

Journal of Family Law and Practice

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Welcome to Volume 1 issue 2 of the Centre's new online journal.

This is the first of two issues collecting the key papers from our 2010 Conference on the three linked topics of International Child Abduction, Forced Marriage and Relocation. For this issue we have chosen to collate most of the Relocation papers from the conference and to present them as a specialised collection of the latest thought on this difficult area of Family Law. Lord Justice Thorpe inaugurated this theme with his first article for us in issue 1 of the present Volume of the Journal and it is interesting to see how the gathering at our Conference from 30 June to 2 July 2010 of the world's experts on this particular topic sparked further creative thought: the published Conclusions of the breakout discussion groups at the conference may be found on our website and here in the articles written by some of those experts is their reasoning behind the results of those very productive sessions.

Our next issue, Number 3 in the present Volume, will take the same approach to International Child Abduction.

Meanwhile we continue to aim to bring together the perspectives of both academe and practice in key areas of Family Law – that is of academics and practitioners in all sections of the profession, including the judiciary as well as the referral Bar and their instructing lawyers – and remain delighted to consider articles for future issues from specialist experts, researchers and practitioners from around the world who can contribute to our mission to gather together the available corpus of international work on contemporary specialist topics and are now seeking articles for the journal's first issue of 2011, to be published in March 2011, which will focus on the third strand of our 2010 conference, Forced Marriage. Submission guidance for authors is to be found at the end of the present issue, after the last article.

Frances Burton

Editor, Journal of the Centre for Family Law and Practice

Relocation – The Continued Search for Common Principles

The Rt. Hon. Lord Justice Thorpe

The Problem

The frequency and intensity of parental disputes over relocation are a relatively modern phenomenon. They are a by-product of communication and travel technology exemplified by the wide-bodied jet and the worldwide web. National frontiers are lowering as we create a global world. As we survey the future we can see that this is a continuing process. The next generation of jets will double capacity.

In our region the steady and continuing expansion of the European Union enlarges the choice of countries to which every EU citizen has the right of entry and residence.

Add to all that the separation factor. In many of our jurisdictions relationships are easily formed and children follow. But the relationships are as easily unformed and the family fractured. In such a painful process one of the parents may well at some level need to distance himself or herself physically as well as emotionally from the other. Dissension results and the contested relocation case is born. Judges in several jurisdictions have said that these are some of the most difficult cases that a trial judge has to decide.

Furthermore the relocation case is but an aspect of the international movement of children. There is the lawless movement or abduction. Then there is the judicially sanctioned movement following a successful application to relocate. From the standpoint of the determined parent there is thus a choice of routes. Nothing more directly engages International Family Law than the cross-border movement of children. International Family Law has developed a common standard to prevent or deter the wrongful removal of children, thanks to the creation and rapid development of the 1980 Hague Convention. The Convention enshrines the principles to be applied internationally to ensure the swift return of abducted children.

The question that this article poses is whether common principles can be agreed internationally for the determination of applications brought by the parent who

has chosen to seek judicial permission rather than to remove wrongfully. Again, viewed from the perspective of the unsettled parent, an informed choice between the lawful and the wrongful in part depends upon knowing what test the judge will apply to the application for permission and accepting that test as reasonable.

With that introduction I turn to consider in some detail the origin and development of the test applied in our jurisdiction and its principled foundation.

The English Approach

The Court of Appeal in London established its principles comparatively early in the course of the social developments referred to above. It was on the 24 July 1970 that the court delivered judgment in the case of *Poel v. Poel* (1970) 1WLR 1469. It was dealt with in the day: only 1 unreported case was cited in argument and none in the three extempore judgments. The three judges concurred that the mother's application to relocate to New Zealand had to be governed by the paramount factor of child welfare. However the court concluded that the welfare of the children was most likely to be achieved by recognising and supporting the function of the primary carer. This concept was expressed by Sachs LJ in the following passage: -

"When a marriage breaks up, a situation normally arises when a child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given.

Any such interference may, as my lord has pointed out, produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the

child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

The subsequent development of this approach was strongly stated in judgments of Ormrod LJ in cases such as *A v. A* (1979) 1FLR 380, the unreported 1981 case of *Moody v. Field* and the later case of *Chamberlain v. De La Mare* [1983] 4FLR 434. The last case is important because Balcombe J at first instance had refused the mother's application, doubting whether prior decisions of the Court of Appeal had sufficiently regarded the statutory requirement to give paramount consideration to the welfare of the child. The mother's appeal was allowed. Ormrod LJ emphasised that the court in Poel had not weighed the interests of the adults against the interests of the children but had rather weighed the effect on the children of imposing unreasonable restraints on the adults. Ormrod LJ explained the principle in characteristically unlegalistic English:-

"The reason why the court should not interfere with the reasonable decision of the custodial parent, assuming, as this case does, that the custodial parent is still going to be responsible for the children is, as I have said, the almost inevitable bitterness which such an interference by the court is likely to produce. Consequently, in ordinary sensible human terms the court should not do something which is, *prima facie*, unreasonable unless there is some compelling reason to the contrary. That I believe to be the correct approach."

These forthright judgments provided a clear standard against which practitioners could measure prospects of success in individual cases and which trial judges could apply to the mounting stream of contested applications. Many of their decisions were challenged in the Court of Appeal on the facts or on the weighing of the discretionary balance but the underlying principle was unchangingly upheld. After thirty years of precedent it is easy to see that relocation applications have been consistently granted by the London Court of Appeal upon the application of the following two propositions:

- (a) the welfare of the child is the paramount consideration; and
- (b) refusing the primary carer's reasonable

proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children.

Of course in the majority of cases the diminution in contact to the other parent has been equally recognised as detrimental but then outweighed in the discretionary balancing exercise.

In so stating the proposition, note that I have given the primary carer the female sex. That is, of course, because in the overwhelming majority of cases considered by the Court of Appeal, the primary carer has been the mother. This factor requires further consideration but clearly the propositions apply equally to cases in which the primary carer is the father.

A landmark event in the law of England and Wales was the commencement of the Human Rights Act 1998 importing into our domestic law the European Convention of Human Rights. Most relevant to family proceedings is Article 8, establishing the right to family life. Inevitable then was the submission that the developed principles determining relocation applications were inconsistent with the ECHR and particularly the Article 8 right of the left behind parent to family life. That challenge came to the Court of Appeal in the case of *Payne v. Payne* [2001] Fam 473. The submission failed. In my judgment I noted that decisions of the Strasbourg Court inevitably recognised the paramountcy of the welfare of the child in any situation in which the rights of individual family members conflicted. By way of instance in *L v. Finland* (application number 25651/94), the court stressed that "the consideration of what is in the best interests of the child is of crucial importance."

I also pointed out that Article 2 of Protocol 4 (a protocol not yet ratified by the United Kingdom) provides the European citizen with "the right to liberty of movement and freedom to choose his residence". Thus Protocol 4 is a useful reminder that it is not one but everyone in a family who enjoys rights. The function of the court is not only to uphold the rights of the individual but to balance the rights of the individuals when they conflict. A cornerstone objective of the European Union is also to ensure the European Citizen's right to movement within the Union.

The judgments in *Payne v. Payne* consider specifically two categories of case in which the court has recognised that the proposed relocation is consistent with the welfare of the child. The first category is the repatriating mother whose only attachment to England came with the marriage and went with its breakdown. The second

category is the mother who has married again to a man whose roots or whose employment incline him to some other jurisdiction.

Later it was suggested that a third category was emerging, which was labelled the life-style choice category. Typically the applicant mother, with the right to reside in any EU jurisdiction, asserted that she and her child would greatly benefit from living out a Spanish/French/Italian/Greek idyll (the chosen locations are invariably Mediterranean and usually not far distant from the sea). It was then submitted that the principle in *Payne v. Payne* had no application to these cases, which were portrayed as whimsical or even capricious choices. That argument was rejected in the case of *B (Children)* (2004) EWCA Civ 956. In my judgment I emphasised the importance of applying the same principle in all relocation decisions and of avoiding invitations to categorise. Clearly in a life-style choice case the applicant faces a harder task in satisfying the judge that the refusal of her application would profoundly destabilise her emotionally and psychologically.

The Welfare Test in Relocation Cases and its Foundation

Let us now consider the elasticity of the welfare test in the context of relocation cases. Almost without exception the applicant is the mother and the primary carer of the child. The respondent father may oppose the application by criticising her proposals as unrealistic, or urging the educational and cultural deficit of the proposed move or, most usually, emphasising the diminution in frequency and overall quantity of his contact were the move sanctioned. In the paradigm case the court weighs the impact on the mother of refusal against the diminution in the father's contact. This balance is struck in the context of the welfare of the child. Thus the harmful impact on the mother is taken to be harmful to the child: the diminution in contact is a deprivation of the child's right to relationship with his father. In recent years father's rights groups have singled out this principle for particular criticism, contending that it is matricentric and discriminatory. Given that the principle is not derived from expert evidence nor from many research studies in this jurisdiction the challenge cannot be lightly dismissed.

The emergence of the principle needs to be seen in the context of social tides that were moving some forty years ago. The judgments reflect the law as it then was.

Parents contended for custody, care and control and access orders expressive more of parental power than responsibility. The parent who held the custody had a consequential right to decide major issues concerning the upbringing of the child including the country of habitual residence. In an age of sharing of responsibility and even residence perhaps the *Poel* edifice wobbles.

The points made in the preceding paragraph merit elaboration. Fortuitously the eleventh edition of Rayden on Divorce and Family Matters was published in October 1970 under the editorship of Joseph Jackson QC assisted by editors including Margaret Booth, then still a junior. In his preface Mr Jackson stated the law to be as at 24 October 1970 and acknowledged assistance on Chapter 27 from Mr Peter Singer and on chapter 26 from Mr Nicholas Wall. (How young we all were then.) Mr Jackson stated how wide ranging were the responsibilities of a custody order. Indeed, as defined in Section 21 of the Matrimonial Proceedings and Property Act 1970, "custodyincludes access to the child".

In Chapter XXIV Mr Jackson wrote "the divorce court has power to award custody of a child to one party with care and control to the other. But this practice has been criticised since it has been said that it is normally better for a child to have one authority in its daily life and that practical considerations as, for example, consent to an operation by the person having legal custody showed how undesirable a split order could be".

Later in relation to matrimonial proceedings in the Magistrates Court he wrote:

"Whereas under the Guardianship of Infants Acts custody may be awarded to one parent and care and control to the other, there is no power under the 1960 Act to make such a split order. But an order awarding custody jointly to both spouses should not be made, save in exceptional circumstances, as in the event of disputes arising over questions relating to the child the matter has then to be referred back to the Court."

In relation to applications to remove a child permanently out of the jurisdiction Mr Jackson noted the very recent decision in *Poel* (then reported in 114 Sol.Jo.). He thus extracted the ratio of the case:

"held, that the dominant factor was that the wife had been granted custody and that the custody arrangements had worked well, so that leave should be given."

I share that analysis. It stares out from the first

sentence of the passage that I have cited above to the effect that on divorce a child, instead of being in the joint custody of both parents must of necessity being in the custody of a single parent. I emphasise those words "of necessity".

On that analysis if the ratio for the decision now seems archaic so too may be the principle.

The concept of the parent empowered by the custody order remains active in Europe. For example in Sweden, Germany, and Austria the parent with a sole custody order may relocate without the consent of the other parent or the court's blessing.

Furthermore the UNC.RC had not been conceived when *Poel* was decided. In recent years its Articles are much more influential in any discretionary welfare judgment. Weight must surely be given to Art. 9(3):-

"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest."

Equally pertinent are the provisions of Article 12(2):-

"for this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings effecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

That sub-paragraph is of course an appendage to Article 12(1) assuring the right of the reasonably mature child to express views in all matters affecting welfare.

It is important that we do not lose sight of the responsibilities and duties that attend the exercise of rights. The mother who bears the responsibilities that flow from the grant of a residence order acquires a broad discretion as to how she discharges those responsibilities, always subject to the overriding power of the court whose supervisory role is there to be invoked by the other parent. Moreover the court recognises that the primary carer's discretion extends to choosing the location of the children's home within the jurisdiction, even if that choice precludes weekly contact or terminates an already established pattern of weekly contact. It is only in the most exceptional cases that the court will intervene to prevent the primary carer's proposed relocation within the jurisdiction: see in *Re E (Imposition of conditions)* (1997) 2FLR 638.

Furthermore whilst the court's jurisdiction is limited

to England and Wales Section 13 of the Children Act 1989 provides: -

"(1) Where a residence order is in force with respect to a child, no person may -

(b) remove him from the United Kingdom; without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made.

(3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes."

Therefore a proposed move to Northern Ireland does not require an application under Section 13 whilst a proposed move to the Irish Republic does. How then do we develop a different principle for the determination of relocation applications that just exceed the borders of the United Kingdom? Differences that might be thought relevant are all of degree and not of kind. As such they contribute to the exercise of the discretion in individual cases. They do not require the development of a different principle.

Finally any re-evaluation of the established principle must be in the context of the court's powers, duly recognising their limitations. For the court's power to prohibit adult freedom in order to promote the interests of the child is a limited power. In the field of relocation the court may only prohibit the primary carer from a move that is incompatible with the welfare of the children. Even in that instance it is only the exit of the child that the court can prohibit. (However in reality a mother does not, save in the rarest instances, abandon her child and go alone. This reality is often exploited by the respondent to the relocation application who will seek to say: well if you are resigned to remaining, the prospect cannot be that distressing. Judges are not generally impressed by that tactic.)

Equally the court does not possess a power to require the other parent to relocate in order to ensure the best possible outcome for the child. There are cases, albeit rare, in which the court concludes that the reduction in contact, the basis of the respondent's opposition, would be overcome were he to join the move. An example of such a case in our court is *Re: S* [2005] 1FCR 471.

In such cases the court has not the power to order the

result that would best serve the interests of the child. The court's powers in relation to the parents are only derived from the residence order, the contact order and the responsibilities that they impose. Powers deriving from the contact order are limited. The court cannot order a reluctant parent to spend time with a child or a committed parent to move in order to make weekly contact possible.

On that analysis the court's power to restrict the mother's right to choose the location of the family home is derived from the residence order and the responsibilities that it imposes. Any interference with that right would be unprincipled unless the welfare of the child plainly required it.

Other Jurisdictions

The principle applied in England and Wales I believe to be well founded and consistent with our statutory law. However it is clearly not universally or perhaps even generally shared by other jurisdictions. The challenge for the international community is to develop a principle of general application. In an ever shrinking world uniformity of approach would help parents to take responsible decisions and would reduce the scope for subterfuge and strategic manoeuvring. Indeed in a real sense uniformity of approach would support the efficacy of the 1980 Hague Convention and reduce the frequency of wrongful removals and retentions.

Whether or not there is sufficient International consensus in this most difficult area is a question that has come to the fore last year and this.

The following factors can be clearly identified:-

- (i) There is no common approach, even within the jurisdictions of the common law. In the United States case law shows wide internal divergence. In the field of family law California is a highly influential jurisdiction. Even within that state the leading cases demonstrate swing from permissive to restrictive approaches and also how much individual decisions have been influenced by social science research literature. In Canada, Australia and New Zealand the emphasis has been on balancing factors that directly bear on child welfare, rejecting the heavy emphasis that this jurisdiction has placed on the impact of refusal upon the primary carer.
- (ii) The recognition of a divergence of approach is nothing new. At the International Judicial Conference for judges of the six leading common

law jurisdictions in Washington in 2000 the following resolution was passed:

"(9) Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention."

(iii) The endeavour to elevate the debate above the domestic into the realm of international family justice was almost inevitable. All the jurisdictions of the common law world share the same problem and recognise the benefits of a uniform solution. The United Kingdom endeavoured to initiate a debate at the 5th Special Commission at The Hague in 2006. Unfortunately time and procedure did not favour the attempt. In this year and last we see a strong momentum. At the Cumberland Lodge Conference for judges of the commonwealth and common law jurisdictions more time was devoted to this debate than to any other. Groundwork was done in preparation for the Washington Conference in March 2010 (convened by the Hague Conference and the International Centre for Missing and Exploited Children) when judges and experts from around the world met to discuss over the course of three days the single topic of relocation. Now we have the opportunity in this journal to progress the debate.

I have reported the outcome of the Washington Conference not only in International Family Law but in Family Law itself, since the issue is currently one of domestic family law. The report is in June (2010) Fam.Law 565. A fuller report appears in (2010) IFL 127 and 211.

At the heart of the resolutions agreed by the fifty delegates from fourteen jurisdictions attending are the factors relevant to decisions on international relocation (paragraphs 3-6 inclusive of the Declaration). I set those paragraphs out below in full:

3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against

relocation.

4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listing in no order of priority. The weight to be given to any one factor will vary from case to case:

- (i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;
- (ii) views of the child having regard to the child's age and maturity;
- (iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
- (iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
- (v) any history of family violence or abuse, whether physical or psychological;
- (vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
- (vii) pre-existing custody and access determinations;
- (viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
- (ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
- (x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;
- (xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;
- (xii) issues of mobility for family members; and
- (xiii) any other circumstances deemed to be relevant by the judge.

5. While these factors may have application to

domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law.

6. The factors reflect research findings concerning children's needs and development in the context of relocation.

Before hearing the criticisms I plead that due consideration be given to the limitations of committee drafting. The lowest common denominator factor guarantees that the text is not a matter of satisfaction to any individual on the drafting committee. It must be remembered that within the spectrum of the jurisdictions are those who have come to conclude, or whose legislators require them to conclude, that priority should be given to maintaining the contact relationship between child and parent. At the other end of the spectrum I identified Germany where the parent to whom the custody of a child has been entrusted requires neither the consent of the other parent nor the permission of the court before relocating. This seems surprising to me in the present century where so much emphasis is placed on shared parenting and the needs of the child for two engaged parents. Even in this jurisdiction in the 1960's the rights of the custodial parent to leave the jurisdiction were as circumscribed then as they are today.

Maintenance of the contact link by the relocation of both parents, a resolution that is attracting increasing judicial attention, is buried within the words of factor xii. That illustrates the delicacy of language that committee drafting demands.

(iv) There is every reason to favour a common standard adopted internationally. This could be achieved by a Convention or a Protocol made available for ratification among the member states to the Hague Abduction Convention. A relocation application is the means to a lawful removal. The Hague Convention is there to reverse an unlawful removal. States operating the Convention should support the creation of a parallel instrument standardising the factors to be taken into account in granting or refusing an application for lawful removal. I shall be disappointed if our efforts over the coming months achieve no progress towards an objective that is clearly achievable.

(v) A protocol to the 1980 Convention is being actively considered. In 2011 there will be the 6th Special Commission on the 1980 Convention. The opportunity that these developments present must not be let slip.

Have Judges been missing the point and allowing relocation too readily?

Peter Boshier*

Introduction

For judicial officers involved in relocation, such cases often rank among the most difficult to adjudicate. While cases involving child abuse or domestic violence are always incredibly tragic, the necessary judicial outcome is often clear and legislation provides useful guidance on how to proceed. In contrast, relocation cases often involve two competent and committed parents, one with sound reasons for wishing to relocate, the other with equally valid reasons for resisting the application. As a Canadian justice wrote, "Even with the very best parents, it is the area where 'win-win' solutions can rarely, if ever, be fashioned".¹ This reality, coupled with the fact that, in large part, the principles governing this area of law are judge made, often makes an obvious outcome difficult to find.

As a consequence, I see, time and again, similar facts giving rise to quite different decisions depending upon the way the Judge sees the issues and the Judge's philosophical view on the raft of issues that relocation cases throw up. The New Zealand Court of Appeal has acknowledged this difficulty in its seminal decisions of *Stadniczenko v Stadniczenko*² and *D v S*,³ noting in the latter that "differing assessments" are available and that in the end each judge will bring his or her own "perspectives and experiences".⁴ The words of Justice Frankfurter (cited by the Court of Appeal in *Dv S*) that "...reason cannot control the subconscious influence of feelings of which it is unaware"⁵ have great application in relocation cases.

