**Relocation Application Cases 2019**

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## Introduction

When your client's parenting case includes your client proposing to live with the children at an address a long way away from the other parent, fasten your seat belt, lock your tray table into position and look for the nearest emergency exit. These cases are notoriously difficult and there are no special rules to guide you on the journey. As the Full Court regularly reminds trial judges and the profession, relocation cases are 'just' parenting cases and the task is assessing the competing proposals against the factors in s60CC of the *Family Law Act* 1975 ("FLA") to make orders in the best interests of the child or children.

I presented on this topic at this conference two years ago. You can obtain a copy from Leo Cussen or from the Foley's List website CPD resources section. Even though it is all still relevant and bears repeating, those of you who were here will be relieved to know that I don't plan to go over it all again. What I do propose to do in this paper is revise the legislative framework, look at three recent appeal cases and update my checklist after each case.

## What are relocation cases?

Relocation cases are disputes about the exercise of parental responsibility in relation to the final issue in the list of major long-term issues, as defined in s4 of the FLA -

> ***"major long-term issues "*** *, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:*
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> *(a) the child's education (both current and future); and*
>
> *(b) the child's religious and cultural upbringing; and*
>
> *(c) the child's health; and*
>
> *(d) the child's name; and*

***(e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.***

There are a few things to note about the wording.

1. <u>The focus is on changes to living arrangements</u>

   Parents with the primary care of children are often stunned to discover there are barriers to moving themselves when the other parent has previously exercised a choice about taking up opportunities to spend time with the children. "But he moved to Townsville for work for 6 months and didn't ask my permission!"

2. <u>The issue is "significantly more difficult"</u>

   Short distance moves will probably not fall into the definition. A move to another suburb may require a rearrangement of changeover and/or times but for an application to succeed restraining the other parent's freedom of movement, your first step is being satisfied that spending time needs to be significantly more difficult. In short move cases, the moving parent should present the move as a fixed happening and propose suitable changeover and time adjustments.

3. <u>The focus is on the difficulty of spending time</u>

   Advances in technology and ease of electronic communication have meant that communication between parents and children is readily available and cost effective no matter what the distance. It is the actual spending time together which is the focus of the parental responsibility decision – the conversations while driving, in the corridor, after school, over dinner and at sport and other activities. The focus here is on the time to parent, to tuck children into bed, to read books together, to cook together and simply enjoy each other's company. It is very important not to gloss over or underestimate the significance of what will be lost from the relationship

with the 'left behind' parent or your client will be seen as 'self-focussed' rather than 'child-focussed'.

4. The focus is on the child

The definition does not refer to difficulties for a parent in spending time with a child but focuses on difficulty for a child. It may be more difficult for a parent to travel to see a child but that is not the issue. The focus is on the amount of time and travel the child will undertake and the effect of the reduced opportunities to spend time on the child, not on the parent.

5. The time is with a parent

There are many people in children's lives who are important to them. The restriction on the other parent's freedom of movement is focussed on the impact on the child's time with a parent, not siblings, grandparents, aunts and uncles, cousins, best friends and class-mates. The impact on the relationship with these significant others is relevant to the best interests of the child but the primary focus is on time with the other parent.

Note the recent case of *Masson v Parsons* [2019] HCA 21 regarding whether a man who was the biological father of a child born out of an arrangement between friends was a 'sperm donor' or a parent.

In the joint judgment, *Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ* state at [54]

> *"…the ordinary, accepted English meaning of the word "parent" is a question of fact and degree to be determined according to the ordinary, contemporary understanding of the word "parent" and the relevant facts and circumstances of the case at hand. To characterise the biological father of a child as a "sperm donor" suggests that the man in question has relevantly done no more than provide his semen to facilitate an artificial conception procedure on the basis of an express or implied understanding that he is thereafter to have nothing to do with any child born as a result of the procedure. Those are not the facts of this case. Here, as has been found – and the finding is not disputed – the appellant provided his semen to facilitate the artificial conception of his daughter on the express or implied understanding*

