



FAMILY LAW COUNCIL

DISCUSSION PAPER

RELOCATION

FEBRUARY 2006

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Consultation

The Family Law Council is seeking comment on:

- the particular questions posed in this paper
- the issues raised throughout this paper on which the reader would like to comment, and
- any other issues related to matters in the paper.

Persons and organisations wishing to make submissions or provide comments on all or any part of this paper are invited to do so in writing.

All written submissions made to Council will be publicly available unless there are reasons for confidentiality and those reasons are drawn to Council's notice. Persons making submissions are asked to keep this in mind. It is particularly important that the privacy of personal material, such as information about individual cases, be protected and Council asks that such material be clearly identified as confidential.

If you do not want your name used, or you want your submission or part of it treated as confidential, please advise Council accordingly and state your reasons for seeking confidentiality. You should be aware that confidential material must sometimes be released if requested under the *Freedom of Information Act 1982* (Cth).

The closing date for submissions and comments is **Friday 7 April 2006**.

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Please note that individuals and organisations whose submission on the December 2004 discussion paper *The 'Child Paramountcy Principle' in the Family Law Act* dealt with relocation will automatically be taken into account.

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Terms of Reference

In May 2000 the Family Law Council discussed the amendments made to the *Family Law Act 1975* by the *Family Law Reform Act 1995*, in relation to the paramountcy principle (the rule that the best interests of the child must be regarded as the paramount consideration when making specified decisions in the Family Law Act).

Council appointed a committee to develop draft terms of reference which were approved by the Attorney-General on 9 October 2000. On 3 June 2003 the Attorney-General agreed to extend the terms of reference to include an examination of relocation cases. The terms of reference are:

1. To examine the nature and application of the legal principle that the child's best interests must be regarded as the paramount consideration in family law litigation concerning children and to consider whether the *Family Law Act 1975* should be amended in this respect.

The Council shall have particular regard to:

- the law before and after the *Family Law Reform Act 1995*; and
- the nature and scope of similar provisions in other jurisdictions.

2. To examine:

- (1) How the best interests of the child principle set out in section 65E of the *Family Law Act* operates in relation to other legitimate interests in a relocation case;
- (2) How best to take account of the interests of other children who may be affected by the relocation decision but are not the subject of proceedings;
- (3) How best to take account of the interests of other people affected by the relocation decision;
- (4) The significance of section 92 of the *Constitution* for the law of relocation;
- (5) Approaches to the problem of relocation in other jurisdictions; and
- (6) Whether the *Family Law Act* should be amended to provide specific criteria for making relocation decisions.

In December 2004 the Council released a discussion paper titled *The 'Child Paramountcy Principle' in the Family Law Act*. The scope of the discussion paper was limited to paragraph 1 of the terms of reference and did not examine paragraph 2. A letter of advice on the paramountcy principle was provided to the Attorney-General on 17 January 2006. The purpose of this discussion paper is to consult on the issues covered in paragraph 2 of the terms of reference.

1. Introduction

- 1.1 The Australian population can be described as fairly mobile. Australian Bureau of Statistics data reveal that in the 2003-04 financial year a total of 386,400 people moved interstate. More than one in three of these movers were aged 20-34 years.¹ Of course some people choose to go further afield and move overseas. In 2003 there were 48,148 permanent departures from the country. Furthermore, in the same year 145,377 Australian residents departed 'long-term' (defined as more than 12 months).² In some instances this may be a return to country of origin, given that 24% of Australia's residents were born overseas (2004 data).³
- 1.2 Australian Bureau of Statistics data on divorce reveal that in 2004, 52,747 divorces were granted and of those 49.8% (26,289) involved children. Both parties were born overseas in 6,904 divorces and in 14,375 divorces at least one party was born overseas.⁴ Following divorce, either or both of the parents may choose to return to their country of origin where they may have extended family to support them.
- 1.3 It is not surprising, therefore, that a significant number of children whose parents are separated or divorced are affected by a parent's decision to move, either within Australia or overseas. There are no figures available on the exact number of children affected.⁵
- 1.4 In family law, cases involving a parent's move with their child are described as 'relocation cases'. These cases can involve moves of relatively short distances (eg. 115km⁶) to moves as far as from Australia to the United Kingdom.⁷ Intrastate, interstate and international relocation cases will all be considered in this discussion paper. There is no definition of 'relocation' in the *Family Law Act 1975* (Family Law Act). A discussion of some approaches to defining relocation is provided in part 2 of the paper.
- 1.5 It should be noted that the paper does not consider child abduction cases (where a parent takes a child without the knowledge of the other parent). The Family Law Council released a discussion paper on parental child abduction in February 1997 and produced a report, titled *Parental Child Abduction*, in January 1998.

¹ Australian Bureau of Statistics, 3412.0 *Migration, Australia*, 20/09/2005

² Australian Bureau of Statistics, *Yearbook 2005*, 21/01/05.

³ Australian Bureau of Statistics, 1301.0 - 2006 *Yearbook Australia* (Chapter 5 – Population)

⁴ Australian Bureau of Statistics, 3307.0.55.001 *Divorces, Australia*, 11/11/2005.

⁵ The proportion of separated parents living at least 500 kilometres apart ranged from 15% to 26% in three datasets examined by the Australian Institute of Family Studies (see for example B. Smyth, G. Sheehan and B. Fehlberg 'Patterns of parenting after divorce: A pre-Reform Act benchmark study' (2001) 15 *Australian Journal of Family Law*, 114-128 and B. Smyth and C. Whitfield 'Holiday-only contact, in B. Smyth (ed) *Parent-child contact and post-separation parenting arrangements*. Research Report No 9, Australian Institute of Family Studies: Melbourne, 2004).

⁶ See for example *D and SV* (2003) FLC ¶93-137 which involved a move from Vermont South (in Melbourne's eastern suburbs) to Drysdale (near Geelong) in Victoria.

⁷ See for example *VG & M* [2005] FamCA 1015 (27/10/05).

- 1.6 Relocation cases cause legal practitioners and judicial officers much angst, due to the competing interests involved. Watts has described the “essential tension” in relocation cases to be “between the child’s right to have a relationship with the contact parent⁸ and the child’s interest in ordinarily living with a residence parent who is happy and not ‘imprisoned’ in a place the parent does not want to be”.⁹ There are other interests affected, which will be considered in part 5 of this paper.
- 1.7 The law on relocation has been variously described as “ambiguous”.¹⁰ The discussion paper provides an outline of the current law in part 3. The main purpose of this discussion paper is to seek views from interested individuals and organisations about whether, and if so, how to change the law on relocation. The views expressed will assist the Family Law Council to advise the Attorney-General whether the Family Law Act should be amended and, if so, how. These recommendations will need to be made in light of the government’s current proposed reforms to the Family Law Act, contained in the Family Law Amendment (Shared Parental Responsibility) Bill 2005. These reforms are outlined in part 4 of the discussion paper.
- 1.8 Australia may learn from the law in other jurisdictions about how to improve the law on relocation. In part 6 of the discussion paper the law in a number of other jurisdictions is discussed.

⁸ Council is aware that the Family Law Amendment (Shared Parental Responsibility) Bill 2005, if enacted, will change the existing terminology.

⁹ G. Watts ‘Can we go or must we stay? Being able to relocate with the children’ (2002) 40(10) *Law Society Journal* 66 at 66.

¹⁰ J. Roebuck ‘U v U: A chauvinistic approach to relocation?’ (2003) 17 *Australian Journal of Family Law* 208 at 208.

2. Defining relocation

- 2.1 The current law in Australia does not provide a definition of ‘relocation’ because there is no need to when these cases are considered to be “parenting cases where the proposal of one of the parties involves relocation”.¹¹ If the Family Law Act was to refer to ‘relocation’, it is likely to be necessary to define this term. The question then arises as to **how would relocation be defined for this purpose?** This is a complex task and there are several issues for consideration.
- 2.2 Some States in the United States of America use distance as a trigger for the operation of their law on relocation. For example, the Louisiana statute only applies where the relocation is out of the state or more than 150 miles (=241.5km) from the previous residence. This would have excluded the Australian case of *D and SV*¹² from being considered a relocation case, as it involved a move of 115km (from Vermont South (in Melbourne’s eastern suburbs) to Drysdale (near Geelong) in Victoria).
- 2.3 The use of distance to define relocation does not take into account that the impact of distance may be different depending on the circumstances of the parties, or the place involved. For example, if the contact parent does not own a car, or cannot afford to spend large amounts of money on petrol, the availability of public transport services will impact on their ability to have contact with their child or children.
- 2.4 The following hypothetical illustrates the point. Ms Black is living in Canberra with her three children. Mr Black (the children’s father) lives a few suburbs away and the children stay with him every second weekend. He does not own a car, but can use the local bus service to collect the children from school on Friday afternoon and take them back to school the following Monday morning.
- 2.5 Ms Black proposes to relocate to Sydney with the children, which is a distance of 290km north-east from Canberra. For Mr Black to travel from Canberra to Sydney and back to see his children there are a number of flights each day, two trains per day and one coach company has 8 services per day (it is a 3 hour and 15 minutes on an express service, or 4 hours on a non-express service).¹³
- 2.6 Compare this to a proposal that Ms Black relocate to Griffith with the children, which is a distance of 349km west from Canberra. There are no flights from Canberra to Griffith, so flying would require going via Sydney. There is no train service, so catching the train would also require going via Sydney. The same coach company which has 8 services per day to Sydney has one service per day to Griffith. That service departs at 8:50pm and arrives at 3am, ie. it is a 6 hour journey.

¹¹ This concept is explained fully in part 3 of the paper.

¹² *D and SV* (2003) FLC ¶93-137.

¹³ There is more than one coach company operating services between Canberra and Sydney, but one was thought to be sufficient as an example for the purposes of this hypothetical.

2.7 Therefore a relocation of a similar distance would have markedly different consequences for Mr Black's ease of contact with his children.¹⁴

2.8 The American Academy of Matrimonial Lawyers has developed a Model Relocation Act (upon which the Louisiana statute is based – discussed further in part 6 of the paper). The Model Act defines relocation in article 101(5) as “a change in the principal residence of a child for a period of [60] days or more, but does not include a temporary absence from the principal residence”.

2.9 The comments provided by the American Academy of Matrimonial Lawyers about the definitions article of the Model Act describe why they chose not to use a particular distance.

The difficulties that may be engendered by a relocation are not limited to a move across state lines, or a move of an arbitrarily chosen distance within a state, e.g., 100 or 150 miles. A visitation schedule may be significantly affected any time that a move is made by either the custodial or noncustodial party, particularly in heavily urbanized areas. A move of even a relatively short distance may create other problems if it impedes access to the child or involves a change of school district.