Notwithstanding these difficulties, I do not consider law that lacks clarity and evenness in its approach to be beneficial. By having a variety of disparate approaches to relocation law we are doing a disservice to the families, and especially the children, at the heart of relocation applications. I believe my view is shared by many, and

there is no doubt that the international community is taking this issue very seriously. Between the 23rd and 25th of March of this year, a conference took place in Washington D.C., convened by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, and supported by the U.S. Department of State through the provision of a venue and some formidable resources. That the U.S. Secretary of State, Hilary Rodham Clinton, actively supported the Conference, probably demonstrates the international commitment and concern attaching to this aspect of the law.

The conveners of that Conference succinctly summarised the problems that we are facing on an international scale. They noted that:

"International family relocation has become a focus of concern within international family law. The ease of travel and communications in the modern world has increased the international mobility of individuals and families and increased the likelihood of such issues coming before the courts. Court involvement is necessary when a custodial parent seeking to relocate with the child faces the objections of the other parent. The question of whether the relocation of the child can be allowed, and under what conditions, needs to be determined. The difficulty of this decision for judges is compounded by the realisation that, whatever be the decision, one parent is going to suffer a loss. If the custodial parent is refused permission to relocate, he or she may have to give up plans for a new life and remain in a country against his/her wishes. If permission to relocate is granted, the left-behind parent loses the advantages and value of easy

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¹ Joan B Kelly "Relocation of Children following Separation and Divorce: Challenges for Children and Considerations for Judicial Decision-Making" (Portions of this article were presented at the World Congress on Family Law and Children's Rights, Halifax, Nova Scotia, 26 August 2009) at 1

² [1995] NZFLR 493, CA (NZ)

³ [2002] NZFLR 116, CA (NZ)

⁴ *Ibid* at para 37

⁵ *Public Utilities Commission of the District of Columbia v Pottak* (1952) 343, US, 451, 466 as quoted at para 37 [2002] NZFLR 116

access to his/her children and contact will now involve much greater cost in terms of both time and money. In addition, he or she will no longer be part of the children's community and share that experience with them.

The complexity of the issues involved and the fact that neither wishing to relocate or objecting to a relocation makes a parent wrong or any less concerned about the welfare of his or her child has resulted in different jurisdictions taking a variety of approaches to issues surrounding relocation. This of course means that the law in the area is uneven as between jurisdictions and that custodial parents are treated differently depending from what State they wish to relocate. It has been recognised that approaches to relocation also have an impact on child abduction and the operation of the Hague Convention on Child Abduction. In addition, the conditions that can be attached to orders permitting relocation bring into play questions of the enforcement of foreign orders and judicial cooperation in ensuring that the left-behind parent can exercise his or her access rights in accordance with the court's decision."⁶

It may be trite to say that we are an increasingly globalised world but, trite as it is, this is a fact that needs to be stated. Relationships are entered into through internet introductions and communication in a way that, just a few years ago, we would never have thought likely. By introducing an international dimension to the issue, an already complex problem is compounded.

With the above in mind, I intend to examine the current approaches to relocation cases, to look at emerging trends in social science evidence and suggest how we could move forward to ensure judges do not 'miss the point'.

Current Approaches Worldwide

An inevitable obstacle in our attempts to develop a universal approach to relocation applications is the reality

that many of the world's countries have different views on the role of parents and the place of children within the family. Even within common law jurisdictions such as England and Wales on the one hand, and New Zealand and Australia on the other, there are some significant differences. It is therefore worth spending some time considering the current approach to questions of relocation espoused by various countries.

New Zealand

New Zealand does not have a specific legislative section relating to relocation; rather the issue is considered a guardianship matter and is therefore governed, principally, by s44 of the Care of Children Act 2004.⁷ As a consequence any judicially determined decision must consider the welfare and best interests of the child as the paramount consideration⁸ and must take into account the principles relevant to the child's welfare and best interests set out in section 5 of the Care of Children Act 2004. This approach was recently endorsed by our Court of Appeal in *Bashir v Kacem*,⁹ a relocation case involving significant inter-parental conflict.

In that judgment, the Court paid particular attention to section 5. The Court of Appeal noted that a court should consider each of the six principles set out in section 5 to determine whether each is relevant in a particular relocation case and, having identified those principles that are relevant, should take account of them in determining the best interests of the child. The Court held that section 5 should therefore provide a framework for consideration of what best serves a child's welfare and best interests, with a partial indication of weighting as between principles.

While *Bashir v Kacem*¹⁰ is the only Court of Appeal judgment on relocation under the Care of Children Act 2004, two decisions of that Court, decided under the Care of Children Act's predecessor, the Guardianship Act 1968, remain pertinent to New Zealand's approach to relocation. These two cases, *Stadniczenko v Stadniczenko*¹¹ and *D v S*¹², both stressed that the welfare of the child is the paramount consideration.

⁶ "International Judicial Conference on Cross-Border Family Relocation – Concept Paper" (The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010)

⁷ New Zealand's primary legislation of private child law disputes

⁸ Care of Children Act 2004 (NZ)

⁹ [2010] NZCA 96

¹⁰ *Ibid*

¹¹ [1995] NZFLR 493

¹² [2002] NZFLR 116

In analysing these two cases in detail, Professor Mark Henaghan, in his article "Going, going... gone – to relocate or not to relocate, that is the question", noted that the Court of Appeal listed factors to be weighed and balanced when determining what is best for the particular child.¹³

These factors were:

1. The child's well being may lie primarily with the primary caregiver and the well being of that family unit bears on the best interests of the child. This has become known as the well being of the parent affects the well being of the child factor;¹⁴
2. The child's well being may depend on the nature of the relationship with both parents – the closer the relationship and the "more dependent the child is on it for his or her emotional well being and development the more likely an injury resulting from the proposed move will be";¹⁵
3. The reason for the move and distance of the move;¹⁶
4. The child's views;¹⁷
5. Both parents are guardians and share in the upbringing of the child that necessarily involves a right to be consulted on decisions of importance;¹⁸
6. The child's welfare is not the only consideration – freedom of movement is an important value in a mobile community but the child's welfare determines the course to be followed (quoting *J v C*, House of Lords).¹⁹ Whilst freedom of movement is recognised it cannot trump the child's welfare that is legally paramount.²⁰
7. The welfare principle is consistent with the

United Nations Convention on the Rights of the Child;²¹

8. All aspects of welfare must be taken into account – physical, mental, emotional as well as development of the child's behaviour consistent with what society expects. It is a predictive assessment. It is a decision about the future;²²
9. There must be no gender bias in deciding cases;²³
10. Decisions about relocation may be affected by the longevity of existing arrangements – "in some cases the duration of the existing arrangements and the greater degree of change proposed may require greater weight to be accorded the status quo";²⁴
11. Decisions of courts outside New Zealand are likely to be of limited assistance because of different social landscapes. "Two relevant factors of the New Zealand scene *...+ are the growth and degree of involvement of both parents in family care and a clear move in Family Court orders to ... shared care;"²⁵ and
12. Relocation cases are difficult but it is not appropriate to give specific guidelines about them.²⁶

My own view is that the passing of the Care of Children Act 2004 signalled an important change which was bound to influence the New Zealand judiciary's approach to relocation cases. I noted this as far back as 2005 where I suggested that the Care of Children Act arguably required the Court to give greater weight to retaining contact with both parents over any other consideration.²⁷ I commented then, that if this approach was adopted, relocation would generally become more difficult for the custodial parent; and that section 5 of the Care of Children Act²⁸ indicated

¹³ Mark Henaghan, "Going, going... gone – to relocate or not to relocate, that is the question" (paper presented to NZLS Conference – Family Law, Auckland, 18 September 2009) at 304

¹⁴ *Stadniczenko v Stadniczenko* [1995] NZFLR 493

¹⁵ *Ibid*

¹⁶ *Ibid*

¹⁷ *Ibid* and *D v S* at para 31

¹⁸ *D v S* [2002] NZFLR 116 at para 28

¹⁹ *J v C* [1970] AC 668, 710-711

²⁰ *D v S* [2002] NZFLR 116 at para 30

²¹ *Ibid* at para 31

²² *Ibid* at para 32

²³ *Ibid* at para 34

²⁴ *Ibid* at para 35

²⁵ *Ibid* at para 36

²⁶ *Ibid* at para 38

²⁷ Peter Boshier "Relocation Cases: An International View from the Bench" (2005) 5 NZFLJ 77

²⁸ Which states that the child should have continuing relationships with both of his or her parents

that parents should not relocate if to do so would have a detrimental impact on the relationship with the other parent.²⁹ This initial viewpoint appears to have been borne out in recent practice.

Australia

Just as New Zealand law has undergone legislative change in this area, so has Australia. Although certain fundamental legal precepts have remained constant in Australian law,³⁰ the entry into force of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) has imposed new obligations on judicial officers hearing and determining parenting disputes, including cases involving an application by a parent to move to a distant location with a child.³¹ While the process of deciding the outcome has been seen to be more complex as a consequence of the introduction of the shared parenting amendments, jurisprudence has shown the approach to be taken to involve three steps.³²

1. Make findings about the relevant section 60CC 'best interests' factors;
2. Consider, based on the section 60CC findings, whether equal time or substantial and significant time is in the child's best interests; and
3. Consider the "reasonable practicability"³³ of such arrangements.

Thus, while there are differences, the Australian approach appears to be broadly in line with New Zealand's approach; adopting a 'best interests and welfare' approach with no presumption in favour of, or against, relocation.

Canada

While there is no definition of relocation in Canadian Law, the law pertaining to relocation has been set by the Supreme Court of Canada in *Gordon v Goertz*.³⁴ As a consequence Canadian judges must follow a "best

interests of the child" approach that requires an individualised assessment of each case, without any presumption in favour of either parent or onus on them.³⁵ However, the custodial parent's views are entitled to great respect and the most serious consideration.

The inquiry is carried out having regard to all relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them. The Court provides a list of factors (or guidelines) that should be considered, including the existing custody arrangement and relationship between the child and the custodial parent, the existing access arrangement and the relationship between the child and the access parent, the desirability of re-examining contact between the child and the access parent, the desirability of re-examining contact between the child and both parents, the views of the child, the disruption to the child of a change in custody, the disruption to the child consequent on removal from family, schools and the community he or she has come to know.³⁶ The Court stated that the custodial parent's reason for moving must not be considered except in the exceptional case where it is relevant to that parent's ability to meet the needs of the child.³⁷ The Court ruled that, in the end, the ultimate question for judges to consider is: what is in the best interests of the child in all the circumstances, old as well as new?³⁸

Despite the fact-driven nature of relocation cases, certain factors have been identified as appearing to be more important than others.³⁹ These include:

1. The comparative importance of the child's relationship with the two parents;
2. The relationship of the child and the new partner of the parent who plans to move;
3. The reason for the move, necessity or benefit to the move; and
4. The behaviour of the parent who wants to move.

²⁹ Peter Boshier "Relocation Cases: An International View from the Bench" (2005) 5 NZFLJ 79

³⁰ Diana Bryant "Relocation in Australia: An Update" (paper presented to The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) at 29

³¹ *Ibid* at 28

³² *Ibid* at 30

³³ A matter that has been the subject of jurisprudence

³⁴ [1996] 2 S.C.R. 27 (2 May 1996)

³⁵ Jacques Chamberland "Judicial Approach to Relocation in Canada" (paper presented to The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) at 37

³⁶ *Gordon v Goertz* [1996] 2 S.C.R. 27 (2 May 1996) at para 49

³⁷ *Ibid* at para 48-49

³⁸ *Ibid* at para 50

³⁹ Nicholas Bala and Joanna Harris "Parental Relocation: Applying the Best Interests of the Child Test in Ontario" (2006) 22 Can. J. Fam. L. 127 at paragraph 50

England and Wales

In England and Wales, while relocation is statutorily governed by section 13 of the Children Act 1989, the principles governing the grant or refusal of applications to relocate were established in the Court of Appeal judgment *Poel v Poel*.⁴⁰ Those principles have been summarised as:⁴¹

1. The welfare of the child is the paramount consideration; and
2. Refusing the primary carers reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children.
3. In the majority of cases the diminution in contact to the other parent is also likely to impact detrimentally. The judge's task is then to strike the balance having regard to these and other welfare considerations.⁴²

Although there is neither a presumption for or against relocation in England and Wales, in practice it is rare for the court not to allow relocation by the requesting parent.⁴³

Pakistan

Relocation cases in Pakistan are decided in accordance with the Guardians and Wards Act, 1890 where the paramount consideration is the welfare of the child. Although it should be noted that, pursuant to Islamic law, a mother has a preferential right to relocate with her daughter (until she turns 12) and her son (until he turns 7). However, it has been noted that this is not an inflexible rule and most courts have retained the welfare of the child as the guiding principle.⁴⁴

Germany

While, the approach in Germany revolves around the guiding principle of the child's best interests; the interpretation given to this principle differs from the countries considered so far. In Germany the moving parent has the right to move wherever he or she wants to; domestically or internationally. Unless there is a risk of violation of the child's best interest, the respect for family life does not require joint custody.⁴⁵

In determining a relocation case; specific aspects have to be considered:⁴⁶

1. The reasons for relocation;
2. The child's social ties to the habitual residence and to the new country;
3. The child's knowledge of the language and culture of the new surrounding;
4. The individual possibilities of the child to get used to the new situation;
5. The existence of a residence permit;
6. Citizenship has no particular meaning;
7. The quality of present and future visitation rights concerning the left-behind parent and other attachment figures;
8. The child's views; and
9. The reason for relocation application.

The United States of America

The law on relocation is not uniform through all States that comprise the United States of America, with such matters more a matter for each State than Federal Government.⁴⁷ However, federal considerations, including the constitutional right to travel, suggests that a custodial

⁴⁰ [1970] 1 WLR 1469 CA

⁴¹ Matthew Thorpe "Abstract of the paper to be Presented at the International Judicial Conference on Cross-Border Family Relocation Washington, DC, United States of America (23 – 25 March 2010)" (paper presented to The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) at 96

⁴² *Ibid*

⁴³ R. Spon-Smith "Relocation Revisited" (2004) Family Law 191 at 193 in Thomas Foley "International Child Relocation Varying Approaches among Member States to the 1980 Hague Convention on Child Abduction" (Research Project, 2006) at 5 (available at <http://www.family-justice-council.org.uk/677.htm>)

⁴⁴ Tassaduq Hussain Jillani "Judicial Approach to Child Relocation" (paper presented to The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) at 90

⁴⁵ Martina Erb-Klünemann "The German Judicial Approach to Relocation" (paper presented to The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) at 44

⁴⁶ *Ibid*

⁴⁷ Peter J Messitte "Relocation of Children: Law and Practice in the United States: A Summary" (paper presented to The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) at 101

parent who wishes to relocate enjoys the right to travel and implicitly to move, which presumably entails the right to take the child with him or her.⁴⁸

Given the matter rests on State law, there are a variety of practices and presumptions but, more commonly, the presumption is in favour of the move by the custodial parent.⁴⁹ However, when courts consider the merits of claims, virtually all States, substantively speaking, follow the 'best interests of the child standard'. It is left to each State to define the specific relevant factors that define that standard.⁵⁰

Summary of Current Approaches

In summary, the varying approaches adopted worldwide have resulted in some stark differences. In countries such as New Zealand and Australia, there is no presumption in favour of the primary caregiver, and the approach adopted is based solely on the best interests and welfare of the child. Dependent upon the circumstances, this can result in a primary caregiver's application to relocate being declined if the Court takes the view that the negative effect of the relocation on the child's relationship with the other parent would be so significant that it is not in the child's interests to be allowed to relocate.

A different approach is adopted in countries including England and Wales where emphasis has been placed on the role of the primary caregiver and an acknowledgement that, normally, steps that enhance that parent's welfare will enhance the child's welfare.

Yet another approach is adopted in the United States where, in some States, there is a presumption in favour of the move by the custodial parent.

Given such a wide variety of approaches between countries worldwide, two questions can reasonably be asked; would an international instrument setting out a uniform approach be useful, and what does social science

research suggest is the 'right' approach to relocation applications?

An International Instrument?

At present, there is no international instrument that governs relocation, although it has been acknowledged that the Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Convention")⁵¹ may come close. This Convention sets out in detail common jurisdictional rules and provision for recognition and enforcement which are complementary to the provisions of the Convention on the Civil Aspects of International Child Abduction ("the 1980 Convention").⁵² The 1996 Convention framework, which is designed to replace the framework contained in the earlier Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, has also provided the inspiration for a European Community Regulation⁵³ on parental responsibility.⁵⁴ Unfortunately however, only 19 countries are presently Contracting States to the 1996 Convention.⁵⁵ The position is wholly different when it comes to the 1980 convention where in excess of 80 countries are Contracting States.⁵⁶ It follows then that when it comes to the wrongful abduction of children, a blueprint for an international response is now becoming increasingly accepted, but that an international response for relocation is proving somewhat more elusive.

What does the Social Science Evidence Tell Us?

To assist those involved in the Washington Conference I referred to earlier, a paper was presented by Dr Nicola

⁴⁸ *Ibid*

⁴⁹ *Ibid* at 97

⁵⁰ *Ibid* at 105

⁵¹ Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, (19 October 1996, entered into force 1 January 2002), available at http://hcch.evision.nl/index_en.php?act=conventions.text&cid=70

⁵² Convention on the Civil Aspects of International Child Abduction (25 October 1980, entered into force 1 December 1983), available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24

⁵³ The European Community rules are now embodied in European Community Council Regulation (EC) NO 2201/2003, *supra* note 23.

⁵⁴ William Duncan "Legal Instruments – 1980 & 1996 Conventions" (Paper presented to The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) at 160

⁵⁵ Statistic correct as at 7 September 2009. For further information please see http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=70

⁵⁶ There are 82 Contracting States to this Convention.

For further information please see http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24

Taylor and Professor Marilyn Freeman⁵⁷ that captured some essential research data and trends on the effects of relocation on children. While I acknowledge that all of this must be seen as work-in-progress, there are nevertheless some important messages in their paper. These messages fall into two broad categories, firstly the key points to emerge from research on geographic mobility in intact and separated families, and secondly, the results of empirical research evidence from common law countries on post-separation relocation disputes and adjudication trends in relocation case law.

In relation to the first, the authors noted that geographic mobility patterns in intact and separated families more generally provide a useful context within which to consider contemporary understandings of post-separation relocation disputes.⁵⁸ While the authors noted the studies to date in relation to intact families had resulted in widely varying findings and therefore need to be interpreted with caution; broadly speaking low to moderate rates of childhood relocation within intact families were seen to be able to be a positive experience for children and young people in intact families, particularly where positive maternal function and positive family relationships were evident.⁵⁹ In contrast, high childhood residential mobility was shown to be associated with a significant increased risk of smoking, alcoholism, depression and attempted suicides.⁶⁰ Most interesting the authors noted that the researchers believe that this relationship was accounted for by adverse childhood experiences, so that high childhood residential mobility may be an indicator for risk of hidden adverse experiences, rather than an indicator of negative outcomes caused by relocation.

In examining the research on separated families the authors found that separated people move considerably more than those who are single or partnered long-term, but that they are less likely than single or couple

households to move long distances.⁶¹

What I take from the paper then is that while a few residential moves can be a positive experience for a child; high mobility (which is found to be more prevalent in separated families) is usually detrimental to children's best interests and welfare, possibly because of the hidden adverse childhood experiences that may be behind the reason for the moves.