> *that he would be the child's parent; that he would be registered on her birth certificate as her parent, as he is; and that he would, as her parent, support and care for her, as since her birth he has done. Accordingly, to characterise the appellant as a "sperm donor" is in effect to ignore all but one of the facts and circumstances which, in this case, have been held to be determinative."*

**Some Recent Cases**

***Masson v Parsons* [2019] HCA 21, [2018] FamCAFC 115, [2017] FamCA 789**

The headline recent relocation case is *Masson v Parsons* [2019] HCA 21. Whilst the issue which took the case all the way to the High Court was the question of whether the biological father was a parent for the purposes of the FLA, the case began as a relocation case before Cleary J in Newcastle.

The applicant, known as Robert Masson in the published material, is the biological father of the child B born in 2007. He is identified as the father on her birth certificate. B's mother, known as Susan Parsons in the published material, was a longstanding friend of Robert's. B was conceived by artificial insemination conducted privately and informally by Robert and Susan in late 2006. At that time, Susan was in the early stages of a new relationship with Margaret. Margaret and Susan eventually married in New Zealand in 2015. Susan bore a second child C in 2008 through an American donor sperm program and Margaret became the other intended parent of C by operation of law. By the time of trial, both children called Robert "Daddy" and he was heavily involved in their care, their school and their activities. Robert did not, at the time of trial, live with his partner of 6 years, Greg, but the children regularly spent time with him. After the birth of B, Robert had moved from Sydney and all the parties lived and worked in Newcastle. In early 2014 Susan and Margaret starting talking about wished to move with the 2 children to New Zealand, where Susan was born, to be closer to her elderly parents.

At a mediation in July 2014 the parties had agreed that both girls spend alternate weekend time and mid week time with Robert. Legal proceedings were commenced by Robert in June 2015 in response to the girls' time with him having

been reduced from around February 2015. Susan filed her response in October 2015 and sought that Margaret be declared the intended parent for B and substituted for Robert on B's birth certificate as the other parent. She sought the relocation to New Zealand. Her Honour noted that each of Robert and Margaret had standing, in any event, to apply for parenting orders pursuant to s65C (c) "any other person concerned with the care, welfare or development of the child."

Unfortunately, despite Consent Orders in late October 2015 permitting travel to New Zealand, in November Susan and Margaret were stopped at the airport by the AFP. The matter returned to Court in March 2016. By this time, Margaret was seeking orders prohibiting Robert from holding himself out to be parent of either child, from attending school or from initiating contact with the families of the children's friends and from holding himself out to be a parent on school committees.

By September 2016, the children had spent some time in New Zealand for Susan's mother's 80th birthday, including a brief enrolment in school and Susan's father had died. Margaret then applied to reduce Robert's time to 3 hours on a weekend supervised by Susan and to restrain Robert from bringing the children into contact with Greg and his extended family.

At [109] Cleary J said –

> *"I interpret the Application in a Case as both an expression of frustration and as a tactical move in the legal proceedings which was not to any extent child focused."*

The relationship between the parties continued to worsen. The family report was released late 2016. An application by Susan and Margaret to have an adversarial expert appointed was refused. The children were not made available to spend Christmas 2016 with Robert. They travelled to New Zealand in early January 2017 and again in late January 2017 when Susan's mother died.

In her reasons Cleary J includes a couple of warnings for lawyers drafting affidavits and cross-examining witnesses. It is very important to have a case concept and be consistent with it.

> *"[224]. Strangely, Robert was strongly cross-examined about having insisted on the amniocentesis testing which Susan underwent. He agreed he had argued for it and said Susan too had wanted the test. It appears to be entirely inconsistent with the proposition that Robert had agreed to be a sperm donor only."*
>
> *"[226]. Again strangely Robert was cross-examined on the basis that he showed some lack of commitment to the child on occasions. For example, he was asked about the fact that he had had no overnight time in 2007. The child was not born until September 2007 and his response was that he had popped in for short walks with her due to her age and had made telephone calls, which seems appropriate."*
>
> *"[227]. The proposition was put that after C was born, Robert came around when it suited him. The question was put as if the respondents had wanted him there every day and were disappointed by his irregular attendance."*