2.10 These comments shift the focus to a consideration of the effect of the move on the contact parent's contact with the child. For the purpose of defining “major long-term issues”, the Family Law Amendment (Shared Parental Responsibility) Bill 2005 uses the phrase “changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent” (the Bill is discussed in more detail in part 4 of the paper).

2.11 Along these lines, one possible way of defining relocation is “a move which will result in changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent”. This would be a definition that takes into account the impact of the move, rather than just the distance, and is consistent with the best interests of the child being the “paramount consideration, but not the sole consideration”.¹⁵

2.12 Finally, should the law apply in the following circumstances?

- A child has been living with their mother (residence parent) and maternal grandmother (who owns the house). The mother is moving interstate, but the child will stay in the same house and be cared for by their grandmother. This would not fall within the definition in the Model Relocation Act, as the child is not moving.
- The child is moving but the residence parent is not. This may be the case if the child is sent away to a boarding school or to live with relatives. This is likely to be captured by the approach to the definition of relocation outlined in paragraph 2.11.

¹⁴ This is quite a simplistic example. The Family Law Council recognises that the challenges will be greater in more remote areas of Australia where there may be no public transport, where at certain times of the year people get flooded in or the only way to reach the area is to fly in on a private aircraft.

¹⁵ This concept is explained fully in part 3 of the paper.

3. Current law regarding the best interests of the child

3.1 There are a number of relevant sections in the Family Law Act, along with a series of important judicial decisions, which need to be referred to in order to understand the law on relocation.

Family Law Act provisions

3.2 Part VII of the Family Law Act is about children. The Part begins with setting out the object and principles underlying this object (section 60B). Relevant principles for the purposes of relocation cases are that “children have the right to know and be cared for by both their parents” and “children have a right of contact, on a regular basis, with both their parents”.

3.3 Pursuant to section 65D of the Family Law Act, the court has the power to make “such a parenting order as it thinks proper”. A parenting order sets out where the child will live (residence) and the contact the child is to have with the contact parent. Therefore if one parent wishes to relocate, they may seek to vary the parenting order under subsection 65D(2) to allow for this, especially if the relocation will impact the contact arrangements.

3.4 The child’s best interests are the paramount consideration when the court is deciding whether to make a particular parenting order (section 65E). There are a number of matters which the court must consider when determining what is in the child’s best interests. These are set out in subsection 68F(2) as follows:

- (a) any wishes expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s wishes;
- (b) the nature of the relationship of the child with each of the child’s parents and with other persons;
- (c) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- (d) 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;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) 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;
- (g) 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;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (l) any other fact or circumstance that the court thinks is relevant.

Defining “best interests of the child”

3.5 The Family Law Act does not provide a definition of “best interests of the child”. As discussed above, the Act sets out matters the court must consider when determining what is in a child's best interests.

3.6 Although there are matters that may or must be taken into account in considering a child's best interests in different jurisdictions, definition of the concept itself is seldom attempted. This may be due to the complexity of the concept and the fact that it is not strictly a legal concept, even though it is often a consideration in legal proceedings and appears in different legislation. It is a concept which is difficult to define as it necessarily varies from child to child, even within one family, and it is not constant over time or circumstance even when applied to a particular child.

3.7 It may be appropriate to attempt a broad definition of the concept (beyond what is set out in the Family Law Act already) and to articulate the parameters that contribute to the complexity. A definition may take into account that a child's best interest is inextricably linked to the function of the primary care giver/s so it is critical in considering the emotional, educational and developmental needs of the child to consider the impact of decisions on the functioning of, and interaction between, the care givers.

3.8 Section 5 of New Zealand's *Care of Children Act 2004* provides some principles which may be useful in spelling out what is best for children. These principles are set out below.

- (a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing;
- (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):

(c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child:

(d) relationships between the child and members of his or her family, family group, whanau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing:

(e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whanau, hapu, or iwi, or by other persons):

(f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

3.9 In your submission please consider **formulating a definition of the “best interests of the child”**.

The impact of the 1995 amendments

3.10 Prior to the *Family Law Amendment Act 1995* (the Reform Act) the welfare of the child was the paramount consideration, but the following principles, summarised succinctly by Kaspiew, were also relevant:

The Full Court in *In the Marriage of Holmes* set out a tripartite test listing factors to be taken into consideration in such cases.¹⁶

First, is the application to remove the child from their previous environment bona fide? A negative answer to this would mean the inquiry should proceed no further.

Second, could the court be reasonably satisfied that the custodial parent would comply with access and other orders designed to continue the relationship between the children and the non-custodian? A negative or uncertain answer to this question would not be decisive but would be a “weighty” factor against the application.

Third, what would be the general effect of either an affirmative or negative response to the application? Factors to be taken into account at this stage were: how the children would be affected by less contact with the non-custodial parent, disadvantages to the welfare of the children in the proposed new environment and the genuine wishes of the custodial parent.

In *In the Marriage of Fragomeli* the court enunciated a further principle which has been seen as important in this area; that “a custodian should be left to order his or her own life without interference from the other parent

¹⁶ *In the marriage of Holmes* (1988) FLC ¶91-918 the mother had applied for custody (as it then was) of the two children and proposed to relocate permanently with them to the United States of America. An order was made granting her custody, but requiring her not to take the children out of Australia. On appeal, the matter was remitted for rehearing.

or from the court, so long as he or she does what may be reasonably expected to be done by him or her for the child in all the circumstances”.¹⁷

3.11 In the decision in *B and B*,¹⁸ the Full Court of the Family Court interpreted the effect of the 1995 amendments, including the new objects provisions. The case involved an application by the mother (the residence parent of the two daughters) to relocate from north Queensland to Victoria to marry a man who had business interests in Victoria and his two children living with him. At trial, Jordan J decided in favour of the mother’s application. On appeal the father and the Attorney-General submitted that the mother could move as long as she did not take the children with her. The Full Court recognised that this was “no choice”, commenting that:

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 6½ years since separation would leave her children and relocate elsewhere. That is true of most relocation cases.¹⁹

3.12 The Full Court dismissed the father’s appeal, therefore the mother was allowed to relocate. The court made it clear that relocation cases are to be dealt with in the same way as other proceedings under Part VII of the Family Law Act. They outlined the effect of the Reform Act on the inter-relationship between sections 60B, 65E and 68F(2). A judge should regard section 65E as the paramount consideration, then go through each of the factors in subsection 68F(2) and discuss the weight to be given to each. This should be followed by discussing the factors in section 60B “which appear relevant or may guide that exercise”.²⁰

3.13 Provided this approach is followed, the three-tiered test from the pre-Reform Act decision in *In the Marriage of Holmes* was held to have ongoing relevance. Other factors that may be considered in individual cases include:

- the degree and quality of the existing relationship between the children and the residence parent
- the degree and quality of the existing contact between the children and the contact parent
- the reason for relocating
- the distance and permanency of the proposed change
- the age and wishes of the children
- the feasibility and costs of travel, and
- alternate forms of contact.²¹

¹⁷ R. Kaspiew ‘Equal Parenting or the Effacement of Mothers? *B and B* and the Family Law Reform Act 1995 (Cth)’ (1998) 12 *Australian Journal of Family Law* 69 at 74.

¹⁸ *B and B* (1997) 21 Fam LR 676; (1997) FLC ¶92-755.

¹⁹ *Ibid* at 750 [10.60]; 84,233.

²⁰ *Ibid* at 734 [9.58]; 84,220.

²¹ *Ibid* at 735-37; 84,221-22.

High Court's decision in *AMS v AIF*

- 3.14 The next important decision in the development of the law on relocation was the High Court's decision in *AMS v AIF*.²² The child was born when the parties were living in Darwin in the Northern Territory. After they had separated, the mother was the residence parent and the father had regular contact with the child. They both moved to Perth in Western Australia, but a year later the mother decided she wanted to move back to Darwin.²³
- 3.15 The Family Court of Western Australia issued an injunction restraining the mother from leaving Perth. Holden J held that “[f]rom the point of view of the welfare of the child it seems to me that he has been in as ideal a situation as he could possibly be in given that his parents do not live together. It is my opinion that the welfare of the child would be better promoted by him continuing in that situation *in the absence of any compelling reasons to the contrary*”.²⁴
- 3.16 The High Court held (Callinan J dissenting), in overturning Holden J, that it was erroneous to have required the mother to demonstrate “compelling reasons” for wanting to relocate. Hayne J clearly explains that to focus on the mother's reasons for wanting to move distracts from the proper focus of inquiry, which should be what is better for the child.²⁵ The best interests of the child must be the paramount consideration in relocation cases, but is not the “sole” or “only” consideration.²⁶ The interests of the parents may be relevant to the best interests of the child, depending on the case.²⁷ Kirby J stated that in the event that there is a conflict, the child's interests take priority.²⁸

A v A: Relocation approach

- 3.17 In *A v A: Relocation approach*²⁹ the Full Court of the Family Court laid down seven guiding principles that apply generally to relocation cases. These principles were derived from the High Court decision in *AMS v AIF* and subsequent Full Court decisions.³⁰ Confirming the statement in *B and B* that relocation cases are not a “special category” of cases, the Full Court chose the description “parenting cases where the proposal of one of the parties involves relocation”.³¹

²² *AMS v AIF and AIF v AMS* (1999) 199 CLR 160. Whilst the case concerned numerous matters, including inconsistency between Commonwealth and State laws, the focus of this discussion will be the way the High Court dealt with relocation principles. For commentary on the decision, see for example L. Young ‘*AIF v AMS: The High Court and Relocation*’ (1999) 13 *Australian Journal of Family Law Journal* 264.

²³ Per Gleeson CJ, McHugh and Gummow JJ in *AMS v AIF and AIF v AMS* (1999) 199 CLR 160 at 167; [1999] HCA 26 at [4]–[5].

²⁴ Cited by Gleeson CJ, McHugh and Gummow JJ at 174; [31].

²⁵ Per Hayne J at 232; [218].

²⁶ Per Kirby J at 207; [143] and per Hayne J at 330; [212].

²⁷ Per Hayne J at 232; [218].

²⁸ See Kirby J at 207; [144].

²⁹ *A v A: Relocation approach* (2000) FLC ¶93-035.

³⁰ Including *Paskandy v Paskandy* (1999) FLC ¶92-878 and *Martin v Matruglio* (1999) FLC ¶92-876.

³¹ *A v A: Relocation approach* (2000) FLC ¶93-035, quoting *Paskandy v Paskandy* (1999) FLC ¶92-878 at 86,453.