In relation to the second key point - the empirical evidence on post-separation relocation disputes and adjudication trends in relocation case law - the authors identified twelve themes as emerging from the empirical research. These were:

1. Most applicants have more than one reason for wanting to relocate, but the majority want to return home to a familiar environment where they have access to extended family support;⁶²
2. Around two-thirds of the studies participants relocated (at least initially);⁶³
3. While almost half of relocation cases settle by consent, they may settle on the basis of the general position (being informed of case law trends), rather than the position of the individual child in the particular case;⁶⁴
4. Legal costs were reported by family members as a major source of financial stress and sometimes financial ruin;⁶⁵
5. Some children endure burdensome (and often extremely expensive) travel if relocation occurs;⁶⁶
6. Inter-parental conflict is a factor in many proposed relocation cases;⁶⁷
7. Allegations of violence feature in all studies, although the divergence between the ways the mothers and the fathers described their experiences was stark and revealed strongly

⁵⁷ Nicola Taylor and Marilyn Freeman "International Research Evidence on Relocation: Past, Present and Future" (paper presented to The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010)

⁵⁸ *Ibid* at 9

⁵⁹ *Ibid*

⁶⁰ *Ibid* at 10

⁶¹ *Ibid*

⁶² *Ibid* at 16

⁶³ *Ibid*

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ *Ibid*

⁶⁷ *Ibid* at 17

gendered discourses;⁶⁸

8. Some parents would like a monitoring system to be in place following relocation proceedings to review what happens after a child has either relocated or stayed. They felt this was the only way that information about the practical effect of Court orders could be ascertained;⁶⁹
9. Mediation is not the answer for everyone, but with skilled and experienced specialist practitioners, mediation might well provide an environment in which relocation issues can be successfully addressed, in a realistic and productive manner;⁷⁰
10. The effect of the relocation decision has profound effects on the parent who 'lost'. What was also clear was that parent's willingness to recognise and encourage their child's relationship with the other parent was a powerful influence on the degree of co-operation that existed following the relocation dispute and its impact on the child;⁷¹
11. When considering the link between international child abduction and relocation, the argument that if the relocation process is too restrictive parents will simply leave the country without the required consents and, if the process is too liberal, potential left-behind parents may take the child before the court has the chance to make a relocation decision, is overly simplistic;⁷² and
12. Most children were relatively happy, well-adjusted and satisfied with how things had worked out, after they had 'got over' the trauma of the relocation. Furthermore, children noted that having an opportunity to express their views in any legal proceedings, and be listened to, was important to them.⁷³

So Where Are We at Present?

From the analysis undertaken above, it is clear that there is a spectrum of approaches to relocation – at one end the argument suggests that a child's welfare is best preserved by protecting the relationship with the primary caregiver and allowing the relocation; at the other end proponents claim that a child's welfare requires frequent, regular interactions with both parents thus militating against relocation.

What is abundantly clear is that these polarised positions mean more, comprehensive research is necessary. If we are to ensure Judges (and indeed legislators) do not 'miss the point' we need to provide them with robust advice, based on sound research, as to what the impact of relocation is likely to be for the child or children at the heart of any relocation dispute. Only then can an accurate determination of what is in the child's best interests be made.

It will be a matter for each individual country to assess their statutory and judge made law, but I think it is now time for judges and legislators to look at what social science research is telling us with regards to the important role that each parent plays, and the sometimes hopelessly difficult situations that arise when relocations are permitted and complex contact arrangements are put in place.

I think too that a movement away from a generic approach, to one which is specifically child focused, issues based and which has regard to the practicalities involved when orders are made is merited, as well as taking a good hard look at the risks that arise when relocation is permitted.

The Future

To assist in the above, the attendees of the Washington Conference courageously concluded that in the absence of an international instrument, we need to commence influencing the international community by setting out

⁶⁸ *Ibid*

⁶⁹ Nicola Taylor and Marilyn Freeman "International Research Evidence on Relocation: Past, Present and Future" (paper presented to The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) at 17

⁷⁰ *Ibid* at 18

⁷¹ *Ibid*

⁷² *Ibid*

⁷³ *Ibid* at 19

some principles. These included:⁷⁴

1. States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child;
2. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs;
3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation;
4. The exercise of judicial discretion should be guided by a (non-exhaustive) list of factors (set out in the Declaration); factors which reflect research findings;
5. The 1980 and 1996 Conventions provide a global framework for international co-operation in respect of cross-border family relocations. Consequently States that have not already done so are urged to join these Conventions;
6. Mediation and similar facilities to encourage agreement between parents should be promoted and made available both outside and in the context of court proceedings;
7. Orders for relocation and the conditions attached to them should be enforced in the State of destination;
8. Authorities in the State of destination should

not terminate or reduce the left behind parent's contact unless substantial changes affecting the best interests of the child have occurred;

9. Direct judicial communications between judges are, where necessary, encouraged; and
10. Additional research in this area is necessary.

The conference also concluded that work should commence on investigating whether an international instrument should be devised.⁷⁵ Much more would need to be thought through on this before it could be advanced; but given the potency of the 1980 Convention, lateral thinking to me suggests that it should not be impossible to develop an international instrument along similar lines.

I can of course only talk of what I believe should occur so far as international relocation cases are concerned. Domestically, it must be a matter for individual countries and their domestic law. But really the principles are not dissimilar and countries may see merit in reflecting an international approach.

Conclusion

If Judges have been missing the point, it might be seen that it is not altogether their fault. This area of the law is one of the most complicated in the Family Law arena. The stakes are high and the research basis light. It is not surprising to me that Judges have tried to do the right thing having regard to what they perceive as the correct current approach, but perhaps ended up missing the point.

But as we have discovered, Family law changes rapidly, reflecting social change. We must constantly look to see what academics and researchers are able to tell us in order to develop our thinking so as to always apply a judicial approach that best serves the interests of children.

⁷⁴ "Washington Declaration on International Family Relocation" (The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) available at http://www.hcch.net/index_en.php?act=events.details&year=2010&varevent=188&zoek=relocation

⁷⁵ "Washington Declaration on International Family Relocation" (The International Judicial Conference on Cross-Border Family Relocation, 23 – 25 March 2010) available at http://www.hcch.net/index_en.php?act=events.details&year=2010&varevent=188&zoek=relocation

Relocation: The International Context

Dr Nicola Taylor* and Professor Marilyn Freeman**

Introduction

Relocation disputes are widely regarded as one of the most controversial and difficult issues in family law internationally (Thorpe LJ, 2010). They arise when, following relationship breakdown, the resident parent (usually a mother) seeks to relocate with the children (either domestically or internationally), and that move will have a significant impact on contact arrangements with the other parent (usually a father). These high-conflict disputes, often involving cross-border issues, are increasing in frequency and complexity as geographic mobility impacts on the career, relationship and lifestyle aspirations of separated/divorced parents.

Relocation has become a topic of huge international interest in recent years. Judicial endeavours to achieve greater international consistency in the approach to relocation disputes have been occurring. As well, scholars have stepped forward to undertake new empirical studies and caselaw analyses. Those of us fortunate enough to participate in the Relocation stream of the recent *International Child Abduction, Forced Marriage and Relocation Conference* had a 'first of a kind' opportunity to benefit from this activity and to contribute to a truly interdisciplinary forum, from which we are hopeful that new possibilities for the future will emerge.

This article provided a research frame of reference for the conference discussions.¹ We begin by reviewing the international research evidence pertaining to geographic mobility in intact and separated families, and then provide an overview of four studies examining family members' perspectives on post-separation relocation disputes.² We also briefly consider the adjudication trends in relocation caselaw in several Western jurisdictions. Finally, we discuss the legal and judicial initiatives aimed at achieving greater international consistency in the relocation field and the need for new research on the link between relocation and child outcomes to provide a more robust evidence base to underpin these efforts.

Geographic Mobility in Intact and Separated Families

In March 2010 we presented a paper (Taylor & Freeman, 2010) about the international research evidence on relocation at the *International Judicial Conference on Cross-Border Family Relocation*, organised by the International Centre for Missing and Exploited Children and the Hague Conference on Private International Law, with the support of the US Department of State. Our paper (soon to be published by the *Family Law Quarterly*), together with recent publications by William Austin (2008), Joan Kelly (2009), Briony Horsfall and Rae Kaspiw (2010) on relocation in intact and separated families, have led to our view that the research evidence on the effects of residential mobility on children has not yet been fully absorbed into the examination of the relocation issue in the academic / judicial arena. This has not been assisted by the fact the research findings that do exist are mixed. Some studies reveal beneficial effects from relocation, while others indicate detrimental or harmful outcomes for children and young people. To illustrate this point about the mixed nature of the findings, and to emphasise why further research is needed, we now provide an overview of some of these studies.

Intact Families

In intact families the two parents, and perhaps the children, will reach the decision together as to whether or not their lives will be enhanced by moving (Goldwater, 1998). How positive this decision might be for the children most affected by it is rarely scrutinised by a third party (like a Court), yet the children are likely to experience the loss of familiar surroundings and close friendships, need to change (pre)schools and start afresh with many aspects of their lives. Importantly, however, they are not (usually) also having to deal with inter-parental conflict, nor the marginalisation of one parent, as can happen when relocation occurs in separated families.

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¹ This article is based on a paper presented at the International Child Abduction, Forced Marriage and Relocation Conference hosted by the Centre for Family Law and Practice, London Metropolitan University from 30 June to 2 July 2010.

² Members of each of these research teams presented their key findings at the conference.

A small number of studies have explored the impact of residential mobility on children and young people living in intact families. The more robust studies take into account the importance of socio-economic factors, the distribution of moves in the sample including the frequency of shifts, and the time duration between moves. However, the findings vary widely and therefore need to be interpreted with caution.

Several studies have found that low to moderate rates of childhood relocation within intact families can be a positive experience for children and young people. Relocations do not necessarily lead to detrimental outcomes for children and may actually enhance their resiliency in some circumstances, particularly where positive maternal functioning and positive family relationships are evident. These studies involved shifts of 174 adolescents from English-speaking countries to Japan (Nathanson & Marcenko, 1995), and moves brought about by government employee (Edwards & Steinglass, 2001) or military transfers (Finkel, Kelley & Ashby, 2003; Weber & Weber, 2005) of American families. The social impact of relocations out of high poverty areas has also been found to be beneficial for children (Pettit, 2004). Dong, Anda, Feletti, Dube, Brown and Giles (2005) investigated the relationship between childhood experiences of relocation and poor adult health outcomes. They found no significant correlation for those adults in the study with low and moderate levels of childhood relocation (i.e. up to seven moves). However, high childhood residential mobility (i.e. eight plus relocations) was associated with a significant increased risk of smoking, alcoholism, depression and attempted suicide. The researchers believed this relationship was accounted for by adverse childhood experiences, so high childhood residential mobility may be an indicator for risk of hidden adverse experiences, rather than an indicator of negative outcomes caused by relocation.

In contrast, other studies have concluded that relocation may be associated with harmful outcomes for children and young people. This small body of research has found significant negative associations between frequent residential mobility or high numbers of residential moves and children's psychological and social functioning and well-being. A meta-analysis of 22 relocation studies concluded that high rates of residential change were associated with increased behavioural problems during childhood and adolescence (Jelleyman & Spencer, 2008). Adam and Chase-Lansdale (2002) found that 267 adolescent African American girls from high poverty urban

neighbourhoods who had experienced multiple residential moves suffered negative outcomes on a range of psychological and social adjustment variables. Significantly worse adolescent adjustment problems in the domains of education, delinquency and sexual activity were predicted by more residential moves, as well as poorer quality relationships with female primary caregivers and less kin support. Haynie and South (2005) used two waves of US National Longitudinal Study of Adolescent Health data to investigate the relationship between residential mobility and adolescent behaviour. They found that adolescents who had recently relocated exhibited more violent behaviours than those who had not recently moved. The role of peer group associations and friendships emerged as important in contributing to the violent behaviour. Young people who experience relocation may be at risk of forming new social ties with peers who engage in risky or anti-social behaviours.

Separated Families

When parents separate they need to make some immediate decisions about the children's care arrangements and where they will live. They may be able to make these decisions by consensus, or require recourse to the Courts. However, in both instances, children appear to act as anchors in their parents' movement decisions. Hence, separated parents' movements tend to be 'spatially restricted' - since the existence of children necessitates the ex-partners' living in relatively close proximity so the children can continue their relationship with each parent (Smyth, Temple, Behrens, Kaspiw & Richardson, 2008). Feijten and van Ham (2007) have drawn on longitudinal survey data to show that separation does indeed lead to "distinctive spatial behaviour" (p. 645) - separated people move considerably more than those who are single or partnered long-term, but they are less likely than single or couple households to move long distances.

Distinguishing the mobility patterns of households where there has been relationship breakdown from intact families is therefore thought to be very important because:

... relocation disputes should be viewed as a particular subset of mobility more broadly, albeit giving rise to some particularly difficult issues. (Smyth et al., 2008, p. 42)

These issues include the impact of the relocation dispute and decision on the child, including the marginalisation or loss of the left-behind parent when the relocation is allowed, or the distress of the residential parent when the application is refused.

Relocation following Parental Separation

Several studies have explored the impact of geographic mobility on child and adolescent adjustment and well-being predominantly through cohort (Gilman, Kawachi, Fitzmaurice & Buka, 2003; Verropoulou, Joshi & Wiggins, 2002) or survey data (Braver, Ellman & Fabricius, 2003; Fabricius & Braver, 2006). By way of example, we have selected two studies which reveal the complexities in undertaking research on relocation outcomes, but which reach different conclusions about its impact on children.

Norford and Medway (2002) examined the relationship between 408 American high school students' history of residential mobility (including changing schools) and their social adjustment. They identified three categories of participants: 152 non-movers; 161 adolescents who had experienced a moderate number of residential moves (i.e. an average of 3.85 moves); and 95 frequent movers who had experienced an average of 7.16 moves. In addition, 67 mothers of adolescents from the frequent relocation group were interviewed. Students who had moved in response to parental divorce participated significantly less in extracurricular activities as the number of relocations they experienced increased. *Relocation following parental separation was not, however, found to be directly related to emotional and social adjustment problems in the long-term.* Rather, maternal attitudes to relocation were important in frequent movers' psychological adjustment. A significant relationship was found between mothers' negative attitudes to relocation and depression for young people with frequent relocation experiences. Most of those students who had moved frequently indicated they would have preferred to have moved less often, but only 26% of them reported that the frequency of their moves had had a negative impact on their lives. A third of the mothers whose children had experienced frequent moves felt that this had a negative impact on their child. The students reported that the worst aspect of relocation was leaving friends and making new friends.

Braver, Ellman and Fabricius (2003) used the survey responses of 602 undergraduate university psychology students whose parents had divorced, 170 of whom had moved with one parent more than an hour's drive away from what used to be the family home, to retrospectively examine the effects of post-separation relocation. The researchers compared students on a range of 14 financial, psychological, social and well-being measures and concluded that, compared with students whose parents did not move more than one hour away, students from families in which either a mother or father relocated, with

or without the child, were worse off. Those students whose parents both remained in the same geographic vicinity had more positive outcomes than those who had a parent relocate with or without the children. There was:

... a preponderance of negative effects associated with parental moves by a mother or father. ... As compared with divorced families in which neither parent moved, students from families in which one parent moved received less financial support from their parents, worried more about that support, felt more hostility in their interpersonal relations, suffered more distress related to their parents' divorce, perceived their parents less favourably as sources of emotional support and as role models, believed the quality of their parents' relations with each other to be worse, and rated themselves less favourably on their general physical health, their general life satisfaction, and their personal and emotional adjustment. (Braver et al., 2003, p. 214)

While Braver et al. (2003) noted that their data were not conclusive because they were correlational, not causal, it was a convenience sample, and there was no way of knowing whether the children who moved would have been better off if they had stayed, they concluded:

There is no empirical basis on which to justify a legal presumption that a move by a custodial parent to a destination she or he plausibly believes will improve their life will necessarily confer benefits on the children they take with them. (Braver et al., 2003, p. 215)

It should be noted that while this is the most widely cited empirical study undertaken in this field it has been subject to considerable criticism (Bruch, 2006; Kelly & Ramsey, 2007; Pasahow, 2005).

In a follow-up study to Braver et al. (2003), **Fabricius and Braver (2006)** published a second study that was partially aimed at addressing criticism of their first study by re-examining the data to assess whether exposure to conflict and domestic violence might account for some of the effects indicated by the first analysis. The 602 college psychology students in the original study had been asked to indicate the level of domestic violence they had witnessed after their parents' divorce. Half of them had also estimated the frequency of parental physical violence and the frequency and severity of conflict at points of time before and after parental separation as part of another concurrent study.

The students' reports revealed that parental conflict

and violence was, on average, more frequent and severe in those situations where mothers had relocated more than a one hour drive away from the family home, compared with paternal relocation and neither parent relocating. In responding to their critics, Fabricius and Braver (2006) reiterated their conclusion from the original 2003 study and concluded that relocation presented additional risks that were not accounted for by exposure to the conflict or violence reported in their sample. Either parent moving away from the children was a risk factor independent of high conflict and domestic violence. They therefore stood by their recommendation to discourage legal presumptions that might favour relocation.

Summary: Two contrasting approaches have emerged from the social science research evidence on post-separation parenting – one arguing that a child's welfare is best preserved by protecting the relationship with the primary caregiver and allowing the relocation (Bruch, 2006; Wallerstein & Tanke, 1996); and the other claiming that a child's welfare requires frequent, regular interactions with both parents (Kelly & Lamb, 2003) thus militating against relocation. In relation to the research evidence on the impact of relocation on children, Horsfall and Kaspiew (2010) conclude that the findings are equivocal, while Kelly (2009) asserts that relocation has detrimental consequences for children across all family types, particularly if there have been prior moves and multiple changes in family structure. Austin (2008) agrees that relocation significantly expands the level of risk for children from divorced families, but also states that:

[R]elocation may or may not be harmful for the individual child depending on the combination of risk and protective factors that may be present. The child of divorce starts out in a position of greater risk of adjustment problems following a residential move. (p. 140)

Family Members' Perspectives on Post-separation Relocation Disputes

Four qualitative studies have recently been conducted in Australia, England and New Zealand, with the second Australian study still continuing due to its longitudinal nature. These differ from the preceding studies by virtue of their focus on parents' and children's experiences of relocation disputes in the context of the family justice system. We now provide an overview of each study's methodology and sample, and their key findings can be obtained from the research teams' London conference papers and other publications as indicated below:

i) **Australia - Behrens, Smyth and Kaspiew:** The

Australian Research Council funded Behrens, Smyth and Kaspiew (2008, 2009a, 2009b, 2010) to undertake a small-scale, retrospective, qualitative study involving in-depth interviews with 38 separated parents (27 fathers and 11 mothers) concerning their experiences of contested relocation proceedings in the Family Court of Australia (FCA), the Federal Magistrates Court or the Family Court of Western Australia between 2002 and mid-2005 (i.e. before the 2006 Australian family law reforms took effect which have made it more difficult for relocation applications to succeed, and where the Court order had been made between 18 months and five years previously). Parents were recruited through the Courts and were classified into four groups:

- 7 successful opposers (6 fathers, 1 mother)
- 20 unsuccessful opposers (19 fathers, 1 mother)
- 6 successful applicants (all mothers)
- 5 unsuccessful applicants (3 mothers, 2 fathers and 1 subsequently successful applicant)

Twice as many parents had an order allowing relocation than not allowing relocation, and most of the participants were fathers. Thus, the dominant accounts ascertained from the in-depth interviews were those of men who had unsuccessfully opposed a relocation. The researchers caution that care is needed in interpretation of their data as it is based on only one side of the story (no ex-couple data), and has not been objectively verified through access to Court files or cross-checking of their judgments. However, the study also included an analysis of all 200 FCA relocation decisions between 2002 and 2004 and this enabled an assessment to be made of how typical their interview cases were.

ii) **Australia - Parkinson, Cashmore, Chisholm and Single:** The Australian Research Council is funding a prospective, longitudinal, qualitative and quantitative study of relocation disputes being conducted by Parkinson, Cashmore, Chisholm and Single (Parkinson, 2008a, 2009; Parkinson & Cashmore, 2008, 2009; Parkinson, Cashmore & Single, 2010). The sample comprises 80 parents from 71 families: 40 fathers who all opposed their ex-partner's proposed move, 39 mothers, and one grandmother. All but one of the mothers was seeking to relocate with their children. One mother was a non-resident parent who opposed the father's proposed relocation. There are nine former couples in the sample. Nineteen children have also been interviewed from nine of the 71 families (although this data has yet to be reported). The participants were recruited through family lawyers and have mostly been interviewed within a few months of their relocation dispute being resolved by

consent or judicial determination following the 2006 Australian family law reforms. The first round of interviews began in July 2006. The families were re-interviewed 18-24 months later and, due to an extension to the project, are now being followed for up to five years after resolution of their relocation dispute. Preliminary findings have only been reported to date as Parkinson and Cashmore (2009) emphasise the project is "a work in progress" (p. 3) since the interviewing and analysis is still continuing.

iii) England – reunite/Freeman: Concerned at the increasing number of relocation cases with which **reunite** is dealing, and the high levels of distress they create for family members, Freeman (2009) undertook a one-year research project on behalf of **reunite** from June 2008 to June 2009, funded by the Ministry of Justice.³ Thirty-six parents were interviewed by telephone using a semi-structured interview format by the principal researcher. Both parties were interviewed in two cases, meaning the sample involved 34 separate relocation cases over a ten year period from 1999-2009. Interviewees were obtained via the **reunite** database; a 'post-box' system whereby lawyers passed on **reunite**'s request for assistance to clients who might be interested in participating in the study; a consultation exercise with organisations with a significant interest in relocation issues; and contacts made directly by the **reunite** Research Unit.

