Australia, unreported, judgment delivered 20 April 1993), where the parties retained joint guardianship while the mother was granted sole custody. In a judgment with which Barblett ACJ and Burton J concurred, Nygh J said: "It is quite clear on the facts as found by his Honour, the wife was the preferred person to have custody of the children. She was, therefore, if not unchallenged, certainly the person who should, on the findings made by his Honour, have the custody of the children. Once th at was determined, she was the custodial parent and, therefore, her happiness and her attitude towards remaining in this country were relevant." (at 13)

The Full Court in Wolfe's case at 10, was clear, however, that there was no onus as such to be dis charged in such cases. Their Honours cited from Carter v Brooks at 63, and commented upon it as follows: "'I think that the preferable approach in the application of the standard is for the Court to weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. I do not think that the process should begin with a general rule that one of the parties will be unsuccessful unless he or she sat isfies a specified burden of proof."

Indeed, in my view, that is also the approach that has consistently been adopted by this Court and it is the approach which has been enunciated by this Court in Brown and Pedersen (1992) FLC 92-271 as the general rule to be followed in all cases where the welfare of children is concerned."

7.43 Until the 1995 amendments there has been, we think, a consistent line of authority about the approach to cases of this sort. The essential points were that these were cases under Part VII which were determined in accordance with the welfare of the children as the paramount consideration. They were discretionary judgments. Against that criterion the trial Judge was required to evaluate the various factors which were specific to the particular case. In approaching that task it was appropriate for the Court to take into account other factors to which the judgments above have made reference, for example, the three matters referred to in Holmes' case. Secondly, a theme which ran through these cases was the general right to freedom of movement, a right which a person who had the daily care of the child may exercise provided always that that was consistent with the children's welfare. Where that person was unable to relocate that may result in significant financial or emotional hardship to that parent and often to other members of that household, including the children whose welfare was required to be protected.

7.44 Mr Hamwood, for the husband, did not contend that the effect of the pre-1995 cases was otherwise. His contention (and that of the Attorney-General but for different reasons) was that the <<Reform Act>>, which in this context really means the provisions in s.60B, has significantly altered that position.

(c) New Zealand

7.45 The position in New Zealand, where the relevant terms are custody and access and there is no equivalent of s.60B, is conveniently summarised in the recent decision of the Court of Appeal in Stadniczenko v Stadniczenko [1995] NZFLR 493. The mother desired to move with the two children of the marriage from Wellington to Auckland. A judge of the <<Family>> Court granted her custody with a condition allowing her to do so. The husband appealed to the High Court which reversed the decision, granting custody to the mother on the condition that the children were not to be removed from Wellington without the consent of the father or an order of the Court. The wife unsuccessfully sought leave to appeal to the Court of Appeal. In the course of its judgment refusing leave that Court extensively discussed the law to be applied in such cases. In particular, it referred with approval to the Australian cases of Craven; Holmes;

and Kuebler and to English cases including P v P, supra, and Nash [1973] 2 All ER 704, and to the Canadian decision of Carter and Brooks (1990) 77 DLR (4th) 45. Their Honours (at 499) concluded that in Australia as the "welfare of the children should be uppermost in the Court's mind", an order restraining the custodian "should only be made if the welfare of the children clearly indicates that the other parent should have regular weekly access rather than less frequent but longer periods of access", that the "genuine wishes of an unchallenged custodian are an important consideration" as is the "right of the mother to control her own destiny, provided she properly appreciates the welfare of the child in so doing." The Court of Appeal referred to Carter and Brooks, supra, (which we will discuss in more detail in part (e) of this Section) and at 500 summarised the principles in that case as follows:-

"... the only principle which governs is that of the best interests of the child. That test cannot be implemented by the devising of a code of substantive rules or of procedural or evidential rules embodying presumptions and onuses. The preferable approach is for the Court to weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. In most cases, an important factor in favour of the custodial parent is that the award of custody shows that from the day to day point of view the best interests of the child lie with its being with the custodial parent, and an incident of custody is the decision where to live. The wellbeing of the new <<family>> unit bears on the best interests of the child. The nature of the relationship between the child and the access parent will always be of importance, and the closer the relationship and the more dependent the child is on it for his or her emotional wellbeing and development the more likely an injury resulting from the proposed move will be. The reason for the move is important, and also the distance of the move. The child's views are relevant. The foregoing factors are far from representing a complete list of what may be relevant."

7.46 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. Choice of residence and rights of access are not solely a matter of the rights of the parents, however. As is shown by the cases cited, they may also be important considerations in their impact on the welfare of the child."

7.47 The Court indicated that the proper approach in the case before it was for the judge to reach his decision "on the basis of the welfare of the children, looking at all relevant factors including the need of the particular children for a continuing relationship with their father ..."

(d) United Kingdom

7.48 The starting point of any recent discussion of the principles to be applied to relocation cases is usually regarded as being the judgment of Sachs LJ in P v P [1970] 3 All ER 659 at 662 (sub. nom. Poel v Poel [1970] 1 WLR 1469) where his Lordship said:-

"When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as Winn LJ has pointed out, produce considerable strains which would be unfair not only 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 a 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 not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

7.49 This decision has been influential in the development of authority in Australia, having been referred to in a number of cases including Holmes, at 76,663 and Kuebler at 77,205.

7.50 The authorities in England since the Children <<Act>> 1989 were summarised by the Full Court in I and I, supra, at 82,024 et seq and it is unnecessary to repeat the detail of that discussion. In particular, the Full Court referred to the 1992 case of M and M (Minors) (Removal From Jurisdiction) [1992] 2 FLR 303. At 308 that Court said:-

"The principle to be derived from the authorities is that if the proposal of the custodial parent to move with the children to another country is a reasonable one, leave should only be refused if it is clearly shown that the move would be against the interests of the child: see Lonslow v Hennig (Formerly Lonslow) [1986] 2 FLR 378, where many of the earlier decisions were considered by this court. Although a number of other authorities were cited in argument, it is unnecessary to refer to them. The principle is clear. It is simply a matter of applying it to the facts of the individual case."

7.51 More recently is the decision of Bracewell J in M v A (Wardship: Removal From Jurisdiction) [1993] 2 FLR 715, a case concerned with an application by the mother to remove children permanently from England to Canada, the children wishing to remain in England. Her Ladyship reviewed a number of cases both before and subsequent to the Children <<Act>>, including P v P, supra; Lonslow v Hennig (formerly Lonslow) [1986] 2 FLR 378; Re F (a Ward) (Leave to Remove Ward out of the Jurisdiction) [1988] 2 FLR 116; M v M (Minors) (Removal from Jurisdiction) [1992] 2 FLR 303, and M v M (Minors) (Jurisdiction) [1993] Fam Law 396, all decisions of the Court of Appeal.

7.52 She said at 720:-

"... the test has not altered in substance over the years. The test remains the same as was laid down in Poel v Poel, although there is undoubtedly an emphasis by reason of the Children <<Act>> 1989 in relation to the wishes of the children where they are of a sufficient age and understanding to be able to express any views."

7.53 At 721, she said that, applying the checklist contained in s.1 of the <<Act>> (which provides that the welfare of the child shall be the paramount consideration and sets out a number of matters which the Court is required to take into account, including the wishes of the children and "the likely effect on him of any change in his circumstances"), "The implementation of the <<Act>> has not changed the test, but has merely emphasised that the check-list is to be applied in considering welfare."

7.54 In refusing the application, her Ladyship included in her reasons the conclusion that the children "would be deprived of shared parenting and the present quality of life which they enjoy and need" and that it would be contrary to their wishes.

7.55 Of more general application to the issues involved in the appeal before us are her remarks at 722 about the Children <<Act>> that:-

"The Children <<Act>> is not concerned with conceptual or philosophical concepts of care, but instead is designed to settle the practical arrangements determining where the children should live and how they should divide their time between the parents."

7.56 A recent summary of the principles applied in England since the Children <<Act>> is contained in a paper - Children Crossing Frontiers - The Perspective of the English Courts - delivered by Butler-Sloss LJ at the 11th Commonwealth Law Conference in Vancouver, Canada, in August 1996. She referred to the well known passage in the judgment of Sachs LJ in P v P, supra, and then said:-

"Those principles 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 moving or the 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 return 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 primary carer with well-thought out and viable 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, since the courts continue to follow the principles set out in Poel v Poel. 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 and this is in my view a pragmatic resolution of irreconcilable interests."

(e) Canada

7.57 In I v I, supra, the Full Court reviewed the relocation cases in Canada up to that time. We will not repeat the detail of that important discussion, but it is of value in this general summary of approaches adopted by Australia and other countries to repeat some aspects of it.

7.58 Under the Canadian Divorce <<Act>> the best interests of the child is the sole consideration and the relevant terms are custody and access. In addition, the legislation contains s.16(10) which is in the following terms:-

"In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."

7.59 That provision has obvious similarities to the terms of ss.60B(2)(b) and 68F(2)(d) of the Australian <<Act>>.

7.60 The Full Court in I and I referred in particular to the judgment of the Ontario Court of Appeal in Carter v Brooks (1990) 30 FLR (3d) 53. Morden ACJO, in his judgment on behalf of the Court, examined previous Canadian decisions and confirmed that the best interests test governed mobility cases, a custodial parent did not have "the right to remove" a child, but "a reasonable measure of respect should, generally, be paid to the views of a custodial parent who has decided to relocate". His Honour went on to say (at 63):-

"In most cases, I would think, it is an important factor to take into account, in favour of the custodial parent, that the existing custody decision (by order or agreement) shows that from a day-to-day point of view the best interests of the child lie with the child's being with the custodial parent. Added to this, it is reasonable to think that an incident of custody includes the determination by the custodial parent of where the parent and the child shall live. Further, if there is a new <<family>> unit as a result of the custodial parent having remarried, the well-being of that <<family>> unit bears on the best interests of the child. See, for example, Korpesho v. Korpesho (1982), 31 RFL (2d) 449, 19 Man R 142 (CA).

The nature of the relationship between the child and the access parent will always be of importance. 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.

The reason for the move is important. If the motive is simply to frustrate access, then it would not be expected that a court would decide in favour of it. On the other hand, if the move is necessary, for example, for the maintenance of employment, this would count in favour of the move.

The distance of the move is, of course, of basic concern. The greater the distance, the more severe the impact of the proposed move will be on the relationship with the access parent. The degree of severity is also likely to be affected rather directly by the financial resources of the access parent.

The child's views are relevant."

7.61 His Honour then referred to s.16(10) and continued:-

"There is no reason to believe that this very general principle would not be taken into account whether or not it is expressed in statutory form.

The foregoing factors, of course, are far from representing a complete list. They are, however, of relevance to the instant case."

7.62 The Full Court in I and I at 82,026-7 also discussed the later decision of the Ontario Court of Appeal in Wainio v Gilmore (1994) 2 FL (4th) 116 and the economic imperatives which may require relocation. The passage is important but we will not repeat it here.

7.63 Since I v I, some Canadian decisions appeared to re-agitate some aspects of the above discussion but the decision of the Supreme Court of Canada in Gordon v Goertz (1996) 134 DLR (4th) appears to authoritatively state the law to be applied in that country. In that case, the father appealed from the trial Judge's and the Saskatchewan Court of Appeal's decisions allowing the mother, custodian of the child, to vary the custody order so that the child could relocate with her from Saskatchewan to Australia and the father have access to the child but only in Australia. The father sought a change of custody or an order permitting access on terms that would allow access in Canada. The Supreme Court of Canada unanimously upheld the mother's custody of the child and right to go with the child to Australia but varied the access order so that the father could exercise access in Canada.

7.64 Madame Justice McLachlin, delivering a judgment which was adopted by the majority of the Court, provided the following summary of Canadian law on the issues involved (at 341-2):-

"1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold test is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

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

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

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

7. More particularly the judge should consider; inter alia: (a) the existing custody arrangement and relationship between the child and the custodial parent; (b) the existing arrangement and the relationship between the child and the access parent; (c) the desirability of maximizing contact between the child and both parents; (d) the views of the child; (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child; (f) disruption to the child of a change in custody; (g) disruption to the child consequent on removal from <<family>>, schools, and the community he or she has come to know.

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

access parent, its extended <<family>> and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?"

7.65 McLachlin J followed a "two-stage procedure" prescribed by the Divorce <<Act>> for determining applications for variation of custody and access orders, namely, "the threshold condition of establishing a material change in the circumstances or needs of the child and the ability of the parents to meet them; followed, if met, by a fresh inquiry into the best interests of the child." (at 338). She delineated the principles which determine whether the custodial parent's move constitutes such a "material change". She stated that it must be "a change which materially affects the circumstances of the child and the ability of the parent to meet them" and if "the child enjoyed frequent and meaningful contact with the access parent, a move that would seriously curtail that contact suffices to establish the necessary connection between the change and the needs and circumstances of the child" (at 330). In addition, the relocation of the custodial parent must not have been within the reasonable contemplation of the judge who made the previous order and this is met if "as here, the custody order stipulates terms of access on the assumption that the child's principal residence will remain near the access parent" (at 330).

7.66 McLachlin J stated that if the threshold material change test is satisfied, the judge must consider the matter afresh and make an order which serves the best interests of the child in the new circumstances. She commented that the Divorce <<Act>> "elevated the best interests of the child from a "paramount" consideration, to the "only relevant issue" and also compelled judges to consider the child's best interests "by reference" to the change in circumstances (at 331-2). In determining the child's best interests "the judge must consider how the change impacts on all aspects of the child's life" (at 331). McLachlin J disagreed with Madame Justice Abella's statement in MacGyver v Richards (1995) 11 RFL (4th) 432 that the best interests of the child test is "indeterminate" (at 569-70). Rather, she stated that the test "stands as an eloquent expression of Parliament's view that the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake." (at 332).

7.67 McLachlin J referred to s.16(10) of the Divorce <<Act>> set out above, and stated that this "maximum contact" principle is "mandatory, but not absolute. The <<Act>> only obliges the judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact" (333). She added that "If the child's needs are likely to be best served by remaining with the custodial parent, and this consideration offsets the loss or reduction in contact with the access parent, then the judge should not vary custody and permit the move" (333).

7.68 McLachlin J then discussed the notion of a presumption in favour of the custodial parent and the apparent disjunction on this point between Carter and the subsequent judgment by the Ontario Court of Appeal in MacGyver. McLachlin J stated that in Carter Morden ACJO had rejected such a presumption and had concluded that "both parents should bear an evidential burden" of showing where the best interests of the child lies, and that, although judges should respect the custodial parents' views, they should not be obliged to defer to the custodial parent as a matter of law.

7.69 By contrast, in MacGyver, Abella JA stated (at 444) that there should be "a presumptive deference to the needs of the responsible custodial parent" and that the court should be "overwhelmingly respectful of the decision-making capacity" of the custodial parent and defer to that "unless there is substantial evidence that those decisions impair the child's, not the access parent's, long-term well-being" (at 445). In MacGyver, the mother was the custodian and the father had access to the child who was born after the parents' relationship ended. The mother planned to marry a man who had been transferred to the US in his employment. The father opposed her move with the child to the US. Abella JA reversed the trial Judge's decision and permitted the mother's relocation.