- 3.18 The case involved a proposed international move. The mother sought a parenting order permitting the child to relocate with her to Portugal. The trial judge had ordered that the child live with her mother in Sydney. The mother's appeal was allowed and the matter was remitted for rehearing.³² The reasons why the appeal was allowed will be outlined to show the practical application of the guiding principles.
- 3.19 The Full Court started by outlining two binding principles from the decision *AMS v AIF*, namely that:
- the best interests of the child are the “paramount consideration, but not the sole consideration”, and
 - a court cannot require the applicant to demonstrate “compelling reasons” for the relocation.³³
- 3.20 The third principle is that the court must evaluate the competing proposals presented by the parties and weigh up the advantages and disadvantages of each for the child's best interests. Fourthly, this should not be done in a way that separates the issue of relocation from that of residence.³⁴ In the case of *A v A*, the Full Court held that the trial judge focussed on the child's contact with the father in Sydney. He did not compare this with the proposal that the mother relocate to Portugal.³⁵
- 3.21 The fifth principle is that the evidence must be weighed as to how each proposal would hold advantages and disadvantages for the child's best interests. It follows that sixthly, the evaluation of the competing proposals is carried out by referring to the relevant sections of the Family Law Act that relate to the best interests of the child - section 60B and the factors in subsection 68F(2).³⁶ About the relationship between these sections, the Full Court held that “the object and principles of s60B provide guidance to a court's obligation to consider the matters in s68F(2) that arise in the context of the particular case” (this is the seventh principle).³⁷ In *A v A* the Full Court held that the trial judge's consideration of section 60B and subsection 68F(2) matters (for example, the child's wishes) was “inadequate”.³⁸
- 3.22 After discussing the guiding principles outlined above, the Full Court set out a three-step summary of the correct approach to determining a parenting case that involves a proposal to relocate the residence of a child.³⁹ The first step is to identify the relevant competing proposals for future care of the child.
- 3.23 The second step is to explain the advantages and disadvantages of each proposal by examining the factors set out in the Family Law Act (ie. each relevant subsection 68F(2) factor with regard to section 60B). One relevant factor to be

³² *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,555.

³³ *Ibid* at 87,544-545.

³⁴ *Ibid* at 87,545.

³⁵ *Ibid* at 87,553-4.

³⁶ *Ibid* at 87,545 – 87,546.

³⁷ *Ibid* at 87,547.

³⁸ *Ibid* at 87,554.

³⁹ *Ibid* at 87,547.

weighed will be the “reasons for relocation as they bear upon the child’s best interests”.⁴⁰ This must be weighed against other factors.

3.24 The third step is to explain why one proposal is to be preferred, having regard to the best interests of the child as the “paramount consideration, but not the sole consideration”. No single factor should determine which proposal is to be preferred. As part of this process, the Full Court held that regard must be had to the following issues:

- a. None of the parties bears an onus. In *A v A* the Full Court considered that the trial judge had erred in requiring the mother to justify the relocation.⁴¹
- b. The importance of a party’s right to freedom of movement.⁴²
- c. Matters of weight should be explained. In other words, the court must indicate which of the relevant matters under sections 60B and 68F(2) were of greater significance and how the matters balance out.⁴³

High Court’s decision in *U v U* and beyond

3.25 The most recent High Court consideration of relocation is the 2002 decision of *U v U*,⁴⁴ another international relocation case. The mother sought to move to India with her daughter. The Family Court ordered that the child remain in Australia and the High Court dismissed her appeal by a 5-2 majority. The facts of the case were that the parties married in India and moved to Australia where the child was born. The mother wanted to move back to India because she had better employment prospects there, as well as extended family support and friends. Between August 1995 and January 1998 the mother and child had lived in India, during which time the father visited on five occasions and had unrestricted access to his daughter.

3.26 So what were the competing proposals for future care of the child? The mother was proposing that she be the residence parent, that she and her daughter would reside in India and the daughter would have contact with her father. The father’s proposal was that the child reside with him in Australia for most of the time and have contact with the mother at certain times eg. school holidays. His alternative proposal was that the child reside with her mother in the “Sydney/Wollongong area”.⁴⁵

3.27 The final orders made by the trial Judge were different to the proposals made by the parties. In the course of cross-examination, the mother had admitted that if she was not permitted to relocate to India with her daughter, she would stay in Australia with her daughter. This was considered to be “an alternative proposal” made by the mother.⁴⁶

⁴⁰ *Ibid* at 87,548

⁴¹ *Ibid* at 87,554.

⁴² Freedom of movement will be considered in detail in part 5 of the discussion paper.

⁴³ *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,551.

⁴⁴ *U v U* (2002) 191 ALR 289; (2002) FLC ¶93-112; [2002] HCA 36.

⁴⁵ *Ibid* at per Gummow and Callinan JJ at 299 [57]; 89,084.

⁴⁶ Trial Judge cited by Gaudron J, *ibid*, at 293-94 [21]; 89,080.

3.28 The majority of the High Court held that “the Court is not, on any view, bound by the proposals of the parties”.⁴⁷ Hayne J explained that:

to confine the inquiry [to the parent’s proposals] would, therefore, disobey the fundamental requirement of the Act that the Court regard the best interests of the child as paramount. Those interests may, or may not, coincide with what one or both of the parents put forward to the Family Court as appropriate arrangements for residence and contact.⁴⁸

3.29 In a more recent case, it was held that where a trial Judge does formulate an alternative proposal, they are required “to afford the parties procedural fairness by indicating and inviting comment on changes to the parties’ own proposals, for example, by way of additional or different contact to that proposed by the relocating party”.⁴⁹

3.30 In light of the decision in *U v U*, Watts has argued that there are four proposals which need to be considered in relocation cases.

1. Child relocates with residence parent.
2. Child does not move and there is a change of residence parent (this may be contrasted with the view expressed in *B and B* that this suggestion would be untenable for most residence parents).
3. The child does not move and the residence parent also stays.
4. The child relocates with the residence parent and the contact parent also moves.⁵⁰

3.31 The fourth proposal was not explored at the trial in *U v U*. Gaudron J (dissenting) stated that the failure to consider the possibility of the father moving to India, “particularly given [his] origins, his professional qualifications and family contacts in India, seems to me to be explicable only on the basis of an assumption, inherently sexist, that a father’s choice as to where he lives is beyond challenge in a way that a mother’s is not”.⁵¹ Kirby J (also dissenting) considered the burden this imposed on the mother - “it will be she who will be controlled by court orders that require her to live, and make the most of her life, in physical proximity to the husband’s whereabouts. In this way, inconvenience to the husband is minimised. But the effect on the wife may be profound”.⁵²

3.32 Hayne J suggested that in future cases it must not be assumed that the father cannot relocate because “[i]t is the interests of the *child* which are paramount, not the interests or needs of the parents, let alone the interests of one of them”.⁵³ Gleeson CJ, McHugh and Gaudron JJ expressed agreement with Hayne J’s comments.

⁴⁷ Gummow and Callinan JJ, *ibid* at 306 [80]; 89,089. Gleeson CJ and McHugh J agreed with this judgment.

⁴⁸ Per Hayne J at 326 [171]; 89,102.

⁴⁹ *Bolitho v Cohen* (2005) FLC ¶93-224.

⁵⁰ Watts, above note 9, at 67-68

⁵¹ *U v U* (2002) 191 ALR 289 at 296 [35]; (2002) FLC ¶93-112 at 89,081.

⁵² *Ibid* at 320-21 [142]; 89,099.

⁵³ Per Hayne J at 327 [176]; 89,103.

3.33 The decision in *U v U* has been interpreted by the Full Court of the Family Court as having “ameliorated the somewhat rigid and/or formulaic approach set out in *A v A*”.⁵⁴ That observation was made in the judgment in *KB and TC*⁵⁵ where the Full Court was satisfied that the trial Judge had balanced all the relevant factors and the decision that the children should live with their father in Japan was upheld.⁵⁶ In interpreting the High Court’s decision in *U v U*, the Full Court stated:

In *U v U* the High Court said that the proper approach to be adopted in a relocation case is a weighing of competing proposals, having regard to relevant s 68F(2) factors, and consideration of other relevant factors, including the right to freedom of movement of the parent who wishes to relocate, bearing in mind that ultimately the decision must be one which is in the best interests of the child.⁵⁷

3.34 A reading of other cases since the decision in *U v U* reveals that an observation made by Kirby J in *AMS v AIF* still holds true. That is, the facts of every relocation case are “unique” and have to be carefully analysed. Previous judicial decisions are only of assistance to the extent that they promote “a general consistency of approach”.⁵⁸

Summary

3.35 In summary, the “general consistency of approach” that can be drawn from the discussion above about the legislative provisions and case law regarding the best interests of the child is as follows.

- Relocation cases are not a special category of cases. The Family Law Act does not specifically mention ‘relocation’ and the cases are best described as “parenting cases where the proposal of one of the parties involves relocation”.⁵⁹
- The best interests of the child is the “paramount consideration, but not the sole consideration”. For example, the interests of the parents can be considered if they are relevant to the best interests of the child.
- The court must consider the competing proposals for the future care of the child, but is not limited to the proposals presented by the parties. All the proposals need to be evaluated in terms of the advantages and disadvantages for the best interests of the child and the court should explain why a particular proposal is preferred.

⁵⁴ *KB and TC* [2005] FamCA 458 at [72].

⁵⁵ *KB and TC* [2005] FamCA 458.

⁵⁶ *Ibid* at [73]-[74].

⁵⁷ *Ibid* at [72].

⁵⁸ Per Kirby J in *AMS v AIF and AIF v AMS* (1999) 199 CLR 160 at 206-7; [1999] HCA 26 at [142].

⁵⁹ *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,541, quoting *Paskandy v Paskandy* (1999) FLC ¶92-878 at 86,453.

- The issue of relocation cannot be separated from the issue of residence and the best interests of the child. The relevant factors in subsection 68F(2) must be considered and the weight given to each should be explained by the court. The object and principles in section 60B provide guidance for this exercise.
- A court cannot require the person who wishes to relocate to demonstrate “compelling reasons” for relocation as this would incorrectly focus on the parent’s interests instead of the best interests of the child.
- It should not be assumed that the contact parent cannot relocate as well, as the interests of the child (not the parent/s) must be paramount.