The sample comprised:

- 25 fathers – only two of whom were the parent seeking to relocate (one such application was granted and one was refused).
- 11 mothers – all of whom were seeking to relocate (seven of their applications were granted and four were refused).

Freeman (2009) notes that it is not surprising that there is a much higher incidence of father than mother participants in her sample as fathers are more usually the left-behind – and therefore more disappointed – parent in English relocation cases and likely to be willing to participate in research on this topic.

iv) New Zealand – Taylor, Gollop and Henaghan: The New Zealand Law Foundation funded a socio-legal research team from the University of Otago to undertake a three-year study on relocation following parental separation from 2007 to 2009 (Taylor, Gollop & Henaghan, 2010a, 2010b).⁴ One hundred New Zealand families where a parent had relocated (or sought to relocate) with the children, and that move would have a significant impact

on contact arrangements with the other parent, were recruited through family lawyers and media publicity to take part in the study. The sample comprised 114 parents (73 mothers and 41 fathers; in 14 families both parents took part), and 44 children (aged 7-18 years) from 30 of the 100 families. It was the mothers who most often wished to move with 61 (84%) of the mothers desiring to relocate, compared to only two of the fathers. Thirty-one fathers (76%) had opposed their ex-partner's proposed relocation – 11 successfully, 19 unsuccessfully, with one case still to be determined by the Family Court. More mothers successfully relocated (39) than those who were prevented from moving or who, after parental discussion, had agreed not to move (19). The first round of in-depth, semi-structured parent and child interviews was conducted in 2007 and 2008, with the parent follow-up interviews undertaken 12-18 months later. These were completed in December 2009 – hence the study remains a 'work in progress' as data coding and analysis is still continuing. Some standardised measures were also administered with the parents to assess their child's social and emotional development and to collect demographic and inter-parental relationship data. Just over half (51%) of the families had their relocation disputes judicially determined.

These four studies, taken separately and together, are providing unique perspectives and insights on the impact of relocation disputes from those most directly affected – the parents and the children. Addressing the issues the family members raise will enable this empirical work to contribute significantly to attempts to clarify the law and process governing relocation disputes.

Adjudication Trends

Studies have been undertaken in several jurisdictions to examine judicial decision-making trends in relocation cases decided by the Courts - Australia (Behrens, Smyth & Kaspiew, 2009a; Easteal, Behrens & Young, 2000; Easteal & Harkins, 2008; Parkinson, 2008b, 2008c), Canada (Bala & Harris, 2006; Thompson, 2004), and New Zealand (Henaghan, 2003, 2008, 2009; Henaghan, Klippell & Matheson, 2000; Taylor, Gollop & Henaghan, 2010a).⁵

Some of these analyses seek to determine the 'success rates' for relocation applications and have generally shown a decline in the number permitted as legal systems have responded to law changes encouraging greater father involvement in their children's lives post-separation. For example:

³ The research report is available on www.reunite.org

⁴ The research report is available from the Principal Investigator – nicola.taylor@otago.ac.nz

⁵ We are also aware that Robert George has been considering relocation caselaw in England and Wales as part of his doctoral studies at Oxford University and look forward to the forthcoming publication of his thesis.

- Following the *Gordon v Goertz* decision in 1996 through until 2004, relocation was allowed in about 60% of Canadian cases, with a small but noticeable decline since 2000 (Thompson, 2004);
- In an analysis of 58 reported Australian relocation cases from July 2006 to April 2008, Parkinson (2008b) found that the introduction of the amendments created by the Family Law (Shared Parental Responsibility) Act 2006 had lowered the 'success rate' as relocations were allowed in only 53% of the cases. This rate was significantly lower than that prior to July 2006;
- Eastael and Harkins (2008) confirmed this drop as their analysis of 50 Australian relocation cases from 2003 to 2008 revealed a 75% 'success rate' prior to the 2006 reforms, but only 60% following the law change;
- In New Zealand, Henaghan (2003, 2008, 2009) has been tracking relocation decisions in the Family Court, High Court and Court of Appeal since 1988. When such disputes were decided under the Guardianship Act 1968, there was a 62% success rate between 1988 to 1998, 48% from 1999 to 2000, and then 38% from 2001-2003. A more recent analysis of 116 cases decided since the Care of Children Act 2004 took effect on 1 July 2005 found that successful applications to relocate within New Zealand initially dropped to a low of 20% in 2005, but then increased to 48% in 2006, went down to 42% in 2007 and 2008, and then up to 60% in 2009 (Henaghan, 2009; Taylor, Gollop & Henaghan, 2010). Applications to relocate overseas were generally more successful, from 38% in 2005 to a high of 70% in 2008. Overall, since mid-2005, 55% of applications to relocate overseas were successful, and 40% of applications for relocation within New Zealand were successful.

Achieving Greater International Consistency in Cross-Border Relocation Disputes

Some countries/states adopt a more neutral or all-factor approach to resolving relocation disputes (e.g. Australia, Canada, Germany, New Zealand), while others are either pro-relocation (e.g. Indiana, Oklahoma, England/Wales, France, Spain) or anti-relocation (e.g. Alabama, Louisiana, Sweden) (Family Law Council, 2006; Messitte, 2009). Custodial parents in some countries have the right to solely determine where they and their child reside, while other countries (e.g. New Zealand⁶) require both guardians to agree on the child's place of residence. Thus the statutory frameworks governing relocation decisions in the courts vary internationally; and so too does the approach adopted to determining the child's welfare / best interests in the context of a relocation dispute.

While the paramount consideration in most Western jurisdictions is usually the child's welfare / best interests, its current interpretation in the relocation context depends on whether the court considers that a child's welfare is best preserved by *allowing the relocation* to protect the child's relationship with a happy, well-functioning primary parent (Bruch, 2006; Wallerstein and Tanke, 1996), or by *refusing the relocation* on the grounds that the child needs the security and stability of their existing environment with regular interactions with both parents (Kelly & Lamb, 2003), unless there are compelling reasons (e.g. domestic violence; child abuse; neglectful, erratic and depressed parenting; mental health and substance abuse issues) militating against this. Other alternatives, such as the mobility of the otherwise non-moving parent, are also beginning to be taken into account.

Clear policy differences are thus evident between jurisdictions. In England/Wales, for example, applicants are routinely granted permission to relocate based on the likely effect of a "refusal of the application on the mother's future psychological and emotional stability."⁷ Conversely, in New Zealand the courts tend to refuse more applications as they work through a broader range of

⁶ New Zealand guardians must agree on a change of the child's residence that may affect the child's relationship with their parents or guardians - s16(2)(b) Care of Children Act 2004. If the guardians cannot agree, permission for the proposed relocation must be obtained from the Family Court by an application under s47(1)(a) for a parenting order with a condition that the child may move, or by an application under s44 for the Court to resolve a dispute between guardians.

⁷ "In most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability" *Payne v Payne* [2001] 1 WLR 1826; [2001] EWCA 166, para 32 per Thorpe LJ.

statutory principles to take account of the child's relationship with others and their current environment (Taylor et al., 2010a).⁸

The growth in applications that courts are experiencing world-wide has helped to drive the quest to achieve greater consistency in the approach to relocation cases by standardising (if possible) the way in which these disputes are dealt with by different jurisdictions. The currently diverse orientations of various legal systems as neutral, pro- or anti- relocation have also focused attention on the robustness of the research evidence base underpinning the factor(s) determinative of the child's welfare / best interests in a relocation dispute. Understandably, there is keen interest in ascertaining which factor(s) or approach have the greatest support in the existing research literature since this will not just help to guide decision-making in individual cases but also shed light on the direction any internationally-agreed protocol should adopt. This would provide more certainty for the parties and their legal advisers when relocation is proposed.

Recent attempts to agree on a common standard for the resolution of relocation disputes have included:

United States of America: Agreement has not yet proved possible within the USA following several efforts to achieve a consistent domestic approach to relocation across the 50 states. The American Law Institute first developed the *Principles of the Law of Family Dissolution* that included a relocation provision (para 2.17, 2002). In 1997, the American Academy of Matrimonial Lawyers (AAML) proposed a *Model Relocation Act*⁹ that contained an extensive list of factors to determine contested relocation cases (see also: Elrod, 2006; Family Law Council, 2006; Messitte, 2009). This was not intended to be a Uniform Act and instead offered three alternative options concerning the burden of proof in relocation cases so that states could adopt the one which best maintained their own jurisdictional policies. Louisiana passed legislation in response to this AAML initiative by adopting Alternative A (the relocating person has the burden of proof that the proposed relocation is made in good faith and in the best interests of the child). Elrod (2006, p. 41)

states that this is "among the most child-focused" of approaches, as many other statutory or court enumerated lists in use in the USA emphasise parental considerations such as distance, cost and difficulty of visitation. The AAML Model Act was not, however, taken up by other American states.

More recently, in 2008, the National Conference of Commissioners on Uniform State Laws drafted a Relocation of Children Act. This provided a list of factors the court should consider in determining the best interests of the child: (a) the quality and relationship and frequency of contact between the child and each parent (b) the likelihood of improving the quality of life for the child (c) the views of the child (depending on the child's age and maturity) and (d) the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the child. This effort was subsequently abandoned as no agreement could be achieved and each state continues to apply its own law (Messitte, 2009). The differing approaches to the burden of proof and the application of presumptions in relocation cases across the states are but one example of the difficulty in arriving at domestic agreement.

The debate over the advantages and feasibility of achieving greater uniformity between family law systems (Duncan, 2009; Thorpe, 2010), and more specific efforts to establish greater international consistency in the resolution of relocation disputes, are nevertheless continuing:

Cumberland Lodge, Windsor, England: Lord Justice Thorpe, and his Office on International Family Justice for England and Wales, hosted The International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions 2009 at Cumberland Lodge from 4-8 August 2009.¹⁰ Paragraph 8 of the Conclusions and Resolutions from the Conference related to relocation:

The search for common principles to be applied in the judicial resolution of relocation disputes in the best interests of the children concerned be pursued both nationally and internationally.

⁸ The importance of the six principles set out in s5 of the Care of Children Act 2004 as relevant to a child's welfare and best interests have also been affirmed by the New Zealand Supreme Court in a recent relocation decision: *Kacem v Bashir* [2010] NZSC 112.

⁹ AAML Proposed Model Relocation Act, 9 March 1997, at §405, see website: www.aaml.org/go/library/publications/model-relocation-act/

¹⁰ This Conference was attended by 42 judges and several academics from the following jurisdictions: Australia, Bangladesh, Canada, Cyprus, England and Wales, Ghana, Hong Kong, India, Indonesia, Irish Republic, Israel, Kenya, Malaysia, Malta, New Zealand, Nigeria, Pakistan, Scotland, Singapore, South Africa, USA, Trinidad and Tobago, Eastern Caribbean States.

Participating jurisdictions shall use their best efforts to ensure such disputes are resolved in a timely fashion. More research and longitudinal studies should be carried out into the impact of relocation decisions on the children and parents concerned, whether relocation is permitted or not (including comparative studies as to the impact of the non-custodial parent's decision to relocate).

The Washington Declaration: On 23-25 March 2010 the Hague Conference on Private International Law and the International Center for Missing and Exploited Children, with the support of the US Department of State, hosted *The International Judicial Conference on Cross-Border Family Relocation* in Washington DC, USA.¹¹ The objectives for this conference were to develop a better understanding of the dynamics of relocation and the factors which are relevant in judicial decision making, to explore the possibility of developing a more consistent judicial approach towards relocation cases, and to examine the potential for closer international judicial co-operation in such cases. The Washington Declaration on International Family Relocation recorded the agreements the judicial delegates and other experts reached.¹² Point 4 stated:

In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively by, the following factors ...

Point 12 recognised that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases.

London: *The International Child Abduction, Forced Marriage and Relocation Conference* was hosted by the Centre for Family Law and Practice at London Metropolitan University, England, from 30 June to 2 July 2010. Conclusions and Resolutions¹³ were agreed by 150 participants from 18 jurisdictions to advance efforts to reach agreement on the approach to be adopted for international relocation disputes. Paragraph 7, International Relocation of Children, endorsed the view of

The Washington Declaration of the necessity of additional research in the area of relocation.

Future Directions

Lord Justice Thorpe, the architect of the drive for a common international standard, believes that the groundwork has been laid for this objective to become achievable:

There is every reason to favour a common standard adopted internationally. This could be achieved by a Convention or a Protocol made available for ratification among the member states to the Hague Abduction Convention. A relocation application is the means to a lawful removal. The Hague Convention is there to reverse an unlawful removal. States operating the Convention should support the creation of a parallel instrument standardising the factors to be taken into account in granting or refusing an application for lawful removal. I shall be disappointed if our efforts ... achieve no progress towards an objective that is clearly achievable. (Thorpe LJ, 2010, p. 40)

To be successful these efforts require a skilful combination of international co-operation and negotiation, as well as conclusive empirical research evidence about the impact of relocation disputes on children and young people, including identification of the 'stand-out' risk and protective factors for children. We agree with Behrens (2003) that:

There is a vital need for research that contributes to knowledge about the results and the effects of court decisions that restrict, or enable, relocation. Decisions on these matters are based on a range of assumptions or guesses about what will happen as a result of a particular decision, and yet there is no empirical evidence which explores the aftermath and helps to make these assessments. It is difficult to have a great deal of faith in a process that involves making such important decisions for children and their parents yet is so unpredictable and has no follow-up mechanisms to assess the results and impacts of the decisions. (p. 589)

Such research would enable us to investigate more

¹¹ This was attended by 50 judges and other experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, UK and USA.

¹² See website: www.icmec.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&PageId=4240

¹³ See website: www.londonmet.ac.uk/flp/conferencepapers

directly the link between relocation and child outcomes, in order to discover in which direction that consistency should be developed. In other words, greater consistency can only be sought, and achieved, once we have a proper understanding of the issues, in particular the outcomes and effects of relocation on the children and families concerned.

Calls for such research have also emanated from the resolutions passed at several recent international conferences:

- Paragraph 8 of the Resolutions from the 2009 Cumberland Lodge conference (cited above);
- The 5th World Congress on Family Law and Children's Rights, held in Halifax, Canada, from 23-26 August 2009 - Resolution 22 encouraged appropriate authorities to undertake longitudinal research into the effects of relocation on children.
- The Washington Declaration (2010) incorporated a specific reference to the need for additional research: "It is recognised that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases" (Point 12).
- Paragraph 7, International Relocation of Children, The London Conclusions and Resolutions (2010) endorses the resolutions of both the Cumberland Lodge Conference (August 2009) and the Washington Declaration (March 2010) that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases.

It is timely to meet the challenge of identifying principles and factors of general application that can unify the approach to relocation cases internationally. Our existing research provides indications to suggest that presumptions in this field of law are unhelpful and may, in fact, work against the best interests of children, and this is reflected in The Washington Declaration which states in paragraph 3 that: "...determinations should be made without any presumptions for or against relocation". The evidence in each individual case should be evaluated and

weighed against a range of principles and factors in determining the child's welfare / best interests. Such commonalities are already beginning to feature in the international documents agreed at Cumberland Lodge, Washington DC and London during 2009 and 2010. Bright-line research findings confirming which factors are the really key ones will be an important next step in informing legal policy and judicial practice as the quest for a common standard adopted internationally continues (Thorpe, LJ, 2010). To help meet this objective of the international community we have already begun planning a collaborative, international project that directly investigates the links between relocation and child outcomes by focusing on the effects of relocation on the child, and considers the issues of family member mobility, as well as child outcomes in circumstances of familial non-relocation. We welcome further enquiry and discussion with those of you who may be interested in our research proposal.

Conclusion

The inaugural conference of The Centre for Family Law and Practice in June 2010 provided a first-of-its-kind opportunity to draw on the experiences of most of the world's leading experts in the relocation field. In terms of debating the need for further research and greater international consistency in the legal and judicial responses to relocation disputes, the opportunities were unparalleled. The daily discussion groups provided fertile ground for carrying forward the work that had previously been undertaken as they included representatives of all the relevant interdisciplinary perspectives of this topic, all present to try and move the relocation field forward to better serve those whose lives are so affected by these disputes. The distinguished rapporteurs were invaluable in drawing together the themes raised by each discussion group, and in assisting to frame the outcomes of those discussions into The London Conclusions and Resolutions which were published after the close of the conference (see www.londonmet.ac.uk/flp). We are determined to continue the work of this unique international gathering of experts and interested parties in order that children involved in relocation disputes may benefit from their specialist deliberations and contributions.

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Going, Going... Gone – To Relocate or Not to Relocate, That is the Question

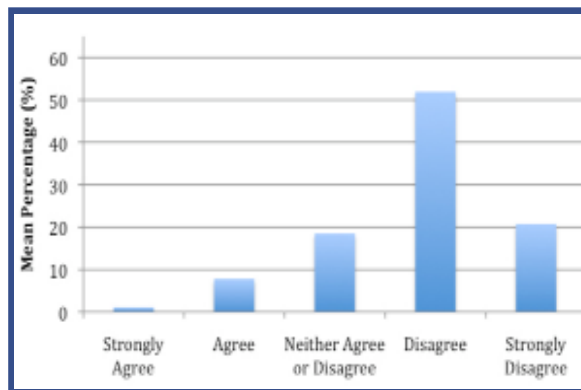
Mark Henaghan*

Relocation cases, as they have come to be known around the world, take up considerable court time and place heavy financial burdens on those involved in them. They put to the test what should be the prime goal of the Family Court system – to resolve disputes in a just and fair manner with the minimum amount of cost and delay.

Public Perceptions of Lawyers and Judges

A survey¹ of 1,800 New Zealanders chosen randomly from the electoral roll, carried out by the Otago University Legal Issues Centre based in the Faculty of Law, shows that cost and delay are the two biggest concerns with our legal system.

To the question, "I believe the average New Zealander can afford to bring a case to court" the responses were:



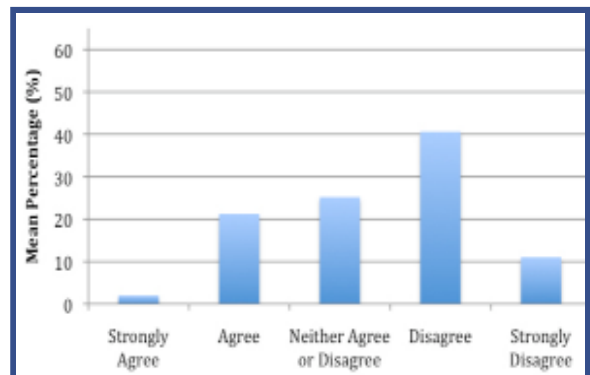
Many of the respondents reported that changes need to be made to the way lawyers charge.