7.70 McLachlin J in reconciling the two cases stated that:-

"the difference between the cases may not be as great as sometimes supposed. Both cases urge careful consideration of the views of the custodial parent...Despite the stronger language of the majority in MacGyver, neither decision proposes a legal presumption in favour of the custodial parent. Most

importantly, both cases emphasize that the only and ultimate standard against which to evaluate the evidence is the best interests of the child." (at 336).

7.71 She also emphasised that:-

"The judge's ultimate task...is to determine where, in light of the material change, the best interests of the children lie" and "The rights and interests of the parents, except as they impact on the best interests of the child, are irrelevant." (at 337).

7.72 McLachlin J strongly rejected any concept of presumptions in applications to vary custody and access resulting from the custodial parent's proposed relocation. The submission in that appeal was that there was a presumption in favour of the custodian's decision to relocate but the discussion is equally relevant to the submissions in Australia based upon s.60B or otherwise that there is a presumption against relocation or an onus upon the resident parent to justify the decision to relocate. McLachlin J detailed several reasons supporting her view and which are valuable to restate here.

7.73 McLachlin J stated that the <<Act>> compels the judge to focus on the best interests of the child, and the rights and interests of the parents, except as they impact on the best interests of the child, are irrelevant. She further stated (at 337-8) that:-

"The <<Act>> contemplates individual justice. The judge is obliged to consider the best interests of the particular child in the particular circumstances of the case. Had Parliament wished to impose general rules at the expense of individual justice, it could have done so."

7.74 McLachlin J referred to other reasons for rejecting the submissions of a presumption in favour of the custodial parent. She discussed (at 339) its "potential effect", namely, "If the presumption is to be introduced in cases based on relocation, it would seem as a matter of principle that it should be introduced in all applications for variation of custody and access".

7.75 McLachlin J considered that the most important of her reasons for rejecting a presumption was its "potential to impair the inquiry into the best interests of the child" (at 340). She asserted that adopting such a presumption had a "tendency to render the inquiry more technical and adversarial than necessary" because it may "deflect the inquiry from the facts relating to the child's needs and the parent's ability to meet them to legal issues relating to whether the requisite burden of proof has been met" (at 339). McLachlin J stated (at 340) that an inquiry into the best interests of the child "should not be undertaken with a mindset that defaults in favour of a preordained outcome absent persuasion to the contrary" because:-

"(t)he inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected".

7.76 McLachlin J added that a presumption in favour of the custodial parent could also "impair the inquiry into the best interests of the child by undervaluing changes in the respective relationships between the child and its parents". If the presumption gives:-

"added weight to the arrangement imposed by the original custody order, it may diminish the weight accorded to the child's new needs and the ability of each parent to meet them. Consequently, its operation might be dangerous in a case, for example, where in the period following trial the access parent has demonstrated the desire, aptitude and temperament to assume a greater role in meeting the needs of the child, and the custodial parent has evinced a corresponding inability to do so." (340-1).

7.77 Finally, McLachlin J stated that a presumption "tends to shift the focus from the best interests of the child to the interests of the parents" because it starts "from the premise that one parent has the prima facie right to take the child where he or she wishes" (341).

7.78 McLachlin J concluded that (at 341):-

"While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability."

7.79 Madame Justice L'Heureux-Dube delivered a separate judgment which reached the same result as McLachlin J but for different reasons. The conflict between the two judgments stems from L'Heureux-Dube J's view that (at 373):-

"The starting point...is that the best interests of the child are rightly presumed to lie with the custodial parent" and "Given that day-to-day decisions affecting the child are clearly left to the custodial parent, there is no reason not to defer to his or her ability and responsibility to <<act>> in the child's best interests when it comes to other decisions, such as the change of residence of the child".

7.80 Consequently, and in contrast to McLachlin J's view, she stated (at 374) 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 should remain in the jurisdiction".

7.81 She stated that the non-custodial parent could also discharge the onus if he or she:-

"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 to the child's best interests that prohibiting the change of residence will not cause comparable or greater detriment to the child than an order to vary custody." (at 374-5).

7.82 L'Heureux-Dube J found support for her views in Abella JA's judgment in MacGyver. Unlike McLachlin J, she considered that the "principled approach" to deciding applications for variation of custody and access developed in MacGyver contrasted greatly with the "case-by-case determination on the evidence of each case", an approach advocated in the judgment in Carter (at 370). She stated that the "effect" of MacGyver:-

"is simply to translate into practical terms the right of the custodial parent to determine the place of residence of the child by placing the burden of proving that the move is not in the child's best interests on the party challenging the legal status quo" (at 372).

7.83 She also felt that it was a "reinforcement of the best interests test" and "provides much needed clarity and certainty in this difficult area of the law and minimizes the need to resort to protracted acrimonious negotiations or, even worse, traumatic and costly litigation which, ultimately, cannot but injuriously affect the children." (at 370-1).

7.84 Ms Pagani, for the wife, placed great weight on the Canadian cases and in particular upon Gordon v Goertz. The Attorney-General made no initial submissions about those cases but was granted leave to file subsequent written submissions. Those submissions were to the effect that the Canadian legislation was based on "notions of guardianship and custody. In making orders for a child or children of the marriage, the Court gives primary control of the children to one parent. There is no notion of 'shared' parental responsibility. The parent who has custody is also vested with the authority to make all decisions regarding the care, welfare and development of the children" and that this is so in spite of s.16(10).

7.85 The submissions referred to four Canadian cases, namely, Carter v Brooks, supra, and Axam v Seguin, supra, discussed above, Young v Young (1993) 108 DLR (4th) 193 and an earlier decision in Wright v Wright (1973) 40 DLR (3rd) 321, but, surprisingly did not refer to Gordon v Goertz.

8. RESIDENCE AND CONTACT CASES

8.1 As we indicated at the commencement of this judgment, some of the argument in this appeal was directed to the effect of the <<Reform Act>> generally upon cases within Part VII. This appeal is but a particular example of the exercise of that jurisdiction, namely, the proposed relocation of children a substantial distance from their previous home. It is, we think, desirable to address the wider issue, namely, the extent to which the <<Reform Act>> has impact upon the principles which are to be applied to relevant cases under Part VII, that is largely but not exclusively applications for parenting orders other than child maintenance.

8.2 We propose to briefly summarise the principles which this Court and courts in the UK, particularly since the Children <<Act>>, have applied in relation to what are now residence and contact cases. There are many reported decisions relating to those issues.

(a) Australia

8.3 We think it convenient to use the discussion by the Full Court in Brown and Pedersen (1992) FLC 92-271 as a starting point. It is a comparatively recent decision of the Full Court and it discussed the authorities to that time. Its formulation of principle has been the subject of discussion and some criticism. Additionally, and importantly, it was the subject of an application to the High Court for special leave to appeal. That Court, in dismissing that application, made observations as to the principles to be applied which we think are of considerable significance.

8.4 It is unnecessary to set out the facts of that case. It was an appeal by the husband from an order which discharged all previous orders for access by him to the ten year old child of the marriage. Amongst the grounds supporting that appeal was the contention that the trial Judge misapplied the principles in determining whether or not an access order should be made or continued.

8.5 The husband relied in particular upon the judgment of Samuels JA in Cooper v Cooper (1977) FLC 90-234. At 76,250 his Honour said:-

"I approach the matter on this basis. First, the paramount consideration is the welfare of the children. Secondly, prima facie the interests of the children would require that both parents have an opportunity to maintain some communication with them, and to play some role in their education and general training for adult life. Thirdly, the interests of the parent seeking access are relevant and are not to be ignored. Fourthly, to deny access to any parent is a serious step, which may well have grave consequences for the child's future development. Hence, fifthly, an order denying access will be made only in exceptional circumstances and upon solid grounds."

8.6 The Full Court, however, preferred the views expressed by Lord Oliver in Re KD (A Minor) (Ward: Termination of Access) [1988] AC 806 at 827. Although that passage speaks in terms of rights of parents, its relevance in Brown and Pedersen was the its more neutral statement of the basis upon which access was to be determined. His Lordship said:-

"I do not find it possible to conceive of any circumstances which could occur in practice in which the paramount consideration of the welfare of the child would not indicate one way or the other whether access should be had or should continue. Whatever the position of the parent may be as a matter of law - and it matters not whether he or she is described as having a 'right' in law or a 'claim' by the law of nature or as a matter of commonsense - it is perfectly clear that any 'right' vested in him or her must yield to the dictates of the welfare of the child. If the child's welfare dictates that there be access, it adds nothing to say that the parent has also a right to have it subject to considerations of the child's welfare. If the child's welfare

dictates that there should be no access, then it is equally fruitless to ask whether that is because there is no right to access or because the right is overborne by considerations of the child's welfare."

8.7 The Full Court went on to say that whether access should or should not be granted "must be guided, and must be solely guided, by considerations of the welfare of the child".

8.8 If one stopped at that point the statement of principle by the Full Court in Brown and Pedersen would, we think, have clearly accorded with the understood position in Australia, namely, that the determinant was the welfare or best interests of the child, and no question of presumptions or onus applied or were seen to be useful in that exercise.

8.<<9>> However, the Full Court went on to apparently endorse the following statement by Treyvaud J in Re A (1982) FLC 91-284 at 77,612, namely:-

"I consider that the principle applicable can be stated quite simply, namely that access by a non-custodial parent will only be ordered where access will advance and promote the welfare of the child."

8.10 That has given rise to the view that the Full Court was espousing the view that there is a positive onus upon an applicant for access.

8.11 We doubt that that was what the Full Court intended. In its discussion immediately following it referred to several cases, including the decision of Nygh J in Cotton (1983) FLC 91-330 and of the High Court in M and M, supra.

8.12 The High Court in M and M, CLR at 76, and FLC at 77,080, in the following passage stated the principles in a way which has been accepted since as authoritatively defining the issues. It remains equally valid now:-

"In proceedings of that kind [proceedings for what was then custody or access] the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child. In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in a child's interests to maintain the filial relationship with both parents: cf J. v Lieschke (1987) 162 CLR 447, at pp. 450, 458, 462, 463-4."

8.13 We think that, properly understood, that discussion of the Full Court was directed to a denial of the assertion that a parent has a "right" to access and the passages quoted from both Cotton and M and M support that view. That also appears from the concluding paragraph by the Court of its discussion of the principles to be applied (at 79,011):-

"For those reasons, we cannot accept the proposition that the onus of establishing good and compelling reasons for denying access lay on the wife, or for that matter, any onus lay on the husband to establish the contrary. Rather, as the High Court pointed out in M and M FLC p 77,080; CLR p 76 proceedings for custody or access are not to be viewed as adversary proceedings in the ordinary sense, but as an investigation of what order will best promote the welfare of the child."

8.14 If there be any doubt about the principles applied in Australia in relation to this issue they were, we think, clearly settled when the matter went to the High Court. The husband applied for special leave. That application was heard and refused on 13 March, 1992. One of the grounds upon which leave was sought was that the Full Court had been wrong in rejecting the statements of principle in Cooper's case.

8.15 Brennan J (as he then was), in giving the judgment of the Court dismissing the application, said in relation to this ground:-

"Finally, the applicant submits that an error appears in the manner in which the court evaluated the welfare of the child. We see no error in the case. If it be the case that Cooper and other cases in the <<Family>> Court suggest that a non-custodial parent has a presumptive right of access, they are incorrect and cannot be followed.

Equally, it is incorrect presumptively to deny access to a non-custodial parent. There is no presumption either way as a matter of law. The benefit to the child of maintaining a bond with a non-custodial parent is a matter of fact to which weight is given according to the circumstances of the case. This ground upon which special leave to appeal is sought must also be rejected."

8.16 Thus we think that although differing views may be held about the interpretation of aspects of the Full Court's judgment in Brown and Pedersen, the position in Australia prior to the <<Reform Act>> was clearly settled by the decisions of the High Court in M and M and in the special leave application in Brown and Pedersen and by the overwhelming trend of authority in this Full Court.

8.17 The ultimate determinant was the welfare or best interests of the child. In that exercise the desirability of the continuance or renewal of contact with the non-resident party was an important consideration. The experience of this Court and the general experience of society indicates that, speaking as a generality, a child whose parents are separated benefits both in the short and long term by being able to maintain an ongoing positive relationship with both parents, and the absence of such a relationship may have a significant negative impact upon that child in a number of ways both short and long term. However, in the determination of a particular case no presumption or onus applied or was helpful; it was a matter of the evaluation of all the relevant issues against the ultimate criterion of the welfare or best interests of the child.

8.18 The question which we will discuss later is whether the <<Reform Act>> makes any alteration to that position.

(b) United Kingdom

8.19 Both before and after the Children <<Act>> the English courts in access/contact cases have emphasised the importance of maintaining contact by children with both parents: see cases such as Re H (Minors) (Access) [1992] 1 FLR 148; Re D (a Minor) (Contact: Mother's Hostility) [1993] 2 FLR 1; Re M (Contact: Welfare Test) [1995] 1 FLR 274; Re P (Contact: Supervision) [1996] 2 FLR 314; Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124. All emphasised that there has been no change in the relevant principles since the Children <<Act>> came into operation, and that the welfare of the children was the determinant, but each emphasised in different ways the importance to be attached to a continuance or renewal of access or contact. For example, in Re H the reference is to the view that termination of access was a result at which the Court "should be extremely slow to arrive"; in Re M the reference is to a "very strong presumption in favour of maintaining contact but each case had to be examined on its merits"; in Re P the view was that it was "almost always in the interests of children" that they should have contact with both parents, and the formulation in Re O was to the same effect.

8.20 It is also significant to note that those cases talk in terms of contact being the right of the child, although the Children <<Act>> has no provision which is the equivalent of s.60B. In Re M, supra, at 278 the Court quoted with approval the statement of Sir Stephen Brown in Re W (A Minor) (Contact) [1994] 2 FLR 441 (at 447) that:-

"It is quite clear that contact with a parent is a fundamental right of a child, save in wholly exceptional circumstances."

8.21 This statement both emphasises the right and the limitations inherent in that right.

8.22 The law to be applied in Scotland was the subject of a recent decision of the House of Lords in Sanderson v McManus (6 February, <<1997>>, not yet reported).

8.23 The governing provision in Scotland is s.3(2) of the Law <<Reform>> (Parent and Child) (Scotland) <<Act>> 1986 which is in the following terms:-

"(2) In any proceedings relating to parental rights the court shall regard the welfare of the child involved as the paramount consideration and shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child."

8.24 The parties, who were not married, separated and the father obtained an interim access order. Subsequently, orders were made refusing further access, the Court concluding that it was not in the child's welfare for access to continue. The father appealed. One of the issues upon which the matter was allowed to be argued in the House of Lords was the interpretation of s.3(2). Although under Scottish law the father of an ex-nuptial child does not have parental rights without a court order, that circumstance was not an issue in this appeal, presumably because of the previously existing access order.

8.25 The principal judgment was that of Lord Hope of Craighead who recorded the argument for the appellant as being that:-

"the link between the child and each of his natural parents is so important in itself that, unless there are very strong reasons to the contrary, it should be preserved. It is a link which has an intrinsic value quite independent of any supposed "right" of a parent to obtain an order from the court allowing access to his or her child. The alteration which section 3(2) of the <<Act>> of 1986 made to the previous law was thus purely procedural. It did not alter the fundamental point that, unless there are strong reasons to the contrary, it is in the best interests of the child to maintain links with his natural parent and that the maintaining of such a link is conducive to the welfare of the child."

