

International Relocation

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The San Andreas fault of family law

- The promise of autonomy
 - Kirby J in *AMS v AIF*: “One of the objects of modern family law statutes... 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.”
- The continuing ties of parenthood
 - Gummow and Callinan JJ in *U v U*: The reality is that maternity and paternity always have an impact upon the wishes and mobility of parents: obligations both legal and moral, the latter sometimes lasting a lifetime, restrictive of personal choice and movement have been incurred.

Relocation overseas

- Almost always mothers who want to relocate
- Two main reasons:
 - Returning home
 - Moving with a new partner
- Law is the same as for domestic moves but
 - Distance a major factor
 - Cost
 - Immigration rights
- Relocation cases are just parenting cases
 - Murphy J in *Fitzroy* (2009): A “relocation case” is not a specific sub-category of parenting case and no principles specific to such cases apply. Such cases are simply cases in which parenting orders are sought in particular factual circumstances.

Application of the law in international relocation cases

The High Court on relocation

- *AMS v AIF* – no need for compelling reasons
 - best interests of child trumps freedom of movement
- *U v U* - examine father's capacity to move as well
- *MRR v GR* - reasonable practicability in s.65DAA(5) can include the economic and social context for shared care.
- The s.65DAA issue
- The s.60CC issue

The s.65DAA issue

- Only arises if there is ESPR
- The logical problem in *McCall and Clark (2009)*
- (a) consider whether equal time (or substantial and significant time) with both parents would be in the child's best interests;
- (b) consider and weigh up an equal time (or substantial and significant time) regime against all the factors having advantages for the child in the relocation proposal including considering the matters in s 65DAA(5); and then
- (c) consider whether an order should be made for equal time (or substantial or significant time) in one location, or for the child to reside with one parent in a distant location, with such other orders as would maintain the benefit of a meaningful relationship for the child if appropriate to do so.

Understanding McCall & Clark

- The analysis required by *McCall and Clark* is obviously most relevant in cases where there is already some form of shared care in the existing location from which one parent wishes to move
- Also relevant where one parent seeks a shared care order.
- Shared care in mother's preferred location
- Shared care in current location
- But if parents wish to live in different places, arguably shared care is not reasonably practicable. So really action is with s.60CC.

The real test in relocation cases

- Will the move have such an adverse impact upon the relationship between the child and the non-resident parent that permission to relocate ought to be refused?
- Gummow and Callinan JJ in *U v U*: 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.”

Parental freedom of movement

- *Adamson & Adamson* (2014), the Full Court said:
- The Court must be sensitive to the wishes and rights of parents to live and work wherever they desire...These rights, and the right of freedom of mobility of a parent, only defer to the paramount consideration of a child's best interests where those interests would be so adversely affected as to justify such interference; and then the interference is legitimate only to the extent that it is necessary to avoid such adverse effects.
- The Full Court went on to say that each parent's fundamental right to choose where they lived and worked should be respected.
- Cited by the Full Court in *Vontek & Vontek* [2017].

Distance and the burden of travel

- *Adamson* and *Vontek* were small distances within NSW.
- Even destinations in Asia involve at least 8 hours on a plane.
- Travel to the endpoint may involve a change of plane and then further travel by road.
- Journey to the Eastern States of the US or to Europe could mean 26-28 hours travel time.
- Many international relocations refused because of the impact of distance on the father-child relationship.

Meaningful relationship

- *Kenneth and Kenneth* (2007) - mother refused permission to return with a 3-year-old child to her South American country. None of the objects and principles of s.60B could be met.
- *Grella and Jamieson* (2015) Move to Europe refused. Child nearly 5. Parents didn't live in same State. Father had a longstanding history of illicit drug use, an admitted history of anti-social behaviours and had been convicted of criminal offences. Repartnered with new child.
- Full Court upheld Hogan J, reiterating what it had said in *Goode and Goode*:
- "...there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with children..."

But what about Skype?

- Full Court in *Banks & Banks* (2015)
- We accept that significant weight should be given to the benefit to the child of having a meaningful relationship with his father (as well as with his mother). We also accept that it may be difficult, if not impossible, to establish and maintain such a relationship without there being regular physical contact. While the mother proposes that the father have almost daily contact with the child by Skype, we accept this is no substitute for face-to-face time.

Factors to consider in international relocation cases

Can the father relocate also?

- Hayne J in *U v U*: “it must not be assumed that one parent (the father) cannot move and that the mother must, in every case, subordinate her ambitions and wishes, not to the needs of the child, but to the wishes of the father to pursue his life in a place of his choosing.”
- The issue is not whether the father *will* relocate The question is whether he *can* do so: *Jurchenko and Foster* (2014). It was appropriate that the father be cross-examined on whether he could in fact relocate to the town where the mother wanted to live.
- But NB immigration issues
- What if mother is wanting to get away from father?

Reasons for relocation

- In theory, not relevant
- In practice, hugely relevant in international relocation cases
- These cases are often extraordinarily hard
- Relocation is bound to have a seriously adverse effect on father-child relationship if he cannot move also
- *Noirot and Lamereaux (2008)* : “Were it not for the mother’s current state of depression and more importantly the prospect of her progressing into severe depression, I would have concluded that the best interests of the son dictated that the mother not remove him from Australia at this time.”

The age of the child/ren

- Judges typically reluctant to allow relocation where child very young
- With older children/teenagers, longer intervals can still maintain the relationship
- As the children grow older they can manage longer periods of time away from one parent.

Proposals for contact

- Dad visiting child – airfares, accommodation, car hire, cooking and cleaning materials in apartment
- Child visiting Dad – must be accompanied by a parent unless can fly unaccompanied
 - Two airfares
 - Will Mum need to fly back for her work?
 - Costs of staying in Australia while child visiting Dad?
 - Costs can be exorbitant
- Flying unaccompanied: 5 yrs old +, same airline. Changing planes? Emotional readiness?
- Burden of travel long distances.

The pattern of past involvement by the father

- The uninvolved father
- The proprietorial father
- The abusive father
- Expert evidence on the quality of the parent-child relationship
- How close is the child to the father?
- Is Dad a realistic primary caregiver?

Children's likely adjustment to the move

- Going home for mother
- Leaving home for child
- Leaving friends
- Locational adjustment
- Relational adjustment
- E.g. Helena who moved to New Zealand when she was nearly 5. Interviewed at age 8, said she missed her father “thousands time more than the universe.”
- Much depends on the closeness of the father-child relationship.

Conclusion

- Important to reality test early on – both in proposing and opposing relocation
- Consider carefully the option of the father moving – no-one is confined to where they happen to be when the music stops
- Relocation cases are almost always 100% about adult interests
- Try to hear the voice of the child in all of it.