



**SUBMISSION TO THE FAMILY LAW COUNCIL  
REGARDING THE INQUIRY INTO RELOCATION OF CHILDREN  
IN FAMILY LAW**

**Prepared by Ms Adiva Sifris, Dr Sarah Middleton,  
Mr Ross Hyams and Ms Vicky Kirmos**

**Introduction**

Court orders regarding the relocation of children after parental separation generate a great deal of emotion, particularly for the parent whose contact with his or her child is altered or whose freedom of movement is curtailed. Australian families are part of a highly mobile society, often with emotional and cultural connections either interstate or overseas. Once residence and contact orders are made or agreed to, extraneous factors may influence where parents and/or children live, resulting in litigation. More often than not, women are the primary care givers and residence parents.<sup>1</sup> Preventing their movement may hinder their social, psychological and economic advancement and perpetuate a cycle of poverty. As the child's best interests are intrinsically linked with the residence parent's well being and are promoted in an environment free from conflict and disharmony, the residence parent's ability to parent effectively is a legitimate concern.<sup>2</sup> However, in a world reflecting a trend in gender-neutral parenting and shared parenting, men are becoming more actively involved in, and taking greater responsibility for, the upbringing

---

<sup>1</sup> See Australian Bureau of Statistics, Household and Families, 1301.0 Year Book, Australia, 2002. <<http://www.census.gov.au/Ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/7fe024c77150f392ca256b350010b3f3!OpenDocument>> (accessed 23 March 2006). Patrick Parkinson & Bruce Smyth, 'When the difference is night and day: Some empirical insight into patterns of parent-child contact after separation' Paper presented at the 8<sup>th</sup> Australian Institute of Family Studies Conference, Melbourne, 2003. <<http://www.aifs.gov.au/institute/afrc8/papers.html#p>> (accessed 23 March 2006). Bruce Smyth and Irene Wolcott, 'Why study parent-child contact?' in Bruce Smyth (ed), *Parent-Child Contact and Post-Separation Parenting Arrangements* (2004) Australian Institute of Family Studies, Report No 9.

<sup>2</sup> *B v B: The Family Law Reform Act* (1997) 21 FamLR 676, 10.42-10.43.

of their children. This is reflected in the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* ('the Bill') with its emphasis on equal shared parental responsibility. However, it is the reality of women in a majority of cases having residence of children, and fathers wishing to be more actively involved, which needs to be carefully balanced.

Relocation cases are assessed against this background, with each case judged on its own merits and, as with all orders involving children, with the best interests of the individual child being the paramount consideration. If the Bill achieves its aims, resulting in a significant increase in shared parenting, relocation will take on a different aspect. That is, it may become more difficult to characterise relocation disputes as always involving the 'residence' parent seeking to relocate and the 'contact' parent opposing the relocation. Instead, the dispute may involve two residence parents. The possibility that the parent seeking to relocate could relocate without the children, but maintain reasonable contact with the children who remain residing with the other parent, becomes a more realistic option. In these cases, the right of the child to maintain meaningful involvement with both parents will weigh more heavily in the balance in assessing where the best interests of the child lie.

Given that it is uncertain whether or not the reforms introduced by the Bill will effect post-separation patterns of parenting, this submission supports the adoption of a wait-and-see approach. The question of whether relocation laws will need to be reformed as a consequence of the legislative changes made by the Bill can only be assessed when the social impact of the Bill is known. Changing the law of relocation at this stage is premature.

However, it is suggested that the Bill's proposed amendments to the *Family Law Act 1975* with the emphasis on equal shared parental responsibility, equating in practice to time allocation of children between parents, will place an unreasonable onus on a parent. In order to relocate it will be necessary to show 'compelling reasons'<sup>3</sup> for doing so. In

---

<sup>3</sup> *Holmes and Holmes* (1988) 12 FamLR 103.

short, the proposed amendments will mean that relocation will be less of an option – a situation that may not be in the child’s best interests.

This submission addresses the following consultation questions:

**Paragraph 2.1, Page 4**

**If the Family law Act was to refer to ‘relocation’, it is likely to be necessary to define this term. The question then arises as to how would relocation be defined for this purpose?**

*It is not necessary to define relocation.*

Specific reference to ‘relocation’ in the *Family Law Act* would serve no clear purpose. The difficulty that judges face with relocation cases is not in deliberating whether the proposed move is intra state, interstate or overseas. Relocation case law suggests this is easily discerned. The difficulty is in the exercise of their discretion in deciding how best to promote the child’s interests as pragmatically and realistically as possible, knowing full well that such cases generate enormous emotional responses and their outcomes leave one parent feeling greatly disappointed.