8.26 His Lordship said:-

"The relationship between the natural father and the child can never be dismissed as irrelevant. The natural relationship is a fact of life which it will always be proper to take into account. But the importance which is to be attached to it must vary according to the circumstances. This is a matter which must be decided not by applying any presumption but upon an evaluation of the evidence. As with any other factor which the court is asked to take into account, the question is whether contact with the parent has something to offer which is likely to be of benefit to the child's welfare. This question must be examined from the point of view of the child. It may normally be assumed that the child will benefit from continued contact with the natural parent. But there may be cases where it is plain on the evidence that it has nothing to offer at all. There may be other cases where the evidence will show that continued contact is likely to be harmful. Whatever the view which is taken on this matter in the light of the evidence, the child's welfare is paramount. The decision of the court will depend on its analysis of all the factors which bear on the question what is in the best interests of the child."

8.27 Specifically in relation to s.3(2), his Lordship said:-

"In my opinion the effect of sub-section (2) is clear. The court is given a wide discretion as to the considerations pointing one way or the other which it may take into account. But all other considerations must yield to the consideration which is stated by the sub-section to be paramount, which is the welfare of the child. As it is told that it "shall not" make any order relating to parental rights unless it is satisfied that "to do so" will be in the best interests of the child, the onus is on the party who seeks such an order to show on balance of probabilities that the welfare of the child requires that the order be made in the child's best interests. It is of course true, as Lord Weir pointed out in this case, that questions of onus usually cease to be important once the evidence is before the court. The matter then becomes one of overall impression, balancing one consideration against another and having regard always to the consideration which has been stated to be paramount. The court must however be able to conclude that it would be in the child's best interests that the order should be made."

<<9. DISCUSSION AND CONCLUSIONS ABOUT THE REFORM ACT>>

(a) General Overview of the <<Reform Act>>

<<9.1 The background to the Family Law Reform Act>> has already been referred to in <<Section 3>>. It is useful to highlight at this point significant areas of change from the previous legislation. Thereafter, we will discuss in more detail the essential aspects of that <<Act>> which arise for adjudication in this appeal and generally in relevant proceedings under Part VII.

<<9.2 The Reform Act>> represents a major re-statement of the law relating to children who come within the ambit of the <<Family Law Act>> and over time it may have a significant impact upon the approach to those matters. In many ways it constitutes a recognition of the child-centred direction in which the Court has already moved. It is clear that many of the aims of the <<Reform Act>> are long-term, educative and normative. That is, they are directed towards changing the ethos where parents separate in the ways in which they think and <<act>> in their role as parents, in their approaches to resolving disputes about their children, in the ways in which lawyers <<act>> for the parents (and the children), in the approach by the Court in the adjudication of disputes and, more broadly, in the attitudes of society generally.

<<9.3 As the explanatory memoranda and second reading speeches to the Reform>> Bill indicated, the major changes and some of major matters continued from the previous legislation include:-

- A greater emphasis upon the importance of parents being able to agree upon arrangements for their children, which arrangements emphasise the continuation of parental responsibility and the continuation of the relationship of the children with both parents. In particular, the legislation makes provision about:- * the greater use of mediation, counselling and arbitration; * the ability of parents to enter into their own legally binding agreement by means of parenting plans which may be registered with the Court.

- The replacement of previous concepts of guardianship, custody and access, which many thought carried with them notions of ownership and possession of children, with the concept of parenting orders, namely, residence, contact and specific purpose orders. A combination of these orders enables the parties or, where they are unable to agree, the Court to mould the arrangements or orders to more precisely reflect an outcome which represents the best arrangements for the children and alters what were seen as the virtually automatic connection between custody and the general responsibility for the daily care and control of the children.

- The concept of parental responsibility which defines the duties, powers, responsibilities and authority which parents have in relation to their children and makes it clear that parental responsibility continues irrespective of whether the parents are married or separated, or whether they have never been married or lived together.

- An object section which provides that children should receive adequate and proper parenting to help them achieve their full potential and to ensure that parents fulfil their duties and meet their responsibilities towards the care, welfare and development of their children, and principles directed to achieving that object.

- That in any decision relating to a child the best interests of that child is the paramount consideration.

- Continuation of the <<Family>> Court's welfare jurisdiction in relation to children.

- Resolution of difficulties and inconsistencies between orders made under the <<Family Law Act and family violence orders made by State Courts.

- Re-enactment of previous provisions in the Family Law Act>> such as child support, location and recovery of children, and child representation.

(b) Discussion of specific sections in Part VII

<<9>>.4 Under this heading we propose to examine the new sections in Part VII which are important to the adjudication of cases under this Part. We will not refer to all of the sections in Part VII - many are subordinate or ancillary to the major sections and many simply reproduce sections which existed under the previous Part VII. We will not at this stage deal with the inter-relationship of these major sections; that is dealt with in more detail in part (c) of this Section.

<<9.5 A primary section in any consideration of Part VII is s.60B>> which sets out the object of Part VII and the principles which underline that object. We have already set out that section but it is worth repeating it at this point, namely:-

"60B. (1) The object of this Part 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.

(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests: (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and (d) parents should agree about the future parenting of their children."

<<9.6 Section 60B>>(1) provides an optimum set of values for children of separated parents and is the goal to which the parents, society and the courts should aim, namely, that children receive "adequate and proper parenting to help them achieve their full potential" and that parents "fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children".

<<9>>.7 It is to be noted that, in contrast to sub-s.(2), sub-s.(1) is not expressed to be subject to the child's best interests. But it was agreed by all parties in this appeal that all of <<s.60B is subject to s.65E>>, namely, that in deciding whether to make a particular parenting order the Court "must regard the best interests of the child as the paramount consideration". It seems likely that the amendment to <<s.60B>>(2) to include that exception was added as an abundance of caution. It also reflects article <<9>>.3 of UNCROC, the text of which is set out in <<Section 3>> of this judgment.

<<9>>.8 In relation to sub-s.(2), the following matters may be noted:-

- It sets out the principles "underlying" the object contained in sub-s.(1) and consequently is to be read as directed to effectuating that object.

- It is expressly made subject to the child's best interests.

- It cannot be regarded as an exhaustive list of principles which underlie the object in <<s.60B>>(1) or the child's best interests. There are a number of other matters which may in particular cases be equally or more important but which are not expressly contained in sub-s.(2), such as the wishes of children and their right to be protected from abuse. Those two matters, together with a number of other important considerations are set out in <<s.68F>>(2) as matters which the Court must consider in determining the best interests of the child. It is this circumstance which makes the inter-relationship between <<s.68F(2) and s.60B>> difficult to precisely define. The matters in the two sections vary but overlap. Neither purports to be exclusive or exhaustive. We will return to those aspects later.

<<9.9 Dealing more specifically with the principles listed in s.60B>>(2), we would make the following comments.

<<9>>.10 Paragraph (a) emphasises two matters, namely, the rights of a child to "know" both parents and to be "cared for" by both parents. These rights apply "regardless" of whether the parents are married, separated, have never been married or have never lived together.

<<9>>.11 The first of those matters, including the broad issue of a child's psychological identity, has always been recognised as a fundamental consideration and it is unlikely that orders made under Part VII would interfere with that other than in the most exceptional of circumstances. The right to be "cared for" by both parents has to be read in the context that typically the parents of whom the paragraph speaks are separated and that is likely to involve different degrees of care by the individual parents, a matter which is largely addressed by the categories of parenting orders which the Court may make or the parties may agree upon.

<<9>>.12 Paragraph (b) is the critical one in this appeal and that is likely to be so in most proceedings under Part VII. It provides, in effect, that children have a "right of contact, on a regular basis, with both their parents" and other people significant to their care, welfare and development. In that latter respect, the right of a child to have contact with, for example, a grandparent or other siblings, is provided for by <<s.65C>> which enables "any other person concerned with the care, welfare or development of the child" to apply for a parenting order. In that respect it is no different from the position which existed prior to the <<Reform Act>> and the law which had developed around the right of non-parents to seek a contact order.

<<9>>.13 The essential aspect of paragraph (b) in this appeal is the right of children to contact with both parents and the impact which a change of location by one parent may have upon the enjoyment by the children of that right.

<<9>>.14 It is now well accepted that in most cases meaningful contact by children with both their parents is important to their welfare both in the short and long-term. That principle has been well established in Australia and in comparable overseas countries for many years. For example, in Australia the position is quite clearly summarised by the High Court in 1988 in M and M, supra, in the passage already quoted at CLR 76; FLC 77-080.

<<9>>.15 But it is equally recognised that there may be cases where the best interests of the children require that contact with one and on some occasions both parents be curtailed or even terminated. If the facts dictate that such an outcome is the appropriate one in the children's best interests there is nothing in s.60B which suggests or requires any different outcome. During the course of submissions it was accepted for the Attorney-General and we agree that the <<Reform Act>> makes no relevant change to the principles to be applied in relation to physical or sexual abuse cases as stated by the High Court in M and M, supra, and acted upon consistently by this Court in the years since.

<<9>>.16 Paragraph (b) refers to the right of contact "on a regular basis". This gave rise to submissions as to the meaning of that term and in particular whether "regular" carried with it concepts of frequency as well as regularity. Mr Hamwood, for the husband, submitted that "regular contact" should be understood as involving the enjoyment of contact in a meaningful and frequent way and that "regular" was not to be understood as confined to regularity per se. The Attorney-General submitted that "in any particular case the degree and nature of contact depended upon the child's best interests in the circumstances of that case and that regular contact does not necessarily require face to face contact" and "regular does not necessarily mean frequent".

<<9>>.17 Ms Pagani, for the wife, submitted that in this case the requirement of "regular contact" was satisfied as the children would be with the father for each school holiday and at Christmas and are of an age at which they are able to communicate by telephone and letter.

<<9>>.18 In considering this aspect the Court must make the order which it considers to be in the best interests of the child. The nature and degree of contact is ultimately influenced by that, par.(b) providing guidance in that respect. This Court has in the past consistently attempted to make orders for contact which are practical and maintain as much direct and indirect contact between the children and the contact parent as is appropriate in the circumstances of that case. That remains the approach. Contact generally and in the context of par.(b) normally encompasses direct contact but can include indirect contact of the type to which the Attorney-General referred. The object in s.60B(1) would not be likely to be achieved in most cases by providing only for contact which was regular but infrequent. Consequently, having regard to the previous

approach of this Court and the requirements of the best interests of the children, par. (b) should not be narrowly interpreted. Fundamentally it emphasises the desirability of contact, and "regular" carries with it a clear understanding that it should also be as frequent as is appropriate and by the various means which are considered to be in the children's best interests.

<<9>>.19 Paragraph (c) requires parents "to share duties and responsibilities" concerning the care, welfare and development of their children. Parental responsibility is defined in s.61B and we will refer to that later. The paragraph emphasises the second of the two objects in sub-s.(1), namely, notwithstanding separation parents still have duties and responsibilities to their children and they are expected to continue to carry out those duties and responsibilities.

<<9>>.20 Paragraph (d) states that parents should "agree about the future parenting of their children". It is an important provision but is in the nature of an exhortation to the parents. It is emphasised in provisions of the <<Act>> relating to primary dispute resolution and parenting plans. Clearly it is to the advantage of children if parents are, consistently with the children's best interests, able to agree on the care, welfare and development of the children and adhere to those arrangements. If the matter comes to Court because the parties are unable to agree this Court has well established procedures which make available to the parties confidential counselling and, if the matter appears to be going on to trial, a <<family>> report may be prepared. In the great majority of cases these often assist parties in the resolution of their disputes.

<<9>>.21 Finally, in relation to s.60B generally, attention should be drawn to the circumstance that the <<Act>> contains another provision which sets out principles to be applied by the Court in exercising its jurisdiction under this <<Act>>, namely, s.43. Included in the matters which the Court is required by that section to have regard to is:-

"(c) The need to protect the rights of children and to promote their welfare."

<<9>>.22 That section is also discussed in part (g) of this Section where we discuss the relevance of UNCROC in the interpretation of Part VII.

<<9>>.23 Section 61B defines the term "parental responsibility" in relation to a child to mean:-

"all the duties, powers, responsibilities and authority which, by law, parents have in relation to children."

<<9>>.24 This definition provides little guidance, relying as it does on the common law and relevant statutes to give it content. It would appear to at least cover guardianship and custody under the previous Part VII and may be wider. The Attorney-General submitted that it was probably wider than that and covered "all of the underlying and continuing common law and statutory law that affects the relationship of parents and their children".

<<9>>.25 It omits any reference to rights. Whilst this omission is understandable, given the philosophy of the amendments, it is doubtful whether that achieves any practical effect other than to make it clear that there are no possessory rights to children, insofar as this could be said to have been the case prior to the amendments.

<<9>>.26 Read in conjunction with s.60B(2)(c) the emphasis is on the continuance of responsibility independently of the status of the parental relationship. Section 61D(2) provides that a parenting order does not take away or diminish any aspect of parental responsibility except to the extent expressly provided for in the order or necessary to give effect to the order.

<<9>>.27 An important issue is whether parents may exercise this responsibility independently or whether they must do so jointly.

<<9.28 The UK Law Commission's report on Family>> Law, Review of Child Law and Guardianship and Custody (1988), suggested a need for joint but independent parenting, the consequence of which is that under the U.K. <<Act>> each parent may <<act>> independently of the other. As the Commission

expressed it, "whether or not the parties are living together, a legal duty of consultation seems both unworkable and undesirable". It recommended that the equal and independent status of parents be preserved (absent actions such as adoption to which there is a statutory requirement of mutual consent). Although this provision has attracted some criticism in the United Kingdom, no such discussion appears to have preceded the introduction of the <<Reform Act>> in Australia. Section 60B(2)(c) and (d) respectively refer to parents sharing duties and responsibilities and agreeing about the future parenting of their children. Section 61C bestows parental responsibility on each parent, in the absence of a court order to the contrary. Section 64B(6) enables the Court to make a joint specific issues order.

<<9>>.29 In the absence of a specific issues order, we think it unlikely that the Parliament intended that separated parents could only exercise all or any of their powers or discharge all or any of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day to day matters, and the impracticability of such a requirement when they are living separately only has to be stated to be appreciated.

<<9>>.30 As a matter of practical necessity either the resident parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children. On the other hand, consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like. We believe that this accords with the intention of the legislation.

<<9>>.31 Section 65D(1) provides that in proceedings for a parenting order the Court may "make such parenting order as it thinks proper". Section 65E provides:-

"In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

<<9>>.32 Section 65E is the fundamental section in relevant proceedings under Part VII. It makes it clear that the best interests of the children is the paramount or pre-eminent consideration. All other provisions in Part VII are subservient to that. In stating the above, we are conscious of the circumstances that there are provisions in Part VII in respect of which the best interests principle does not apply. But they are not relevant to the present issues.

<<9>>.33 As we previously indicated, the term "best interests" has been substituted for the term "welfare" in the previous legislation but it appears to be clear and was accepted by all counsel in this appeal that no difference was intended from this change in terminology.

