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 …