Pre and post *Family Law Reform Act 1995* relocation cases reveal that the court is not concerned with defining relocation. Instead its focus is directed at the practical implications of its decision to permit or prohibit a parent from moving and the significant implications of how a ‘lack of contact’ or ‘reduced contact’ with the other parent will affect the best interests of the child. It is also recognized that while the best interests of the child are the primary consideration the court also takes into account the interests of the parents in the child’s life.<sup>4</sup>

Under the current legislation, relocation orders are ‘parenting orders’ within the meaning of section 64B. They are determined in accordance with the child’s best interests, in light of the objects and principles of section 60B, and the factors set out in section 68F(2). It is

---

<sup>4</sup> *AMS v AIF and AIF v AMS* [1999] HCA 26, 144 (Kirby J); *U v U* [2002] HCA 36, 159 (Kirby J) and 170 (Hayne J).

not necessary to define relocation because the proposed section 60CC and the amended objects provision in section 60B, do not prevent relocation cases from being determined in the same manner. In this sense, they do not constitute a distinct category of orders nor would they benefit from being classified as such. As the Court in *B v B: The Family Law Reform Act (1997)* (*'B v B'*) stated:

[R]elocation cases are not a special category. They are governed by the provisions of Part VII in the same way as any other case relating to parenting orders...<sup>5</sup>

Thirty years of case law has yet to raise concerns about relocation cases which either a definition or a 'special category' in the *Family Law Act* would alleviate.

### **Paragraph 3.9, Page 8**

**Please consider formulating a definition of the “best interests of the child”.**

*It is not necessary to formulate a definition of the “best interests of the child”.*

The concept of the child's best interests is open to criticism, as being vague and too broad and resulting in the unpredictability in judicial decision making and the furtherance of litigation. As convenient a tool as it may appear at first glance, a definition of the child's best interests cannot accommodate the diverse nature of the interests appropriate for a particular child, from a particular background and at a particular time of development. For a proper assessment of what best promotes the interests of a particular child the common denominator of what constitutes a child's best interests cannot be restrictive.

Therefore, section 65E which provides that the child's best interests are paramount must continue to be understood in terms of the achievements of certain goals which are deemed socially and morally beneficial for the child. These goals enshrined in section 60B are amplified by the considerations in section 68F(2). They act as standards by which the court evaluates the child's best interests because they offer individual meaning, to individual children, in individual circumstances. In determining the child's best interests under the new section 60CC, the court is obliged to consider how the 'Primary

---

<sup>5</sup> *B v B: The Family Law Reform Act (1997)* 21 FamLR 676, 9.60.

considerations’ of ‘the benefit to the child of having a meaningful relationship’ with both parents and of the need to protect the child from harm are to be achieved, and then, further consider the criteria listed under ‘Additional considerations’.

In attempting to give effect to the principle of the child’s best interests, the court is concerned to provide individual justice and to gain for the child the best opportunity for quality of life. Inevitably, this requires the application of flexible and wide judicial discretion. But that is not to say that discretionary powers are absolute. They are subject to guidelines or criteria derived from case law or legislation, as well as the scrutiny of a superior court.<sup>6</sup> If the process creates outcomes which are unpredictable but ultimately establish what is in the best interests of an individual child, such outcomes are to be preferred to those on a legal conveyer belt.

### **Paragraph 3.36-37, Page 15**

**Please consider whether the Family Law Act should be amended to provide specific criteria for making relocation decisions. In considering this broad question, please also consider commenting on the following consequential questions:**

- **Whether relocation cases should become a special category of cases that require separate treatment (contrary to the approach that has been adopted by the High Court and the Full Court of the Family Court), and if so, why?**
- **Which of the criteria should be mandatory and which should be relevant considerations? Are there any factors that should not be taken into account?**
- **If some guidelines were to be inserted in the Family law Act, should they be based on the principles from case law outlined above?**

*Relocation cases should not become a special category of cases that require separate treatment nor is there a need for guidelines to be inserted in the Family Law Act.*

As mentioned above, relocation cases, from the freedom of movement cases<sup>7</sup> prior to the *Family Law Reform Act 1995 (Cth)*, to those in recent years, do not raise matters that cannot be accommodated by the existing legislative framework or the proposed

---

<sup>6</sup> *Norbis v Norbis* (1986) 161 CLR 513, 536 (Brennan J), 519 (Mason and Deane JJ).

