

FOLEY'S | LIST

ARE WE THERE YET?

THE RELOCATION OF CHILDREN OVER SHORTER DISTANCES

Author: Alison Burt

Date: 10 August, 2017

© Copyright 2017

This work is copyright. Apart from any permitted use under the *Copyright Act 1968*, no part may be reproduced or copied in any form without the permission of the Author.

Requests and inquiries concerning reproduction and rights should be addressed to the author c/- annabolger@foleys.com.au or T 613-9225 6387.

‘ARE WE THERE YET?’

THE RELOCATION OF CHILDREN OVER SHORTER DISTANCES

Introduction

The Full Court has repeatedly emphasised that relocation cases cannot be treated as a separate category of parenting dispute.¹ If there is no such thing as a ‘relocation case’, then how on earth is one to identify a ‘short-distance relocation case’? Nonetheless, parents seeking to move perhaps just an hour or 100km away from their previous residence take up a considerable amount of court time and attention. Whilst less stark in their potential outcomes than international or interstate relocation cases, these shorter distance relocation cases can be deceptively complicated.

Is the move to be classified as a relocation?

How are parents to know what sort of move would be treated as a ‘relocation’, particularly given the vagaries in travel times? In theory a move from Melbourne’s eastern to western suburbs could result in a longer journey between homes than a move from eg Shepparton to Bendigo; most of us would see the latter as a ‘relocation case’, but what about the former?

The *Family Law Act* does not define relocation, unsurprisingly given that as a concept receives no distinctive statutory treatment.

¹ See eg *B and B: Family Law Reform Act 1995* (1997) FLC 92-755.

In *D & SV* (2003) the Full Court queried whether a move of 115 km, from Vermont South to Geelong, should be considered as a relocation, although the point was not raised by either party.² In that case the father argued that because the proposed move would prevent the children from spending time with him after school on weekdays, the usual relocation principles should apply. Their Honours noted that in a number of American jurisdictions, parents are entitled to move between 70 – 150 miles from the other parent without consent or a court order.³ Whilst not recommending such arbitrary limits, the Full Court cautioned against restricting the right of parents to move over shorter distances, noting that ‘the less distance involved in the move, the more readily satisfactory alternative contact arrangements or logistical arrangements for shared residence are likely to be available’.⁴

In *Morgan & Miles*, Justice Boland sitting as the Full Court considered on appeal whether a move of 144 km could be said to constitute a relocation:

...it is not distance per se which should be the determinative criteria. In many cases what is relevant is **the consequence of the move or proposed move**. The issues to be determined may be quite different for example, for an infant or toddler developing attachments, to those of older children; or for economically impoverished families where fuel costs may be unaffordable thus impeding maintenance of a meaningful relationship. Conversely, there may be little impact on maintaining a meaningful relationship between a child and the non relocating parent particularly if the child has a history of living predominantly with the relocating parent, and spending time with

² FLC 93-137.

³ *D & SV* (2003) FLC 93-137 [41].

⁴ *D & SV* (2003) FLC 93-137 [38].

the other parent where, with alternate arrangements, the child's relationship with the non relocating parent can be maintained and fostered.

Sensibly, **the legislation does not seek to define “local”, intrastate, interstate or international moves**. Rather, it requires a judicial officer to consider, on a case by case basis, the effect of a move on the particular child in determining the overall parenting application (see particularly s 60CC(2)(d) and (e), and if applicable s 65DAA(1)(a) and (b), s 65DAA(2)(a) and (b) and s 65DAA(5)), and affords the opportunity to craft orders which are in that child's bests interests.⁵ (my emphasis)

So, context and consequences are all. In practice and in my experience, any move which changes the child's living arrangements in such a way as to make it significantly more difficult for the child to spend time with the other parent is likely to be treated as a relocation. Where there are existing orders for time which are rendered impracticable by the proposed move, the distinction will be clearer than when there is no established status quo in relation to time. Where the move would result in a change of school, as well as affecting spend-time arrangements, it will be difficult to persuade the court to treat it as anything other than a relocation.

Interim hearings

We are all familiar with the difficulties which courts face in making findings in the context of a factual dispute and on an interim basis:

⁵ *Morgan & Miles* [2007] FamCA 1230 [91] – [93].

...the limits to an interim hearing are well known. Disputed issues of fact cannot be resolved at an interim hearing, and, axiomatically, those disputed issues of fact may be fundamentally important to one or more of the s 60CC (of the Family Law Act 1975 (Cth) (“the Act”)) considerations by which the Court determines what orders are in the best interests of children.⁶

In *Morgan & Miles* Her Honour specifically applied the *Goode* pathway to the question of a proposed interim relocation.⁷ The Full Court⁸ has subsequently approved Her Honour’s guidance in terms of the ‘core principles’ to be applied:

- the child’s best interests remain the paramount but not sole consideration;
- that a parent wishing to move does not need to demonstrate “compelling” reasons;
- that a judicial officer must consider all proposals, and may himself or herself be required to formulate proposals in the child’s best interests; and
- the child’s best interests must be weighed and balanced with the “right” of the proposed relocating parent’s freedom of movement.⁹

Her Honour confirmed also that the court should be reticent to determine issues of relocation at the interim stage:

“It is highly desirable that, except in cases of emergency, the arrangements which will be in the child’s best interests should not be determined in an abridged interim hearing

⁶ *Edgar & Strofield* [2016] FamCAFC 93 [15].

⁷ *Morgan & Miles* [2007] FamCA 1230.

⁸ *Malcolm & Munro* (2011) FLC 93-460.

⁹ *Morgan & Miles* [2007] FamCA 1230 [80].

and these are the types of cases in which the child's present stability may be extremely relevant on an interim basis. It further appears to me that the comments of Warnick J in *C&S*¹⁰, remain apt and relevant to determination of these cases.¹¹

Her Honour's judgment is often used to oppose applications for interim relocation even over modest distances on the grounds that the parent seeking to relocate has to show a case of 'emergency'. That approach has been explicitly rejected by the Full Court.¹² In *Browne v Keith*, the trial judge had summarised the authorities as indicating:

The case law suggests the Court should not readily grant interim relocations where there has been a unilateral relocation except in cases of emergency. This is not a matter where there is an emergency.¹³

The Full Court considered that His Honour's misstatement of the law had caused his subsequent consideration of the issues to miscarry, and upheld the mother's appeal primarily on that ground.

What then must a parent seeking to relocate on an interim basis do to optimise his or her chances of success? I would suggest consideration of the following:

¹⁰ *C & S* [1998] FamCA 66, where Warnick J, with whom Ellis and Lindenmayer JJ agreed, said:

In my view it is clear that the interests of any child or children, including the children here, are very much connected with any questions directly affecting those children, such as a relocation, being determined by a Court without the impediment of a situation of recent development, which situation significantly alters the relationship of the children or circumstances of the child with regard to one of its parents, from what it or they had been immediately beforehand.

¹¹ *Morgan & Miles* [2007] FamCA 1230 [74].

¹² *Browne v Keith* [2015] FamCAFC 143 [29].

¹³ *Browne v Keith* [2015] FamCAFC 143 [28].

- 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.

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.

Alison Burt

3 August 2017