Susan and Margaret's case was that Robert was a sperm donor with no parental rights or responsibilities. It is therefore inconsistent with their case to criticise him for wanting a test during pregnancy and criticise him for a lack of attention to the child after she was born. The issue appears to have become confused due the general tendency to think of anything you can say to criticise the other party rather than to think carefully about whether to criticise the other party. Faced with inconsistent evidence in affidavit material, counsel at trial is put in an impossible situation. Ignore the inconsistencies and have them exploited by the other counsel or cross-examine on them and risk the Judge noticing the inconsistencies herself.

At trial, Robert proposed that the children live with Susan and Margaret but that they be restrained from changing the children's residence from the current area. He sought 3-way shared parental responsibility, 5 nights a fortnight and half holidays, special days and travel orders. He had alternate orders for time if the move to New Zealand was permitted. His alternate position of living arrangements, described as a last resort if the Court found that the children would otherwise lose their relationship with him, was for the children to live with him and spend 5 nights per fortnight with Susan and Margaret.

Her Honour was satisfied the alternate position was genuine, not strategic for litigation purposes. She stated -

> *"[34]. I accept that Robert had become sufficiently concerned about being closed out of the lives of the children that he proposed residence with himself as a fallback position."*
>
> *"[35]. I accept that his true preference was for the children to live with Susan and Margaret unless doing so was considered by the Court to be at the expense of losing their relationship with him. It was in my view a realistic position to take and not intended to be inflammatory."*

Susan and Margaret's proposals at trial included declarations of parentage and removal of Robert from B's birth certificate, parental responsibility shared between the two of them only, moving to New Zealand in 2018, specific restraints on Robert describing himself as a parent, permitting Greg and his extended family to refer to the children as family members, taking photos of the children in the bath or partially or fully naked, posting photos of the children on social media and restrictions on attending at school and taking the children out of Australia. Until the move to NZ they proposed alternate weekends and once in NZ one weekend a term plus school holiday time. All time was to be at Robert's mother's residence where Robert lived at trial, not at Greg's place or at the new home they planned to make together. They also proposed counselling for Robert to assist him in acknowledging that "he is not a parent of either of the children".

The Independent Children's Lawyer supported parental responsibility to Susan and Margaret only with information to Robert and restraints on changing B's birth certificate The ICL proposed 5 nights a fortnight and half holidays, opposed the move to New Zealand and supported overseas travel for the children.

The trial ran for 5 days in March and April 2017.

In order to assess the issue of who was the other legal parent of B, her Honour considered s60H of the FLA. Due to the wording of s60H, she was required to find whether Susan and Margaret were in a de facto relationship at the time B was conceived and whether all 3 parties consented to an artificial insemination procedure. She found that Susan and Margaret were not yet in a de facto relationship at that time. She therefore found that Margaret was not a legal parent of B. Her Honour found that Robert had agreed not only to provide sperm to father B but also to take on the responsibilities of parenthood with Susan, without

knowledge of a de facto relationship with Margaret at that time. In the ordinary meaning of the word parent, he was B's parent and that had not been displaced by s60H.

Her Honour set out at length the deterioration in the relationship between the adults, which she found was caused by a concern by Susan and Margaret about the legal status of Robert as a parent of B and the intrusion they now felt into their life as a family.

On the issue of relocation to New Zealand, her Honour listed the positives such as the family connections and lifestyle benefits but ultimately refused the relocation due to the loss the children would experience in their relationship with Robert, his mother and Greg (and his extended family).