<<9>>.34 The major reasons for the change appears to be the more general use of the term "bests interests" in Australia and overseas and the use of that term in UNCROC, and also because of the confusion which surrounded the term "welfare" because of its various meanings in Australia. The use of that term was the subject of debate in the drafting of UNCROC. The term "best interests" was chosen in preference to "welfare" as it was considered to represent a more child-centred and less paternalistic concept - see Alston and Gilmour-Walsh "The Best Interests of the Child - Towards a Synthesis of Children's Rights and Cultural Values" Proceedings of the UNICEF Salamanca Symposium on The Convention on the Rights of the Child (1 to 4 May, 1996).

<<9>>.35 The second matter was discussed by the Full Court in Re Z (1996) FLC 92-694. At 83,264 Fogarty J explained the different meanings attributed to the word "welfare" and made reference to the change to "best interests" as a result of the <<Reform Act>> in the following passage:-

"Confusion sometimes arises in any discussion of these issues because of the separate ways in which the word "welfare" is used. One of its uses is as a general term to describe child protection legislation - State or Territory "child welfare" legislation. More anciently it was used to describe the parens patriae jurisdiction of courts in relation to children within that jurisdiction. In addition, it is frequently used as a description of the principles to be applied in relation to legislation or otherwise with respect to children. For example, importantly here <<s 64 of the Family Law Act>> before its amendment by the <<Reform Act>> provided

that in exercising its jurisdiction relating to the guardianship, custody or welfare of, or access to, a child the Court must regard the "welfare of the child as the paramount consideration". That is also the guiding principle in the parens patriae jurisdiction and is frequently employed in the State child welfare legislation to state its fundamental criterion. In more recent times there has been a general move to substitute the term "best interests" for "welfare": see, for example, <<s 65E of the Family Law Act>>, as recently amended, referred to in more detail later, and <<ss 67L, 67V and 67ZC>>(2)."

<<9>>.36 It should be noted that the "welfare" jurisdiction of this Court, that is, in the second sense in which that term was used in the quotation above, is now to be found in <<s.67ZC>>. It provides that in addition to other jurisdiction of the Court under Part VII "the court also has jurisdiction to make orders relating to the welfare of children". In determining whether to make such an order the Court is to have "regard to the best interests of the child as the paramount consideration".

<<9.37 Section 64B>> defines a "parenting order". It provides that a parenting order may deal with one or more of the following:-

(a) The person with whom a child is to live (residence order)

(b) Contact between a child and another person (contact order)

(c) Maintenance of a child (child maintenance order)

(d) Any other aspect of parental responsibility for a child (specific issues order)

<<9>>.38 This section and the subsequent sections of Div.5 emphasise one of the fundamental differences between the amendments introduced by the <<Reform Act>> and the previous legislation. Under the latter, the Court usually made a custody order in favour of one parent and an access order in favour of the other parent. The custody order carried with it not only residence but also powers in relation to the day-to-day care of the children. Now the structure of the <<Act>> is that the norm is residence and contact orders which deal only with the matters described above, leaving all other powers, authority and responsibilities in relation to children to be shared between the parents. If either parent desires to alter that position it is necessary for that person to apply for a specific issues order.

<<9>>.39 The aim of these provisions is twofold. Firstly, to underline the shared responsibilities of parents and to avoid, where it is unnecessary to do so, the apparent imbalance which was thought to arise from the custody/access regime. The changes are obviously far more than semantic. Residence is not custody by another name. It has a more constrained meaning, being limited to identifying the person or persons with whom a child is to live. In this it diverges from the English concept, in which authority to manage the child's daily life is conferred by reason of a residence order, which the other parent, even when in possession of an order for parental responsibility, cannot restrict.

<<9>>.40 Secondly, it gives the Court a wider range of orders which it may make so as to tailor its intervention to the requirements of the individual case.

<<9>>.41 In relation to s.64B, we should refer to one further matter. We have referred to a residence/contact regime. We agree with the submissions of the Attorney-General that it is open to the Court in an appropriate case to make a residence/residence order as the appropriate regime. Indeed there are many cases where such orders are desirable, reinforcing as they do the shared parenting responsibility concept contained in the new legislation. On the other hand, a residence/contact order should not be seen as a second best option. Rather, we think it should be used in circumstances where the contact is of relatively short duration, particularly where there is no overnight aspect.

(c) The Inter-relationships of ss.60B, 65E and 68F:-

(i) Discussion

<<9>>.42 The essential issue in this appeal is the inter-relationship of these sections.

<<9>>.43 We agree with the Attorney-General that as a matter of procedure the way in which this issue would be likely to arise would be that in the circumstances of a proposed change in existing arrangements (in relocation cases usually a proposal by the resident parent to relocate with the children) application will be made to the Court by one of the parties seeking either changes to existing orders or new orders to meet the new situation or the retention of the existing position. On the hearing of that application the Court may consider whether a change of residence is called for, whether alterations should be made to the contact order, or whether a specific issues order should be made which, in a relocation case, may have the effect of permitting or inhibiting the proposed relocation.

<<9>>.44 It was agreed before us that these three sections are the sections which essentially apply to these issues. The inter-relationship of those sections is also central to the correct approach to be adopted in all cases under Part VII where the best interests of the children is the paramount consideration.

<<9>>.45 The submissions for the parties on this issue may be briefly summarised as follows. Mr Hamwood, for the husband, submitted that the starting point is to look at the extent to which the children have enjoyed the rights referred to in s.60B, particularly the right to contact, and that it is necessary for the applicant for change to persuade the Court that it is not in the interests of the children that that level of enjoyment of that right should continue. He submitted that the best interests (s.65E) of the children is a "defeasance provision" to s.60B and that the "checklist" in s.68F(2) is subsidiary to this exercise and is a guide to the Court in ascertaining whether or not the rights set out in s.60B should be met.

<<9>>.46 Ms Pagani, for the wife, submitted that the amendments do no more than re-state previous principles but with additional emphasis on the matters identified in s.60B. She submitted that at best s.60B could be regarded as a starting point in the inquiry and an indication that the Court should specifically identify those matters and give them proper weight. However, she submitted that those matters are to be weighed against all other relevant circumstances, including the matters in s.68F(2), and that the ultimate determinant is the best interests of the children (s.65E).

<<9>>.47 The Attorney-General submitted that the primary section remains s.65E, namely, that the best interests of the children are paramount. In determining that question the Court is required to have regard to the list of matters contained in s.68F(2), giving such weight to those matters as is appropriate in the individual case, and in that exercise the Court is "guided" or "affected" by the matters in s.60B. He submitted that those principles give guidance to the Court as to what values apply in considering the matters set out in s.68F(2). He submitted that the matters in s.60B(2) constitute "guideposts" to reaching the object defined in s.60B(1) but that they should not be followed if it would lead to a conclusion which is inconsistent with the best interests of the children. The Attorney-General also submitted that in this exercise no question of presumptions, starting points or onus applies, but that, absent any reason for departing from the object and principles in s.60B, it would be expected that the Court would arrive at a conclusion which is consistent with the implementation of those provisions.

<<9>>.48 Mr Rose, for the Commission, submitted that the Court should go firstly to s.60B and then to s.68F(2) to determine what is meant by, or what is the content of, the best interests of the children and then to s.65E which makes it clear that the Court cannot make an order unless it is in the best interests of the children.

(ii) Conclusions about the <<Reform Act>>

<<9>>.49 We consider that the submissions of Mr Hamwood should be rejected. They are not, in our view, consistent with a proper reading of these provisions. They represent an artificial approach, and may result in outcomes which are inconsistent with the best interests of the children.

<<9>>.50 Otherwise it may be said that there are only shades of difference, perhaps semantic in some respects, between the other submissions, particularly between those of Ms Pagani and the Attorney-

General. It would be highly undesirable if the essential provisions in Part VII were to give rise to semantic disputes revolving more around processes than substance.

<<9>>.51 In our view, the essential inquiry is clear. The best interests of the particular children in the particular circumstances of that case remain the paramount consideration. A court which is determining issues under Part VII of the type to which we have referred, starts from that essential premise and it remains the final determinant.

<<9>>.52 The legislature has also made it clear that in that process the Court is required to have regard to both the provisions contained in s.68F(2) and those contained in s.60B.

<<9>>.53 The wording of s.68F(2) makes that clear - the Court "must consider" the various matters set out in (a)-(l) of that sub-section. That sub-section sets out a list of matters which the Court is required to consider to the extent that they are relevant to the particular case. The weight which is attached to any one consideration will depend upon the circumstances of the individual case and is a discretionary exercise by the trial Judge. The list is similar to the list contained in previous legislation but with the additions previously referred to. The list is not intended to be exhaustive. That is made clear by par.(l) "any other fact or circumstance that the court thinks is relevant". This simply underlines the circumstance that the facts in individual cases may vary almost infinitely, that the inquiry is a positive one tailored to the best interests of the particular children and not children in general, and that the Court is required to take into account all factors which it perceives to be of importance in determining that issue.

<<9>>.54 Section 60B is 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. The section is subject to s.65E. Nor does it purport to define or limit the full scope of what is ordinarily encompassed by the concept of best interests. The object contained in sub-section (1) can be regarded as an optimum outcome but is unlikely to be of great value in the adjudication of individual cases. The principles contained in sub-section (2) are more specific but not exhaustive and their importance will vary from case to case. They provide guidance to the Court's consideration of the matters in s.68F(2) and to the overall requirement of s.65E. The matters in s.68F(2) are to be considered in the context of the matters in s.60B which are relevant in that case. But s.65E defines the essential issue.

<<9>>.55 Ultimately it is a question of applying in a commonsense way the individual sections so as to achieve the best interests of the children in the particular case. Although the Attorney-General submitted that the inter-relationship between the three sections was as much about procedure as it was about substantive law, we think it would be a mistake for this essential exercise to be clouded by procedural or semantic issues.

<<9>>.56 The Court now, as previously, is required to determine what is in the best interests of the particular children (s.65E). It will direct attention to both of the other sections, but the weight to be attached to individual components of those sections may vary significantly from case to case.

<<9>>.57 This approach, which emphasises the essential importance of the exercise of the discretion in each case, accords with the approach otherwise adopted by courts to the discretionary provisions in the <<Family Law Act>>: see Mallet (1984) 156 CLR 605, (1984) FLC 91-507, and ZP v PS (1994) 181 CLR 630, (1994) FLC 92-480. For many years in child related cases the legislature and the courts have consistently emphasised that the welfare or best interests of the particular child in the particular circumstances of that case is the determinant, and have eschewed the application of fixed or general rules as the solution. That continues to be the case; the <<Reform Act>> should not be understood as suggesting otherwise.

<<9>>.58 As a matter of proper practice and to ensure that this essential task is performed, a judge in the adjudication of such a case would be expected in the judgment to clearly identify s.65E as the paramount consideration, and then identify and go through each of the paragraphs in s.68F(2) 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 relevant or which may guide that exercise. The trial Judge will then evaluate all the relevant issues in order to reach a conclusion which is in that child's best interests.

<<9>>.59 In this approach no question of a presumption or onus arises. The analysis by McLachlin J in Gordon v Goertz, supra, is compelling. The <<Act>> contemplates individual justice. Any question of presumption or onus has the potential to impair the inquiry as to what is in the best interests of the particular children. It may render the case more technical and adversarial, and may divert the inquiry from the facts relating to the children's best interests to legal issues relating to burdens of proof. The task is not "to be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary". See the judgment of Brennan J (as he then was) in Brown and Pederson, supra.

<<9>>.60 In cases where there are no countervailing factors the s.60B principles may be decisive, not only because they are contained in s.60B but because they accord with what is in the best interests of the particular children. 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. However, to attempt to impose that approach in cases where the best interests of the children may not indicate that conclusion as appropriate is contrary to the legislation and contrary to the long established views of this and other courts which deal daily with the welfare or best interests of children.

(d) Matters which may be considered in relocation cases

<<9>>.61 As we previously pointed out, relocation cases are but a particular example of proceedings under that Part VII. However, because this appeal is a relocation case and because there are factors which it is of value to consider in determining such a case we think that the following further considerations will often be of significance to the outcome in those proceedings.

<<9>>.62 Circumstances often arise where it becomes necessary or desirable for one or other parent to relocate. When the children reside with the parent who proposes to relocate, the question of the importance to the children remaining with the parent in relocated circumstances needs to be weighed against the changes to the children's environment and more particularly against any loss of or reduction in contact with the contact parent. This essential conflict is ultimately to be determined having regard to the best interests of the children but the following considerations are likely to have relevance in individual cases.

- The degree and quality of the existing relationship between the children and the residence parent. The circumstance, if it be so, that the residence parent has been the primary carer of the children for some time and would generally be regarded as the preferred residence parent is an important consideration because of the degree of attachment that children usually have with the parent with whom they reside on a day-to-day basis. It is fundamentally for this reason that, as we pointed out previously, the earlier cases, although discussed in the context of custody rather than residence, still have value. In many of those cases the essential emphasis was not upon the legal consequences which flowed from custody but upon the factual matters which existed in that case.

- The degree and quality of the existing contact between the children and the contact parent. In individual cases this may vary from substantial and enriching to the children to circumstances where it is irregular or may even be contrary to the children's best interests.

- The reason for relocating. Usually this relates to either economic or personal considerations. If a parent, by relocating, is able to improve the economic position of that <<family>> unit then this is an important consideration since it will usually reflect upon the wellbeing of all members of that <<family>>. In particular, where the residence parent is able to change from being dependent upon welfare to earning a more substantial income, that is an important matter. Relocation for the purposes of re-partnering can be of equal importance. Many divorced parents remarry. Sometimes that requires a change in residence. It is not a question, as Mr Hamwood suggested, of the residence parent putting his or her personal interests ahead of those of the children. The marriage will usually make a significant difference to both the social and economic circumstances of the parent and that will usually reflect directly upon the best interests of the children: see Funder, Harrison and Weston - Settling Down and Pathways of Parents After Divorce (1993).

<<9>>.63 It is important for the Court to consider whether the reasons to relocate are genuine, whether they are optional or whether they are seen as important or essential for the orderly life of that parent. The three-tiered test in relation to this referred to in Holmes, supra, remains a valid guide to these aspects.

<<9>>.64 One aspect of these matters which was the subject of substantial submissions by all counsel related to the question of freedom of movement of the residence parent. We will discuss this further in part (a) of Section 10 to which reference should be made. Reference should also be made to the submissions for the wife and the Commission: see Section 6(b) and (d).

<<9>>.65 This issue has also been referred to in a number of cases to which we have referred both in Australia and overseas. As a generality, the freedom of a parent to move without restrictions imposed by or through the other parent is an important matter. Refusal to allow relocation is often seen as an undesirable intrusion into the right to move and to remake one's life after separation, particularly where it is anticipated that the change of location will enhance other aspects of that person's life and the lives of members of that household. However, in relevant proceedings under Part VII the ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges upon those interests then it must give way.

<<9>>.66 The interests of the children may be affected by proposed relocation in two broad ways. Firstly, the relocation may be of benefit not only to the parent but also to the children in a direct way. That is, the lifestyle of that <<family>> unit and those children may be enhanced by the move. Secondly, in some cases the inability of the residence parent to relocate will impose significant pressures upon that parent and diminish his or her capacity to cope and so diminish the quality of the lifestyle in that home. A very important aspect of a child's bests interests is to live in a happy <<family>> environment. That may be significantly impacted upon where the residence parent is required to live in circumstances which diminish his or her future life either in an economic or a social sense, perhaps in a long-term way. If that had an adverse impact upon the children's best interests, that may be an important matter to consider. Similarly, the prospect that the lifestyle of members of that <<family>> will be enhanced by the move is a positive factor to be considered as part of an assessment of the children's best interests.