<sup>7</sup> *Craven v Craven* (1976) 1 FamLR 11 was indicative of the trend followed in *Holmes and Holmes* (1988) 12 FamLR 103; *Fragomeli and Fragomeli* (1993) 16 FamLR 698 and *I and I* (1995) 19 FamLR 147.

amendments. Nor are the matters they raise fundamentally distinct from those of residence, contact and specific issues so that they warrant being in a special category.

Thus, the High Court and the Family Court have rightly focused on ensuring that relocation decisions, as all decisions made under Part VII, are based on the paramountcy principle, the merits of the individual facts of the case and the exercise of wide judicial discretion. To this end, the Family Court in *A v A: Relocation Approach* ('*A v A*')<sup>8</sup>, incorporated the High Court's binding principles into a system of workable guidelines. However, such guidelines should not be inserted into the *Family Law Act* but should remain as part of the court's function to apply the law. Therefore, it is highly relevant that the High Court in *AMS v AIF; AIF v AMS*<sup>9</sup> ('*AMS v AIF*') removed the application of the *Holmes* test<sup>10</sup> and in *U v U*, held in reference to the guidelines in *A v A*, that the court is neither obliged nor able, in every case, to follow the court's procedure in the manner established by its guidelines.<sup>11</sup> Individual justice and the paramountcy principle demand otherwise.

#### **Paragraph 4.4 Page 16**

**Do you have any comment on the Committee's recommendation?**

**The Committee recommends an additional provision to be included in the *Family Law Act 1975* (the Act) that should a parent wish to change the residence of a child in such a way as to substantially affect the child's ability to either:**

- **Reside regularly with the other parent and extended family, or**
- **Spend time regularly with the other parent and other relatives,**

**The court must be satisfied on reasonable grounds that such relocation is in the best interests of the child.**

*This provision should not be included in the Family Law Act.*

In view of the comments in the previous sections it is suggested that this provision is not included in the *Family Law Act*. Notwithstanding the principle from the High Court's

---

<sup>8</sup> *A v A: Relocation Approach* (2002) 26 FamLR 510.

<sup>9</sup> *AMS v AIF and AIF v AMS* [1999] HCA 26.

<sup>10</sup> *Holmes and Holmes* (1988) 12 FamLR 103, 114.

<sup>11</sup> *U v U* [2002] HCA 36, 80.

decision in *AMS v AIF* that a parent wishing to relocate does not need to show ‘compelling reasons’,<sup>12</sup> the proposed provision is strongly reminiscent of the arguments put forward by counsel for the father in *B v B*. In effect, these arguments are at the heart of the new Bill.

Counsel for the father in *B v B* proposed that the legislation intended that the rights of children predominate unless there was evidence to suggest that the current situation was contrary to their best interests. It was acknowledged that as inconvenient as that might be, it applied to both parents, so that the court could prevent the contact parent as much as the residence parent from relocating. Further, the parent wishing to relocate had an evidentiary onus to persuade the court that the children’s rights should be changed and as such to demonstrate that the continuance of the children’s existing rights would be contrary to their best interests. Counsel submitted that in relocation cases a parent was a “hostage to fortune” as the rights of children were superior to and extinguished any right which a parent as a private individual could claim. In short, the mother who sought to relocate, showed in counsel’s opinion, an inability to put her children’s needs ahead of her own and to continue to carry out her duties and responsibilities which section 60B required of her.<sup>13</sup>

The Bill’s emphasis on joint parental responsibility shifts the notion of shared parenting (a notion already endorsed by the existing provisions in Part VII and subject to the paramountcy principle) from the general position, that children should have regular contact with both parents, to the more specific position, of how much time each parent has with the child. In doing so, it extends this object in the existing section 60B provision and elevates it to a ‘primary consideration’.

As mentioned previously, the new section 60CC will anchor an assessment of a child’s best interest under the ‘additional considerations’ on to the ‘primary consideration’ of the child having ‘a meaningful relationship’ with both parents, with ‘meaningful’ being

---

<sup>12</sup> *AMS v AIF and AIF v AMS* [1999] HCA 26, 47 (Gleeson CJ, McHugh and Gummow JJ), 191 (Kirby J), 209 (Hayne J).

<sup>13</sup> *B v B: The Family Law Reform Act* (1997) 21 FamLR 676, 6.1-6.7.

squarely understood in terms of a child spending ‘substantial and significant time’ with a parent. In this sense, the child’s right to spend ‘substantial and significant time’ with a parent will be given considerable weight.