Her Honour found -

> *"[458]. One outcome may well be that the respondents Susan and Margaret feel a sense of relief that they have put distance between themselves and Robert in order toachieve the family group of four they want "without interference". The evidence supports that there would be such a reaction.*
>
> *[459]. This attitude would have the most adverse effect on the children. It would represent a devaluation for the children of members of their family who have great emotional significance for them.*
>
> *[460]. I am not confident that the children's relationship with Robert, Mr H and Ms F would be maintained at its present level if the children go to live in New Zealand."*

In relation to the capacity of the adults to provide for the needs of the child, her Honour found -

> *469. The only limit on capacity in my view is that Susan and Margaret have allowed themselves to overlook the fact that Robert, Mr H and Ms F are part of the children's family and that although they would like to define their family one way – two adults, two children – the children have not experienced life that way and delight in their relationships with Mum and Margaret, Dad and Greg and Nana.*

Not surprisingly, Susan and Margaret appealed the decision.

Judgment had been handed down on 3 October 2017. Cleary J heard a stay application, which she allowed only in part on 18 December 2017. The Full Court (Thackray, Murpy and Aldridge JJ) heard the appeal on 22 March 2018 and delivered their decision on 28 June 2018.

Murphy and Aldridge JJ concurred with the judgment of Thackray J in allowing the appeal on Ground 1, a new point argued by Senior Counsel for Susan and Margaret that –

> *"[6]…her Honour, who was sitting in New South Wales, erred in failing to recognise that s 79 of the Judiciary Act 1903 (Cth) required her to apply the Status of Children Act 1996 (NSW) ("the State Act"). The effect of that Act is that the respondent is conclusively presumed not to be B's father."*

His Honour also allowed Ground 2, which asserted a failure to follow the relevant legal principles and/or the relevant legislative pathway in determining [the appellants'] application to relocate to New Zealand with both of the children.

> *94. Although I accept it would have been necessary in any event for her Honour to consider, in relation to all parties, all of the factors in s 60CC, that does not pardon the error of treating a person as a "parent" who legally is not a "parent".*
>
> *"[96]… I acknowledge though that her Honour approached the matter from the perspective of the children, both of whom regarded the respondent as their father. I accept her Honour may therefore have arrived at the same result even if she had realised that, at law, the respondent was not a "parent" of either child. However, it is unsafe to speculate."*

The case was therefore remitted to the Family Court for rehearing by a different Judge and the parties was granted Costs Certificates for the appeal and the rehearing. It was not, however, reheard.

Not surprisingly, Robert sought and was granted leave to appeal to the High Court.

The High Court heard argument on 16 April 2019. As set out above, on 19 June 2019 the High Court reversed the decision of the Full Court, found that the Federal *Family Law Act* did cover the issue and that there was no scope for the application of the state law. The High Court agreed with the findings of Cleary J that Robert

was a parent of B and as a consequence the decision stands restraining Susan and Margaret from relocating the residence of the children to New Zealand. Susan and Margaret were also ordered to pay Robert's costs of the High Court appeal. In an interview for the Good Weekend magazine of The Age on 28 July 2019, Robert tells his story (and it is interesting reading) It is reported that he sold a meticulously renovated Georgian house to pay for his legal costs.[1]

The case certainly had interesting legal issues as well as the relocation question but it does have lessons for us in preparing and running relocation cases.

- Be careful and counsel your clients about taking an approach which is critical of the other parent. It can be very helpful if you can show that the children's relationships will be supported even if a move is allowed.

- Maintain consistency of case concept. Challenge your clients if the story seems to be changing. Humans have a tendency to revisit history and adjust recollection to suit their current feelings and perceptions.

- Work with your clients (or suggest that they talk through with a counsellor) what the impact on the other parent may be. Humans have a tendency to block inconvenient thoughts and emotions when focussing on an important goal. It helps to be able to show an understanding of the impact on the other parent and on the children's relationship with them when seeking to relocate.

- Be particularly careful about cases where the move appears to be motivated by a desire to move away from the other parent. While there is no need to demonstrate a compelling reason to relocate, a malicious motivation for moving may well be relevant.

[1] 'What makes a father?': the sperm donor who asked the courts to answer this question tells his story, *Good Weekend* 28 July 2019 https://www.smh.com.au/national/what-makes-a-father-the-sperm-donor-who-asked-the-courts-to-answer-this-question-tells-his-story-20190722-p529js.html

- Be realistic in advising clients about the potential costs of litigation. Not everyone can afford to be a High Court test case.