<<9>>.67 Ordinary common experience indicates that long-term unhappiness by a residence parent is likely to impinge in a negative way upon the happiness and therefore the best interests of children who are part of that household. Similarly, where the parent is able to live a more fulfilling life this may reflect in a positive way on the children. However, the ultimate determinant is the best interests of the children; the wishes and desires of the parent per se give way to that.

- The distance and permanency of the proposed change. An aspect which needs to be considered in any of these cases is the degree of change involved. For example, whether the proposed relocation is to an overseas country and, if so, the circumstances in that country, whether it is to another State and, if so, questions of the distance and convenience of travel, and whether the relocation is intended to be temporary or permanent.

- Other important considerations which will vary from case to case include:- Dislocation from other aspects of the children's former environment such as schools, friends, extended <<family>>. The wishes of the children. The ages of the children. The feasibility and costs of travel. Alternate forms of contact.

<<9>>.68 The Attorney-General submitted that because of the new Part VII, essentially s.60B, it is now unsafe to rely upon the previous decisions of this Court in relocation cases. We do not think that this is generally so. We have analysed the major cases in Australia on this issue in Section 7. As we pointed out in that analysis, some of the cases placed too great an emphasis upon the asserted right of a parent to relocate and to the extent that cases have approached the matter from that perspective, they do not represent the law either before or since the <<Reform Act>>. Otherwise, many of those cases provide a detailed and useful analysis of the issues and have consistently provided guidance to judges in determining individual cases. We consider that that remains so provided that they are read within the context of the discussion in part (c) of this Section.

<<9>>.69 It should also be pointed out that the approach adopted by courts in other comparable countries and which we have analysed in Section 7, indicates a broad consensus of approach by all courts to these difficult issues of relocation. Whilst the legislation in those countries differs, the cases demonstrate a relatively uniform recognition of the difficulties involved and the principles to be applied. We think this is particularly so of the Canadian cases such as Gordon v Goertz which provide a detailed analysis of the issues and guiding principles in a context of legislation which is not dissimilar from the Australian <<Act>> including s.60B.

10. Other matters

(a) The Relevance of Conventions and Treaties and freedom of movement

10.1 The status of international treaties and conventions and the way in which they operate in relation to <<family>> law has been the subject of increasing attention. This issue was not raised before Jordan J at the trial and was not an aspect of his decision or orders. Nor is it relevant to the outcome of this appeal. However, as it was argued before us and as the issues raised may be important in other cases and generally, we express the following views about these matters.

(i) The Convention on the Rights of the Child and Teoh's Case - The Ramifications of the Convention for the Interpretation of Statutes

10.2 Unlike the United States and continental legal systems, where the entry into treaties or conventions creates self executing law, the English and Australian position is that such treaties do not enter into domestic force unless and until there is a legislative <<act>>. In Koowarta v Bjelke Petersen (1982) 153 CLR 168 at 224 Mason J (as he then was) said:-

"It is a well settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia (Chow Hung Ching v The King (1948) 77 CLR 449, at p. 478; Bradley v The Commonwealth (1973) 128 CLR 557, at p. 582). In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need for legislation by Congress (Foster v Neilson (1829) 2 Pet.253 at p.314".

See also Teoh's case (1995) 183 CLR 273 per Mason CJ and Deane J at 286-7.

10.3 During the drafting of <<the Constitution>> it had been contemplated that treaties entered into by the Commonwealth should become the law of the land. However, as Stephen J pointed out in Koowarta v Bjelke Petersen, supra, at 212:-

"the Constitution as finally adopted attempted no such departure from settled common law doctrine; the exercise of treaty - making power was not to create municipal law. For that legislative action would be required."

10.4 Legislation, which is otherwise valid, cannot be held invalid on the ground that it is inconsistent with international law or treaties: see Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 37-8 per Brennan, Deane and Dawson JJ; at 52 per Toohey J; at 74 per McHugh J. However, the existence of a treaty obligation alone allows a court to take such a treaty into account in the development of the common law: see Mabo v Queensland [No. 2] (1992) 175 CLR 1 at 42 per Brennan J, with whom Mason CJ and McHugh J agreed. In addition:-

"The Courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty ": Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 38 per Brennan Deane and Dawson JJ.

10.5 Nicholson CJ and Fogarty J expressed views on this issue in Murray v Director, <<Family Services, ACT>> (1993) FLC 92-416. That was a case under the Hague Convention on the Civil Aspects of International Child Abduction in which the Court was required to consider argument about the relationship between the Hague Convention, which had been given domestic affect by the Child Abduction Regulations, and UNCROC. It had been argued that the Hague Convention was inconsistent with, and should be read as subject to, UNCROC which succeeded it in point of time. The relevant extract of the judgment is as follows at 80,255 to 256:-

"Before turning to the remaining arguments of the wife it is necessary to say something about the status of international instruments such as the Hague Convention and the Convention on the Rights of the Child in Australian domestic law.

This subject was recently considered by the Full Court of the Federal Court of Australia in Minister For Foreign Affairs and Trade v Magno (1992) 112 ALR 529 at 534. That was a case which involved consideration of the validity of a regulation made pursuant to <<s15 of the Diplomatic Privileges and Immunities>> <<Act 1967>>.

That section provides: - "The Governor-General may make regulations, not inconsistent with this <<Act, prescribing all matters required or permitted by this Act>> to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this <<Act. "

Section 7 of that Act>> also provides that certain provisions of the Convention in question, namely the Vienna Convention on Diplomatic Relations, have the force of law in Australia and sets out in specific terms which Articles have such effect and makes specific reference to their provisions. The Convention itself is set out as a Schedule to the <<Act>>.

In the event, the majority of the Full Court (Gummow and French JJ, EinfeId J dissenting) held that the Regulation in question was valid. In the course of his judgment, Gummow J expressed what might be regarded as a conservative view as to the effect of international conventions and treaties on Australian domestic law.

In making this comment we stress that we do not do so in any critical sense as the subject is not free from uncertainty, but rather to find a starting point against which the submissions before us can be measured. His Honour's views, which appear at pp 534-535, may be summarised as follows.

Firstly, that if an international obligation involves enforcement in the courts which is not already authorised by municipal law, legislation is needed to make the necessary changes in the law or to equip the Executive with the necessary means to execute the obligation.

Secondly not all legislative approval of treaties or other obligations entered into by the Executive renders the treaty binding upon individuals within Australia as part of the law of the Commonwealth or creates justiciable rights for individuals.

Thirdly, in cases where a convention has been ratified by Australia, but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in order to help resolve an ambiguity in domestic primary or subordinate legislation.

Fourthly, where a statute has adopted the nomenclature of a convention in anticipation of subsequent Australian ratification, it is possible to refer to the convention to assist resolution of an ambiguity, but not to displace the plain words of the statute.

Fifthly, in the exercise of a discretion and where the domestic law upon its proper construction permits it, regard may be had to an international obligation or agreement which has been ratified by Australia, but not otherwise incorporated into domestic law and where the domestic law is not ambiguous. In this regard, his Honour pointed to the still unresolved difficulty, if it is suggested that the obligation or agreement has been

misconstrued by the decision maker, as to whether this amounts to an error of fact or law for the purpose of review or appeal.

Sixthly, in circumstances where Parliament has expressly given the same meaning to a law as the meaning it bears in a particular agreement or convention, it may attract the provisions of <<s15AB of the Acts Interpretation Act 1901>>, where the agreement or convention is "referred to" within the meaning of <<s15AB>>(2)(d). In such circumstances consideration may be given to it not merely to construe provisions which are ambiguous or obscure but for the wider purposes set out in <<s15AB(1).

Gummow J concluded that the regulation making power conferred by s15>> of the <<Diplomatic Privileges and Immunities Act>> authorised the making of regulations to give effect to <<s7 of the Act>>, so as to implement the obligations imposed on Australia under the Vienna Convention and that the particular Regulation under attack was valid.

French J, who was the other member of the majority, did not in his judgment specifically address the general question of the incorporation of international agreements and conventions into domestic law. It is apparent from his judgment, however, that he considered that the human rights and fundamental freedoms of speech and assembly accepted in a number of international conventions and specifically asserted in Articles 19 and 20 of the Universal Declaration of Human Rights and Articles 19 and 21 of the International Covenant on Civil and Political Rights, to both of which Australia is a party, were relevant for consideration in the context of domestic law (see pp 555-6).

He said at p557: - "The Diplomatic Privileges and Immunities <<Act>> 1967, through s7, imposes duties upon the executive which are expressed in the words of the Convention itself. Those words and particularly arts 22 and 29 are capable of application to the full range of constitutional statutory and administrative regimes which are parties to the Convention. It is a paradigm of an <<Act>> which in the words of the High Court in Morton v Union Steamship Co of New Zealand Ltd 'lays down only the main outlines of policy.'"

He concluded that s7 of the <<Act>> imposed on the Executive as a matter of municipal law the obligations undertaken by Australia at international law under the Convention and concluded that the relevant regulation was, subject to certain reservations, valid.

In his dissenting judgment, Einfield J did not differ from the majority on the question of the incorporation of the Convention into domestic law. However, he considered that other conventions had achieved a similar status and that the validity of the regulation in question under this Convention had to be considered in light of them.

He drew a distinction between agreements or conventions which have been ratified by the Executive Government only and those which have been ratified by the Parliament, and a further distinction between the latter and those which, like the International Covenant on Civil and Political Rights, have been appended as schedules to legislation such as the Human Rights and Equal Opportunity Commission <<Act>> 1989 (sic.).

He conceded that the High Court had made it clear in Dietrich v R (1992) 109 ALR 385 that ratification, either by the Executive or Parliament, does not, of itself, result in the rights which it embodies becoming enforceable as part of Australian domestic law. However he pointed out that no argument had been put to the Court as to the effect of the Human Rights and Equal Opportunity Commission <<Act>> as Australian legislation embodying the Covenant or part of it and that the argument before the High Court appears to have proceeded upon the basis that there was no such legislation -see p570.

In this regard it is of interest to note that in his dissenting judgment in In Re Marion (1991) FLC 92-193 at 78,303 (later upheld by the High Court on other grounds see Secretary, Department of Health and Community Services v JWB and SMB (1992) FLC 92-293; 66 ALJR 300), Nicholson CJ, after reviewing the authorities and the legislation, said in relation to the Declaration on the Rights of Mentally Retarded Persons and other international instruments, which are also incorporated into the Schedule of the same

<<Act>>:- "Contrary to what I said in In re Jane, however, I now think it strongly arguable that the existence of the human rights set out in the relevant instrument, defined as they are by reference to them, have been recognised by the Parliament as a source of Australian domestic law by reason of this legislation."

Having regard to the remarks of Einfield J and to the fact that this issue does not appear to have been considered by the High Court in either Dietrich's case or in Marion's case on appeal, it may be that this is still an open issue.

After referring to the decisions of the High Court in Australian Capital Television Pty Ltd v Commonwealth (No 2) (1992) 108 ALR 577 and Nationwide News Pty Ltd v Wills (1992) 108 ALR 681, Einfield J concluded that these cases established that in Australia there is a constitutional guarantee of freedom of speech, at least in discussion of federal political matters or public affairs, and that this, coupled with the provisions of the International Covenant on Civil and Political Rights, meant that substantial weight should be given to freedom of speech in interpreting the Regulations in light of their purpose.

He accordingly concluded, by reason of his view that the Regulations involved an unreasonable curtailment of freedom of speech and for other reasons not relevant to present considerations, that the Regulations were invalid.

In Dietrich's case, Mason CJ and McHugh J referred with tentative approval, but without deciding the issue, to what they described as a "common sense approach" of having regard to international obligations in helping to resolve uncertainty or ambiguity in judge made law (pp392-3).

Toohey J was more positively in favour of this proposition (pp 434-5) and Brennan J was prepared to accept the International Covenant on Civil and Political Rights as a legitimate influence on the development of the common law (p 404). The only Judge who appeared to doubt the proposition was Dawson J (pp 425-6). Further, as EinfeId J pointed out in Magno's case, in Mabo v Queensland (1992) 107 ALR 1, Brennan J, (Mason CJ and McHugh J concurring), said at p 29: - "The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol [the First Optional Protocol to the International Covenant on the Protection of Civil and Political Rights] brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."

It thus may be that this can, with some degree of confidence, be added to the categories stated by Gummow J.

Further we consider, with respect, that Gummow J may have been too restrictive in his third category in concluding that the terms of the convention may only be resorted to for the purpose of resolving ambiguity in domestic primary or subordinate legislation. We think that such conventions may also be resorted to in order to fill lacunae in such legislation, having regard to the views of the High Court expressed in Dietrich's case and those expressed by Kirby P in Jago v District Court of NSW (1988) 12 NSWLR 558."

See also Kirby P in Young v Registrar, Court of Appeal and Anor. [No.3] (1993) 32 NSWLR 262 at 274 and the New Zealand Court of Appeal decision of Tavita v Minister for Immigration [1994] NZFLR 97.

10.6 Teoh's case, which was decided subsequently, did not close that issue. The joint judgment of Mason CJ and Deane J, with whom Gaudron J agreed, noted that it had not been submitted before them that a declaration made pursuant to s.47(l) of the Human Rights and Equal Opportunity Commission <<Act>> operated to incorporate the Convention "as a source of individual rights and obligations" under municipal law: (1995) 183 CLR 273 at 287. Toohey J observed at p.301 that the suggestion made by Nicholson CJ and Fogarty J in Murray's case was a matter that did not arise in Teoh's case.

10.7 The position of UNCROC in the area of <<family>> law may gain further strength from <<s.43(c) of the Family Law Act>> which provides, in what we highlight is a mandatory direction, that:-

"The <<Family>> Court shall, in the exercise of its jurisdiction under <<this Act>>, and any other court exercising jurisdiction under <<this Act>> shall, in the exercise of that jurisdiction, have regard to - ... (c) the need to protect the rights of children and to promote their welfare; (Emphasis added)

10.8 This sub-section has been in <<the Act>> since 1975 and was the subject of Executive and Parliamentary attention recently when the <<Reform Act>> introduced a new paragraph to s.43:-

"(ca) the need to ensure safety from <<family>> violence;"

10.<<9>> The Attorney-General submitted that s.43 could not be interpreted as applying to UNCROC because that Convention was not in existence at the time of the passage of s.43. He said that the <<Family Law Act>> in effect provided a code, and that, while UNCROC may have provided some of the material from which the <<Act>> was drawn, it was not open to a court to look at the Convention as a whole.

10.10 We are unconvinced by this argument for the following reasons.

10.11 Firstly, while that Convention may not have existed at the time of the passage of the <<Act>>, the concept of the rights of children was well established and had been recognised by the 1959 UN Declaration of the Rights of the Child to which Australia acceded. This Declaration had been preceded by the Declaration of Geneva adopted by the League of Nations in 1924. The 1924 Declaration committed all members, of which Australia was one, to be guided by its principles. In addition, as noted in the first paragraph of Australia's Report Under the Convention on the Rights of the Child:-

"1. Successive Australian Governments have acknowledged the rights of children as fundamental human rights. In 1981 this acknowledgment was made through the inclusion of the UN Declaration on the Rights of the Child 1959 as a Schedule to the <<Human Rights Commission Act 1981>>. In 1986 this acknowledgment was re-affirmed by the inclusion of the Declaration as a Schedule to the legislation which replaced the 1981 <<Act, the Human Rights and Equal Opportunity>> <<Commission Act 1986>>." (p.1).