The harshest comments in the feedback were directed at lawyers and costs:

- "Lawyers should be economically [sic] efficient and not just there to fill their own pockets."

- "Lawyers charges are unrealistic for average NZers."
- "Lawyers that I have had dealings with are generally only after how much money they can bleed out of the system."
- "Sometimes it seems lawyers use various tactics eg calling for extraneous reports to delay an inevitable outcome."
- "Basically I think the solicitors and the lawyers should act in the best interests of the individual and not of their own."
- "Lawyers string out the cases."
- "I personally like to keep out of lawyers' ways as much as possible and courts as I think lawyers are really doing it for money 95% of the time not really justice. I've heard lawyers boasting 'I could win the case either way.'"

To the question, "I believe my case would be completed in a reasonable time if I went to court", the responses were:



The following text comment captures the concerns with delays:

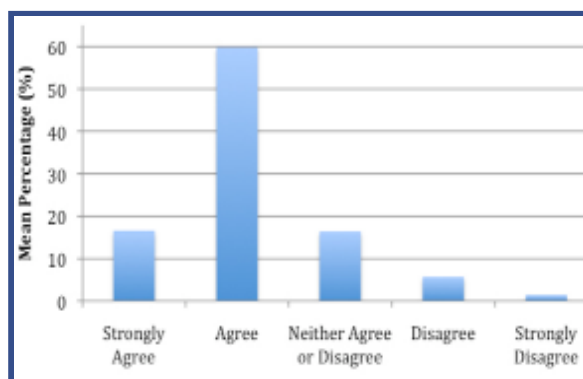
"The time it takes to get a court hearing. The stress and anxiety it causes a person or family."

*University of Otago .Thank you to Heidi Gray and Sheena Martin for research assistance and Karen Warrington and Lauren Julian for brilliant word-processing.

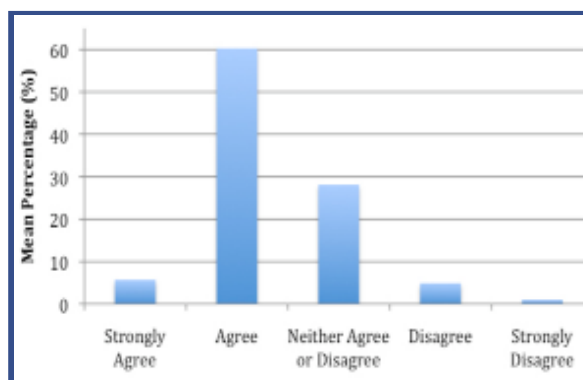
¹ A User's Perspective of the Judicial System: Data from a Large Nationwide Study, Saskia Righarts, Shana Fonnesbeck under the supervision of Mark Henaghan and John Hansen. Full survey results available from saskia.righarts@otago.ac.nz.

Notwithstanding these negative responses on cost and delay, lawyers and judges generally come out of the survey positively.

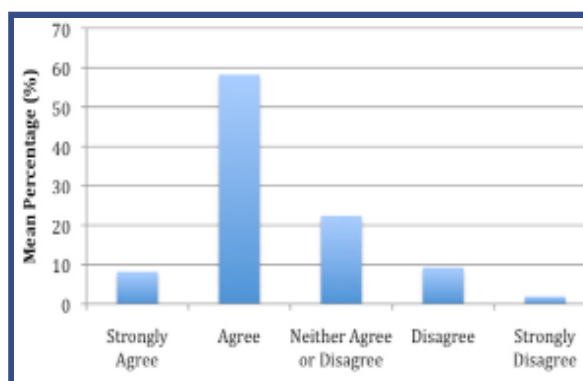
To the question, "If I hired a lawyer, I would trust him or her to act in my best interests", the responses were:



To the question, "In general I think New Zealand lawyers are competent to do their jobs", the responses were:

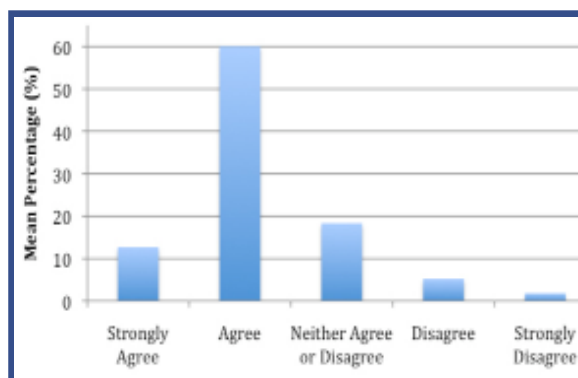


To the question, "I believe I would get a fair hearing in the New Zealand court system", the responses were:



To the question, "In general I think New Zealand judges

treat people with respect", the responses were:



Consumer Perceptions of Costs and Delays in Relocation Cases

Two empirical studies on relocation, one in New Zealand² (hereafter called New Zealand Relocation Study) and one in Australia³ (hereafter called Australia Relocation Study) are revealing consumer experiences of relocation cases. The New Zealand Study (2007 – 2009) involves 100 families (114 parents, 73 mothers and 41 fathers, in 14 families both parents took part and 43 children (aged 7-18) from 29 of the families. The families were recruited via lawyers providing their clients with a letter and a brochure about the research and via articles and advertisements in community newspapers.

The New Zealand sample includes families that resolved the relocation dispute by agreement as well as those who went to court, and it involves families who were in the process of resolving the dispute as well as those who had resolved the relocation dispute.

The Australian research involves 80 parents, 40 women and 40 men where the dispute had been resolved in the previous six months. Recruitment was via their lawyer.

In both studies extensive interviews were carried out with the participants. These two empirical studies will be used throughout this article to show the consequences of particular relocation decisions; at this stage the focus is on costs and delays.

In the New Zealand Relocation Study many parents expressed strong dissatisfaction about the delays they faced and expense (particularly legal fees) they incurred. Some parents expressed serious financial impediments such as mortgagee sales because of the costs of litigation. Most parents found the court process highly stressful; particularly having to put their lives on hold while a decision was reached. The highest costs for a relocation

² Nicola Taylor, Megan Gollop, Mark Henaghan (Otago University).

³ Patrick Parkinson, Judy Cashmore, Judy Single (Sydney University).

case in the New Zealand samples was \$150,000 and this was for a litigated relocation case within New Zealand. Several others spent over \$100,000. Twelve of the respondents in the Australian Relocation Study reported legal costs of \$100,000 or more, with the highest being \$450,000 for a litigated case. The highest for resolution by consent was \$220,000. The median for litigated cases was \$45,000 and for those decided by consent \$30,000. Eleven of the families in the Australian Study had to sell the family home to pay the bills.

The psychological stress and financial impact on families involved in relocation cases means that the "paramount considerations" of the children's welfare and best interests is likely to be seriously impaired no matter what the outcome of a judicial decision is. Most children's wellbeing is dependant on psychologically available parents⁴ and the level of financial resources⁵ available in the home. Both these pillars of well being crumble under the weight of drawn out relocation disputes.

Family Lawyers Can Make a Difference

Family lawyers can make a difference if they give their client's good advice about relocation cases. Good advice depends on:

1. Knowledge of the law. The general principles are easy to state, in fact every Family Court and High Court decision starts with the same mantra and quotes from the two New Zealand Court of Appeal cases⁶ on relocation decided before the Care of Children Act 2004 and subsequently endorsed by High Court decisions⁷ under the Care of Children Act. Judges are required to work through the considerations in sections 4, 5 and 6 of the Care of Children Act and apply them as they are relevant to that particular child. The overriding principle, "the welfare and best interests of the particular child in their particular circumstances"⁸ tells you nothing unless you know the values and preferences judges are likely to bring to its application. These values and preferences will be exposed in this article based on an analysis of 116 decisions made under the Care of Children Act 2004 since the Act's inception.

2. Application of the law to your client's situation.

This requires a very good understanding of all aspects

of what is happening in your client's life and the life of the children. It also requires a careful analysis of the attitude your client brings to their situation. A very negative attitude to the other parent can be fatal in relocation cases, as the analysis of the cases will show. A client who has not thought about the impact their decisions may have on their children and the other parent will be in a vulnerable position. It is our job as lawyers to look well ahead as best we can to the possible impediments to a resolution. Seeing cases that have gone as far as getting to court when, for example, the party wishing to relocate has no clear reason why or any clear plan for the children's relationship with the other parent, or when the non-relocating parent has a weak relationship with the child and a poor attitude to the other parent, are a waste of everyone's time and resources. A major job of the lawyer is to do some reality testing for their clients. This can save a lot of time, money and angst for your clients. This article will conclude with a reality test for clients in relocation disputes.

3. Keep on top of the file and keep your client involved and up to date. It is easy to forget, when there are so many demands on lawyer's time, that for the client their file is the only game in town. It came through very clearly in our Legal Issues Centre Study that clients appreciate and learn from lawyers who keep them regularly updated as to what is happening. This lessens the psychological worries and ensures your client is fully involved in the process which means they are much more likely to carry out the tasks you have asked them to do such as working out how much time they spend with their children and what activities they do with their children. The more a client can provide key information themselves the less it will cost them and the more likely the case will be resolved. Clients are capable of generating their own creative solutions to the problem.

4. Work with the lawyer for the other side to generate solutions rather than just let the case drift into one process after another.⁹ If both lawyers are as fully conversant as they can be with the facts and their client's views, interests, resources, capabilities and priorities the chances of resolution are much higher.

⁴ P Amato & J Gilbreth, "Nonresident Fathers and Children's Well-being: A Meta-analysis" (1999) 61 J Marriage & Fam 557, 564; S McLanahan "Father Absence and the Welfare of Children" in M Hetherington (ed), *Coping with Divorce, Single Parenting and Remarriage: A Risk and Resiliency Perspective* (1999) p117, 130-35.

⁵ J Bartfeld "Child Support and the Postdivorce Economic Well-being of Mothers, Fathers and Children" (2000) 37 *Demography* 203; D Meyer and M Hu "A Note on the Antipoverty Effectiveness of Child Support Among Mother-Only Families" (1999) 34 *J Human Resources* 225; L Argys, E Peters, J Brooks-Gunn and J Smith "The Impact of Child Support on Cognitive Outcomes of Young Children" (1998) 35 *Demography* 159.

⁶ *Stadniczenko v Stadniczenko* [1995] NZFLR 493; *D v S* [2002] NZFLR 1169.

⁷ Following the lead of Priestley J in *Brown v Argyll* [2000] NZFLR 705.

⁸ Section 4 Care of Children Act 2004.

⁹ Robert Mnookin, Scott Peppet, Andrew Tulumello *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, The Belknap Press of Harvard University Press, 2000, is the best book on this subject.

Relocation Law – The Search for a Universal Code

There is no specific statutory provision in New Zealand that sets out relocation law as has been proposed in Australia by the Family Law Council.¹⁰ The National Conference of the Commission on Uniform State Laws has drafted a Relocation of Children's Act,¹¹ which has not been adopted in the United States with each state having its own law.¹² Both of these attempts at a codified approach to relocation have some helpful insights which are consistent with good practice in New Zealand and which will be alluded to in the analysis of current New Zealand practice. But, in the end, neither code as drafted is able to provide a rule-based solution that will apply to all relocation cases and thereby avoid the costs of litigation.

The Family Law Council proposal for a specific section on relocation will not necessarily lead to more predictable results because it contains value judgements. First it needs to be determined that the parent opposing relocation is "significant" to the child's care, welfare and development. Then it needs to be considered whether that person is "willing and able" to assume primary care responsibility. There are further value judgements about the "age and development" of the child and how relocation will interfere with the "child's ability" for a "strong" attachment with both parents. The "effect" on the child of the emotional state of either party if their proposals are not accepted also requires considerable value judgement. All these matters are being considered

at the moment under the current law. Judges will come to different results on how they see the outcomes of these considerations given the way the parties and the particular child are seen by the court.

The American draft code provides a list of factors the court should consider in determining the best interests of the child. These all contain value judgements and predictors such as the quality of the relationship with each parent and the likelihood of improving the quality of life for the child.¹³ They are the kind of factors a New Zealand court would take into account. By themselves they tell you nothing of likely outcomes unless you know how judges interpret and prioritise them. This may well vary from judge to judge.

New Zealand Relocation Law in 2009

The starting point is the Care of Children Act 2004 that governs disputes between parents and others over children. The focus of the Care of Children Act, which repealed the Guardianship Act, is on children's care and not on parental rights. The purpose of the Act set out in s(3)(1)(1) is solely about children:

- promote children's welfare and best interests
- facilitate children's development by helping to ensure that appropriate arrangements are in place for their guardianship and care
- recognise certain rights of children

All legislation in New Zealand according to the Interpretation Act 1999 is to be interpreted according to

¹⁰ Family Law Council, Report, *Relocation*, May 2006; available on the Council's website, recommendation 4.

(A) Where there is a dispute concerning a change of where a child lives in such a way as to substantially affect the child's ability to live with or spend time with a parent or other person who is significant to the child's care, welfare and development, the court must:

(1) Consider the different proposals and details of where and with whom a child should live, including:

- (a) what alternatives there are to the proposed relocation;
- (b) whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted; and
- (c) whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.

(2) Consider which parenting orders are in the child's best interests having regard to the objects contained in section 60B and all relevant factors listed in section 60CC, and:

- (a) whether given the age and developmental level of the child, the child's relocation would interfere with the child's ability to form strong attachments with both parents;
- (b) if a party were to relocate:
 - (i) what arrangements, consistent with the need to protect the child from physical or psychological harm, can be made to ensure that the child maintains as meaningful a relationship with both parents and people who are significant to the child's care, welfare and development as is possible in the circumstances;
 - (ii) how the increased costs involved for the child to spend time with or communicate with a parent or people who are significant to the child's care, welfare and development should be allocated;
- (c) The effect on the child of the emotional and mental state of either party if their proposals are not accepted.

(B) The court may also consider the reasons the parent wishes to move away and any other relevant considerations.

¹¹ 2008 by the National Conference of the Commission on Uniform State Laws.

¹² Linda D. Elrod, "A Move in the Right Direction?: Best Interests of the Child Emerging as Standard for Relocation Cases," 3(3) *Journal of Child Custody* 29-61

¹³ Section 9 of the Draft Relocation of Children Act 2008. (USA).

its text and in the light of its purpose. The purpose section is often overlooked in the heat of relocation battles. It might be a good idea for all family lawyers to give their clients a card with these aspects of the purpose of the Act printed on it to remind everyone of what the goal is.

To deliver the purpose of the Act, Parliament has legislated that the welfare and best interests of the child must be the first and paramount consideration. The only difference in wording from the 1968 Guardianship Act is that the words "best interests" are added to "welfare". It has been argued that welfare and best interests mean the same thing. For instance, in *Director General of Social Welfare v L*¹⁴ Richardson P felt that the word "welfare" was a broad expression and the term "and interests" found in s11(b) of the Adoption Act 1955 were merely added words of emphasis.

However, in *Director General of Social Welfare v L*¹⁵ also in the context of s11(b) of the Adoption Act 1955 Bisson J said that there was a distinction between welfare and interests. Welfare is defined as including the normal duty and care owed by a parent to a child to nurture the child to a state where the child is independent of the parent. Welfare includes the provision of shelter, clothing and food together with love and affection and it demands close and attentive physical and emotional involvement with the child. Bisson J here relied on Jeffries J's definition of welfare in *E v M*.¹⁶

Bisson J gives an example of the "interests" of the child as the consequences for the child of the termination of the parent/child relationship. He points out that there can be potential conflict between the welfare and best interests of a child. For example, a child may be in a situation where her welfare is being attended to by a foster parent, yet the long term interests of the child – to have a relationship with a natural parent – may mean that her immediate welfare may have to be sacrificed for the child's long term best interests. In a relocation case the child's immediate needs may be met by a relocating parent but the long term interests of a relationship with the other parent may be put at risk.

The Concise Oxford Dictionary defines welfare as the "health, happiness and fortunes of a person". Interest is defined as the "advantage or benefit of someone". Therefore the child's health, happiness and fortunes must

be priorities along with any other advantages or benefits the situation can give to the child. This means that lawyers need to carry out a more wide-ranging consultation with their clients than under the Guardianship Act 1968. Immediate needs and more long-term benefits and advantages for the child should be discussed. For example, if a relationship with a child is put at risk it limits the future insurance for the child if anything happens to the primary carer and the other parent is no longer closely connected.

The words "first and paramount" are not the same as "sole" consideration. However, they have been interpreted to mean that they trump all other considerations. Lord MacDermott's statement in *The House of Lords in J v C*¹⁷ states that "first and paramount":

... must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed.

With the stronger child focus in the Care of Children Act 2004 it is crucial that the child's welfare and best interests really are first and paramount. Issues of sympathy for a parent or trying to please both parents or trying to appease a parent or punish a parent should not be allowed to dilute the paramountcy principle. The focus of negotiation is on the child's welfare and interests and how parents (or others) can meet those interests.

The principles in ss4, 5 and 6 can be divided up into those that "must be" considered or taken into account, the "in particular" and the "shoulds". I have discussed the implications of the wording in my 2005 New Zealand Law Society Conference paper, "The Impact of the Care of Children Act 2004 on Family Law Practice".¹⁸ When the new legislation came into force Principal Family Court Judge Peter Boshier in a paper entitled "Relocation Cases: An Internal View from the Bench"¹⁹ saw that s5(b) of the

¹⁴ [1989] 2 NZLR 315.

¹⁵ [1989] 2 NZLR 315 at 325.

¹⁶ High Court, Wellington, M361/79, 13 September 1979.

¹⁷ [1970] AC 668 at 770.

¹⁸ In Family Law: The New Era – Professionalism in the Family Court, CLE October 2005.

¹⁹ Presented at the Association of Family and Conciliation Courts, 20 May 2005, also (2005) 5 NZFLJ 77.

Care of Children Act which says "in particular the child should have continuing relationships with both of his or her parents" "indicated parents should not relocate if to do so would have a detrimental impact on the relationship with the other parent." Priestley J pointed out in *Brown v Argyll* that portions of Judge Boshier's paper were being used in submissions to support the proposition that the Care of Children Act 2004 made it more difficult to succeed in relocation cases – in essence a presumption against relocation.

The continuing relationship with both parents consideration along, with the other considerations, must be taken account of but it cannot be raised to the level of an overriding consideration. The fact the words "in particular" are used and that it "must be taken into account" mean that the continuing relationship with both parents consideration must be considered in each case but does not mean it overrides other considerations otherwise there would be no point in listing the other considerations.

The judge must still put the child's best interests as paramount. All the considerations are for one purpose – to benefit the child. The fact a continuing relationship with both parents has been given "in particular" status does not mean it cannot be outweighed by other benefits to the child, such as safety from psychological violence (s.5(e)) which would give an overall best interests approach to the child. Otherwise the "paramount" consideration of the child's best interests would be subservient to one of the considerations of the benefits of a continuing relationship with both parents. As Priestley J said in *Brown v Argyll* "centre stage is the s4(2) requirement that the welfare and best interests assessment must focus on the particular circumstances of a child. This is as true for relocation cases as it is for all other disputes involving children."²⁰ Judges need to show how each consideration relates to the particular child and give reasons as to what weight it should be given in relation to the child and the other considerations.

