- explanation of the reasons for the proposed move with an emphasis on why it cannot await the final hearing, and the likely impact of a refusal to allow the move
- evidence of attempts which have been made to alleviate the problem without resorting to a move eg paid help at home, seeking local employment etc
- evidence of timely and sensible attempts to negotiate an agreed outcome with the other party;
- generous proposals for spend time arrangements which minimise the impact of the proposed move, eg the offer of additional time in the school holidays
- if possible evidence of how the party seeking to relocate has been supportive of the children's relationship with the other parent in the past
- detailed proposals for accommodation, education and employment in the new area.

'Faits accomplis' and damage limitation

In an ideal world no client would move their children more than two streets away without the consent of the other parent or permission from the Court. In practice, we often find ourselves representing clients who have simply made the move, in the face of clearly expressed opposition from the other parent or even after the issue of an application to restrain them from doing so.

In *Edgar & Strofield*, the Full Court considered an appeal against interim orders requiring the mother of 7 year-old twins to return them to their former place of

residence.[14] She had moved a distance of some 88km in order to obtain employment. Since the parents' separation four years previously, the children had been spending alternate weekends with the father and the mother was continuing to facilitate them doing so after the move. The father applied for week-about shared care on an interim basis. At first instance, the Court ordered the mother to return the children to their previous place of residence and granted orders for their time with the father to increase over four months to equal time. On a subsequent hearing relating to the mother's application for a stay, the trial judge referred repeatedly to the children's primary attachment to their mother as an 'overarching' criterion – despite the absence of any such finding in His Honour's interim reasons.

Justice Kent (with whom Justices Murphy and May agreed) upheld the mother's appeal against the interim orders, considering that His Honour had been

> distracted by the issue of "relocation"; rather than focusing upon the competing proposals of the parents in the circumstances as they existed at the time of the interim hearing, in the context of the undisputed history, so far as the appropriate interim care arrangements for the children were concerned.[15]

This decision may provide a useful note of caution for a judge who is expressing outrage at the conduct of a parent who has been guilty of a 'unilateral relocation' but where the move has no or no significant impact on the children's time with the other parent.

[14] *Edgar & Strofield* [2016] FamCAFC 93.
[15] *Edgar & Strofield* [2016] FamCAFC 93 [29].

What can be done to salvage the situation where the move has already taken place but impedes the current arrangements for time? Those cases are in my experience likely to succeed only when the relocating parent can point to dire financial or practical reasons for moving without first seeking consent or an order eg unforeseen and unforeseeable loss of housing, a critically ill relative, cessation of financial support from the other parent causing a financial crisis, etc.

It is particularly important here to try to emphasise whatever the relocating parent has done in the past and is willing currently to do to support the children's relationship with the other parent and, unless the other parent is directly responsible for the crisis which precipitated the move, to avoid blaming that parent for failing to consent in advance.

Final hearings

If the parents have or are likely to be granted equal shared parental responsibility then a careful approach to s 65DAA is required, particularly at final hearing. In *Ulster & Viney*[16] the Full Court considered an appeal concerning children aged 7 and 9 whose mother had moved 85km from Melbourne to Gippsland for reasons relating to her employment and housing.

Before the start of proceedings the children were spending two nights per fortnight with father. Interim orders were granted for the children to spend six nights per fortnight with the father during term time in order to keep the children in their previous schools

[16] [2016] FamCAFC 133.

pending final hearing. At trial Judge Bender allowed the relocation and ordered time for the father on alternate weekends and the intervening Friday afternoons as well as during school holidays.

One aspect of the father's appeal was the argument that Her Honour had erred in defining the children's time with him as 'substantial and significant' pursuant to s 65DAA(3) and (4). He asserted that involvement in the children's 'daily routine' pursuant to s 65DAA(3)(b)(i) required him to be actively involved with their weekday routine. The majority of the Full Court disagreed, considering that the order for time allowed some albeit limited involvement with weekday routine.[17] Their Honours considered also that the order met the second limb of the definition, in the context of the parties' agreement as to the arrangements for time in the event of the relocation and the children's existing bond with their father.[18] A subsequent application by the father for special leave to appeal to the High Court was unsuccessful.[19]

In the other recent Full Court decisions such as *Adamson & Adamson*[20] and *Jurchenko & Foster*[21] there has been an emphasis on the need to consider the right of both parents to live in their preferred place of residence. In particular, mothers who concede for example that they will, if not allowed to relocate their children, forfeit their wish to relocate in order to continue as primary carer should not be prejudiced by court then

[17] [2016] FamCAFC 133 [91]-[93]. Note however at [4]-[8], the dissenting judgment of Strickland J who considered that the order for time could not be described as 'substantial and significant' in the context of the overall reduction in the time which the children would now spend with the father.
[18] [2016] FamCAFC 133 [100]-[103].
[19] *Ulster & Viney* [2016] HCASL 263 M109/2016.
[20] [2014] FamCAFC 232.
[21] [2014] FamCAFC 127.

elevating that concession to a 'proposal' of equal status to those placed before the court by the parties.[22]

Conclusion

Social science research tells us that litigated relocation disputes generally occur in the context of high-conflict parental relationships.[23] Disputes over short-distance relocations seem capable of causing almost as much emotional fallout, both for the party seeking to move and the party seeking to prevent the move, as those involving interstate or even international relocation. In these cases the relocation issue is often a symptom rather than a cause of hostility between the parents, so that even the prospect of a move from one suburb to another is seen by the other parent as a threat to their relationship with the children.

One has sympathy for primary carers restrained until final hearing from moving to secure employment or family support, when often the non-primary carer will have moved away from the former family home without the prospect of any such restraint. It may well be that the shift seen in *Adamson* [24] and *Foster*[25] will in time lead to greater recognition of the impact on mothers who are prevented from moving even short distances for economic and emotional reasons.

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[22] *Jurchenko & Foster* [2014] FamCAFC 127 [108]-[113]..
[23] See eg Parkinson, Cashmore and Single (2010) 'The need for reality testing in relocation cases' *Family Law Quarterly 44(1) 1-34.*; Kaspiew, Behrens and Smyth (2011), 'Relocation disputes in separated families prior to the 2006 reforms: an empirical study', *Family Matters 86.*
[24] [2014] FamCAFC 232.
[25] [2014] FamCAFC 127.

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