- It is of course easier in retrospect, but consider the options which may have been available to the parties for resolving the case, without the high stakes litigation.

## *Wendland & Wendland* [2017] FamCAFC 244

This appeal was decided 21 November 2017. The Full Court (Ainslie-Wallace, Ryan & Aldridge JJ) dismissed an appeal from the Federal Circuit Court against a decision of Judge Vasta in which he made an order in broad terms -

> *"That the Child be permitted to relocate to wherever the Mother is posted by the Australian Defence Force"*

At the time of the hearing below, the timing or location of the mother's next posting was not yet known. By the hearing of the Appeal, it was known that she was to be posted to another state in 2018 and therefore the appeal hearing was expedited. Judge Vasta heard the case on 6 and 7 September 2017 and gave judgment the next day. The Full Court heard argument on 16 November 2017 and delivered judgment 5 days later.

The Full Court dismissed the Appeal but the parties did agree to add the words into the order "within the Commonwealth of Australia" to restrict the potential for the child moving overseas (as this was not intended).

The child was born in 2013 so was only 4 years old when the case was heard. The parties separated in March or April 2016. The mother had served in the Australian Defence Force for 18 years since the age of 20. The parties met and lived in Queensland where the mother served with the ADF. In mid 2016, the mother was told she would be posted to another town from January 2017 and she applied to Court. His Honour refused the mother an interim relocation in December 2016 and the posting did not proceed. At the time of trial, the mother had reached the limit of 7 years in a posting and could expect to be moved every 2 years or so. The child was living with the mother but spending time with the father after daycare 4

nights a week and overnight 3 nights a fortnight. She was able to provide a map of prospective posting locations, none of which were an easy drive from the current town.

The family report writer recommended refusing the relocation on the basis of the possible, as yet unknown, impact on the child's relationship with the father. His Honour did not follow the report recommendations.

There were 11 broad ranging grounds of appeal.

For our purposes the most interesting grounds were considered under the question –

> **Was the decision of the primary judge so unreasonable as to amount to an error of law and did the primary judge err by, in effect, giving a "blank cheque" to the mother? (Grounds 1 and 2)**

The Full Court stated -

> *"26. Thus, the family report writer opined that without knowing the proposed destination, the effect on the relationship between the father and the child, for example, could not be determined and therefore he would recommend against the order proposed by the mother.*
>
> *27. It was, however, also clear that in his first report the report writer was not in favour of a relocation to Town G, saying he was "unable to endorse [the child's] removal from [Town H], and the father and others".*
>
> *28. All this led his Honour to conclude:*
>
> > *80. I have carefully considered all of the submissions that have been made. It does seem to me that if I accepted all of the submission made of the father, it would be very hard to ever justify any child relocating from where the child grew up, especially if there is no risk to the child and especially if the presumption had not been displaced.*
> >
> > *81. But Courts order relocations all the time, as long as such a relocation is in the best interests of the child. The main argument that the father advances is that his relationship with [the child] will necessarily be diminished if relocation is allowed.*
> >
> > *…*
> >
> > *84. There is little doubt that allowing [the child] to relocate will diminish the quality of the relationship between the father and [the child]. There will be a loss if [the child] moves away from [Town H]. On*

*the evidence before me, I have no doubt that the mother will do all that is needed to ensure that there is still a meaningful relationship between father and daughter.*

*85. One of the big factors I have looked at is that the mother has come from a prejudiced upbringing. Through sheer willpower, she has forged a career with the ADF to the extent that the ADF is now part of who she is. The ADF was a part of who she was when she met the father. The ADF was a part of who she was when she conceived [the child]. The ADF was a part of her when she gave birth to [the child], and the ADF is still part of her now as she continues to care for [the child].*

*86. If the mother were to leave the ADF, I am of the view that it would change who the mother is. It is not simply a case of the mother facing unemployment and having to look for another job. It is actually changing the very being of who the mother is. Such a profound change in who the mother is would also result in a profound change for [the child]. This is in keeping with what [the family report writer] has already observed in the parts of the report that I have already quoted.*