The two New Zealand Court of Appeal cases on relocation decided before the Care of Children Act 2004 both emphasise that the welfare of the child is the

paramount consideration. In *Stadnickzenko* the Court said the preferable approach is to "weigh and balance" factors that are relevant to the particular circumstances of the case at hand "without any rigid preconceived notions as to what weight each factor should have."²¹ The same emphasis was put in *D v S* by the Court of Appeal where the emphasis was on all aspects of welfare to be taken into account, "there is no room for *a priori* assumptions".²² The Court acknowledged in *Stadnickzenko* different judges could come to different results on the same facts. This is what happened in both *Stadnickzenko* and *D v S* where High Court Judges "weighed and balanced" differently than the Family Court Judges in both cases on essentially the same facts. This makes it difficult for lawyers to predict outcomes that are determined not so much by the rule of law but by how the judges see the parties and the interests of the child and the different weight they give to particular considerations. The Court of Appeal in *D v S* acknowledged that "differing assessments" are available and that in the end each judge will bring his or her own "perspectives and experiences".²³ The words of Frankfurter J are cited by the Court of Appeal in *D v S* that "... reason cannot control the subconscious influence of feelings of which it is unaware."²⁴ The Court of Appeal in *Stadnickzenko* and *D v S* listed factors to be weighed and balanced when determining what is best for the particular child:

- the child's well being may lie primarily with the primary caregiver and the well being of that family unit bears on the best interests of the child. This has become known as the well being of the parent affects the well being of the child factor.²⁵
- The child's well being may depend on the nature of the relationship with both parents – the closer the relationship and the "more dependent the child is on it for his or her emotional well being and development the more likely an injury resulting from the proposed move will be."²⁶
- The reason for the move and distance of the move.²⁷
- The child's views.²⁸
- Both parents are guardians and share in the

²⁰ At para 63 Pankhurst J in *ACCS v AVBM (Parenting Order)* [2006] NZFLR 986, HC at [52] [53] said the new Act does not herald a change of approach.

²¹ [1995] NZFLR 493, CA (NZ) at 500.

²² [2002] NZFLR 116, CA (NZ).

²³ At para 57.

²⁴ At para 57 from *Public Utilities Commission of the District of Columbia v Pottak* (1952) 343, US, 451, 466.

²⁵ *Stadnickzenko*.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ *Ibid* and *D v S* at para 31.

upbringing of the child that necessarily involves a right to be consulted on decisions of importance.²⁹

The Care of Children Act lists the decision as to residence as an important guardianship decision that requires consultation.³⁰ This means that a parenting order giving day to day care does not mean a right to unilaterally change residence.

- The child's welfare is not the only consideration – freedom of movement is an important value in a mobile community but the child's welfare determines the course to be followed (quoting *J v C*, House of Lords). Whilst freedom of movement is recognised it cannot trump the child's welfare that is legally paramount.³¹ As Kirby J put it in *AMS v AIF* – "parents enjoy as much freedom as is compatible with their obligations with regard to the child."³²
- The welfare principle is consistent with the United Nations Convention on the Rights of the Child.³³
- All aspects of welfare must be taken into account – physical, mental, emotional as well as development of the child's behaviour consistent with what society expects. It is a predictive assessment. It is a decision about the future.³⁴
- There must be no gender bias in deciding cases.³⁵
As we shall see there is a strong gender divide between women who are most likely to be the relocators and men who are most likely to be the *status quo* parent.
- Decisions about relocation may be affected by the longevity of existing arrangements – "in some cases the duration of the existing arrangements and the greater degree of change proposed may require greater weight to be accorded the *status quo*."³⁶ Whilst this is not an *a priori* assumption, it is very close to one.
- Decisions of courts outside New Zealand are likely to be of limited assistance because of

different social landscapes. "Two relevant factors of the New Zealand scene [...] are the growth and degree of involvement of both parents in family care and a clear move in Family Court orders to ... shared care." Again this is close to an *a priori* assumption to keep both parents closely involved with the child.³⁷

- Relocation cases are difficult but it is not appropriate to give specific guidelines about them.³⁸

The High Court have warned against a "tick the box" checklist approach³⁹ but there is general agreement in the High Court that the considerations in ss4, 5 and 6 of the Care of Children Act 2004 need to be applied to the case with particular emphasis on the considerations which are relevant to the particular child. Lawyers need to prepare their case around the considerations in the Care of Children Act 2004 in order to determine where the best interests of the particular child is likely to lie. Priestley J in *MBS v EAC*⁴⁰ emphasised that a relocation application will be "immeasurably strengthened if there is detailed evidence relating to the environment factors and psychological factors."

In summary each case will depend on its own facts with judges required to look to the future and assess which proposal put to the court is best for the particular child. The judge will consider the matters in ss4, 5 and 6 of the Care of Children Act as well as the additional factors suggested in *Stadnickzenko* and *D v S* such as how a parent's well being relates to the child's well being and the effect on the child of spending less time with a parent. It is crucial that all evidence is gathered for one purpose only; to show the future impact on the welfare of the child. By its very nature such evidence is inevitably speculative and to a degree guess work. None of us can see the future but the lawyer must build a compelling case which paints a clear picture of the future based on concrete proposals that put the child's interests first.

²⁹ *D v S* at para 28.

³⁰ Section 16(2)(b) Care of Children Act 2004.

³¹ *D v S* at para 30.

³² (1999) 199 CLR 110,224

³³ *D v S* at para 31.

³⁴ *D v S* at para 32.

³⁵ *D v S* at para 33. S4(4) of the Care of Children Act 2004 makes this clear.

³⁶ *D v S* at para 35.

³⁷ *D v S* at para 36.

³⁸ *D v S* at para 37.

³⁹ Priestley J in *Brown v Argyll*. Hansen J in *S v L* [2008] NZFLR 232 at para 28.

⁴⁰ [2005] NZFLR 1.

Clients quite naturally come to lawyers with their own interests to the forefront – “I should be free to live where I want to.” “It’s my child, I have a right to see him whenever I like.” The lawyer’s job is to ask what the arrangements for the children will be and most importantly, how those arrangements will benefit the child. Ultimately what is at stake in a relocation case is the degree to which a judge can see that the proposals put forward have been carefully thought about in terms of what is best for the children. The standard of “best” is a high one, and in reality unattainable, but if your clients do not begin thinking in those terms it will show through and their attitude and the perception the judge has of them will derail their case. The reason why the child’s welfare and interests are paramount is to endeavour to take the parents away from their own conflicts and needs and look to how things are for their children.

In the most recent appeal to the High Court *Carpenter v Armstrong*⁴¹ Heath J allowed the appeal and helpfully set out the information necessary to make a better predictive assessment into the future which the law requires in such cases:

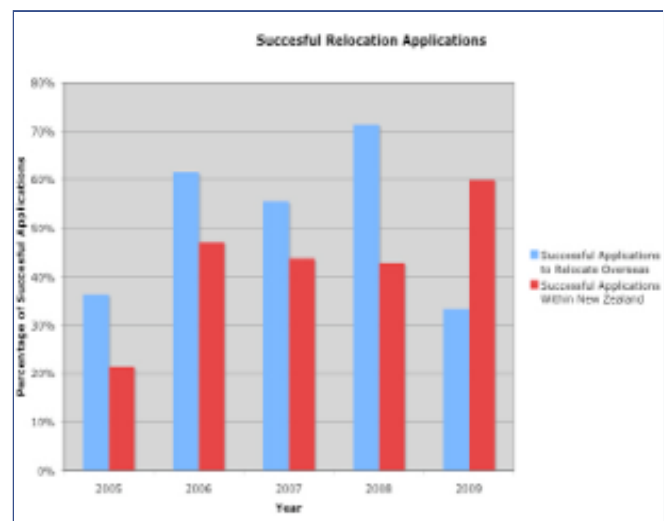
- a) Identify the developmental milestones for each child over the next five years. That is not an easy task but would involve predicting the levels of character, values, learning and personality the children could be expected to reach.
- b) Identify each child’s needs to meet those milestones. Children need good role models, good schools, good friends, a safe environment, nurturing and love.
- c) Which parent is most likely to meet those needs without considering relocation? This will depend on each parent’s ability to understand those needs and have the capacity to meet them.
- d) How will the different living proposals meet those needs? The choice was between the Bay of Plenty and the English Midlands. Heath J said more information would be required for the English Midlands so proper comparisons could be made.
- e) The views of the child, as far as feasible, on the issues. One child was young and unable to express views verbally. A psychologist was asked to assess views indirectly from behavioural responses.

- f) What adverse effects is each child likely to suffer if the parent with day to day care of the children in one country does not actively foster a continuing and good quality relationship between the children and the other parent.

All these questions are speculative. There is no scientific way of finding the answers. It will depend very much on the preferences of judges answering those questions as to what the outcomes will be. The best you can do is prepare your clients thoroughly with specific responses and hope that the judge approaches the answer in an open minded way and not a predetermined manner.

The Statistics of Relocation Cases Since the Inception of the Care of Children Act 2004

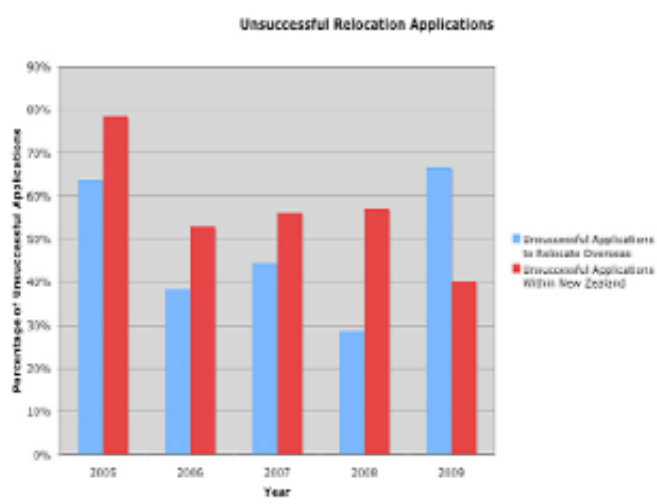
These statistics are based on the analysis of 116 decisions, primarily Family Court, but also involves 16 High Court decisions.



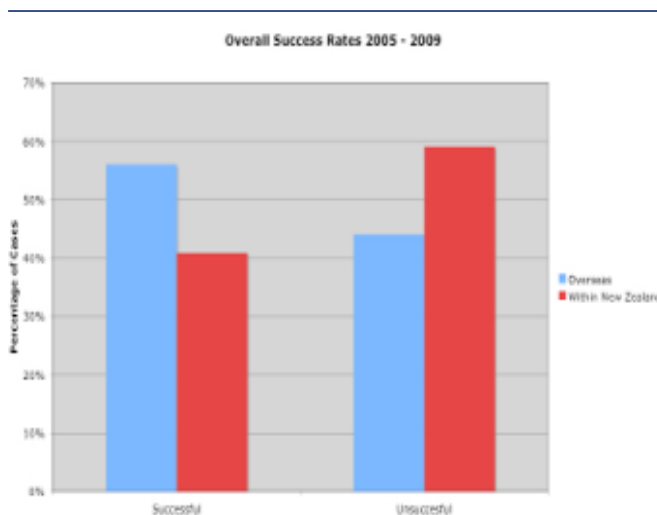
Successful applications to relocate within New Zealand have steadily increased from a low of 20% in 2005 up to 48% in 2006, down to 42% in 2007 and 2008 and up to 60% in 2009. Applications to relocate overseas have generally been more successful from 38% in 2005 to a high of 70% in 2008. The increase of allowing relocation may be explained in terms that those who apply to court to relocate prepare their cases very well. It may be that since the High Court has reinforced that there is no particular emphasis in the Care of Children Act 2004 about

⁴¹ High Court, Tauranga, CIV 2009, 470.511, 31 July 2009.

how relocation cases are to be decided, differing from Principal Family Court Judge Peter Boshier's extra curial article, that relocating may be more difficult with the new Act because of the emphasis on the relationship with both parents, that Family Courts are looking at each case with no *a priori* assumptions for or against relocation.



These figures mirror the successful applications



Overall 55% of applications for relocating overseas are successful whereas 40% of applications for relocation

within New Zealand are successful. Intuitively one would think this would be the other way around. Kirby J in the Australian High Court case of *AMS v AIF*⁴² thought that relocation within Australia would be easier than relocation out of the country because it would be easier to keep both parents involved in the child's life. A reason why overseas relocations may be more successful is that because it is a major move the case may be better prepared and there may be more sympathy, particularly for a parent who wants to return home after a break up. Patricia Eastale and Kate Harkins examined 50 relocation cases heard in the Family Court at Federal Magistrates Court in Australia from 2003 – 2008 and found 60% of those wanting to relocate were allowed to go. Pre the 2006 amendment to the Family Law Act, The Shared Parental Responsibility Act 2006, 75% were allowed to go, as compared with 50% after the amendment.⁴³ The amendment made a meaningful relationship with both parents a primary consideration when decisions about children are made. My previous research on relocation had shown a downward trend from 62% allowed to relocate pre 1998, to 48% from 1999 – 2000 and down to 35% just after the Care of Children Act 2004 came in.⁴⁴ Patrick Parkinson⁴⁵ looked at 58 Australian reported cases from July 2006 to April 2008 on relocation. In 53% of cases relocation was allowed. The strike rate for International cases was lower - four out of nine. Percentages do not tell the whole story because some cases should never have gone to court where the non-relocating parent has been abusive and disinterested in the child.

Predominant Factors in Relocation Cases

Lang J said in *M v M*⁴⁶ that a relocation case, like all parenting disputes about children, is "about which living arrangements will best meet the interests and welfare of the children". It is, as Wild J said in *S v O*⁴⁷ a "predictive assessment." Whilst there are no prior assumptions, in the end after the weighing and balancing exercise courts have to come down one way or the other. They may do it on a quantitative basis, such as there are more factors for than against or they may do it on a qualitative basis, this particular factor is the one that tips the balance a

⁴² (1999) 199 CLR 160.

⁴³ "Are we there yet? An analysis of relocation judgements in the light of change to the Family Law Act (2008) 22 AJFL 259-279

⁴⁴ Henaghan, M., Klippell, B., & Matheson, D. (2000). "Relocation Cases". New Zealand Law Society Seminar, June 2000, Wellington; Henaghan, M. (2003, October). "Relocation – Taking the baby with the bath water". *Family Law Conference Proceedings* (pp.159-175), Wellington; Henaghan, M., (2008). "Care of Children Act Cases: Where to from here?" Paper presented at the LexisNexis Child Law Conference, Wellington; Henaghan, M. (2008). "Doing the Cocabana: Using the Care of Children Act for child clients". 6 *New Zealand Family Law Journal*, 53.

⁴⁵ "The Realities of Relocation: Messages for Judicial Decisions" (2008) 22 AJFL 35-55

⁴⁶ High Court, Auckland, CIV 2009-404-1513, 9 July 2009.

⁴⁷ [2006] NZFLR 1 at [109].

particular way. Either way is fine as long as the judge has considered and given reasons why other factors carry less weight in the particular case.

The focus here will be on factors that tend to be predominant when a relocation is allowed and those which are predominant when it is not. It is always safer to hang the case on more than one factor and produce the best possible evidence. It is important that your client is consistent, sincere and child focused on what they are planning. The way a judge perceives each party and their motivations is crucial in this discretionary area of the law where ultimately the judge has to trust which parent will provide the best environment for the child into the future. Judges have no more ability to look into the future than anyone else. They are relying on their assessment of the character of the parties based on how they present in court and their past actions as to whether or not they can trust the person to take care of the child and to do what they said they would do in terms of how they will relate to the child and the child's relationship with the other parent into the future.

At the level of common law reasoning where the personalities are taken out of the equation and the focus is on generic generalities, many of the cases are indistinguishable from each other and therefore the outcomes should be the same. The difference in outcome is solely the way particular parties are seen by the court.

For example in *S v O*⁴⁸ the mother, who was Irish, wanted to return to Ireland with the children where she would have the emotional and financial support of her family. The father was in a relationship with a former au pair of the family. Both the Family Court (Judge Callinicos) and High Court (Wild J) Judges held that the mother's emotional well being was crucial to the well being of the children. The mother was the primary care giver. The mother said she felt isolated, helpless and trapped in New Zealand, "it could be a life sentence". This created more conflict with the father and a greater alignment of the children with the mother. It was accepted that the mother would work "hard and strenuously" to maintain the children's relationship with the father.

In *LH v PH*⁴⁹ an Austrian mother wanted to return home to Austria with the children where she had extended family. Her husband had formed a relationship with another woman. The mother said she was alone and

unsupported in New Zealand and like the mother in *S v O*, that she would be happier if she was allowed to return to her family in Austria. Both the Family Court and the High Court (Winkelman J) found that the mother could function well in both New Zealand or Austria and therefore the loss of the relationship with the father won the day.

The only difference between the two cases was less evidence of a poor emotional prognosis if the mother remained in New Zealand and not the same degree of evidence of increasing conflict between the parents. The Family Court Judge had noted resentment and a possible element in the mother wanting to return to Austria and that she had a eurocentric view of the world which meant her attitude to contact with the father was not accepted as genuine.

Winkelman J commented that there is no expectation or requirement that judges in relocation cases undertake an analysis of factual similarities and differences between cases (at [39]). Each case according to Winkelman J depends on "different dynamics between the mother and father, different circumstances and different children" (at [38]). Personal assessment of the parties and the personal preferences of judges rule in this area, not the rule of law. The emphasis on perception of the facts makes it *crucial* to prepare your client thoroughly and the factual basis for their claim.

1. The Relocating Parent's Case

A) The Legal Basis

Because there are no prior assumptions in New Zealand there is no presumption in favour of or against the relocating parent. The English Court of Appeal led by Thorpe LJ in *Payne v Payne*⁵⁰ has led the charge in tipping the weighing and balancing in favour of the relocating parent. In the United Kingdom the leave of the court is required if a child is to be taken out of the country. *Payne* involved a New Zealand mother of a four-year-old girl who wanted to return home from England. The mother was the primary care giver and Thorpe LJ said that refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of the child. Thorpe LJ did acknowledge that the "effect upon the child of the denial of contact with the other parent and in some cases his family, is very important" (at 40-41), but concluded his judgment that

⁴⁸ [2006] NZLFR 1.

⁴⁹ [2007] High Court Auckland, CIV 2006-404-5799, 21 March 2007.

⁵⁰ [2001] 2 FLR 1052, CA.

"the emotional and psychological well being of the primary carer must be given greater weight when considering the paramount consideration of the child's welfare." New Zealand courts are required to consider all the factors including the well being of the relocating parent as it affects the child, once they have done that they then, as was done in *S v O* with the Irish mother, come down on the well being of the relocating parent and the dependence of the child on it as the crucial and decisive factor.

Gaudron J in the Australian High Court case of *AMS v AIF*⁵¹ saw the issue as whether the relocating mother (to Darwin) should have day to day care no matter where she lives, or whether she should have it only if she lived in Perth. This puts the case in terms of who is really the best person to care for the child, which is a crucial issue in any parenting dispute. If the relocating parent clearly is the better parent to have care, and the relationship with the other parent can be maintained with quality blocks of time, then relocation is in the best interests of the child. There is evidence from American research that adolescents can maintain close relationships with a non-resident parent if they stay with their parent for an extensive period during the summer holidays even if they do not have them during the school year.⁵²

Social scientists have battled for some time to have the last word on what is best for children. Such studies are always limited by the fact that they are generalised about a particular group of children studied in a particular context. The researchers bring their own bias to any study, which is impossible to eliminate. The way data is collected, the inferences drawn from data and the overall conclusions are not neutral free matters. Even if they were, they would be conclusions about those children and would not necessarily apply to the particular child about whom the decision needs to be made. The social scientist findings can be broken into two camps. One camp⁵³ is that a child's welfare is best preserved by protecting the

relationship with the primary care giver. The other view⁵⁴ is that a child's welfare requires frequent, regular interactions with both parents.⁵⁵ In her most recently published research findings Judith Wallerstein⁵⁶ said that there is unpredictability of the overall post-divorce relationship between father and child. "Those men who were closet to their children during the marriage were the largest group among those who moved away after the divorce."⁵⁷ A major finding of this work is that "the findings run counter to the thinking in parts of the legal system that holds that if the conflict between the embattled parents is settled and the mother does not block the father's role, that he will maintain responsibility and enduring contact with his children".⁵⁸ For example remarriage and the step mother's attitude toward the father's continued relationship with his children from the first marriage was a matter of "critical importance" on how the relationships with children was fostered or not.