Consultation questions

3.36 It is clear that a full understanding of the law on relocation cannot be gained from reading the Family Law Act alone. In your submission, please **consider whether the Family Law Act should be amended to provide specific criteria for making relocation decisions**. In considering this broad question, please also consider commenting on the following consequential questions:

- **Whether relocation cases should become a special category of cases that require separate treatment (contrary to the approach that has been adopted by the High Court and the Full Court of the Family Court), and if so, why?**
- **Which of the criteria should be mandatory and which should be relevant considerations? Are there any factors that should not be taken into account?**
- **If some guidelines were to be inserted in the Family Law Act, should they be based on the principles from case law outlined above?**

3.37 In answering these questions, you may wish to take into account the material in the rest of the discussion paper, in particular the proposed reforms outlined in part 4.

4. Proposed reforms

4.1 Family law in Australia is in a state of flux. In mid-2004 the Government announced its move towards significant reforms to the family law system. In June 2005 the Government released an Exposure Draft of proposed substantial changes to the Family Law Act - the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the draft Bill).

4.2 The draft Bill was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) for inquiry. On 18 August 2005 the Committee tabled its report on the provisions of the draft Bill. The report made 59 wide range recommendations. Importantly for the purpose of this discussion paper, recommendation 8 concerned relocation.

The Committee recommends an additional provision be included in the *Family Law Act 1975* (the Act) that should a parent wish to change the residence of a child in such a way as to substantially affect the child's ability to either:

- Reside regularly with the other parent and extended family; or
- Spend time regularly with the other parent and other relatives,

the court must be satisfied on reasonable grounds that such relocation is in the best interests of the child.⁶⁰

4.3 The Government responded to the Committee's report on 8 December 2005, on the same day as the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill) was introduced in the House of Representatives. The Government response to recommendation 8 requested that the Family Law Council give particular consideration to this recommendation as part of the inquiry into relocation. The Government intends to consider recommendation 8 further in light of Council's advice.⁶¹

4.4 Do you have any comments on the Committee's recommendation?

4.5 The Bill contains numerous proposed amendments which, if enacted, may have an impact on the way relocation decisions are made. In part 3 of the paper it was shown that the most important sections of the Family Law Act in relocation cases are section 65E (the best interests of the child are the paramount consideration), subsection 68F(2) (factors that must be considered when determining the best interests of the child) and section 60B (objects of Part VII of the Family Law Act). Each of these sections will be dealt with in turn.

⁶⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs Report on the Family Law Amendment (Shared Parental Responsibility) Bill 2005 at 24.

⁶¹ Government Response to the Recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Family Law Amendment (Shared Parental Responsibility) Bill 2005, table in the House of Representatives on 8 December 2005, at 3-4. The response is available online at <www.ag.gov.au/family>

Proposed amendments to sections 65E, 68F(2) and 60B

- 4.6 The content of section 65E will not be changed by the Bill. The section will be moved so that it follows the objects provision and therefore it will become section 60CA (if the Bill is enacted).
- 4.7 Subsection 68F(2) will also be moved, becoming section 60CC (if the Bill is enacted). The section will be amended so that the court must consider ‘primary considerations’ and ‘additional considerations’, as follows.

Determining child’s best interests

- (1) Subject to subsection (5), in determining what is in the child’s best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

- (2) The primary considerations are:
- (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
 - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

- (3) Additional considerations are:
- (a) any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views;
 - (b) the nature of the relationship of the child with:
 - (i) each of the child’s parents; and
 - (ii) other persons (including any grandparent or other relative of the child);
 - (c) the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
 - (d) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
 - (e) 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;
 - (f) the capacity of:
 - (i) each of the child’s parents; and

- (ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (j) any family violence involving the child or a member of the child's family;
- (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or
 - (ii) the making of the order was contested by a person;
- (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (m) any other fact or circumstance that the court thinks is relevant.

(4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

- (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child; and
 - (ii) to spend time with the child; and
 - (iii) to communicate with the child; and
- (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child; and
 - (ii) spending time with the child; and
 - (iii) communicating with the child; and
- (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

4.8 The objects provision will also be amended by the Bill (if enacted). The section number will remain the same. The proposed section is as follows.

- (1) The objects of this Part are to ensure that the best interests of children are met by:
 - (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

- (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- (d) ensuring 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 to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
- (c) parents jointly 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; and
- (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

- (a) to maintain a connection with that culture; and
- (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.

4.9 "Communicating" with a child (referred to in paragraph 2(b) above) would presumably not be limited to face to face communication. There are a number of ways a parent might have contact with a child, such as by telephone, email, webcam or by letter.

4.10 This is recognised in another part of the Bill. In proposed subsection 63C(2) which sets out what a parenting plan might deal with, paragraph (e) refers to "the communication a child is to have with another person or other persons". For this purpose, communication "included (but is not limited to) communication by (a) letter; and (b) telephone, email or any other electronic means" (at item 17).

Other relevant proposed amendments

4.11 A key change proposed in Schedule 1 of the Bill is a presumption of equal shared parental responsibility when making parenting orders (proposed section 61DA at item 13). The presumption will not apply in certain circumstances. It is proposed that the effect of an order that provides for shared parental

responsibility will be that decisions about a “major long-term issue” are required to be made jointly (proposed section 65DAC at item 31). “Major long-term issues” is defined as including (among other things) “changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent” (inserted into subsection 4(1) at item 4).

4.12 Further, where a parenting order provides that the parents are to have equal shared parental responsibility for the child, the court must consider the child spending equal time or substantial and significant time with each parent in certain circumstances (proposed section 65DAA at item 31 of Schedule 1).

4.13 In this context the Bill seems to presume that face to face contact is required.

For the purposes of subsection (2), a child will be taken to spend *substantial and significant time* with a parent only if:

- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
- (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child’s daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
- (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

5. Other people and interests affected by relocation

5.1 In part 3 of the paper the focus was the law regarding the best interests of the child. This was dealt with as a distinct part because the Attorney-General asked the Family Law Council to examine relocation as part of a broader reference on the ‘paramountcy principle’ in the Family Law Act (the rule that the best interests of the child must be regarded as the paramount consideration when making specified decisions in the Family Law Act).

5.2 The terms of reference also directed Council to consider:

- the interests of other people affected by relocation (for example, children who are not the subject of the proceedings)
- how the law operates in relation to other legitimate interests (such as the reasons a person might want to move), and
- freedom of movement of the parent wishing to relocate.

5.3 A proposed relocation brings to the forefront all the social and economic connections people have, which may be with more than one place. It is not only the interests of the parent who wants to move which have to be weighed in the balance with the child’s interests. It could also be the interests of the residence parent’s new partner, their children from another relationship, their employer which wants to relocate them to another city in the interests of the business and so on.

5.4 If we bring into play the possibility that the contact parent might move to be close again to the resident parent following her relocation, as *U v U* indicates, then we have another set of interests to take into account. His employer, and its interests in his services in the present location, his new partner, her children and her employer’s interests, and the future of their relationship if he decides to move but she cannot. There may also be financial issues, since relocation from say, Kalgoorlie to Perth raises a whole lot of major financial issues in being able to enter the housing market in Perth on the basis of the proceeds of sale from the property in Kalgoorlie. A move from an existing employer to a new one may also risk loss of seniority and prospects for advancement. A relevant factor therefore is whether it is reasonable to expect the contact parent to sacrifice his economic interests to support the relocation of the other parent.

5.5 A final factor is whether relocation could affect the interests of other children. For example, if the question is raised whether the contact parent should relocate with the resident parent, then it may be necessary also to consider his contact with a child from a previous relationship where that contact might be affected by his relocation.

Overview

- 5.6 This part of the paper begins with some demographic data on families who have had judicial determinations about their relocation. This shows that generally speaking, mothers are more likely to be residence parents and residence parents are more likely to need to apply to the court to move the child. This is followed by a consideration of what happens when a contact parent moves and the role the law plays in regulating contact parents' movements.
- 5.7 Next is a discussion of the reasons why residence parents may seek to relocate and their right of freedom of movement under section 92 of the *Constitution*. The reasons a person wishes to relocate may be personal (for example, employment opportunities), or they may be relationship based (for example, their new partner lives in the place where they want to move). The reasons given by parents wishing to move with their children reveal the complex web of other people and other interests affected by relocation. The way the law deals with the interests of other people affected by relocation is outlined by looking at some of the same cases considered in part 3 of the paper from a different perspective.
- 5.8 Lastly, the challenge faced by families of jobs which require constant movement is considered, using a case study of the Australian Defence Force. This shows that the interests and requirements of employers may impact upon separated families.

Demographic trends

- 5.9 The Australian Bureau of Statistics Family Characteristics Survey in 2003 provides the following insights about children with a parent living elsewhere:
[t]here were 1.1 million children aged 0-17 years in 2003 (23% of all children in this age group) who had a natural parent living elsewhere. Of these children, 76% lived in one parent families, 13% in step families and 9% in blended families. Children were more likely to live with their mother than their father after parents separate. The survey found that in 84% of cases it was the father who was the natural parent living elsewhere.⁶²
- 5.10 Easteal, Behrens and Young carried out an empirical study of 46 relocation decisions made in the Canberra registry of the Family Court of Australia and Perth registry of the Family Court of Western Australia over an 18 month period (from July 1997 – December 1998).⁶³ 38 of the cases proceeded to judgment, while the remainder were settled by consent. Although this is a relatively small sample size, insight can be gained from the researchers' analysis of the demographic characteristics of the people involved in these cases.
- 5.11 Of the 38 cases which proceeded to judgment (18 in the Canberra registry and 20 in the Perth registry), 36 of the movers were women. 25 (69%) were permitted to move. The male mover in Western Australia was permitted to relocate, whilst the

⁶² Australian Bureau of Statistics 4442.0 *Family Characteristics, Australia*, 22/09/2004

⁶³ P. Easteal, J. Behrens and L. Young 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14 *Australian Journal of Family Law* 234.

male mover in Canberra was not.⁶⁴ Eastal et. al. considered whether distance impacted on the outcome of the case and concluded it did not - 67% of those going a long distance or overseas were allowed to relocate, compared to 75% of those moving a short distance.⁶⁵

Contact and relocation

5.12 The Australian Institute of Family Studies has researched contact patterns of children with one parent living elsewhere and found the following:

- About a third (29.8%) have “little or no contact” – defined as less than once a year or never.
- 18.9% have “intermittent contact” – defined as at least once every 3 months to once a year.
- Half (51.3%) have “regular contact” – defined as daily to once a month.⁶⁶

5.13 Of those children who have little or no contact, one reason was the physical distance between them and the contact parent. For example, the Household, Income and Labour Dynamics in Australia survey conducted in 2001 found that 67% of both mothers and fathers in this category lived more than 50 kilometres from their former partner. Further, 17% of mothers and 8% of fathers were not able to provide information about where their former partner was.⁶⁷ Of course it is not a simple case of physical separation equals little or no contact. There is a complex interplay of factors. In addition to relocation, the Australian Institute of Family Studies list three other important ‘R’s’ that characterise this group – repartnered, residual bad feelings towards each other and relative economic disadvantage.⁶⁸

5.14 It is difficult to draw any conclusions from the Eastal et al. study about either:

- the contact category parents wishing to relocate fall into, or
- the impact of contact arrangements with the contact parent on the decisions.