10.12 Subsequent paragraphs of the Report explain Australia's "active role" in drafting the Convention, the processes leading up to ratification and the then Attorney General's declaration of the Convention as a schedule to the <<Human Rights and Equal Opportunity Commission Act>>. Significantly, the Report states:-

"6. Australia does not propose to implement the Convention on the Rights of the Child by enacting the Convention as domestic law. The general approach taken in Australia to human rights and other conventions is to ensure that domestic legislation, policies and practice comply with the convention prior to ratification." (p.2, emphasis added).

10.13 Against such a backdrop, it is hard to see how the Convention can be considered not to be relevant.

10.14 Secondly, the rights of children should not be regarded as static and <<s.43(c) of the Family Law Act>> should not be interpreted as frozen in time. The Parliament, in enacting it, clearly expected the Court to make an examination of what the rights of children are from time to time. It is difficult, especially in light of the above extract from Australia's report to the monitoring committee on the Convention, to imagine a better starting point than a convention like UNCROC, which has, as the High Court pointed out in Teoh's case, received almost universal international acceptance. In Australia it has been ratified and is a declared instrument appearing in the schedule to the Human Rights and Equal Opportunity <<Act>>.

10.15 The Minister's declaration had effect from 13 January, 1993. Unsuccessful attempts were subsequently made in each House of Parliament pursuant to sub-s.47(3) of the <<Act>> to disallow the Minister's declaration: see House of Representatives Hansard 1 September, 1993, pp.691-701; Senate Hansard 30 September, 1993 pp.1473-98 and 1595-8; 5 October pp.1682-85.

10.16 Thirdly, even if the Convention had no such recognition other than ratification and s.43(c) did not exist, it is our view that the Court could have regard to the Convention in accordance with the principles outlined in Magno's case, Murray's case and Teoh's case. We do not accept the Attorney-General's submission that the <<Family Law Act>> constitutes in effect a code, or that <<s.6OB>> is couched in such terms that it is unnecessary to look outside it. Both the object and the principles set out therein are expressed in broad and not exclusive terms such that extrinsic assistance may be necessary or useful to interpret them. They are statements of broad general principle, consistent with UNCROC but lacking the sort of precision that would be expected if they were intended to constitute part of a code.

10.17 This becomes more apparent when regard is had to <<s.68F>>(2) which, while it refers to matters also encompassed by <<s.6OB>>, also deals with matters outside its scope, such as <<family>> violence, child abuse, Aboriginal and Torres Strait Island culture and, in <<s.68F>>(2)(l), "any other fact or circumstance that the court thinks is relevant".

10.18 Again the comment may be made that the existence of UNCROC is likely to be a fact or circumstance that the Court thinks is relevant in the absence of any inconsistent statutory provision. This view is strengthened by the observation by Gummow J in Magno's case that regard may be had to a convention or treaty in the exercise of a discretion, which the <<Family>> Court clearly exercises in determining matters of parenting responsibility and the best interests of children.

10.19 Fourthly, we consider that UNCROC must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends. As put by Sir Anthony Mason in his address to the Second National Conference of the <<Family>> Court of Australia (1995):

"True it is that a convention does not necessarily embody rules of international law. But the Convention on the Rights of the Child has attracted widespread international acceptance. 178 nations have acceded to it. And why should the principle that the provisions of a ratified but unincorporated convention do not form part of the law of the land forbid judicial formulation of the common law by reference to the convention if it enjoys widespread acceptance, including acceptance by Australia. The point of the principle is that it denies the status of domestic law to a provision in an unincorporated convention. But the provision will achieve that status if it is incorporated into domestic law by statute. And the provision may contribute to the development of a principle of domestic law if the judges draw upon it for that purpose." (International Law and its Relationship with <<Family>> Law' Second National Conference Papers,(1995) p.18).

10.20 Fifthly, we adhere to the view expressed by Nicholson CJ and Fogarty J in Murray's case and supported by the view expressed by Einfield J in Magno's case, that the fact that this Convention is expressed as a schedule to the <<Human Rights and Equal Opportunity Commission Act>> may give it a special significance in Australian law. Indeed the Attorney-General did not necessarily disagree with this, preferring to rely upon the submission that the <<Family Law Act>> operated as in effect a code and that it would therefore be necessary to refer to the whole of the Convention only in very limited circumstances.

10.21 Sixthly, as appears in <<Section 3>> of this judgment, it is apparent that in particular <<s.60B and also other sections as introduced by the Reform>> Bills relied upon UNCROC as a source. We also referred in that section to the close relationship between a number of sections, particularly <<s.60B>>, and various articles of UNCROC and we also referred to the second reading speeches and explanatory memoranda which made it clear that that Convention provided a basis for some of the <<reforms>> contained in that proposed legislation.

10.22 There are examples of circumstances where the legislature has incorporated part only of an international instrument and the courts have had regard to the balance of the instrument as an aid to its interpretation. In particular, the regulations made under <<s.111B of the Family Law Act>> only partially give effect to the terms of the Convention on the Civil Aspects of International Child Abduction.

Nevertheless in De L v Director General, NSW Department of Community Services (1996) FLC 92-706 at 83,464, Kirby J said:-

"The apparent purpose of the Regulations is to make provision of the kind permitted by <<s 111B of the Act>>. So far as is presently relevant (and subject to the complaint about variance) reg 16(3) follows quite closely the language of the Convention. It may therefore be inferred that it was intended by the rule maker that the words used in the Regulations should attract the same meaning as would be given by international law to the words of the Convention itself.

Where a treaty is incorporated as part of local law, Australian courts will interpret that law in accordance with the international law governing the interpretation of treaties. The rules were originally governed by international custom. Stimulated by the work of International Law Commission, the International Court of Justice accepted that its "first duty", when called upon to "interpret and apply the provisions of a treaty", was to "endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur". If, however, the words are "ambiguous or lead to an unreasonable result", the Court held itself entitled to resort to other methods of interpretation seeking to "ascertain what the parties really did mean when they used these words".

This approach is now reflected in the Vienna Convention on the Law of Treaties. Those provisions are regularly applied by Australian courts to guide them in a principled and consistent construction of treaties of local significance. This is done as a matter of law and out of comity to ensure that the interpretation of international treaties by Australian courts will, so far as possible, conform to the approach which will be taken by the courts of other countries in relation to the same treaty.

Some courts have followed quite a strict rule, akin to that formerly observed by the common law: excluding travaux preparatoires, historical, argumentative and other material and confining attention to the language of the treaty in question. For example, this appears to have been the approach taken to the interpretation of the language of the present Convention in the decision of the Full Court of the <<Family>> Court in In the Marriage of Hanbury-Brown, R; Director-General of Community Services. However, it is probably fair to say that, both before international tribunals and municipal courts, there is now a greater willingness to look to relevant background material, than was formerly the case. In this respect, the practice of international law parallels that of Australia municipal law. By the time cases get before courts of high authority, international and municipal, suggestions of ambiguity or uncertainty tend to be insistent. Even parties which support a construction, based upon the text alone, ordinarily seek to bolster their arguments by reliance on extrinsic material. So it has proved in this case.

The Supreme Court of Canada permitted reference to be made to, and itself utilised, the travaux on the present Convention in order to understand its purpose and in particular the reference, in the preamble, to the fact that "the interests of children are of paramount importance." Except in cases of unarguably clear treaty language, courts today regularly have resort to the opinions of scholars, reports on the operation of the treaty and decisions of municipal courts addressing analogous problems. But in the end, the object of the task of interpretation of treaty language is the same as that of interpreting municipal legislation. It is to give meaning to the words used, read in their context and, to the fullest extent possible, for the purpose of achieving the objects which are stated or otherwise apparent." (footnotes omitted).

10.23 It should be noted that although Kirby J dissented from the majority as to the outcome of this appeal, there appears to be no difference between his Honour and the majority on this issue. The majority (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) similarly had regard to the contents of the Convention in construing the regulations.

10.24 During argument in this appeal attention was drawn to the fact that the express references to the Convention in the early draft of what became <<s.60B>> was not in the final enactment. While express reference may elevate the relevance of the Convention, it is another matter to rely upon the fact that the express reference was deleted in order to draw support for the proposition that the Convention is not relevant to a statute which, it is asserted by the Commonwealth, stands alone but which obviously draws upon articles of the Convention.

10.25 We now turn to consider whether, if it is permissible to refer to the whole of the Convention, that affects the interpretation of <<s.6OB>>. It appears to us that if regard is had to the whole of the Convention, the object and principles stated in <<s.6OB>>, while obviously important, do not represent anything like the full quotient of rights of children provided by UNCROC. It confers rights extending well beyond those set out in that section, or indeed in relation to issues of residence and contact generally.

10.26 It is also apparent that the expressions of principle contained in <<s.6OB>> are expressions of broad principle, which, although important, may be of limited value in the determination of a particular case and, as such, it may be difficult to elevate them to a higher position than as a clear Parliamentary recognition and legislative emphasis upon principles which have long been applied by the Courts in Part VII cases and which were succinctly expressed by the High Court in M and M, supra, in the passage already quoted at CLR 76; FLC 77-080.

10.27 We have discussed elsewhere whether the principles established by earlier relocation cases are still appropriate, and have expressed the view that, with some qualifications and exceptions, they are. So far as UNCROC is concerned, we can see nothing inconsistent between it and the principles established by those cases, or the principles expressed by us in the present appeal.

10.28 Further, we think that if we were to accept the submission of Mr Hamwood as to the meaning of the <<Reform Act>>, we may be adopting an approach that is inconsistent with the principles expressed in that Convention and would be applying a strained interpretation of the legislation.

10.29 (ii) Other International Instruments

Also under consideration before us were several other human rights instruments, namely:-

- the International Covenant on Civil and Political Rights (ICCPR) which is a declared instrument under the <<Human Rights and Equal Opportunity>> <<Commission Act>> and appears as a schedule to it; and

- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which appears as a schedule to the <<Sex Discrimination Act 1984>> which in <<s.48>> confers certain functions and powers of scrutiny upon the Human Rights and Equal Opportunity Commission.

10.30 In this appeal the former was relied upon both by the Commission and the wife, and the latter by the wife, in support of the recognition of the rights of freedom of movement and the protection of women against unequal treatment. Reliance upon these instruments proceeded on the basis that the relevant provisions had not been specifically incorporated into domestic law but were scheduled to domestic law.

10.31 Mr. Rose, for the Commission, submitted that domestic law recognises a general right to freedom of movement. We have already summarised his submissions on these issues in <<Section 6>>(d) and need not repeat them.

10.32 He also pointed out that <<s.3 of the Human Rights and Equal Opportunity>> <<Commission Act>>, which is an interpretation provision, states, inter alia, that unless a contrary intention appears, for the purposes of <<the Act>>:-

""human rights" means the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument; "

10.33 <<Section 3>> also provides that:-

""Covenant" means the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2, as that International Covenant applies in relation to Australia;"

10.34 From this footing, Mr Rose submitted that the Court should read <<s.6OB>> on the basis that it is a common law rule of statutory interpretation that a court is to interpret statutes in light of a rebuttable presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms [Re Bolton; Ex parte Beane (1987) 162 CLR 514 at 523 and Nationwide News Pty. Ltd. v Wills (1992) 177 CLR 1 at 43] of which freedom of movement is one such right and freedom. He also referred to Mabo's case, supra, at 42 in support of an argument that the ICCPR, having entered into force in Australia, is a legitimate and important influence on the development of the common law.

10.35 Mr. Rose accepted that the best interests of children remain the paramount consideration in cases such as the present one. The point of these submissions was to buttress the Commission's argument against suggestions that parental wishes, circumstances or actions as they relate to relocation ought not form part of the consideration of what is in the children's best interests because of the changes effected by the <<Reform Act>>. He submitted that as a fundamental human right, freedom of movement had not been abrogated by the changes to the <<Act>> and ought to be given recognition and appropriate weight in determining the question of what will be in the children's best interests.

10.36 In addition to adopting the Commission's submissions, Ms Pagani, for the wife, submitted that, in taking account of the right to freedom of movement in its interpretation of s.6OB, the Court should also have regard to CEDAW. Her submission identified that CEDAW reiterates the freedom to choose the place of residence and domicile [article 15(4)] and rights associated with marriage [article 16] and enjoins States Parties to <<act>> equally as between men and women.

10.37 Against this backdrop, Ms Pagani urged the Court to take judicial notice, in the sense discussed by this Court in Mitchell's case, supra, of the economic and social consequences upon women generally which may flow from preventing their relocation.

10.38 In Mitchell at 81,997-8, after discussing the Canadian decision of Moge v Moge, supra, the Full Court said:-

"Australia has a body of research indicating that mothers who are the primary carers of dependent children inevitably drop out of the paid work-force and consequently suffer financial deprivation which is exacerbated by marriage breakdown: see the Australian Institute Of <<Family>> Studies publications, McDonald (Ed.) (1986) Settling Up: Property and Income Distribution as Divorce in Australia; Funder Harrison and Weston (1993) Settling Down: Pathways of Parents After Divorce. In our view there are significant advantages to the Court being able to take judicial notice of research concerning the economic consequence of marriage and its dissolution.

We also agree with the caution contained in Moge against judicial notice being perceived as a substitute for evidence in the particular case. In this regard, we note that in Patsalou and Patsalou (1994) FLC 92-580, the Full Court approved of the trial Judge making reference in her reasons for judgment to relevant literature - in that case, on the subject of the effect of inter-spousal violence upon children. The Full Court rejected a complaint that the parties should have been invited to make submissions on this body of res earch. As we see it, the trial Judge in that case effectively took judicial notice of the research as a form of "background information" within which to then construe the evidence on the record. We recommend a similar approach in spousal maintenance cases."

10.39 As to the content of the judicial notice to be taken in a case such as this, as we previously pointed out, Ms Pagani drew upon the factum submitted by the Women's Legal Education and Action Fund in Canada for submission to the Supreme Court of Canada in the appeal of Gordon and Goertz, supra, and which we briefly summarised in Section 6(b).

10.40 While it is only the last two of those matters referred to there which are relevant in the present appeal, the others may arise where relocation is motivated by employment considerations.

10.41 In the end result, the submission for the wife, as we understand it, was not that any individual right to freedom of movement held by a parent prevails over the best interests of the children or that the taking

judicial notice of the matters referred to above should result in any presumption in favour of relocation for caregiving mothers.

10.42 Rather, Ms Pagani said that the best interests principle is the over-arching principle, but that when the best interests of children are being considered, the fundamental rights and freedoms of the parents, and the consequences of denying those freedoms, must be appreciated having regard to the gendered differences in the social and economic consequences of caregiving which we referred to and the background information of which, she submitted, the Court should take judicial notice.