Priestley J in *MBS v EAC*⁵⁹ said "A relocation application of course... will be immeasurable strengthened if there is detailed evidence relating to environmental factors and psychological factors. The fact that the health and well being of a primary care giver will be enhanced if relocation occurs is a potent factor which should not lightly be ignored." If there is evidence of abuse, whether physical or psychological, that will enhance the relocation case. The very recent Court of Appeal case of *Surrey v Surrey*⁶⁰ in the context of the Domestic Violence Act, emphasised that the Court is to assess the risk of domestic violence on the basis of past conduct informed by the subjective views of the victim. Reliance on past conduct was held to be an appropriate guide to future conduct, particularly when the perpetrator lacked insight into his behaviour. Those who have had to live with violence are likely to know the risks better than anyone else. There is no definition given of "primary care giver". It assumes more than 50% of the care. It is an important starting point for a relocating parent.

⁵¹ (1999) 199 CLR 160.

⁵² Elanor Maccoby, Christy Buchanan, Robert Mnookin and Sanford Dornbusch, 'Postdivorce Roles of Mothers and Fathers in the Lives of their Children' (1993) 7 *Journal of Family Psychology* 24; Christy Buchanan, Elanor Maccoby and Sanford Dornbusch, *Adolescents after divorce* (1996) 85.

⁵³ Wallerstein J and Tanke T (1996) "To Move or Not to Move: Psychological and Legal Considerations in Relocating of Children Following Divorce" 30 *Family Law Quarterly*, 305-335.

⁵⁴ Kelly JB and Lamb ME (2000) "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children" 38 *Family and Conciliation Courts Review*, 297-311.

⁵⁵ See Carol S Brusck "Sound Research or Wishful Thinking in Child Custody Cases?" (2006) 462 *Family Law Quarterly* 281-314.

⁵⁶ Judith S Wallerstein and Julia M Lewis, "Divorced Fathers and Their Adult Offspring: Report From a Twenty-Five Year Longitudinal Study" *Family Law Quarterly* 42.4 (Wntr 2009), p695.

⁵⁷ Ante note 50 at 702.

⁵⁸ Ante note 50 at 704.

⁵⁹ [2005] NZFLR 1 at 39.

⁶⁰ 7 August 2009, [2008] NZCA 565.

It was accepted in *S v O*⁶¹ that a relocating parent's well being is relevant to the child's welfare because a parent's well being enhances their parenting ability. It also gives justification to the reasonableness of why they want to move.

In *B v B (Relocation)*⁶² the Family Court judge had found that the mother was "just managing at present" and that there was a "significant risk potentially that [her] ability to cope alone will start diminishing rapidly" once the child started school. Because this was the crucial deciding factor in the case Duffy J held that independent psychological evidence was essential and that this was compounded by the fact that the Judge gave no reasons why such evidence was required. A further complication was that there was no evidence before the Court to show the respondent's unhappiness was impacting negatively on the child but the "reverse is the case".⁶³ Duffy J goes on to say that health professionals are usually reluctant to make predicative assessments of the mental health of parents. "Apart from anything else, the circumstances that will prevail in the future and their impact on psychological well being cannot be known." If that is the case further psychological evidence would not be of any help. The Family Court Judge had found that the child's relationship with the father would be difficult to re-establish if the child went to England. This was seen to be a *predictable* factor whereas the mother's well being was seen as *unpredictable*.

Duffy J concluded (at para 12) that "relocation will only be in the child's best interests if his mother is so harmed by having to remain in New Zealand that her emotional and psychological health will deteriorate to a point where it will impact detrimentally on the child." Given it was conceded earlier that such a prediction is not easy to find from experts, this makes it risky to pin a case solely on the well being of the relocating parent. It puts the relocating parent, as Robert George⁶⁴ points out, in a no win situation, "unless they will be so devastated by refusal of leave that their psychological health will be impaired if they cannot relocate. But a parent who was that psychologically troubled might risk losing control of their children altogether if the other parent were capable of having day to day care".

The majority of the Family Court of Australia in *Taylor v Barker*⁶⁵ accepted that the trial Judge could "imagine" and "infer" from the evidence that the mother would not be happy if she were not able to move with the child and her new partner, who has a child, to Queensland. The minority Judge, Faulks DCJ, was not prepared to "elevate on inference" to the conclusive factor – "an expert opinion based on observation and fact rather than conjecture may establish the veracity of such an inference."⁶⁶

An Australian study by Patricia Easteal and Kate Harkins⁶⁷ found that Australian Family Court judges are giving less weight to the mover's happiness as a consideration because they are following the minority view of Faulks DCJ and requiring expert evidence. One Australian Judge said that "if parental happiness is a relevant consideration it must surely be the happiness of both parents is relevant."⁶⁸

A relocating primary care giver's well being needs to be combined with a good reason to relocate such as retraining, a new job, leaving an abusive partner, a strong network of friends and family, a good attitude with the father and a clear commitment to ongoing contact with the other parent - provided there are no safety issues for the children where non contact or limited contact would be appropriate. The child's safety is a mandatory principle in s5(e) of the Care of Children Act 2004 and children are entitled to protection from all forms of violence including psychological violence - a clear plan for the schooling and upbringing of the children and a plan of how to integrate the children into the new environment. Children who are old enough to understand need to have been consulted on the move.

The avoidance of conflict between parents as a justification for relocation can be a double-edged sword if there is a good relationship between the children and the other parent. Is it better that children have less conflict in their lives and potentially lose their relationship with the other parent? That will depend very much on what is most important for the particular child. Some children can cope with conflict if their relationship with both parents is kept intact.

⁶¹ At para 77.

⁶² [2008] NZFLR 1083.

⁶³ At para 51.

⁶⁴ [2009] *Otago Law Review* "The Shifting Law: Relocation Disputes in New Zealand and England", 107 at 125-126.

⁶⁵ [2007] FAM CA 1246.

⁶⁶ *Ibid* at [128].

⁶⁷ "Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act" (2008) 22 AJFL 259.

⁶⁸ *Glover v Taylor* FMCA Fam 926 DC 200711760 at [39].

In the recent case of *K v B*⁶⁹ two girls, F aged 6 and K aged 4.5, had quite different upbringings. The parents are Muslim. F from 1-2.5 years of age spent all her time in the care of her father and stepmother in New Zealand and barely any time with her mother until she was 2. K spent her entire life in the care of her mother and her mother's family in Australia and never saw her father or sister. Both children and parents are in New Zealand – the mother wants to take the children to Australia. The Family Court held the children were attached to both parents. Mr B was not able to travel to Australia. The mother was found to be in danger of alienating the younger child, K, against the father. The mother, who had moved a number of times, was seen as lacking stability for the children and this would be exacerbated if she went to Australia, so relocation was refused by the Family Court.

Courtney J found that the relocation issue was a major cause of the conflict between the parents and that the quality of the girls' relationship with the father would be adversely affected by a move to Australia. Courtney J accepted (at [53]) that if the children moved to Australia with the mother their relationship with the father would suffer and the risks of alienation would be higher and that there would be a sense of loss, especially for F. Courtney J decided that the unacceptable risk of damage to the children from the conflict was the decisive factor and the mother was given permission to take the children to Australia. There was no evidence in the case that there was physical or psychological abuse by the father. The conflict is not explained. What is the nature of it? What are the causes? What impact is it having on the children?

The decision has the potential to totally alienate the children from their father which could be very damaging to F who had a close relationship with her father. There was no clear weighing of how important the relationship with the father is for the children and why it was less important than lessening the conflict. The children could have been placed in the father's care, or more work could have been done on working on lessening the conflict in New Zealand so the children could benefit from both parents. The children may prefer the conflict to the alternative of a significantly reduced relationship with the father. The Australian Relocation study found that where there is conflict, contact after relocation became more difficult.

By comparison in *Carpenter v Armstrong*⁷⁰ the parents detested one another and constantly fought. The

mother's application to relocate to England with two boys, aged 7 and 3, was successful in the Family Court on the basis she needed to escape the conflict and have the benefit of the emotional and financial support of her extended family in England. The father said he had to stay in New Zealand to support his mother. Heath J held that the present conflict does not assist in determining which of the two parents can best undertake day to day care in the future because the mother said she would go to England anyway even without her children. The case had been fought on what was best for each parent and therefore the Family Court had to choose the least detrimental outcome for the children and that was against the spirit of the Act – a "damage control" function (para 12).

Heath J allowed the appeal and asked for a refocus on the children's best interests which was which of the two options, living with the father in New Zealand or living with the mother in England, was best for the future well being of the two boys. One boy was more attached to the father and one more attached to the mother. Generally it is seen as against the interests of children to separate them from each other but each case must be looked at on its specific merits. In the end the case will be decided on which parent the Court trusts best to bring up these children. Both parents have a very poor attitude to each other. The parent who can readjust their attitude to consider the children's relationship with the other parent will strengthen their case.

2. The Non-Relocating Parent's Case

The overwhelming fact that emerges from the cases for the non-relocating parent is that the child needs a continuing relationship with that parent for their future well being. Concerns about damage to that relationship, diminishing that relationship, estrangement of that parent, injury to that relationship are predominant in the cases where relocation is declined whether it is a relocation within New Zealand or outside New Zealand. Evidence of the "psychological needs" of the child for a close relationship with the non-relocating parent is powerful. For example in *R v P*⁷¹ Judge Emma Smith declined a mother's wish to relocate to Australia with young children (4, 5 and 3). The mother had good reasons, such as employment and financial opportunities. The mother was the primary care giver of the children.

⁶⁹ High Court Auckland, 23 April 2009, CIV 2008-404-000583.

⁷⁰ High Court Tauranga, 31 July 2009, CIV 2009-470-511.

⁷¹ Family Court, Dunedin, FAM 2005-012-000233, 23 February 2006.

Psychological evidence before the Court said the children had an unfulfilled psychological need for more time with the father and this was crucial to the decision to decline relocation. When children are young and there is a good and growing relationship with the father, judges are reluctant to allow relocation too far away because the growing relationship may be stopped in its tracks and may not recover.

This can be difficult for young mothers who are desperate to start a new life. In *S v L*⁷² the child was 6 and had been born as a result of a brief relationship with the father. Initially the father had not shown interest but in recent times was beginning to develop a relationship with the child. The mother had a new fiancée and desperately wanted to relocate to Australia where her father lived. The mother, who was clearly the primary care giver, had a negative attitude towards the father because of the relationship. Both the Family Court and the High Court feared that if the mother did go to Australia this attitude may mean that the relationship with the father would wain because the mother would not encourage it once she was out of the country. The mother in this case moved to Australia without the child. Within six months the father decided it was better if the child lived with the mother.

In the New Zealand Relocation study there were several instances where a resident or shared care mother moved *without her children* after the Family Court declined her application to relocate, granted a non-removal order, or ordered her back following a unilateral move. In these 12 families this meant that the care of the children was reversed, with the father becoming the resident parent. In several troubling cases the father had undertaken only a limited parenting role prior to this change of day to day care, had sometimes not sought, wanted or expected the full time responsibility for his children and was living with a new partner and step children. The children were therefore removed from their mother's primary care (when she opted to proceed with her relocation) and placed with their father (sometimes in a new locality) in an unfamiliar blended family. It was not surprising that five of these situations broke down within a two year period and the children were eventually returned to their mother's care. The distress and trauma described by the parents and children involved has been the most anguishing aspect of our research to date.

A recent article in *The Australian* highlights the consequences of a punitive approach. In the case of *Irish v Michelle* the Family Court ordered the removal of two Tasmanian children from the care of their mother, who had been their primary carer, to live with their father, who had moved to Melbourne to live with his new girlfriend. The reason was the mother had not encouraged the children to maintain a relationship with the father after he had left home. A mother in the case of *Rosa v Rosa* has been left to live in a mining town in Townsville so that she can be with her daughter. The family had only been there for a year before the break up. There was no work for the mother and she was living in a caravan but the Court order was for the child to remain there so the mother had to stay there and live in conditions bordering on poverty.⁷³

Recent English research, "Relocation – The Reunite Research Project,"⁷⁴ by Marilyn Freeman of 36 people (25 fathers and 11 mothers – in 94.10% of the cases the mother sought relocation) found that there were consistent problems with exercising contact that had been ordered by the court granting relocation. There were also problems with financing international contact which meant for many of the left-behind parents, relocation is the end of any meaningful direct relationship with their children. Many of the fathers in the English study spoke of the over emphasis of the courts on the "distress argument" that the mother's distress on not being able to leave will impact on the child. One relocating mother in the English study regretted being allowed to relocate and to remove her child so far from the father. She said that it is a happy child that makes a happy mother and not the more commonly expressed happy mother that makes a happy child. This mother thought that the English approach to allowing relocation is based on the unspoken assumption that mothers are the better primary carers for their children and that fathers are able to move on with their lives without their children. The fathers in the English study felt like expendable, unnecessary accessories to a child's life.

The other factors which generally support non-relocation are the continuity principle and the fact the status quo is working well. The child is doing well in the current environment. Lack of a male figure in a child's life, the uncertainty of the new location, no good reasons for relocating by the relocating parent are all in favour of the

⁷² [2008] NZFLR 237.

⁷³ "Flaws" in John Howard's Family Law. Caroline Overington, *The Australian*, 3/6/09.

⁷⁴ Obtainable at www.reunite.org

non-relocating parent. The attitude of the relocating parent, the children's desire to remain in the community they are in, to the other parent is a consistent theme where relocation is declined. Such relocating parents are not trusted to continue to foster the relationship between the children and the non-relocating parent. The Australian Relocation study has found that where there is conflict, contact becomes more difficult after relocation.

3. Are There Relocating and Non-Relocating Judges?

The majority of judges have a reasonably even split between allowing or not allowing relocation. Judge Ullrich has the highest % decline rate in contested relocation cases that go to court followed by Judge Ryan. Judge Annis Sommerville has the highest % allow relocation rate in contested cases that go to court, followed by Judges Mather, Walker and Burns. Such % rates do not necessarily single a bias in one direction or the other. Judges have to take into account all the factors and come down one way or the other.

4. Inside the Judicial Mind

Guthrie, Rachlinski and Wistrich⁷⁵ have written a revealing article on what goes on inside the judicial mind after studying judges. Judges can tend to anchor and frame their decisions. This means they start from a preferred fixed point and then look at risks and benefits around that anchor. Fiona McKenzie's⁷⁶ study of relocation included responses from seven Family Court judges to their approach under the Care of Children Act 2004. It shows that some judges start from a clearly preferred position as they see the legislation, others are more neutral in their approach.

"I now start from the position of sharing day to day care but with no assumption that it should be equal. However, if a parent is available for equal care and wants that, I look for reasons why not. I move to physical contact and then non-physical contact depending on how difficult that is to put in place."

"By seeking a sharing of the day to day care wherever possible looking to other means to provide relationships where a sharing of day to day care is not possible."

"Starting point child to have a relationship with both parents however that can happen but no presumptions it

should be 50/50."

"I have a very close focus on child's relationship with each parent and how this may be affected by different care options."

"The issue of a child's right to have a relationship with both parents is one of the factors to be taken into account in any relocation case. In one case it might get greater prominence or weight than in another. I do not think it forms a factor to be given any greater weight than any other factor. The Court of Appeal has made it very clear that no prior assumption should be brought to a case and each case needs to be assessed on its own merits."

"I don't start from a position (consciously). I look at the history, the individuals, the relationships, the skills and compare the effects of possible outcomes and attempt to match a form of orders that makes sense of those matrices."

5. Keeping the Experts on Track

The best person to keep experts appointed under s-33 Care of Children Act 2004 on track is the lawyer for the child. Winkelmann J in *LH v PH*⁷⁷ used the process from the High Court decision of *K v K*⁷⁸ to emphasise that the code in section 4 of the High Court Rules 1985 should be complied with by experts to ensure impartiality and independence. This is crucial in relocation cases when so much is at stake. The code requires that:

- a) an expert has an overriding duty to assist the Court impartially on relevant matters within the experts are of expertise;
- b) an expert is not an advocate for any party;
- c) an expert must state his or her qualifications in a report;
- d) if an expert witness believes that his or her evidence might be incomplete or inaccurate without some qualification, that qualification must be stated;
- e) the facts, matters and assumptions on which opinions are expressed must be stated explicitly;
- f) the reasons for opinions given must be stated explicitly;
- g) any literature or other material used or relied upon to support opinions must be referred to by the expert; and
- h) the expert must not give opinion evidence outside

⁷⁵ (2001) 86 *Cornell Law Review* 777-830.

⁷⁶ *Uneasy Trends in Relocation Cases* LLM dissertation, Victoria University, March 2009.

⁷⁷ High Court Auckland, 21 March 2007, CIV. 2006-404-5799.

⁷⁸ (2004) 23 FRAZ 534

the witness's area of expertise.

6. Is it Worth Appealing a Relocation Case?

There have been 16⁷⁹ appeals to the High Court under the Care of Children Act 2004 in relocation cases. Generally relocation cases are appealed from a parenting order where there is a general right of appeal under s143 of the Care of Children Act 2004. In some cases the original application is under section 44 and 45, the disputes between guardians provisions. A child's place of residence is a guardianship matter. Resolution of guardianship decisions require leave of the High Court to appeal. Heath J in *A v H*⁸⁰ said that because relocation is critical to any subsequent parenting order "leave to appeal will almost inevitably be granted." Panckhurst J in *ACCS v ALMB*⁸¹ said guardianship disputes over relocation are of such fundamental consequence that it would be unthinkable if they were not susceptible to appeal. Six of the appeals have been successful. There has been some discussion in the High Court cases since *Austin Nichols & Co Inc v Stitching Lodestar*⁸² as to whether an appeal in a relocation case is a general right of appeal or an appeal from a discretion. In the end the High Court Judges followed Blanchard J's statement in *D v S*⁸³ that they are fully entitled to substantiate their views on questions of fact including what is in the best interests of the child. The Judges can take account of the fact that the Family Court Judge heard and saw all the witnesses but are still free to substitute their own views on questions of fact and evaluation. There is no automatic deference to the fact the Family Court is a specialist court.

But when should appeal Judges substitute their own views? When a Family Court Judge does not consider a relevant consideration important to the particular child then that is a time for intervention. It is also appropriate where the trial Judge does not give reasons as to why particular considerations are relevant or not. The whole point of a consideration is that its relevance or not must be explained and justified in terms of the other considerations.

A further basis on which High Court Judges intervene is

where they do not agree with the reasons for the weight to be given to a consideration. Here, the Family Court Judge has taken into account the relevant considerations and given reasons for how they have been weighed and balanced, but the High Court would weigh and balance them differently. The Court of Appeal in *D v S* accepted that "differing assessments" are available and that in the end each Judge will bring his or her own "perspectives and experiences" (at para 57). Given that Family Court Judges are appointed because of their experience in Family Law, it does not make sense to replace that experience and perspective from that of a non specialist appeal Judge, otherwise we create a never ending lottery where each Judge brings their own perspective or experience.

7. What About Contact if the Relocating Parent Goes

Both the Australian study and the English study show that after relocation, contact can be more difficult and may completely break down. There are reciprocal legal arrangements with Australia which makes it a little easier to enforce contact. There are no such arrangements with other countries such as England. This puts the non relocating parent at the behest of the relocating parent if contact breaks down. They would have to commence proceedings in an English court which is costly and with no guarantees.

In *Hunter v Morrew*⁸⁴ Simon Jefferson took a New Zealand High Court Declaration to the Court of Appeal in the United Kingdom about rights of access. The English Court of Appeal held that as the declaration was not supported by legislation in the Care of Children Act 2004 they did not have to abide by the declaration of the New Zealand High Court.