Their main relevant observation was that in 5 of the 38 cases (13%) substantial contact with the non-mover was taking place (defined as more than 2 nights per week). Three of these residence parents were not permitted to move and two were.⁶⁹ This is too small a sample size to draw conclusions from.

5.15 All of the cases in the Eastal et al. study involved a residence parent wishing to move (whether the mother or father). For some children, their contact with the contact parent will be impacted upon by the contact parent moving. This raises the question whether contact orders are mandatory or permissive? That is, if a court order states that contact is to occur with the contact parent at particular times, does the contact parent have to exercise contact at those particular times?

⁶⁴ *Ibid* at 240.

⁶⁵ *Ibid* at 241.

⁶⁶ B. Smyth (ed) *Parent-child contact and post-separation parenting arrangements*. Research Report No 9, Australian Institute of Family Studies: Melbourne, 2004 at 4-5.

⁶⁷ *Ibid* at 121.

⁶⁸ *Ibid* at 120.

⁶⁹ Eastal et al, above note 64 at 255.

5.16 In *B and B* the Full Court said:

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.

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.⁷⁰

5.17 This passage indicates that it is possible for a contact order to create an obligation on the contact parent to exercise contact. The passage is obiter, and there appear to be no decisions on the point. Typically contact orders are phrased in a way that does not precisely specify whether the contact parent has such an obligation, and different views have been expressed on the matter.⁷¹ Dickey argued that contact orders are “permissive”, suggesting that they create no such duty, while Monaghan argued the contrary.⁷²

5.18 In practice it is certainly rare, and to the Council's knowledge unknown, for a successful contravention application to be made on the basis that the contact parent failed to exercise contact as provided in the contact order. It is likely that two beliefs contribute to this situation: the belief that contact orders create no such obligation and the belief that in practice it would be futile to seek to require an unwilling parent to exercise contact. Although the first belief appears contrary to the dicta in *B and B*, the second belief has some basis in dicta from the Full Court. In *B and B* the Full Court considered that even if an application were to be brought by a residence parent to enforce contact, they “think it unlikely that in the exercise of discretion a court would do so”.⁷³

5.19 To similar effect, in *Schorel v Elms*, the Full Court said:

you cannot force a parent to see a child that they do not want to see. The appropriate remedy for the consistent failure of a parent to avail themselves of the benefits of a contact order is not to be found in seeking to punish the parent or force the contact upon them but rather to relieve the

⁷⁰ *B and B* (1997) 21 Fam LR 676 at 750; (1997) FLC ¶92-755 at 84,234.

⁷¹ A. Dickey, ‘Mandatory parenting orders’ (1998) 72 *Australian Law Journal* 20; D. Monaghan ‘Can contact parents contravene a contact order?’ (1999) 73 *Australian Law Journal* 20.

⁷² *Ibid.*

⁷³ *B and B* (1997) 21 Fam LR 676 at 750 [10.64]; (1997) FLC ¶92-755 at 84,234.

residence parent of non-compliance with the order by discharging, suspending or varying the order.⁷⁴

5.20 Monaghan, however, points out that in *B and B* the Full Court indicated that there might be exceptions, and in *Schorel v Elms* the Full Court was considering “persistent failure”, and argues that enforcement of the contact parent’s obligation might be beneficial in some situations involving occasional failure to exercise contact.⁷⁵

5.21 In the Family Law Council’s view, the question remains unresolved.

5.22 Do you think that the Family Law Act should be amended to provide that it is necessary for a contact parent to apply to a court to amend the contact orders if the residence parent opposes the contact parent’s relocation?

5.23 It is worth noting that Article 2 of the American Academy of Matrimonial Lawyers’ Model Relocation Act contains provisions requiring both adults with custody or visitation rights to give notice to the other party about their intended relocation in a way that is almost identical.⁷⁶ (The Model Act is discussed further in part 6 of the paper).

⁷⁴ *Schorel v Elm* (unreported, Appeal No SA 13 of 1998, 29 June 1998), Cited by Monaghan, above note 72 at 20.

⁷⁵ Monaghan, above note 72 at 22.

⁷⁶ **§ 202. Notice of Intended Change of Residence Address of Adult**

Except as provided by Section 205, an adult entitled to [visitation with] a child shall notify every other person entitled to [custody of or visitation with] the child of an intended change in the primary residence address of the adult as required by Section 203.

§ 203. Mailing Notice of Proposed Relocation or Intended Change of Residence Address

(a) Except as provided by Section 205, notice of a proposed relocation of the principal residence of a child or notice of an intended change of the primary residence address of an adult as provided in this article must be given by:

(1) [first class mail] to the last known address of the person to be notified;

(2) no later than:

(A) the [60th] day before the date of the intended move or proposed relocation; or

(B) the [10th] day after the date that the person knows the information required to be furnished by Subsection (b), if the person did not know and could not reasonably have known the information in sufficient time to comply with [60] day notice, and it is not reasonably possible to extend the time for relocation of the child.

(b) Except as provided by Section 205, the following information, if available, must be included with the notice of intended relocation of the child or change of primary residence of an adult:

(1) the intended new residence, including the specific address, if known;

(2) the mailing address, if not the same;

(3) the home telephone number, if known;

(4) the date of the intended move or proposed relocation;

(5) a brief statement of the specific reasons for the proposed relocation of a child, if applicable;

(6) a proposal for a revised schedule of [visitation with] the child, if any; and

(7) a warning to the non-relocating parent that an objection to the relocation must be made within [30] days or the relocation will be permitted.

(c) A person required to give notice of a proposed relocation or change of residence address under this section has a continuing duty to provide a change in or addition to the information required by this section as that information becomes known.

Freedom of movement

5.24 So far this part of the paper has shown that the majority of residence parents are mothers and it is usually the residence parent who needs to seek permission from the court to relocate. In practice there are generally no restrictions on a contact parent's freedom of movement. Now the paper will discuss what consideration the cases give to the residence parent's right of freedom of movement.

5.25 Section 92 of the *Constitution* which provides Australians with a right of freedom of movement. It provides:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

5.26 Whilst it is not immediately obvious that this section includes movement of people, the High Court confirmed that it does in the decision of *Cole v Whitfield*, when they said “[a] constitutional guarantee of freedom of interstate intercourse, if it is to have substantial content, extends to a guarantee of personal freedom ‘to pass to and fro among the States without burden, hindrance or restriction’: *Gratwick v Johnson*”.⁷⁷

5.27 This section has been established as only applying to domestic movement.⁷⁸

5.28 The High Court's most recent decision in a relocation case – *U v U* – discussed freedom of movement. The majority held simply that “whatever weight should be accorded to a right of freedom of mobility of a parent, it must defer to the expressed paramount consideration, the welfare of the child if that were to be adversely affected by a movement of a parent”.⁷⁹ This has led one commentator to conclude that the right of freedom of movement and other reasons for wanting to relocate are to be given “no particular weight”.⁸⁰

5.29 Kirby J (dissenting) outlined his agreement with the English approach that “where the custodial parent herself...has a genuine and reasonable desire to emigrate then the court should hesitate long before refusing permission to take the children”. This hesitation allows for consideration of “factors affecting the carer's life, such as their freedom of movement, association, employment and personal relationships”.⁸¹ This is not an approach that has been accepted into Australian law.

Other people affected by relocation

5.30 Up to this point, the focus of the paper has been on the interests of those in the nuclear family (residence parent, contact parent and children). Upon examination

⁷⁷ *Cole v Whitfield* (1945) 70 CLR 1 at 17.

⁷⁸ *ZN & YH & The Child Representative* [2002] FamCA 453 at [34].

⁷⁹ Per Gummow and Callinan JJ in *U v U* (2002) 191 ALR 289 at 308 [89]; (2002) FLC ¶93-112 at 89,090; Gleeson CJ and McHugh and Hayne JJ agreeing.

⁸⁰ Watts, above note 9 at 67.

⁸¹ *U v U* (2002) 191 ALR 289 at 324 [158]; (2002) FLC ¶93-112 at 89,101.

of the reasons why residence parents give for wanting to move, it is clear that other people will be affected by the outcome of a relocation case. These people include grandparents and other relatives, new partners and children who are not the subject of the order.

5.31 Residence parents may have many varied reasons for wanting to move and are likely to cite a combination of reasons. For example, in *U v U* the mother would have better employment opportunities in India and the benefit of extended family support and in *B and B* the mother was engaged to a man who had an established business and two teenage children living with him in Victoria.

5.32 The Eastal et. al. study examined the correlation between the reasons given for relocation and the outcome of the cases. The reasons that corresponded most highly with successful applications to move were employment and extended family support. The authors made the following findings.

Those applying to relocate gave a variety of employment reasons: higher paying job (86% could go), currently unemployed with a job at the other end (40% allowed), a different job (80%) and employment for a new partner (86%).⁸² ...Eleven of the 13 movers who said they wanted to be in the same city or area as extended family were regarded by the judges as offering a sincere, and obviously compelling, motive.⁸³

5.33 In 16 of 31 cases where the information was available the movers had repartnered. This was not found to be a significant variable. 68.8% of those who had repartnered were allowed to move, compared with 60% of those who had not.⁸⁴

5.34 The study merely shows the correlation, not the influence of the reasons for wanting to relocate on the outcome. To understand the way interests have been taken into account, a more detailed examination of the case law is required. But first, how does the Family Law Act require other people to be considered? Subsection 68F(2) makes two references to separation from other people in the list of factors that must be considered when determining what is in the child's best interests. These are:

- (b) the nature of the relationship of the child with each of the child's parents and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;

5.35 One of the principles underlying the object of Part VII of the Family Law Act is subsection 60B(2)(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”.

⁸² Eastal et al, above note 64 at 244.

⁸³ *Ibid* at 245.

⁸⁴ *Ibid* at 243.