*87. As it is at the moment, the mother is a fantastic role model for [the child]. She is illustrating to [the child] that an individual does not have to succumb to their environment. An individual can rise above their surroundings and empower themselves. This aspect of the mother is a cornerstone of the relationship of the mother as with [the child].*

*88. While there is no doubt that whatever decision I make will change the relationship that [the child] has with her mother or her father, I am of the view that the very core of the relationship between [the child] and her father will not change, despite them being separated by distance. While the relationship will not be optimal, it will still be meaningful.*

*89. This is in contrast to the relationship between the mother and [the child], which would change drastically if the mother were to leave the ADF and, in effect, change her very identity.*

*29. The conclusions of his Honour at [80], [81], [83] and [84] clearly take into account the evidence of the family report writer and in particular his opinion that a relocation would diminish the relationship between the child and the father and paternal grandmother. In the balance of those paragraphs the primary judge set out his conclusions as to the other matters he took into account. As the primary judge then said at [90], this was not an easy decision and there were negatives with any decision that might be made. On balance, his Honour considered that the child's best interests were served by maintaining her relationship with the mother as a member of the ADF.*

The Full Court also noted at [34] that his Honour was well aware of the nature of the order he was making ("the Blank Cheque") but gave consideration to the fact

that it was not in the child's best interests for there to be a fresh litigation every 2 years or so when the mother might be given a fresh posting.

Things to note from this case are –

- Trial judges do not have to accept the opinion of the Family Report writer. They do need to consider the opinion but it is just one piece of evidence. Be very wary of this point if you are proposing or considering settlement of a relocation (or any other parenting) case.

- The exercise is weighing the proposals of each parent and it is very common for them to be considered finely balanced in a relocation case.

- Orders do not have to be specific and you do not have to have a definite proposal in place to apply (but there should be a good reason for not having a developed proposal).

- These are discretionary judgments and it is very difficult to win appeals against discretionary judgments unless the Trial Judge is so far out of the range of reasonable discretion or has otherwise fallen into an error of law.

- Sometimes the Appeal Court can move quickly, so if you have a suitable case, make the application for expedited hearing.

***Babcock & Waddell* [2019] FamCAFC 129**

This is a recent case in which the Full Court (Strickland, Ryan & Aldridge JJ) dismissed an appeal from a Family Court decision of McClelland J made 30 April 2018 allowing the mother to relocate the child from Sydney to Perth. The appeal was heard on 31 October 2018 and judgment delivered on 31 July 2019.

The parties had met and commenced cohabitation in Perth in 1995, then the father moved to Sydney for work. After a short separation in 1997, the mother moved to Sydney and joined the father living with his parents. The mother alleged domestic

violence during the relationship. The father conceded verbal and physical altercations. The father used crystal methamphetamine, at times on a daily basis from 2000 to April 2010. The child was born in 2006 and the mother was her primary carer. In July 2010 the father moved to Perth again for work and the mother and child joined him. By August 2010 the parties had finally separated after an argument which became violent. The mother and child moved in with the maternal step-grandfather in Perth. The mother obtained an Interim Family Violence Restraining Order in Perth in August and the father returned to Sydney a few days later. He applied to the Federal Magistrates' Court in Sydney in October and ex parte interim orders were made requiring the mother to return the child to Sydney. Her stay application was unsuccessful and she eventually withdrew the appeal she filed, instead amending her response in December to permit her to live in Perth with the child. The father obtained a recovery order in January 2011 but orders made at the same time provided for the child to live with the mother in Sydney and spend 5 nights per fortnight with the father. This arrangement, varied to 6 nights continued until 2014 and the proceedings were discontinued in 2012. The father repartnered and had a son and a daughter from that relationship. In 2014, the father applied again and the mother again applied to relocate to Perth.

The trial was heard in September and October 2017. By the time of the hearing the child had been diagnosed with OCD and the mother was seeking an assessment for her regarding ADHD. Orders were made permitting the relocation, for reasons based on the emotional support the mother would have in Perth and concerns about her mental health. The father appealed raising 3 grounds alleging errors of principle or approach and weight issues.