However, as Kirby J stated in *AMS v AIF* and the Family Court has held consistently, the child’s best interests are the paramount but not the sole consideration. In giving proper effect to the child’s best interests the court must consider the legitimate interests of the parent, in as far as these interests impact on the child and enhance the child’s well being. Often the child’s best interests coincide with the residence parent’s interests and the proposed relocation benefits both. Therefore, an obligation for ‘compelling reasons’ to justify the proposed relocation only reinforces the notion that there is a rule that separated parents must continue to live close to each other for the benefit of their children. As Kirby J stated, ‘there is no such universal rule.’<sup>14</sup> Further, it reinforces the notion that there is a rule that the child’s right to maintain personal relations and direct contact with each of the parents on a regular basis, is absolute. Again, as his Honour stated, ‘the rule is not absolute.’<sup>15</sup>

Accordingly, the provision raises a number of concerns, some of which have been mentioned already. First, the provision places an unreasonable onus or evidentiary burden on the parent wishing to relocate. In effect, ‘reasonable grounds’ equates to ‘compelling reasons’. Some reasons may be considered more ‘reasonable’ than others and given particular weight. In practice, this may elevate the ‘reasonable grounds’ to the same position as the child’s best interests despite section 60CA making it clear that the child’s best interests are the paramount consideration. Therefore, the parent wishing to relocate will need to show why the child’s ability to reside regularly or to spend time regularly, with the other parent and extended family needs to be disturbed, and why it is necessary to do this for the child’s best interests. Further, where there is equal shared parenting in place or a substantial time allocation with both parents, then the provision implies that, the parent wishing to relocate will need to show why the status quo should be disturbed.

---

<sup>14</sup> *AMS v AIF and AIF v AMS* [1999] HCA 26, 144.

<sup>15</sup> *AMS v AIF and AIF v AMS* [1999] HCA 26, 146.

Second, the provision implies that ‘regular’, ‘residence’ and ‘time’ must involve face to face contact and be as frequent as possible. This is confirmed by the provision on the ‘substantial and significant time’ which a child spends with a parent in section 65DAA(3).

Third, by including the ‘extended family’ and ‘relatives’ in the equation, the provision increases the hurdles which the parent seeking to relocate must endeavour to jump. This is discussed further at paragraph 5.42.

In short, the proposed provision would undo a well entrenched belief in relocation cases that regular contact does not mean frequent, but must be as appropriate as necessary in order to meet the child’s short term and long term interests and that the quality and continuity of the relationship is to be preferred to the quantity of time a child spends with a contact parent. The proposed provision would in fact succumb to ‘parochial attitudes’ which Kirby J warned were out of place in a modern and highly mobile society<sup>16</sup> and would ‘impose serious deprivations upon the human rights of custodial parents, who are mostly women.’<sup>17</sup> However, setting aside these issues, the proposed provision offers little in the way of establishing what is in the child’s best interests that cannot be established under section 60CC and in that, if for nothing else, it is redundant.

**Paragraph 5.22, Page 25**

**Do you think that the Family Law Act should be amended to provide that it is necessary for a contact parent to apply to a court to amend the contact orders if the residence parent opposes the contact parent’s relocation?**

*The Family Law Act should not be amended in this way.*

It is highly questionable whether the court should impose on a parent who, for various reasons, may not want to or is unable to have contact with his or her child the

---

<sup>16</sup> *U v U* [2002] HCA 36, 164.

<sup>17</sup> *U v U* [2002] HCA 36, 161.

requirement to do so.<sup>18</sup> It cannot be regarded as being in the child's best interests to force an unwilling parent to exercise contact. It is highly doubtful whether a court would consider a failure to exercise contact as a contravention of a parenting order. The requirement would be almost impossible to enforce and result in litigation flourishing and in court orders which, in practice, would be unworkable. Contact parents who are relocating would simply ignore such an impracticable provision.

**Paragraph 5.42, Page 29**

**Please address how you think the law should take account of the interests of other people affected by relocation decisions.**

The rights of grandparents and extended family members<sup>19</sup> are well-established and are sufficiently referred to in the new Bill.<sup>20</sup> An intact family rarely takes into account the interests of other people affected by its decision to relocate as decisions reached by the family are designed, more often than not, to enhance the well being of its members and advance their social and economic interests. It is unreasonable to impose this extra burden on the separated parent who wishes to move for similar reasons. It is also unclear whether the interests of other people affected by the relocation should be on an equal par with the interests of the parent opposed to the relocation. How many people's interests are to be permitted to have an impact on the child's best interests? Where do we draw the line?