- 5.36 In *A v A: Relocation Approach* the impact of relocation on contact with a half-sibling was considered. The mother proposed to relocate to Portugal with the child of the marriage, M. She had another child, C, from a previous marriage. At the time of the trial, C was living with her father in Portugal. The mother had remarried. The Full Court of the Family Court held that the trial Judge had placed too much emphasis on M’s contact with her father in Sydney. The trial Judge had not given sufficient consideration to “the child’s relationship and prospects for contact with C”⁸⁵ under subsection 68F(2).⁸⁶
- 5.37 In *KB and TC*⁸⁷ the children’s relationship with a new partner was a relevant factor. The father was permitted to relocate to Japan with his children, where they would live with him and his new wife. He had employment in Japan as a wine marketing consultant.⁸⁸ One of the factors that was relevant to the decision was that the children had “a strong and comfortable bond with the father and the new wife”.⁸⁹
- 5.38 The decision in *ZH & YH & The Child Representative*⁹⁰ exemplifies the complexity of children’s contact with their extended family and a parent’s new partner. At the time of the application the parties were all living in Tasmania. The children were residing with their mother and her new husband. The mother wished to relocate with the children to the United States of America because her new husband was a citizen of the United States of America and they wanted to live with his mother.
- 5.39 The mother did not have any extended family in Tasmania. She had developed “a warm relationship” with her husband’s extended family in Sharon, Massachusetts.⁹¹ The father’s extended family and the children’s friends were in Tasmania. After balancing these factors and the children’s wishes, Nicholson CJ concluded in relation to the factor ‘the likely effect of separation on the children from their parents or other significant persons’, they should remain in Tasmania.⁹²
- 5.40 Contact with extended family was not a decisive factor in the High Court’s decision in *U v U*. The facts were that the mother had no family in Australia and only three or four friends. Her parents and extended family live in Mumbai in India, where she also has many friends. The father’s parents and sister live in Australia and he has extended family in Mumbai. Gummow and Callinan JJ made the comment that “[w]hile living in India between May 1995 and January 1998, N was exposed to, and enjoyed appropriate social activities, including significant contact with friends and relatives. If she remained in Australia she would continue to be exposed to, and enjoy such activities”.⁹³

⁸⁵ *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,553-54.

⁸⁶ As noted in part 3 of the paper, the matter was remitted for re-hearing.

⁸⁷ *KB and TC* [2005] FamCA 458.

⁸⁸ *Ibid* at [5].

⁸⁹ *Ibid* at [73].

⁹⁰ *ZH & YH & The Child Representative* [2002] FamCA 453

⁹¹ *Ibid* at [55].

⁹² *Ibid* at [145]-[148]

⁹³ *U v U* (2002) 191 ALR 289 at 300 [63]; (2002) FLC ¶93-112 at 89,084.

5.41 Gaudron J (dissenting) approached the issue differently. In her view, the trial judge had failed to properly consider the distress not being able to return to India would cause for the mother, which may “intensify” given her lack of family support in Australia. No findings had been made on the likely impact of this distress on her daughter.⁹⁴ Kirby J (dissenting) also took the view that the effects on the mother from being required to stay in Australia will have an inevitable impact on the happiness and best interests of the child.⁹⁵

5.42 In your submission please address **how you think the law should take account of the interests of other people affected by relocation decisions.**

Relocation and employment

5.43 There are some professions which require people to move regularly to retain employment. For example, members of the police force, diplomats and employees of some banks. Not only does this place strain on intact families, it can cause challenges for maintaining contact with children post-separation.

5.44 These challenges are exemplified by a case study of the Australian Defence Force. In November 2004, the Family Law Council met with representatives of the Defence Community Organisation to learn about the services provided to defence personnel and the challenges posed by relocation.

5.45 By way of background, Australia has an assimilated military community. This means that personnel and their families generally reside in the broader communities in which they are posted. Australian practice contrasts with the model in the United States of America where military communities are generally based in their own identified compounds, with dedicated services, shopping centres and the like. It is therefore much easier for Australian Defence Force families to link in with wider community support services, although there is still a strong collegiate culture of military families supporting each other under the umbrella ‘Australian Defence Force Family’.

5.46 The Family Law Council learnt that the rate of family breakdowns in the Australian Defence Force is on par with the rest of the Australian population. Approximately 15.2% of Australian Defence Force personnel have children who live away from their family. A challenge for separated families is that the Australian Defence Force must be able to redeploy personnel every 2 – 3 years.

5.47 This deployment policy makes it difficult very often for personnel to secure child care. Council was also advised that parents who have contact with their children post-separation (rather than residing with them), often have a difficult time managing the additional consequential costs. Some bases are able to provide married quarter accommodation for contact visits. Council was advised that in the absence of married quarter accommodation, unless they live in the same locality as their children, it is very difficult for Australian Defence Force personnel to

⁹⁴ Per Gaudron J in *U v U* (2002) 191 ALR 289 at 297 [40]; (2002) FLC ¶93-112 at 89,082.

⁹⁵ *Ibid*, per Kirby J at 324 [160]; 89,099.

arrange contact visits. This reduces the time they are able to spend with their children.

5.48 The Australian Defence Force provides relocation assistance to non-Australian Defence Force partners where their relationships with Australian Defence Force personnel have broken down. For example, the Australian Defence Force will often offer to remove the non-Australian Defence Force party to locations where he or she has family support.

6. The law in other jurisdictions

6.1 The Family Law Council's terms of reference direct the Council to consider "approaches to the problem of relocation in other jurisdictions". This part of the paper provides summaries of the law in the United Kingdom, New Zealand, Canada and selected States in the United States of America.

United Kingdom

6.2 The United Kingdom's *Children Act 1989* (Children Act) prohibits the removal of a child from the country. Subsection 13(1) provides:

- (1) Where a residence order is in force with respect to a child, no person may—
 - (a) cause the child to be known by a new surname; or
 - (b) remove him from the United Kingdom;without either the written consent of every person who has parental responsibility for the child or the leave of the court.

6.3 Relocation decisions are made by reference to the child's welfare as the paramount consideration, as they are a question "with respect to the upbringing of a child" (which requires the child's welfare to be the court's paramount consideration pursuant to subsection 1(1) of the Children Act). When determining the child's welfare the court must have regard to the checklist of factors that are outlined in subsection 1(3) Children Act, as follows:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.

6.4 The primary carer must establish that the relocation is reasonable. When making this decision the court may look at career prospects, housing, education, distance, cultural difficulties, the reason for the move, contact arrangements, the child's bond with the primary carer and the child's wishes.⁹⁶ Once the court is satisfied that the relocation is reasonable, the court will grant leave to move unless it can be clearly shown that the relocation would be detrimental to the child's welfare.⁹⁷

⁹⁶ *M v A (Wardship: Removal from Jurisdiction)* [1993] 2 FLR 715.

⁹⁷ *Payne v Payne* [2001] 1 FLR 1052.

6.5 The leading relocation case in the United Kingdom is the decision in *Payne v Payne* in which the court established several guidelines that may be applied in international relocation cases. These include:

- (a) Ascertain whether the application is genuine, and whether the planned relocation is realistic;
- (b) What is the basis of the other parent's objection?
- (c) What effect would the relocation have on the non primary carer and his future relationship with the child?
- (d) To what extent would any negative effects be offset by the new relationships the child would develop in the new state of residence?
- (e) What would be the impact on the applicant if leave were not granted?

The answers to these questions must be considered in the light of the child's welfare being the paramount consideration.⁹⁸ In *Payne v Payne* the court held that refusing an application of a primary carer who has made a reasonable proposal for relocation is likely to be detrimental to the welfare of the children.⁹⁹

6.6 The same approach applies in domestic relocation cases, except that the weighing up of competing interests against relocation will be less stringently applied.¹⁰⁰

6.7 The court's rationale for not interfering with the reasonable decision of the primary carer is that the carer is still going to be responsible for the children, and refusal of an application to relocate would result in bitterness which would have an impact of the quality of life the child experiences.¹⁰¹ For example, in *A v A (Child: Removal from Jurisdiction)*, Ormrod LJ explained:

It is always difficult in these cases when marriages break up where a wife who, as this one is, is very isolated in this country feels the need to return to her own family and her own country....The fundamental question is what is in the best interests of the child; and once it have been decided with so young a child as this that there really is no option so far as care and control are concerned, then one has to look realistically at the mother's position and ask oneself the question: where is she going to have the best chance of bringing up this child reasonably well? To that question the only possible answer in this case is Hong Kong.¹⁰²

6.8 Whilst the United Kingdom has neither a presumption for or against relocation, in practice it is rare for applications to relocate to be refused.¹⁰³

New Zealand

6.9 The law in New Zealand is in somewhat of a state of flux, as the new *Care of Children Act 2004* (Care of Children Act) replaced the Guardianship Act on 1 July 2005.

⁹⁸ *Payne v Payne* [2001] 1 FLR 1052.

⁹⁹ *Payne v Payne* [2001] 1 FLR 1052.

¹⁰⁰ *Re H (Children: Residence Order: Condition)* [2001] 2 FLR 1277.

¹⁰¹ Per Ormrod LJ in *Chamberlain v De La Mare* (1983) 4 FLR 434.

¹⁰² *A v A (Child: Removal from Jurisdiction)* [1980] 1 FLR (UK) 380 at 381-382.

¹⁰³ R. Spon-Smith 'Relocation Revisited' [2004] *Family Law* 191 at 193.

- 6.10 The approach of the New Zealand courts to relocation cases prior to the Care of Children Act has been that the courts will not start with any presupposed assumptions, as in *D v S* it was held that a “presumptive or a priori weighing is inconsistent with the wide all-factor child-centred approach required under New Zealand law”.¹⁰⁴ The best interests of the child was the paramount consideration under the Guardianship Act. In *Stadniczenko* the Court of Appeal stated that “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”.¹⁰⁵
- 6.11 In determining the child’s best interest the court would have regard to the reasonableness of the parent’s desire to relocate compared to the disadvantage of the reduced contact between the child and the non primary carer. The court would also consider the wellbeing of the family unit, the reason for the move, the right of parents to pursue a new life or career opportunities and any views the child may have concerning the relocation.¹⁰⁶ The courts have observed that “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”.¹⁰⁷
- 6.12 The New Zealand Court of Appeal has expressly declined to follow the approach the United Kingdom took in *Payne v Payne*. The Court of Appeal also noted that the “decisions of courts outside New Zealand are likely to be of limited assistance. Even if the overseas statute focuses on the welfare of the child as the paramount consideration in a similar legislative context, the social landscape in which it is applied will not replicate our local circumstances.”¹⁰⁸
- 6.13 The welfare of the child is also the paramount consideration pursuant to section 4 of the Care of Children Act. As mentioned in part 3 of the paper, section 5 of that Act provides some principles relevant to the child’s welfare and best interests as follows:
- (a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing;
 - (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents);
 - (c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child:

¹⁰⁴ *D v S* (2001) NZCA 374 at [47].

¹⁰⁵ *Stadniczenko v Stadniczenko* [1995] NZFLR 493 at 500.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *D v S* (2001) NZCA 374 at 36.