What is interesting about the case for our purposes is that the trial judge took a series of questions from an English relocation case and asked and answered them in assessing the parties proposals.

Per Strickland J -

> *[54]. Then, after extensive consideration of the legislative provisions and the evidence of the parties, his Honour relevantly came to the specific issue that the parties had put before him, namely, "Should the mother be permitted to relocate to Perth with the child?" (see p.55 of the reasons for judgment).*

*55. In determining that question, his Honour noted once again that the focus of the proceedings is on the best interests of the child in the circumstances of the case before him, and indicated that in addition to applying the legislative provisions, he considered certain questions arising from an English decision of Re: TC and JC (Children: Relocation) [2013] EWHC 292 ("Re: TC and JC (Children: Relocation)") to be relevant, namely:*

> *337. …*
> *a) Is the application genuine in the sense that it is not motivated by some selfish desire to exclude the father or other person from the child's life?*
>
> *b) Is the application realistically founded on practical proposals both well researched and investigated?*
>
> *c) What would be the impact on the applicant, either as a single parent or as a new spouse or partner, of a refusal of a realistic proposal?*
>
> *d) Is the other parent or person's opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?*
>
> *e) What would be the extent of the detriment to the father and his future relationship with the child if the application were to be granted?*
>
> *f) To what extent would that detriment be offset by the extension of the child's relationships with the applicant's family?*

Strickland J concluded -

*68. It is readily apparent that his Honour applied those factors as a means of assisting in the task of determining what was in the best interests of the child (see, eg, [337]). They were not applied in substitution for the factors in s60CC of the Act, although there is a significant overlap between the two. Thus, I can see no error here by the primary judge.*

In his separate judgment, Aldridge J also addresses the use of the English decision and cautions against it but also found no error with the reasoning of the Trial Judge. He restates the law in Australia and reminds us that a parent seeking to relocate with a child does not have to show compelling reasons.

*"124. Nonetheless, I consider that the specific questions posed by Mostyn J do not entirely accord with the principles to be applied in Australia.*

*125. In Australia, the Court must determine what is in the best interests of the child by considering the matters set out in s 60CC(2) and (3) of the Act. True it*

*is, that this includes "any other fact or circumstance that the court thinks is relevant" (s 60CC(3)(m)) but this does not readily admit the introduction of a new set of principles to be applied.*

*126. In particular, proposition (b) and, to some extent, (a) and (d), as posed by Mostyn J, tend to suggest that a parent seeking to move with the child must establish that he or she has a sound, justifiable and reasonable reason for doing so. That is not the position in Australia.*

*127. In AMS v AIF (1999) 199 CLR 160 ("AMS v AIF"), Kirby J said:*

> *145. Fourthly, the applicable legislation is enacted, and the relevant discretions exercised, for a society which attaches high importance to freedom of movement and the right of adults to decide where they will live. That is doubtless why courts have expressed themselves as reluctant to make orders which interfere in the freedom of custodial (or residence) parents to reside with the child where they wish, at least where such parent is the unchallenged custodian or has been designated the sole guardian of the child. One of the objects of modem family law statutes (including FLA 1975 and FCA 1975) is to enable parties to a broken relationship to start a new life for themselves, to control their own future destinies and, where desired, to form new relationships, free from unnecessary interference from a former spouse or partner or from a court. Courts recognise that unwarranted interference in the life of a custodial parent may itself occasion bitterness towards the former spouse or partner which may be transmitted to the child or otherwise impinge on the happiness of the custodial (or residence) parent in a way likely to affect the welfare or best interests of the child. This said, the touchstone for the ultimate decision must remain the welfare or best interests of the child and not, as such, the wishes and interests of the parents. To the extent that earlier authority may have suggested the contrary, it has now, properly, been rejected. (Footnotes omitted)*