---

<sup>18</sup> *B v B: The Family Law Reform Act (1997)* 21 FamLR 676, 10.64.

<sup>19</sup> Schedule 1 section 5 subsection 4(1) states:

relative of child:

(a) in Part VII, means:

- (i) a step-parent of the child; or
- (ii) a brother, sister, half-brother, half-sister, step-brother or step-sister of the child; or
- (iii) a grandparent of the child; or
- (iv) an uncle or aunt of the child; or
- (v) a nephew or niece of the child; or
- (vi) a cousin of the child; and

(b) in subsection (1AB), has the meaning given by subsection (1AC).

<sup>20</sup> s. 60B(2)(b); s. 60CC(3)(b)(ii); s. 60CC(3)(d)(ii); s. 60CC(3)(f)(ii); s. 63C(2) and (2A).

**Paragraph 6.45, Page 42**

**Are you aware of any Australian social science research that should be taken into account in the development of the law in Australia?**

The ramifications of equal shared parenting for relocation have yet to be tested and there is little empirical research on the effects of shared residence on children or whether it is in their best interests. However, statistics from the Australian Institute of Family Studies report<sup>21</sup> indicate that the success of the Government's reforms will ultimately depend on the attitudes of the parents, the dynamics of family relationships and socio-economic variables. The report highlights the need for parents to be co-operative, flexible in their negotiations and responsive to the need for each to be involved in the life of their children. The key to successful shared parenting arrangements is dependent on high levels of communication and adequate to high socio-economic resources. However, as relocation cases clearly confirm, parents with such resources seldom need the assistance of the court.

**Paragraph 6.50, Page 42**

**Do you think that the Family Law Act should provide presumptions either for or against relocation of children with a residence parent, creating a legal onus on the other party to displace the presumption?**

*The Family Law Act should not provide presumptions either for or against the relocation of children with a residence parent.*

Decisions affecting children should be subject to the paramountcy principle. As each case is different, it needs to be determined on its own unique facts. Presumptions undermine this and are incompatible with a case by case assessment. In practice, where shared residence is in place, a legal onus will translate into a presumption that the parent wishing to relocate cannot move. For parents bargaining in the shadow of the law this may shift the balance of power during mediation. Also, it may prevent a parent who feels unable to

---

<sup>21</sup> Bruce Smyth (ed), *Parent-Child Contact and Post Separation Arrangements* (2004) Australian Institute of Family Studies Report, No 9.

displace the onus to continue to live in circumstances which are detrimental to their well being and not in their children's best interests.

Case law reveals that invariably the residence parent is the mother and repeated reasons for relocating, such as repartnering, family support and financial security although neither 'compelling' nor creating an onus, emerge as better reasons and suggest that the social and economic implications of gender continue to be given considerable weight in the court's decision making process. These cases also acknowledge that parents who feel trapped, controlled and financially dependent and in circumstances limiting their opportunities to form new relationships, to tap into the emotional and physical support of the extended family, to find better employment or to advance their career, will not be able to parent effectively and this in turn will impact badly on their children. The residence parent's happiness is important because it impacts on the child's best interests. Thus, a presumption which potentially derails the court's focus to decide, in the proper exercise of its discretion, whether in the particular circumstances it suits the best interests of the child to permit the parent to relocate the child's residence, is to be rejected.

The aim of the new Bill is to encourage parents to actively engage in the care and support of their children. It seeks to make parents pro-active in sharing parenting and co-operative in their parental responsibilities. However, any presumption attempting to simplify what is by its very nature complex is incompatible with individual justice and distracts attention from what best promotes the child's best interests.

## **Conclusion**

Familial relationships in intact families are demanding and complex. They are even more so with separated families. In today's society it is becoming the norm for people to partner, have children, separate, repartner, have children and so the cycle continues. Blended families are becoming more prevalent and diverse family formations more acceptable. Family Court judges deal with such complexities on a daily basis and there is ample proof of this in relocation case law. It is the nature of families and familial relationships which demand that a one size fit all solution for relocation cases, is

inappropriate and if imposed is unlikely to resolve the issues they raise. The proposed amendments may seek to redress what some fathers perceive to be an imbalance in the Family Law system in favour of mothers, but it is imperative, in the area of relocation, that this is not achieved at the expense of their children.