(d) relationships between the child and members of his or her family, family group, whanau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing:

(e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whanau, hapu, or iwi, or by other persons):

(f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

6.14 It is not known how exactly these principles will influence relocation decisions. For example, paragraph (b) could be a factor that works in favour of, or against, relocation. Judge Boshier, Principal Judge of the Family Court of New Zealand, has observed that “the move might bring the child closer to their family...or put the child in an environment more conducive to matters such as cultural participation”.¹⁰⁹

6.15 Judge Boshier outlines some reasons why the Care of Children Act may not lead to a new approach to relocation cases and reasons why it might. In concluding, he states:

The new Act clearly intends that having a relationship with both parents be considered as generally in the best interests of children. As parenting orders include this principle as a fundamental constituent, it may become difficult for a parent to convince the Court that it is in the welfare of the child to be removed from the parameters of the order.....In general, where both parents can provide for the welfare of the child, the Act suggests that the Court should conclude that this is in the child's best interests, and therefore not allow relocation.¹¹⁰

Canada

6.16 In Canada the approach to relocation cases is based on the best interests of the child. The relevant Canadian Statute is section 16 of the *Divorce Act 1985* (Divorce Act). Subsections 16(8) to (10) provide:

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) 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

¹⁰⁹ P. Boshier ‘Relocation cases: an international view from the bench’ (2005) *New Zealand Family Law Journal* 77 (Lexisnexis electronic version – no page references).

¹¹⁰ *Ibid.*

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.

6.17 The leading relocation case in Canada is *Goertz v Gordon: Women's Legal Education and Action Fund*.¹¹¹ The case involved a successful application for a residence mother to relocate from Canada to Australia. The Supreme Court held that presumptions are not relevant to making relocation decisions. McLachlin J, for the majority, wrote a "presumption in favour of the custodial parent has the potential to impair the inquiry into the best interests of the child. This inquiry should not be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary."¹¹²

6.18 Justice McLachlin, who delivered the judgment of the majority, set out a number of factors to consider in relocation cases, as follows.

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

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 access arrangement and the relationship between the child and the access parent;
- c) the desirability of maximizing contact between the child and both parents;
- d) the views of the child;
- e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
- f) disruption to the child of a change in custody;
- g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.¹¹³

6.19 The court must make a fresh inquiry as to the best interests of the child and not base its decisions on the findings of the preliminary custody hearing to ensure that all material changes in the circumstances are taken into account.¹¹⁴ Usually motives for moving will not be an issue considered by the courts, however, occasionally the motive will reflect adversely on the parent's ability to fulfil the child's best interests. For example, when the sole motive of a parent to relocate is to prevent the other parent from having contact with the child, the primary carer is not showing an ability to meet the needs and interests of the child.¹¹⁵

6.20 The court must weigh up the benefit of the child staying with the primary carer in a new location against the advantage of having continuous contact with the non primary carer, extended family and the community. The interests and rights of the

¹¹¹ *Goertz v Gordon: Women's Legal Education and Action Fund* [1996] SCR 27.

¹¹² *Ibid* at 340.

¹¹³ *Ibid* at paragraph [49].

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

parents are to be respected, but are not the focus of the inquiry.¹¹⁶ The ultimate decision of the court in each case is what is the best interests of the child taking into account all the relevant circumstances.¹¹⁷

6.21 Bala and Harris have conducted a study of trends in relocation decisions in the province of Ontario in light of the *Goertz v Gordon* decision. They observe the following general trends:

- In one half of cases the custodial parent is able to obtain court approval for a move;
- Appellate courts say that they give “significant deference” to the decisions of trial judges about relocation, recognizing their discretionary and factual nature, but in half of its recent relocation cases, the Ontario Court of Appeal has not upheld the trial decision;
- Custodial parents (almost always mothers) have the greatest success in obtaining permission to move with their children if the non-custodial parents have had only limited involvement in the lives of their children, and when the children are younger and particularly dependent on their primary caregivers;
- Expert evidence from psychologists is given less weight in these cases than in other types of child related cases, though the Ontario Office of the Children’s Lawyer often has an important role to play, and the wishes of a child, typically brought before the court by the Children’s Lawyer, can be very significant, especially if the child is older;
- Residence restrictions in separation agreements and joint legal custody are not significant factors in preventing a move, but if the parents have a true shared parenting arrangement with roughly equal sharing of parenting, the courts are reluctant to permit relocation.¹¹⁸

United States of America

6.22 Family law in the United States of America is a state responsibility, so there are different approaches across the country. However, all the states start with the general rule that the best interest of the child is paramount.¹¹⁹ Some states then use a case by case analysis, other states adopt statutory or case law factors to consider when determining what is in the best interests of the child, and some simply look to see if the move constitutes a substantial change of circumstances that would effect the existing custody arrangements.

6.23 In many States in the United States, there is a presumption in favour of allowing a custodial parent to relocate. However, in other States there is neither a presumption for nor against relocation and the decision of the court is completely based on the best interests of the child.

6.24 The different approaches in the different states of America demonstrate the competing philosophical views that exist concerning relocation cases. Some of the different views include the right of the primary carer to move freely, the duty of

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ N. Bala and J. Harris ‘Parental Relocation: Applying the Best Interests of the Child Test in Ontario’, forthcoming 2006 in *Canadian Journal of Family Law*. The paper is a substantially revised version of a paper presented at the Ontario Bar Association, Family Law Program, 27 April 2005, Toronto.

¹¹⁹ T. Sample and T. Reiger, ‘Relocation standards and constitutional considerations’ (1998) 15 *Journal of the American Academy of Matrimonial Lawyers* 229 at 229.

the state to protect the best interest of the child, and the right of the non primary carer to maintain a meaningful relationship with their child. The different philosophical approaches have ensured that each jurisdiction has its own way of dealing with relocation issues.

6.25 The American Academy of Matrimonial Lawyers established a committee to develop a Model Relocation Act for consideration by state legislatures.¹²⁰ The Model Act was not intended to be a uniform Act and throughout the Model Act there are alternative options that each state may adopt to maintain their own jurisdictional policies.¹²¹ Therefore the Model Act does not provide a solution to the problem that exists in the United States of America - that every state has a different approach to the burden of proof or presumptions to be applied in relocation cases.

6.26 The Model Act outlines three alternatives concerning the burden of proof in relocation cases and the reasons why a consensus could not be reached.¹²²

[Alternative A]

The relocating person has the burden of proof that the proposed relocation is made in good faith and in the best interest of the child.

[Alternative B]

The non-relocating person has the burden of proof that the objection to the proposed relocation is made in good faith and that relocation is not in the best interest of the child.

[Alternative C]

The relocating person has the burden of proof that the proposed relocation is made in good faith. If that burden of proof is met, the burden shifts to the non-relocating person to show that the proposed relocation is not in the best interest of the child.

Comment

After considerable analysis and discussion, there was significant approval for every section of this proposed act, except for this particular, intractable section. As is apparent from the three alternatives submitted, there was no agreement on the placement of the burden of proof in a relocation dispute. Some favored the custodian proposing relocation bearing the burden (Alternative A), while others favored placing the burden of proof on the party seeking to block the relocation (Alternative B). An obvious compromise proposal (Alternative C), suggested a shifting of the burden of proof; initially requiring the person proposing to relocate the child to show a good faith reason for the move. If that burden was met, the duty to go forward with evidence would shift to the objecting party, who would bear the burden of showing that the relocation is not in the best interest of the child. This alternative also failed to elicit a consensus.

¹²⁰ M. Kisthardt, 'Perspectives on the relocation of children' (1998) 15 *Journal of the American Academy of Matrimonial Lawyers* 1 at 1.

¹²¹ *Ibid.*

¹²² American Academy of Matrimonial Lawyers, *Model Relocation Act*, as adopted by the board of Governors of the AAML, Cancun, Mexico, March 9, 1997, § 407.

Rather than attempt to promulgate a proposal commanding an insignificant majority, it was determined that the serious disagreement on this apparently crucial issue should be forthrightly stated and left for each legislature to determine for itself. The alternative of omitting this section entirely was rejected because the moving party would then automatically bear the burden under the usual rule of civil litigation. It was believed to be inappropriate to place the burden of proof on a petitioner-plaintiff, rather than allocate the burden to the status of either the party proposing or objecting to a relocation. The issues are sufficiently clear and the matter sufficiently sensitive to avoid allocating the burden of proof based upon who happens to first file a lawsuit.

Finally, some might argue that the controversy over the burden of proof is more a hypothetical problem than a realistic hurdle, given the fact that ultimately each alternative turns on an adjudication of the best interest of the child. Thus, the burden of proof in practice may be little more than a hypothetical legal concept. The trier of fact may first decide the relocation issue based on an evaluation of the best interest of the child and thereafter find whether the burden of proof has been met. In short, relocation is extraordinarily subject to result-oriented analysis by the trier of fact, thereby perhaps making the allocation of the burden of proof less relevant than it might first appear.

Overview

6.27 The remainder of this part of the paper will discuss a sample of states which provide illustrations of the different approaches taken across the United States of America. Firstly, the law in Indiana will be outlined as an example of a State that is pro-relocation. Secondly, New York will be discussed as a jurisdiction that uses a case by case analysis. Thirdly, Louisiana will be considered as an example of a State that leans against relocation. This part of the paper ends with a discussion of social scientist controversy in the Courts.

Indiana

6.28 The Indiana courts assess an application for relocation on the basis that it may require a change in custody arrangements and the application must be heard with the court mindful of the child custody modification statute.¹²³ In other words, if the primary carer wishes to relocate the court must consider granting custody to the other parent.

6.29 The child custody modification statute states that the court cannot change existing custody arrangements unless there is a substantial and continuing change in circumstances that would justify the court modifying the custody arrangements.¹²⁴ The burden of proof to establish a substantial change of circumstances is on the non-primary carer.

¹²³ *Swonder v Swonder* 642 NE 2d 1376 (Ind. Ct. App. 1994).

¹²⁴ *Ibid.*

6.30 An out of state move is not of itself, sufficient to constitute a substantial change in circumstances that would justify the court's conclusion that the primary carer's continued custody is unreasonable.¹²⁵

New York

6.31 In New York, there is neither a presumption for nor against relocation. The courts decide each relocation case on its own merits and do not rely on any preconceived assumptions.¹²⁶

6.32 The courts' primary focus is on the best interests of the child and it may weigh up numerous factors to determine what is the best interest of the child in each case. Some of the factors the court may consider include¹²⁷:

- the impact of the move on the relationship of the child and the non primary carer
- the motives behind the move
- the benefits and harms the child may experience from the change in circumstances
- the economic, emotional and educational opportunities afforded by the move
- the negative impact which will result due to continued hostility between the parents
- the possibility and feasibility of a parallel move by the non primary carer as an alternative to restricting the primary carer's mobility.