*128. His Honour also said:*

> *191. First, to impose upon a custodial (or residence) parent the obligation to demonstrate "compelling reasons" to justify relocation of that parent's residence, with consequent relocation of the residence of the child, is not warranted either by the statutory instructions to regard as paramount the welfare of the child or by the practicalities affecting parents. Parents enjoy as much freedom as is compatible with their obligations with regard to the child. The freedom continues, including with respect to their entitlement to live where they choose. At least in the case of a proposed relocation within Australia, the need to demonstrate "compelling reasons" imposes on a custodial parent an unreasonable inhibition. It effectively ties that parent to an obligation of physical proximity to a person with whom, by definition, the personal relationship which gave rise to the birth of the child has finished or at least significantly altered. (Footnote omitted)*

*129. Gleeson CJ, McHugh and Gummow JJ expressly agreed with that statement (at[47]).*

*130. Kirby J made the same point again in U v U (2002) 211 CLR 238 saying:*

> *144. The implications of adopting the "alternative proposal": Treating the wife's refusal to abandon her child and her expression of willingness (if necessary) to stay with the child in Australia as an "alternative proposal" requires, in effect, that parent to show "good" or "compelling" reasons to relocate, given that doing so will always make it more difficult (and in some cases virtually impossible) for physical contact between the other parent and the child to be maintained. Such an approach stacks the cards unfairly against the custodial/residence parent. It is precisely the approach held to have been erroneous in AMS.(Original emphasis)*

*131. At [82], Gummow and Callinan JJ, with whom Gleeson CJ, McHugh and Hayne JJ agreed, said:*
*…The trial judge and the Full Court were sensitive, and rightly so, to the wish and right of the appellant to live and work wherever she desired.*

*132. It is to be recalled that orders which provide for a parent, as opposed to a child,to reside in a particular place are made only in exceptional circumstances (Sampson & Hartnett (No. 10) (2007) FLC 93-350).*

*133. The questions posed by Mostyn J tend to obscure that fundamental freedom and are more likely to divert a judge tasked with applying the Act from applying the relevant statutory considerations, rather than assist. It follows that the principles set out by Mostyn J must be approached cautiously in Australia, if at all.*

For our purposes, the reminders from this very recent appeal are –

- What is required in a relocation case is a careful assessment of the competing proposals. This should be done in a way which doesn't give greater weight to the "no change" proposal, usually raised in the alternative.

- Parents who wish to move do not have to demonstrate compelling reasons (but it is very important anyway to show how well thought out and child focussed the proposal is – even if the child focus is the long term benefit to the child of living with a happier, emotionally supported parent).

- Be careful to frame your orders sought around the residence of the child, not the parent.

- Don't try and be too clever with cases from other jurisdictions. You might lead your judge into error and your client into an appeal.

**Revisiting my Conclusion from 2017**

Relocation cases continue to feature heavily in the work of the Courts and of family lawyers

- I have chosen 3 interesting appeals. There are others.
- There are interesting first instance decisions in both courts. Have a look on austlii.edu.au
- Talk to your colleagues, some cases do resolve at mediation - saving clients from the trauma and expense of litigation – with some parents agreeing to stay and others agreeing the other can go.

Prepare them well, whether you are for the departing parent or the one who may be left behind.

- Don't be caught with a shifting story – look for the inconsistencies yourself – even if it means having a junior barrister go through mountains of text messages before you file affidavits (or possibly before you file proceedings).
- Start a meaningful chronology early in your file and update it with the third column showing the location or source of the information.

Tell your story well.

- Put your client's case.
- Don't exaggerate and embellish.
- Keep the narrative flowing.

Focus on the quality of relationships rather than the quantity of time.

- Acknowledge that time will never be the same.
- Focus on how the other relationship will be fostered (or damaged) after a move.

Be alert to issues of family violence and how they may have affected the positions

of the parties.

- When alleging family violence make it clear that you are bringing examples rather than all incidents and state the facts clearly from your client's perspective without "opinion".

And think carefully before allowing your client to embark on an appeal of a discretionary judgment.

And fasten those seatbelts, keeping your eye out for the emergency exit …