10.43 There can be little doubt that a general right of freedom of movement is a right recognised by Australian law, but in proceedings under Part VII it is a right that cannot prevail over what is considered to be in the best interests of the children in a particular case.

10.44 The rights of women to live their lives free of discrimination would appear to be similarly recognised, and a doctrinaire approach to the question of relocation may, in practice in some cases, for the reasons argued by Ms Pagani, have the effect of discriminating against women.

10.45 Further, we think that the economic factors referred to by her as affecting women who are the sole caregivers of children are also relevant and should not be overlooked by a court when considering a child's best interests.

10.46 Nevertheless the essential point is that the question must always come back to the best interests of the particular child in each case, and rights of the type discussed above must give way to those best interests.

(b) Rights of Children

10.47 The <<Reform Act>> (s.60B) is expressed in terms of "rights" of children and the balance of Part VII is notable for the absence of "rights" in relation to parents, even in its definition of "parental responsibility" (s.61B) and which is in contrast to the U.K. equivalent.

10.48 These matters give rise to questions about the nature of those rights and whether this is a new concept or a legislative recognition of prior developments.

10.49 Any view that until the <<Reform Act>> the law in Australia spoke in terms of the rights of parents to custody or access seriously misunderstands the development of the law long before 1995. For example, in Brown and Pedersen, supra, the Full Court said (at 79,010):-

"Whatever may have been the accepted principle in the past, this Court has long laid to rest any notion that a parent has a right to "access.""

10.50 The Full Court then referred to several earlier cases in this Court where the discussion was in terms of the right of children. The Full Court had some difficulty with a full acceptance of that concept because "the difficulty with the use of the word "right" is that it detracts from the principle that the welfare of the child is the paramount consideration as stated in sec 64(1)(a) of the <<Act>>."

10.51 By this time the movement from rights of parents to rights of children and their inter-relationship had further developed in the remarks of Lord Denning MR in Hewer v Bryant [1970] 1 QB 357 at 369 and the "Gillick-competent" test enunciated by Lord Scarman in Gillick v West Norfolk and Wisbech Area Health Authority [1986] 1 AC 112 at 183 et seq, namely:-

"Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child - custody, care and control of the person and guardianship of the property of the child. But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law, as I shall endeavour to show, is that parental rights are

derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child."

10.52 His Lordship went on to say at 186:-

"The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. Lord Denning MR captured the spirit and principle of the law when he said in Hewer v. Bryant [1970] 1 QB 357,369: 'I would get rid of the rule in In re Agar-Ellis, 24 Ch D 317 and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off without a shilling. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent Report of the Committee on the Age of Majority [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice.'"

10.53 In Australia, in Secretary, Department of Health and Community Services v JWB and SMB (Marion's case) (1992) 175 CLR 218, (1992) FLC 92-293; Mason CJ, Dawson, Toohey and Gaudron JJ specifically adopted the first of the above statements of Lord Scarman, and went on to say (at FLC 79,174; CLR 237-8):-

"This approach, though lacking the certainty of a fixed age rule, accords with experience and with psychology. It should be followed in this country as part of the common law."

10.54 In this Court those views were adopted on a number of occasions: see, for example, H v W (1995) FLC 92-598 at 81,947 per Fogarty and Kay JJ. That appeal was concerned essentially with the weight to be attached to the wishes of the children as to their future custody. The Court referred to the Gillick test which it adopted, but in the course of doing so it referred again to the conflict which is involved when one is talking about the right of a child on the one hand and the overall responsibility of the Court to determine the issue in question having regard to that child's welfare or best interests on the other. The Court said:-

"The "Gillick-competent" test is helpful by analogy. But where a court is concerned with the welfare of a child no question of "self-determination" by a mature child can arise. In the ultimate, whether by a statute or at common law, whilst the wishes of children are important and should be given real and not token weight the court is still required to determine the matter in the child's best interests and that may in some circumstances involve the rejection of the wishes of the child."

10.55 For a more detailed discussion of these issues and of the emerging emphasis on the rights of children within the concept of best interests see the judgments of the members of the Full Court in Re Z, supra, and also N and S and The Separate Representative (1996) FLC 92-655, at 82,708.

10.56 By the time the <<Reform Act>> came into operation any concept of rights of parents in relation to residence and contact have long been abandoned. Those issues were seen as involving the rights of children, not in an absolute sense but in the sense that the issue was to be determined from that perspective, great weight being attached to children's rights and wishes but ultimately subordinate to the criterion of their best interests.

10.57 We agree with the submissions of the Attorney-General that the rights given to children under s.60B are not rights which are legally enforceable. This view appears to suggest a major inconsistency between legislation which provides for and emphasises the rights of children and at the same time the statement that they are not legally enforceable rights. This apparent dilemma between self-determinism by children and veto by parents or courts is discussed by John Eekelaar: The Interests of the Child and the Child's Wishes:

The Role of Dynamic Determinism: in the publication The Best Interests of the Child (1994) P. Alston. The point made there is that the unenforceability of these rights is fundamentally because of the inherent conflict between the child's best interests on the one side and self-determinism by the child on the other, against a background of age, maturity, vulnerability to pressures. It may also reflect the nature of the practical day to day relationship between parents and their children.

(c) Can a contact parent be inhibited from relocating?

10.58 Mr Hamwood, for the husband, submitted that, consistently with s.60B(2)(b), the Court's power to prevent a residence parent from relocating applied equally to a contact parent. This is because the loss to the children of the right of contact with the contact parent would be diminished to precisely the same extent whether it was the children or the contact parent who moved from the previous location. Consequently, in order to protect the right of the children to contact in an appropriate case the contact parent could be inhibited from relocating. Otherwise it may appear that the law is discriminatory, preventing relocation by the residence parent, usually female, who has the greater responsibilities for the children, whilst allowing the contact parent to relocate without restriction and regardless of the impact on the rights of the children. The Attorney-General expressed no view on this issue.

10.59 In this context one difference between the resident parent relocating with the children and the contact parent relocating needs to be recognised. In the former situation the children would also move from their previously known environment whereas that would not be the case in the latter situation. But it is the right of contact with parents to which s.60B(2)(b) is directed.

10.60 This case is concerned with the question whether a residence parent can be permitted to relocate with the children. The practical effect of the application of the husband, if he is successful, would be to prohibit the wife from relocating. The wife made it clear that unless she was able to take the children with her she would not leave Cairns. It was submitted for the husband and the Attorney-General that there was not a restriction on her freedom to relocate provided that she did not take the children with her. However, in our view, such an approach in this case and in most cases like it is entirely unrealistic and the suggested choice is no choice at all. It would be untenable to suggest, as it was in this case, that a parent who had been the primary carer of the children during the five years of the marriage and in the 6 1/2 years since separation would leave her children and relocate elsewhere. That is true of most relocation cases.

10.61 Further there are many cases where an option by the residence parent of leaving the children to reside with the contact parent or, less frequently, another person, would not be open or practical. Examples include where the exigencies of employment and other circumstances in which the contact parent is living render this impractical and where there is no other suitable person as long-term caregiver.

10.62 We consider that there is power to make an order that may have the indirect effect of restricting the movement of a contact parent. That issue would ordinarily arise when a contact parent seeks to relocate and applied to the Court to vary the existing contact order. If the Court refused to do so because it considered that it would be contrary to the children's best interests to have contact reduced, it may do so by refusing that application, and this may place the contact parent under an obligation to adhere to the existing order. It may also arise in other ways - for example, an application by the residence parent for contact orders to be made in particular terms which may be inconsistent with relocation by the contact parent. The use of injunctions is much less clear because it would raise the issue whether the best interests of the children is the paramount consideration in such applications: see s.68B.

10.63 In any of those eventualities it is possible that the failure of the contact parent to comply with those orders may amount to a breach of the orders in respect of which proceedings by way of enforcement could be brought.

10.64 However, we are not aware of any such order ever having been made in Australia and we think it unlikely that in the exercise of its discretion a court would do so. Essentially the reason is that it would be most unlikely that the children's best interests would be served by requiring the contact parent to have contact which he or she did not wish to have, although it is possible to envisage circumstances where the

continuance of contact is so overwhelmingly in the best interests of the children as to nullify that circumstance.

10.65 In our view, the possibility that such orders might be made emphasises the unrealistic and impractical interpretation of s.60B which is involved in Mr Hamwood's overall submissions. We do not accept an approach which involves parents being "captives of fortune" to their children. Children have rights of a kind referred to in s.60B and otherwise. Parents also have lives to lead and they have the powers and authority referred to in s.61B. The rights to which s.60B(2)(b) refer must be understood and applied in a practical way in the Australian community. To freeze both parents at the location to which they went after separation so that the children may continue to have that contact with each of them is most unlikely to serve the long-term best interests of the children. It would inevitably mean that one or both parents may be forced to forego personal or economic opportunities which are advantageous to all members of that <<family>> or to continue to live in circumstances which are no longer suitable or appropriate. The width of the submissions of Mr Hamwood highlights the need to avoid any doctrinaire approach to s.60B. It has to be interpreted in a reasonable way in our society where the relocation of one or both parents for good reason may be important not only to that parent but also to other members of that <<family>> unit.

11. SOME POST <<REFORM ACT>> DECISIONS

11.1 Since the <<Reform Act>> came into operation in June 1996 there have been a large number of decisions by this Court which have applied the new legislation, including a number of relocation cases.

11.2 The Attorney-General in the course of his submissions drew our attention to five judgments at first instance and one of the Full Court, largely for the purpose of illustrating that they were generally not in conformity with the principles he had put forward.

11.3 Consequently, it is desirable for us to refer to them. We do not intend to set out the factual background of those cases as that is largely irrelevant to the point at issue here and we do not propose to express any view as to the correctness of the outcomes. One of the decisions is now subject to appeal to the Full Court. We will confine this discussion to those cases as we do not consider it to be practical to refer to many other Part VII cases which have been decided since June 1996.

11.4 The first case to which the Attorney-General referred is the decision of Faulks J in Strong and Sporne, 1 November, 1996. In that case, as a consequence of orders made in December 1995, the father had custody of the two young children of the parties' relationship for each alternate weekend and half of school holidays, together with other particular days; otherwise the mother had the custody of the children. Subsequently, the mother proposed to move from Canberra to Townsville with the children. She sought changes to the orders to achieve that result, principally that the father have school holiday contact. The effect of his Honour's orders was to deny the mother the power to take the children with her to Townsville and, as the mother had made it clear that in that event she would remain in Canberra, his Honour made a residence order in her favour and a contact order in favour of the father. It is unnecessary for present purposes to discuss the reasons which led his Honour to that conclusion. The relevance here is his Honour's statement of the principles to be applied.

11.5 His Honour discussed the relevant legal principles and in doing so referred to most of the Australian relocation cases to which we have previously referred, together with many of the Canadian cases. His Honour then referred to the <<Reform Act>> and in particular to s.60B and made reference to its connection to UNCROC. His Honour then said:-

"Accordingly, in my opinion, while it is appropriate that section 60B should be used as a basis for interpretation and reference for other matters to be dealt with under the Part, there is no imposition of any new duties or creation of any new rights by that section.

This is important because of the overall questions about whether or not there is a presumption to be displaced in relation to these matters.

However, it is important to note in relation to the new regime set out under part VII of the <<Family Law Act>> 1975 that the overriding principle is that generally the reservoir of parental responsibilities should remain for both parents, unless it is necessary to tap into that reservoir for specific purposes from time to time.

In this regard the <<Family Law Act>> 1975 prescribes that parenting orders may be made and in this regard that orders could be made for residence; that is where a child will live and with whom the child would live; contact, which is the contact that the child will have with either parent from time to time, or in relation to specific issues which deal with any other aspect of parental responsibility for a child.

In my opinion, the clear intention of the legislature was that the reservoir of parental responsibility should remain untapped except and until it is necessary for that to be drawn upon.

In this regard any decision made in relation to a parenting order must be made by reference, (as the <<Family Law Act>> 1975 prescribes under section 68F), to what must be the children's best interests.

In this regard the <<Family Law Act>> 1975 stipulates in section 68F(2), those matters which the court must consider in coming to a conclusion about what constitutes the child's best interest. I will return to those matters in due course.

Effect of the <<Family Law Reform Act 1995>> It seems to me that the amendments to <<the Act>> do not significantly effect the position as outlined by the court in I and I, Fragomeli and Skeates-Udy, to the extent that overall the dominating consideration in a decision about whether a custodial parent (using the old fashioned term), should be entitled to remove himself or herself away from the non-custodial parent (again using the old fashioned terminology), must be the children's best interests, and that to the extent that there is any suggestion that there is some residual or overriding interest on the part of the custodial parent, this must be fitted into a consideration of being a factor which is in the best interests of the child."

11.6 The Attorney-General submitted that there were "a number of problems with his Honour's statement" but the only one to which he specifically referred was the use of what he described as the "old language" and "an inappropriate process to identify the issue to be resolved".

11.7 We think that his Honour's statement was in practical terms appropriate. Whilst it does not accord precisely with the wording of our analysis of the relationship between the three sections, it correctly identifies that inter-relationship.

11.8 The Attorney-General also referred to the judgment of Chisholm J in Kessler and Roach, 4 April, <<1997>>. In that case a major issue was the application by the wife for permission to take the children from Australia to South Africa. His Honour refused to make that order.

11.<<9 His Honour said that in his view the Family>> Court had never taken the view that, as a matter of law, a parent has a right to move: the question is always governed by the child's best interests which is the paramount consideration: see L. Young: Will Primary Residence Parents be as Free to Move as Custodial Parents Were?: (1996) 11 (3) Australian <<Family>> Lawyer 31.

11.10 His Honour adopted the views of Faulks J in Strong and Sporne, referred to above. He then referred to <<s.60B>> and the term "right" and that it would be inappropriate to attach "an unduly technical meaning to the word "right" in <<s.60B>>". His Honour gave reasons for this and went on to say:-

"It is unhelpful in such matters to proceed as if the legislature had intended to erect a hierarchy of rights, in which some would necessarily prevail over others. It seems more likely that the legislature intended to identify matters of particular importance but leave it to the court in particular cases to weigh up all the relevant matters and decide which order would in all the circumstances be most likely to promote the best interests of the child."

11.11 His Honour then said:-

"... in my view the <<Act>> as amended should be interpreted as intended to ensure that the courts take account of a range of matters in determining the best interests of the child, rather than intended to prescribe the relative weight to be attached to those factors. This must be a matter for assessment in each case."

11.12 Referring to pre-1995 relocation cases he noted that they were governed by the principle that the child's welfare was the paramount consideration. He went on to say:-

"To the extent that statements in earlier decisions suggest that the custodian's right to freedom of movement dominates or submerges the welfare of a child, they did not represent the law."

11.13 His Honour then referred to several overseas cases and continued:-

"In my view they do not support the proposition that the law treats the residence parent as having a "right" to live with the children at any place he or she chooses, in the sense of a right that competes with the best interests of the child. Once an application is made and the matter is before the court, ultimately in my view the court must determine it in accordance with the child's best interests. That was the law before the 1995 amendments and remains the law after them.