6.33 The list is not exhaustive and the court may add to the factors that are or are not to be considered to ensure each relocation case is decided on its own merits. As the court focuses on a case by case approach, there is no guidance or stringent requirements placed on the weight of each factor the court takes into consideration.¹²⁸

6.34 The process of the court is determined on a case by case basis with the emphasis on "minimising the parents' discomfort and maximising the child's prospect of a stable, comfortable and happy life".¹²⁹

¹²⁵ *Ibid.*

¹²⁶ *Tropea v Tropea* 87 NY 2d 727.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

Louisiana

6.35 Louisiana has passed legislation based on the Model Relocation Act.¹³⁰ The Louisiana legislature has chosen to adopt 'Alternative A' from the Model Relocation Act and placed the burden of proof on the relocating parent to prove that the relocation is being made in good faith and in the best interests of the child.¹³¹

6.36 The Louisiana statute only applies where the relocation is out of the state or more than 150 miles (= 241.5km) from the previous residence.¹³² The court may not consider whether the person proposing relocation will move without the child if their application is refused, or whether the person opposing relocation will also relocate if the relocation application is allowed.¹³³

6.37 In making a decision regarding relocation, the Statute requires the court to consider the following factors.¹³⁴

- The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the non relocating parent, siblings, and other significant persons in the child's life.
- The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.
- The feasibility of preserving a good relationship between the non relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.
- The child's preference, taking into consideration the age and maturity of the child.
- Whether there is an established pattern of conduct of the parent seeking the relocation, either to promote or thwart the relationship of the child and the non relocating party.
- Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the relocation and the child, including but not limited to financial or emotional benefit or educational opportunity.
- The reasons of each parent for seeking or opposing the relocation.
- The current employment and economic circumstances of each parent and whether or not the proposed relocation is necessary to improve the circumstances of the parent seeking relocation of the child.
- The extent to which the objecting parent has fulfilled his or her financial obligations to the parent seeking relocation, including child support, spousal support, and community property obligations.
- The feasibility of a relocation by the objecting parent.

¹³⁰ The Model Act was developed by the American Academy of Matrimonial Lawyers and was discussed at the start of the section on the United States of America.

¹³¹ Louisiana Revised Statutes § 9:355.13.

¹³² E. Terry et al. 'Relocation: Moving forward or backward?' (1998) 15 *Journal of the American Academy of Matrimonial Lawyers* 1 at 225-226.

¹³³ *Ibid.*

¹³⁴ Louisiana Revised Statutes § 9:355.12.

- Any history of substance abuse or violence by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.
- Any other factors affecting the best interest of the child.

Social Science controversy in the Courts

6.38 The issue of relocation has also been a subject of controversy in California. In this state, social science evidence has played an important role in the debates in the Supreme Court by way of amici curiae briefs (which are written submissions handed to the court by an interested person referred to as a ‘friend of the court’).

6.39 The Californian courts receive expert reports to ensure that the latest research involving children and the effects of relocation can be noted in each case to help the court ensure the best interests of the child are protected. Whilst the court recognises that each case is different, the court also recognises that psychological research may be an invaluable tool for parties and the court to use when hearing relocation cases. Some of the different areas of studies that may be significant in relocation cases include¹³⁵:

- the influence of mothers and fathers on the child’s psychological development
- the effect of parental absence
- the impact of divorce
- the effects of father custody and joint custody
- the effects of remarriage, and
- the impact of relocation on children in intact and divorce families.

6.40 In deciding the case of *In re Marriage of Burgess*¹³⁶ an amici curiae brief was provided by Dr Judith Wallerstein and five other health professionals.¹³⁷ Wallerstein’s brief focused on the ‘primary psychological parent’ doctrine. The doctrine states that the child only has one parent that will have a significant effect on the psychological development and adjustment of the child. The primary carer is taken to be the ‘primary psychological parent’, and thereby the central ‘family unit’, which requires stability and continuity for the welfare of the child.¹³⁸

6.41 Wallerstein et al argued that the primary carer and child relationship that is formed post divorce needs to be protected. They noted that there is no evidence that the amount of time spent with the non primary carer throughout the child’s developmental years is significantly related to a good upbringing for the child.¹³⁹ Wallerstein et al argued that post divorce symptoms that children usually suffer from, are not avoided by a child having access to both parents. The development and adjustment of the child is primarily related to a close and stable relationship

¹³⁵ R. Warshak, ‘Social Science and Children’s Best Interests in Relocation Cases: *Burgess* Revisited’ (2000) 34 *Family Law Quarterly* 1 at 84.

¹³⁶ *In re Marriage of Burgess* (1996) 13 Cal 4th 25.

¹³⁷ J. Wallerstein, *Amica Curia Brief of Dr. Judith S. Wallerstein, PhD*, filed in Cause No. S046116.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

with the primary carer. However, the continuing involvement of non-primary carer has little impact on the child's adjustment.¹⁴⁰

6.42 This may be contrasted with the amici curiae brief by Warshak, Braver, Kelly and Bray et al¹⁴¹ filed in the case of *In re Marriage of Lamusga*.¹⁴² The Warshak et al brief argues that Wallerstein et al's brief did not take into account the large amount of research that suggests children naturally develop close attachments to both parents and that it is in the child's best interests for both relationships to be maintained.¹⁴³

6.43 The authors cite a study that concluded that a child's welfare is not dependent on the frequency of visits by the non primary carer but the type of contact that is experienced. Therefore, for meaningful involvement in the child's life the non-primary carer needs to play an active role in the child's everyday life. However this is unlikely to happen if the child is relocated to a different community.¹⁴⁴

6.44 This is a controversy which remains unresolved.

6.45 Are you aware of any Australian social science research that should be taken into account in the development of the law in Australia?

Summary and Consultation question

6.46 In summary, it is clear that there are three general approaches to relocation decisions in the jurisdictions considered in this paper.

6.47 The first approach is in favour of relocation. The United Kingdom and the State of Indiana are both examples of this approach.

6.48 The second approach is more neutral. Decisions are made on a case by case basis, with the emphasis on the best interests of the child in each case. Canada and the State of New York are examples of this second approach.

6.49 The third approach is against relocation. Louisiana is an example of this approach. If Judge Boshier's predictions about the potential impact of the Care of Children Act in New Zealand are correct, this is the category where the New Zealand law will fall. It is too soon to draw any conclusions about this.

6.50 Do you think that the Family Law Act should provide presumptions either for or against relocation of children with a residence parent, creating a legal onus on the other party to displace the presumption?

¹⁴⁰ *Ibid.*

¹⁴¹ R. Warshak, S. Braver, J. Kelly, J. Bray et al, *Amici Curiae Brief on Behalf of Lamusga Children*, filed in Cause No. S107355.

¹⁴² *In re Marriage of Lamusga* (2002) Unpub. For the Supreme Court decision, see *LaMusga v. LaMusga*, 32 Cal. 4th 1072 (2004)

¹⁴³ *Ibid.*

¹⁴⁴ C. Winquist Nord, D. Brimhall and J. West, *Fathers' Involvement in Their Children's Schools*, (1997) US Department of Education, National Centre for Education Statistics.

7. Summary of Consultation Questions

A number of consultation questions have been posed throughout this discussion paper. Your submission does not have to cover them all and you may wish to comment on any of the following questions.

Paragraph 2.1, Page 4

If the Family Law Act was to refer to ‘relocation’, it is likely to be necessary to define this term. The question then arises as to how would relocation be defined for this purpose?

Paragraph 3.9, Page 8

Please consider formulating a definition of the “best interests of the child”.

Paragraph 3.36-37, Page 15

Please consider whether the Family Law Act should be amended to provide specific criteria for making relocation decisions. In considering this broad question, please also consider commenting on the following consequential questions:

- Whether relocation cases should become a special category of cases that require separate treatment (contrary to the approach that has been adopted by the High Court and the Full Court of the Family Court), and if so, why?
- Which of the criteria should be mandatory and which should be relevant considerations? Are there any factors that should not be taken into account?
- If some guidelines were to be inserted in the Family Law Act, should they be based on the principles from case law outlined above?

In answering these questions, you may wish to take into account the material in the rest of the discussion paper, in particular the proposed reforms outlined in part 4.

Paragraph 4.4, Page 16

Do you have any comments on the Committee’s recommendation?

Paragraph 5.22, Page 25

Do you think that the Family Law Act should be amended to provide that it is necessary for a contact parent to apply to a court to amend the contact orders if the residence parent opposes the contact parent’s relocation?

Paragraph 5.42, Page 29

Please address how you think the law should take account of the interests of other people affected by relocation decisions.

Paragraph 6.45, Page 42

Are you aware of any Australian social science research that should be taken into account in the development of the law in Australia?

Paragraph 6.50, Page 42

Do you think that the Family Law Act should provide presumptions either for or against relocation of children with a residence parent, creating a legal onus on the other party to displace the presumption?

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Appendix A: Functions of the Family Law Council

Functions of the Family Law Council

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. The functions of the Council are set out in subsection 115(3) of the Act as follows.

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

The Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

Membership of the Family Law Council (as at 1 January 2006)

Professor Patrick Parkinson, *Chairperson*

Ms Nicola Davies

Mr Kym Duggan

Federal Magistrate Mead

Justice Susan Morgan

Mr Clive Price

Ms Susan Purdon

Justice Garry Watts

The following six agencies and the Family Law Section of the Law Council of Australia have observer status on the Council (with names of observers):

Australian Institute of Family Studies – Mr Bruce Smyth

Australian Law Reform Commission – Ms Kate Connors

Child Support Agency – Ms Yvonne Marsh

Family Court of Australia – Ms Jennifer Cooke and Ms Dianne Gibson

Family Court of Western Australia – Principal Registrar David Monaghan

Federal Magistrates Court of Australia – Mr John Mathieson

Family Law Section of the Law Council of Australia – Ms Maurine Pyke

Appendix B: Members of the relocation committee

The members of the committee who prepared this discussion paper are:

- Justice Susan Morgan (convenor)
- Mr Kym Duggan
- Ms Susan Purdon
- Principal Registrar David Monaghan

- Ms Anita Mackay (secretariat)

Consultants who are assisting the committee are:

- Justice Richard Chisholm
- Ms Tara Gupta
- Ms Susan Holmes

Ms Amy McCann, a university student who worked in the Secretariat as a 'summer clerk' in January - February 2006, assisted with the drafting of this paper.