The amendments, and particularly <<s 60B>>, set out in a new way various matters the court should take into account. These formulations may usefully direct the court's attention to, or highlight, certain aspects such as the importance of both parents for children, and the importance of parent-child contact. It may be that in emphasising these things the legislature will prompt the courts to reconsider the relative weight that has been given to particular aspects in reported cases. But what the new provisions clearly do not do, in my opinion, is to provide a formula that gives any prescribed relative weighting to any of these matters. In the end it remains up to the court to attach whatever weight seems appropriate to the factors that are relevant to the best interests of the children in the particular case."

11.14 The Attorney-General criticised the statement by Chisholm J that:-

"The present case was argued by all parties on the basis that it was essentially the question of determining what would be best for the children. This is in my view consistent with the law both before and after the amendments."

11.15 The Attorney-General submitted that this may be true in a broad sense but it had "the potential to mislead and also has the potential of, if followed, sending the court in the wrong direction because the approach to the question of what is in the best interests of the child under the old provisions is entirely different to the one that is applicable under the new provisions." He explained this by saying that under the previous legislation "there were no objects stated and there was no guiding principles stated. There were considerations which were somewhat similar to <<s.68F>> if not identical but the approach of looking at those considerations with a view if feasible to achieving the objects was not a process ... required under the old Part VII." Whilst submitting that the goal of Part VII is proper parenting and the fulfilment of parental responsibilities by both parents and that that goal is to be seen as achieved by complying with the guiding principles in <<s.60B>>(2), the Attorney-General conceded that the paramount consideration was the best interest of the child. He stated that in reaching its conclusion the Court is obliged to take into account <<s.68F(2) and the objects contained in s.60B>>, referring again to his analogy that <<s.60B>> represented "guideposts" but that "where to follow the guideposts would put you in a pothole you do not do it because it is not in the interests of the child that you drop them in a pothole."

11.16 What is clear from both of these cases is the detailed analysis by each trial Judge of the facts in the individual case with the best interests of the child as the determinant. In each case they paid what we consider to be appropriate regard to <<s.60B>>. We think that such an approach is to be preferred to what may seem a rather formal process which does not necessarily concentrate upon the best interests as the determinant or the individual facts in each case.

11.17 The Attorney-General also referred to the judgment of Dessau J in Alexander and Day, 29 November, 1996. This was a complex case involving issues of both sexual abuse and relocation. At p.31 et seq, her Honour set out the law to be applied to the interstate relocation which was proposed in that case. She referred to some of the pre-1995 cases and then set out the relevant provisions under the new Part VII and concluded:-

"I see no inconsistency between the new provisions and the previous authorities. In the new provisions, the rights of the child to know and have regular contact with both parents is underlined. This embodies Australia's commitments to the United Nations Convention on the Rights of the Child and highlights the need to consider those rights. The provision is <<s.68F>>(2)(d) is a signpost for the court to consider the practical difficulties in maintaining and promoting the child's rights to contact. These objects, principles and matters in no way detract from the general principle that it is the child's best interests which are paramount and it is this overriding principle which was so clearly highlighted in the authorities to which I have referred. To interpret the new provisions otherwise could suggest an absolute right and one which might thus be enforced to a child's detriment. The provisions reiterate that in determining parenting orders, it is the child's best interests which is the court's paramount consideration. In addition, the right in <<s.60B>>(2) is expressed as a principle underlying the objectives "except when it is or would be contrary to the child's best interests." The intention of the legislature is thus made clear".

11.18 The Attorney-General did not analyse this case in any detail, contenting himself with the observation that the statement by her Honour that she saw "no inconsistency between the new provisions and the previous authorities" was "surprising".

11.19 Although we have phrased the issue slightly differently from the way in which her Honour has, we think that her analysis of the law does not justify criticism as being inconsistent with the current provisions.

11.20 The Attorney-General also referred to the decision of Kay J in B v H, 11 November, 1996, it being an application by the father for a contact order. Again the factual situation was rather complex and the matter is on appeal. In discussing the law, his Honour referred firstly to <<s.65D>> and then noted that by operation of <<s.65E>> the Court must regard the best interests of the child as the paramount consideration, and then to <<s.68F>>(2) which sets out matters which the Court must consider in determining the child's best interests. His Honour analysed each of the relevant paragraphs of that last provision.

11.21 His Honour then said:-

"Whilst previous decisions of the Court postulated the proposition that contact orders ought only be made where it could be demonstrated that to make them would be positively advantageous to the child (see Brown v Pedersen (1992) FLC 92-271), by enacting the recent amendments to the <<Family Law Act and particularly those set out in s 60B>>, in my view Parliament has made it clear that children should be able to maintain contact with both of their parents unless the children's best interests dictate otherwise."

11.22 His Honour went on to say that the provisions of <<s.60B of the Act>> "can be said to be central to the philosophy of the <<Family Law Reform Act 1995>>", and concluded that the principles set out in <<s.60B>>(2)(a) and (b) are the "general principles which I feel the legislature requires individual Judges to be guided by unless the evidence discloses that the child's best interests require some other approach to be taken."

11.23 The Attorney-General indicated no desire to become involved in his Honour's interpretation of Brown and Pedersen and we have briefly referred to that issue in <<Section 8>>. The Attorney-General, however, supported the statement by the trial Judge that <<s.60B>> "can be said to be central to the philosophy of the <<Family Law Reform Act 1995>>". However, his submissions also made it clear that to the extent that Kay J's judgment may suggest a presumptive approach it did not accord with the Commonwealth's position in this appeal.

11.24 The question whether his Honour is correct in his assertion that <<s.60B>> is central to the philosophy of the <<Reform Act>>, may be a matter of semantics. It is, we think, unequivocally clear that the overall determinant in a particular case is s.65E. It could be said that s.60B, so far as it is said to deal with the philosophy of the <<Reform Act>>, is central, but it is not exhaustive or exclusive. As previously pointed out, the principles set out in s.60B(2) are not exhaustive and there are a number of other "philosophic" underpinnings to the <<Act>> not expressly stated in that provision. It may be said of s.60B(2) that it provides a non-exhaustive statement of guides or guideposts to the Court's decision in a particular case and they are required to be taken into account in a serious way where relevant, but the ultimate determinant still remains s.65(E).

11.25 The final decision to which the Attorney-General referred was Holswich and O'Farrell (1996) 21 Fam LR 210, a decision of the Full Court. The report is incomplete as it contains only a portion of the judgment. The case was concerned with the question of contact by the father to the 1 year old child of a former relationship. The mother opposed contact largely based on her antipathy to the father and her concerns about supervised contact. The trial Judge ordered that contact should occur every three months and then once each month, such contact to occur at an access centre. The father appealed. The Full Court dismissed that appeal and did not call upon the respondent.

11.26 Ellis J, who gave the judgment of the Court, set out the provisions of s.60B and noted the words "except where it is or would be contrary to a child's best interests" in s.60B(2). His Honour then went on to say (at p.211):-

"In coming to her decision, the trial judge was obliged, in deciding whether to make a particular parenting order in relation to the child, to regard the best interests of the child as the paramount consideration: see s 65E. That principle is, in my view, the overriding principle, and the court is required to make the parenting order which, in the circumstances of the case, it considers will best promote the child's best interests.

The reference to the child's rights in s 60B(2)(a) and (b) should not, in my view, be seen as detracting from the long-established principle that, in deciding what parenting order to make, in this case an order for contact, the child's best interests must be regarded as the paramount consideration. Thus, the primary issue raised before the trial judge was what parenting order and, in particular, what contact order would, in the circumstances of this case, best promote the best interests of the child and the primary issue before this court is whether the trial judge, in discharging her duties, erred in the appellate sense."

11.27 The Attorney-General's submissions were that, whilst the decision "on its face seems inoffensive" the reference to "child's rights" "is apt to mislead" and:-

"The notion that there should be no detracting from the long established principle that the paramountcy of the child's best interests, I think is to misdescribe the relationship between s.60B(2) and s.65E. Section 60B(1) sets out the object, s.60B(2), the guiding principles in the achievement of those objects; s.65E, the criterion of the best interests of the child, and the process involved them going to s.68F to determine what, in the light of consideration of those imperative considerations of the best interests of the child are; at all times the goal being to achieve proper parenting and fulfilment of parenting responsibilities. It may seem a little finicky to be challenging that language, but I think if anything has to be got right at the outset of the proper interpretation of Part VII, it is the relationship between s.60B(2), 65E and 68F."

11.28 These submissions raise fundamental matters which we have already discussed in Section <<9>>. They may also suggest the importance of procedure over substance. We have already set out our conclusions as to the inter-relationship between those sections. The best interests of the child is and remains paramount. That is not diluted by s.60B. Section 60B (and s.68F(2) guide the exercise but the ultimate determinant is the best interests of that child in that particular case.

11.29 Otherwise we consider that the passage from the judgment in Holswich's case sufficiently described the process for the purposes of determining the issues in that appeal.

12. APPEAL PRINCIPLES

12.1 The matter before us is not a re-trial of the parties' applications but an appeal in accordance with established principles. We have already set out in detail the submissions for all parties. The essential argument by Mr Hamwood, for the husband, was that his Honour misapplied the law as it is since the <<Reform Act>> came into operation and that as a consequence his discretion miscarried. Mr Hamwood did not seek an order for a re-trial but sought the re-exercise by this Court of that discretion in accordance with correct principles, a course which he submitted would lead this Court to dismiss the wife's application. The effect of this would be that the wife would remain living in Cairns with the two children.

12.2 Similarly, the essential argument by Ms Pagani, for the wife, was that his Honour applied correct principles, had properly exercised his discretion and that the appeal should be dismissed. In the event that we concluded otherwise, she did not seek a re-trial but a re-exercise of the discretion by this Court leading to the same outcome.

12.3 Neither the Attorney-General nor Mr Rose, for the Commission, made submissions as to the merits of this appeal or its outcome.

12.4 Mr Hamwood did not challenge his Honour's findings of fact but did challenge to some of the conclusions which his Honour drew from these primary facts and which, it was submitted, vitiated his discretion. In addition, he submitted that, even if his Honour applied the correct legal principles and there were no significant errors of fact, his discretion had miscarried.

12.5 In relation to this last submission, as counsel for the husband recognised, such an appeal is against a discretionary order where no error of principle or fact is asserted and where the argument must be that the outcome of the exercise of that discretion was unreasonable or plainly unjust. The difficulty confronting an appeal on that basis in a discretionary area such as is involved here is well known. It is sufficient to refer to the well-known passage in the judgment of Stephen J in Gronow (1979) FLC 91-716 at 78,848-<<9>>; (1979) 144 CLR 513 at 519-520 where his Honour said:-

"The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge. Because of this and because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the trial judge can do, an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight."

13. THIS APPEAL

13.1 The judgment of the trial Judge was a detailed and thorough one. No challenge was made to his findings of fact, and we think that the conclusions which he drew from that material were clearly open to him and cannot be the subject of any effective challenge in this Court.

13.2 The main challenge was directed to the legal principles which the trial Judge applied. We have already set them out. His Honour made three central points. Firstly, that the best interests of the child remains paramount. Secondly, in that exercise the Court must have regard to and give proper weight to the object and principles in s.60B so far as they are relevant. Thirdly, the Court must also have regard to and give proper weight to the matters set out in s.68F(2) as far as they are relevant. Although not precisely formulated in the way in which we have in Section <<9>>, those statements of principle succinctly and accurately describe the task and identify the relevant provisions. There is no doubt that the best interests of the child is and remains paramount. That task is to be performed by considering and giving effect to the

matters in s.68F(2) and the object and principles in s.60B, as far as they are relevant. How relevant any one or more of them is will depend upon the individual case. They are non-exclusive lists since obviously there are a number of other matters and objects which the Court may aim to achieve or cater for in a particular case.

13.3 In his statement of legal principles, the trial Judge made two other important points. The first was that the Court should consider the three-tiered test in Holmes' case. We consider that that remains valid. It is intended to be no more and no less than a convenient checklist to assist in part of the process. In some cases it may be helpful and in other cases it may not. The trial Judge was entitled to have regard to that.

13.4 Finally, his Honour said that, subject to the first three matters which he mentioned, it was proper to give weight to "the wishes and interests of each of the parents together with the notion that parties should ordinarily be free to pursue a new life subject to meeting their responsibilities as parents," to the circumstance that "one parent has been the unchallenged primary caregiver" of the children for a long time and that the move was interstate as distinct from overseas.

13.5 We have already referred to those aspects in our discussion, principally in Section <<9>>. Ultimately their relevance is the extent that they impact upon the children's best interests. It is clear that his Honour dealt with that aspect in that way.

13.6 His Honour then applied those principles to the facts before him. No serious analysis of or challenge to that process was undertaken before us. We have set out the detail previously. It need not be repeated. His Honour analysed the relationship between the parties and the children, the details of the proposed relocation, and the consequences upon everybody of granting or refusing orders enabling that relocation to take place. He placed emphasis on the impact upon the wife of a refusal, concluding that she was currently depressed, that she would be "devastated" by a refusal and that she would suffer trauma and a long period of grieving. He said that he seriously questioned her capacity to cope if she was denied the opportunity to go to Bendigo. He concluded that this would have a significant adverse effect upon the quality of her parenting and would be "a tragedy for these children". He also concluded that she may deteriorate significantly in her parenting capacity if she was required to remain with the children in Cairns. He also analysed in detail the consequences of lessened contact by the children with their father and the impact upon them of a change from their accustomed environment.

13.7 The essential point of this careful and delicate analysis was not to give way to the wishes of a parent who, Mr Hamwood suggested, was placing her interests ahead of those of her children. His Honour's identification of the wife's strongly held wishes and the impact upon her if she was unable to go forward in her life by remarrying was not for the purposes of giving effect to her wishes or interests in themselves. The relevance was, as his Honour explained, the impact upon the children and their best interests.

13.8 The question of the relevance and significance of conventions and treaties was not an issue before his Honour and did not form part of his reasons. Consequently, we need not examine that aspect here.

13.<<9>> In the light of the conclusions we have reached, it is unnecessary for us to consider whether the circumstance that the wife had a custody order before the <<Reform Act>> and the effect of the transitional provisions upon that make any difference.

13.10 Our task is to determine whether his Honour misapplied the law and, if he did not, whether his discretionary decision to permit the mother to relocate was reasonably open to him. We have already indicated that we consider that his Honour applied correct principles. We are satisfied that he examined the facts and competing issues in a meticulous way in a case of some emotion. We do not consider that his Honour was incorrect in exercising his discretion to allow the mother to relocate. Indeed, we would say that, given his Honour's findings about the background facts of this case and the impact directly and indirectly upon the children of a refusal to make that order, his Honour was clearly correct in the conclusion at which he arrived. Consequently, we would dismiss the appeal.

14. COSTS

14.1 We will give directions enabling the parties to make written submissions as to the costs of this appeal. We have already taken written and oral submissions as between the Attorney-General and the husband and wife in relation to costs insofar as they arise from the additional two days of hearing in May <<1997>> when the Attorney-General and the Commission intervened, and those submissions need not be repeated.

15. ORDERS

15.1 The orders are:-

1. The appeal is dismissed.

2. (a) The wife is to file and serve on each other party her written submissions as to the costs of this appeal within twenty-one (21) days; (b) The other parties are at liberty to file and serve on each other relevant party any written submissions as to costs, being either in response to the submissions of the wife or otherwise, within fourteen (14) days thereafter; (c) The wife and any other party are at liberty to file and serve on each other relevant party any written submissions in reply within seven (7) days thereafter.