8. The New Zealand Research Study on Relocation Following Parental Separation

Our three-year research project has been funded by the New Zealand Law Foundation, for the period January 2007 to December 2009. We have recruited 100 families

⁷⁹ * = successful appeals. **B v B* [2008] NZFLR 1083; *S v O* [2006] NZFLR 1; **K v B* 23/4/09 (2009) 27 FRNZ 417; *D v T* 13/6/08 [2008] NZFLR 761; *S v L* [2008] NZFLR 237; *V v F* 1/12/06 CIV-2006-485-1573; *H v H* 7/7/09 CIV-2009-485-341; **E v B* 14/11/08 [2009] NZFLR 126; *H v H* 21/3/07 [2007] NZFLR 737; **A v H* 27/10/06 CIV-2006-419-1210; *B v S* 9/6/06 [2007] NZFLR 263; *Brown v Argyll* 9/5/06 [2006] NZFLR 705; *M v M* 9/7/09 CIV-2009-404-1513; *ACCS v AVMB* 5/5/06 [2006] NZFLR 986; *T v J* 10/11/05 CIV-2005-485-559; **Carpenter v Armstrong* High Court, Tauranga, CIV 2009, 470.511, 31 July 2009.

⁸⁰ High Court Hamilton 27 October 2006, CIV 2006-419-1210

⁸¹ High Court Christchurch, 5 May 2006, CIV 2005-409-002492

⁸² [2008] 2 NZFLR 141 SC.

⁸³ [2003] NZFLR 81 CA.

⁸⁴ [2005] EWCA CIV 976.

where a parent has relocated (or sought to relocate) with the children and that move would have a significant impact on contact arrangements with the other parent.⁸⁵

The research was approved by the University of Otago Human Ethics Committee and has the support of the Principal Family Court Judge and the Family Law Section of the New Zealand Law Society. A literature review and an analysis of New Zealand family law judgments on relocation matters are also being completed.

RECRUITMENT: All New Zealand family lawyers were informed about the study and invited to draw it to the attention of clients who may be interested in participating in it. Lawyers provided their clients with a letter and brochure that we supplied about the research, and interested clients either gave their consent for their contact details to be passed onto us or contacted us directly via e-mail or our national toll-free telephone number. Nicola Taylor and Megan Gollop then followed up all these contacts. We had initially hoped to recruit families within six months of their relocation case being resolved, but the numbers coming forward were not sufficient to achieve this. We therefore used articles and advertisements in community newspapers and on websites to recruit more families to attain the desired sample size. This had the advantage of broadening our sample to incorporate both litigated disputes and those resolved by parental agreement (either with or without lawyer, counselling or mediation interventions) and to include families whose relocation issues had been resolved over a range of years.

METHODOLOGY: During 2007 and 2008 the first round of in-depth interviews was conducted with the parents and their children aged 7 years or more. Each adult participant is being interviewed again 12-18 months after their initial interview so that the impact of the relocation decision and any changes in family relationships and contact arrangements can be tracked over time. Some standardised measures are also being administered, and demographic information collected. We will complete the follow-up interviews in December 2009. Thus the research is a 'work in progress' and the findings reported in this article should be regarded as preliminary until the data analysis is finalised later this year.

SAMPLE: One hundred families are participating in our study. The comprises 114 parents (73 mothers and 41

fathers; in 14 families both parents took part), and 43 children (aged 7-18 years) from 29 of the 100 families.

Table One: Current Parent Type

Care arrangement	Mother	Father	Total
Resident parent	50	9	59 (52%)
Contact parent	8	24	32 (28%)
Split care	8	2	10 (9%)
Shared care	4	4	8 (7%)
Independent contact	1	2	3 (3 %)
Independent resident	2	0	2 (22%)
Total	73	41	114

Table One indicates that at the time of the initial interview over half (52%) of the participants were resident parents (50 mothers, 9 fathers); and just over a quarter (28%) were the contact parent (8 mothers, 24 fathers). Ten parents (9%; 8 mothers, 2 fathers) had a split care arrangement whereby one parent had the day-to-day care of one or more children and the other parent had the day-to-day care of the other children in the family. Seven per cent of the parents interviewed shared the care of their children with their ex-partner (4 mothers, 4 fathers). Five of the participants (3 mothers and 2 fathers) had children who were living independently at the time of the interview, but they had previously been the contact parent (3%) or the resident parent (2%).

	Mothers	Fathers	Total
Successful movers	39	1	40 (35%)
Unsuccessful movers	19	1	20 (18%)
Successful opposers	2	11	13 (11%)
Unsuccessful opposers	3	19	22 (19%)
Non-opposers	1	5	6 (5%)
Applicant (case still) unresolved	3	0	3 (2%)
Opposer (case still unresolved)	0	1	1(0.9%)
Other	6	3	9 (8%)
Total	73	41	114

Table Two: Parent Relocator Type

⁸⁵ The objectives of the research are: to examine parents' and children's experiences of the outcomes of relocation disputes after an application to relocate has been allowed or refused (by a parent or the Family Court), and to then follow-up these families 12-18 months later; to explore the factors associated with the successful adaptation of children who are relocated away from their non-resident, and to identify any problems they encounter; to determine the short-term and medium-term patterns of contact which develop when children relocate away from their non-resident parent; to explore the effects of a decision not to approve a relocation on the relationship between the parents, and the relationship each of them has with their child(ren); and to examine (in the fully litigated cases) the accuracy of predictions made by the Court about the likely consequences for parents and children of approving or refusing the proposed relocation.

The position the parents took in terms of the relocation issue (i.e. whether the parent was the one who wished to relocate or the one who opposed their ex-partner relocating) is shown in Table Two. Included in these figures are six cases where a Family Court decision was appealed, in which case the final outcome was coded. The majority (35%) of the participants were those who had successfully sought to relocate, while just under a fifth (18%) of the parents had wished to move but had not (either because their application had been declined, there was a non-removal order in place, or they decided to stay after discussion with their former partner). While about a tenth (11%) of the parents who participated were those who had successfully opposed their former partner relocating with their children, almost a fifth were unsuccessful in opposing such a move. The 'non-opposers' group of parents (1 mother, 5 fathers) did not object or legally challenge the other parent relocating with the children, and only comprised 5 per cent of the participants. The 'other' category included: parents in families where it was the non-resident parent who had relocated; both parents moved at the time of the separation; the move occurred prior to the separation; or it was the contact parent who lived in a different location to the children who was successfully applying for their care, thus resulting in the children (not the parent) relocating. Only nine (8%) of the 114 parents fell into this 'other' category.

It was the mothers who most often wished to move with 61 (84%) of the mothers desiring to relocate, compared to only two of the fathers. Thirty-one fathers (76%) had opposed their children's mother's proposed relocation – 11 successfully, 19 unsuccessfully, with one case still to be determined by the Family Court. There were more mothers who successfully relocated (39) than those who were prevented from moving or who, after parental discussion, had agreed not to move (19).

Table Three: Parent Mover Type

	Mothers	Fathers	Total
Moved	46	4	50(44%)
Moved but ordered back	1	0	1 (0.9%)
Moved but returned	4	0	4 (3.5%)
Followed children	0	3	3 (3%)
Moved elsewhere	1	6	7 (6%)
Stayed	16	28	44 (38.5%)
Stayed then later moved	2	0	2 (2%)
Yet to be determined	3	0	3 (3%)
Total	73	41	114

Table Three shows that our sample was quite mobile with over half (59%, n=67) of the parents geographically relocating, and 44 parents (38.5%) not moving at all and remaining where they lived prior to the relocation issue arising (2% remained initially but then moved later). While many parents had moved (either with or without their children), four parents (3.5%, all mothers) had eventually returned to their original location (where the father resided) either voluntarily or, in one case, the mother was ordered back by the Court. Some contact parents whose children had moved away with their resident parent either followed their children to the new location (3%, all fathers) or subsequently moved elsewhere themselves (6%, 1 mother, 6 fathers).

The Complexity and Diversity of the Relocation Issue

The retrospective element of our study allows a more longitudinal view of patterns of mobility within post-separation families and reveals the complex and diverse nature of relocation issues in the New Zealand context. Within our sample it was not possible to simply categorise families as those where the proposed relocation had either been allowed or declined, and whether the proposed move had occurred or not. Many different relocation sequences emerged which expanded beyond the more standardised patterns of successful or unsuccessful applicants and opposers found in the Australian studies.⁸⁶ Not all of our families actually disputed and/or legally challenged a proposed relocation, there were multiple relocations within some families (either proposed or actual, some opposed and some not), and in several families both parents relocated. Within our sample it is therefore evident that a relocation 'dispute' is not a discrete, one-time-only event, but is instead illustrative of an ongoing process of family post-separation transition(s). Many families in this study described non-opposed relocations before the disputed move, and as will be shown, the families' situations did not remain static after the relocation in issue was resolved.

For data analysis purposes we have coded 'the relocation' as the move (proposed or actual) that each participant primarily focused on during their initial interview. In many instances this was straightforward as the dispute had clearly been over one application to relocate; in other cases where there were multiple (proposed) moves we have had to determine which move actually counts as 'the relocation'. With this in mind, the

⁸⁶ See *supra* notes 1 and 27.

100 families fell into 12 different groups that describe the sequence of their relocation issue, thereby allowing insight into not only the antecedents and precursors of the relocation, but also the outcome and any subsequent transitions.

Families have been initially divided depending on whether or not the resident parent has moved. In over two-thirds (73%) of the families the resident parent has moved. Within the remaining 27 families, there are four families where the relocation dispute has yet to be determined by the Family Court. In the remaining 23 families the resident parent has not proceeded with the proposed move because it was opposed by the other parent, or it was the contact parent who had moved or wanted their children to move to be with them in a different location.

Table Four outlines the number of families in each of the 12 categories of relocation sequences and illustrates

the complexity and diversity involved:

Approximately three times more relocations proceeded than did not in this study. Just over half (51%) of the families had their relocation disputes determined by the Family Court, or the High Court on appeal, with five families having involvement with an overseas Court, and a further 6% of the families having their relocation attempt stopped through the granting of a non-removal order by the Family Court. Approximately one-third (34%) of the families reached agreement by consent after consulting their lawyer or undergoing Family Court conciliation (counselling/mediation) or without any legal involvement at all.

Table Four is also noteworthy for the variety illustrated within each of the 12 categories, particularly in relation to what happened after the relocation issue was resolved. For example, amongst those families where the relocation proceeded and one parent moved with the children there

Table Four: Relocation Sequences⁸⁷

Resident (or shared care) parent moved (n=73)	
1. Family Court (or the High Court on appeal) allowed the relocation and the parent relocated with the child/ren	23
2. Resolved by parental agreement or was not opposed by the other parent and the parent relocated with the child/ren (in 2 cases the move occurred prior to the separation)	20
3. Unilateral move by the resident parent, which was opposed but the Family Court allowed the parent to remain in the new location with the children	10
4. Unilateral move by the resident parent, which was not opposed or legally challenged and the parent remained in the new location with the children	7
5. Unilateral move by the resident parent, who was ordered back, and returned with the children	1
6. Unilateral move by the resident parent, ordered back or subsequent relocation application denied, the children returned, the resident parent did not	5
7. Family Court declined a relocation application or a Non-removal order was granted, and the parent moved without the children	7
Resident (or shared care) parent did not move (n=23)	
8. Family Court or the High Court (on appeal) declined the relocation, the parent remained with the children	10
9. Resolved by agreement with the other parent and the parent remained with the child/ren	6
10. The contact parent who lived elsewhere successfully applied to have the care of the children and the children did not move	3
11. The contact parent who lived elsewhere unsuccessfully requested to have the care of the children and the children moved	1
12. The contact parent moved	3

⁸⁷ N=96 since in 4 of the 100 families the outcome is still to be determined by the Family Court.

were instances where:

- The other parent subsequently also moved to be in the same location as their children.
- The other parent subsequently moved elsewhere.
- The resident parent moved again to another location with the children.
- The move was only temporary due to work or study opportunities.
- The intact family had relocated without the father prior to the separation and the mother and children subsequently remained in the new location but the father did not also relocate and remained in the original location.
- The relocating parent eventually returned with the children to live back in the original location.
- The care of the children was split between both parents, resulting in some siblings relocating and others not.
- Children were involved in international child abductions or were unilaterally relocated without the consent or prior knowledge of the other parent (and in some cases the children themselves).
- After a unilateral move the parent was ordered back and either returned with the children, or the children returned but the parent did not.
- Both parents moved to a new location at the time of the separation.

This list shows that it was not always the resident parent and the children who moved, but rather there were a variety of permutations of transitions, with situations when the entire family (both parents and children) moved, the mother or father moved (with or without the children), or it was the children (some or all) who moved while the parents did not.

The following are key findings in the New Zealand study:

- The parents found the relocation dispute highly stressful, expensive and, for some, traumatic;
- Some children are having to endure lengthy car or unaccompanied plane trips to remain in contact with their non-resident parent;
- Several parents have relocated to certain areas (eg Southland) because housing and education is more affordable there;
- Parents who are required to remain living in a particular locality (because their application

to relocate has been refused) generally regard this as an infringement of their civil liberties but seem to accept the situation and understand why their child's relationship with the other parent has been prioritised at this time;

- Having a young child reach school-age seems to lead to a change in their pre-school care arrangements (which may have been more flexible and shared despite the relation);
- Parents' willingness to recognise the importance of their children having a relationship with both parents influences the degree of cooperation which exists following the relocation. Some parents have been inventive and positive in promoting and maintaining contact (eg reading story books to their children over the phone);
- Generally, children prefer regular telephone contact or face to face visits rather than e-mail contact with their non-resident parent. Parents, however, find e-mail and texting useful for keeping in touch with their ex partner. We have so far found little use of webcams. Teenage children utilise texting as a means of keeping in touch with parents;
- Parents' satisfaction with their lawyer and the Family Court is, unsurprisingly, linked to the case outcome. Many have expressed strong dissatisfaction with the length of time taken to resolve their case and its cost;
- Parents have identified a lack of written resources for them to consult on the relocation issue. Much of what they obtain through the Family Court is oriented towards shared care which is usually untenable when a relocation dispute arises.

The Australian study has made the following findings:

- 65% of the resolved cases – the applicant was allowed to move either by judicial decision or by consent. It was easier to move by consent, 58% overall moved by court decision.
- 53% of the cases had to go to court to be resolved. This is very high with estimates that only 6-10% of all cases go to court.
- The costs are high - the median for those going to court is \$45,000 with a mean of \$66,172 and the highest \$450-500,000. The median for consent is \$30,000 with a mean of \$54,700 and the highest \$220,000.

- After the decision was made to relocate it sometimes did not happen for a variety of changes of circumstances.
- Cases where there is conflict can mean contact becomes more difficult after relocation.
- Travel costs are high - \$10-15,000 a year.
- Travel was a burden for the child in many cases.⁸⁸

Reality Testing Your Clients

Patrick Parkinson⁸⁹ has suggested a range of issues which should be raised with clients in relocation cases to save them from wasting time, money and effort.

Issues for the parent who needs to relocate:

1. Has she considered the impact of the move on children who will have to go to a new environment – a new school, a new community, a new park? How will the children cope with this? Who is in place to help them cope with this given children are under stress because of parental separation.
2. What are the prepared arrangements for the other parent to see the children? Can they pay some of the costs? Where the children are young, the Courts like more frequent contact to keep the other parent alive in the child's mind - can they affect this? Older children can have more gaps between contact.
3. What impact will there be on the children of seeing less of the other parent? How close is the relationship with the other parent? Will the closeness be able to be maintained when there is distance from that parent?
4. Is it realistic to expect the other parent to move? For example, if both parents have come from a previous location which they could move back to. But if the other parent is immersed in the community with their job and potentially a new family it may be more difficult. If the reason for the move is a new partner can the new partner move?
5. If the motivation is to put distance from the other partner then they will not want the other partner to move. There needs to be a good reason for the distance such as escaping a controlling and threatening relationship.

Issues which need to be raised with the parent who opposes:

1. How much involvement have they had in the children's life? Would the quality of the relationship disintegrate if there was a move? Can they think of ways to maintain the quality through regular communication?
2. Can they move themselves? If not, why not?
3. Are there issues of violence or abuse which mean the children and their partner need to be protected from them?
4. Are the other parent's reasons for contact 'appropriate'? Are the travel costs affordable and the travel burdens manageable?

Conclusion

The answer to the question in the title of this article is it depends on how well the lawyer advises their clients. It depends on the attitude of their clients and if it goes to court it depends on how the Judge perceives their client, and which anchor the Judge starts from and what weight they give to the considerations in the Care of Children Act 2004, when they make their decision.

It is possible to predict outcomes in some cases, such as when the non relocating parent has spent little time with the child and has been abusive to the relocating parent, or when the non relocating parent is a crucial part of the child's life, and the relocating parent does not have good reason to leave. The hard cases are when there is a close relationship with both parents and the relocating parent has a good, well thought through reason to relocate, which if disallowed will affect her psychologically and financial well-being. These cases can be decided by allowing relocation and putting in place contact provisions that will preserve the relationship with the other parent, or not allowing the relocation of the child.

⁸⁸ See Parkinson, "What We Know Now and Why it Matters" – paper for Family Law Conference, Fiji, June 2009 – to be published in the *Australian Journal of Family Law*.

⁸⁹ The Realities of Relocation: Messages from Judicial Decisions (2008) 22 *Australian Journal of Family Law* 35-55.

Moving On: Best Interests of Children in Relocation Cases

Linda D. Elrod*

*Relocation cases . . . present some of the knottiest and most disturbing problems that our courts are called upon to resolve. . . . the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents.*¹

I. Introduction

Relocation or removal cases, when one parent attempts to move a child either out of state or a significant distance from the child's other parent², are among the most difficult for courts to decide because they are "no win" situations. The status quo changes and the child may have to establish a new type of contact with at least one parent. While moving is a relatively common experience for American families³, divorced families move more often. Within four years of separation or divorce, 75% of custodial parents will relocate at least once. Half of these will move again⁴. Moving can be traumatic for both adults and children, even when all members of the family relocate as an intact family. When the proposed move involves only one of the parents and the child, the potential move can generate conflict where there had been none before or can exacerbate a bad situation when the parties are already involved in high conflict.

The most common relocation case arises when the primary residential custodian of a child announces an intent to move to a new location. How relocation issues are resolved depends on the law of the jurisdiction and the

particular facts of the case. Relocation cases are so intensely fact-driven, it is hard to predict results⁵. One survey showed that in the reviewed time period, permissions to relocate were granted in 41% of cases, denied in 43% of cases, and the issue remanded to the trial court in sixteen percent of cases⁶. There are four usual alternative outcomes:

- the court allows the parent to relocate with the child;
- the court disallows the relocation request, however, the status quo is preserved because the parent decides not to move without the child;
- the court disallows relocation and the parent moves without the child, resulting in primary custody being transferred to the nonmoving parent; or
- the relocation is allowed and the other parent chooses to follow to the new community.

Occasionally, a judge will transfer primary residential custody to the "nonmoving" parent even though the moving parent changes his or her mind about moving.

The outcome of any given case depends upon the existence of a statute or case precedent making it easy or difficult for a parent to relocate with a child, the type of parenting arrangement that currently exists, and the attitude of the judge who hears the motion. If the court allows a reexamination based on an evaluation of the child's best interests, in the absence of bright line rules, the

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¹ *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996).

² See LA. REV. STAT. § 9:355.1 (defining relocation as an "[i]ntent to establish legal residence with the child at any location outside of the state)." See also ARIZ. REV. STAT. § 25-408; COLO. REV. STAT. § 14-10-129; FLA. STAT. § 61-13001 (2009); GA. CODE § 19-9-1(A)(2)(C); IOWA CODE § 598.210, ME. REV. STAT. tit. 19A § 1653(14).

³ U.S. CENSUS BUREAU, GEOGRAPHICAL MOBILITY/MIGRATION REPORT 2008 (showing 15.9% of children move during a one year period).

See <http://www.census.gov/population/www/socdemo/migrate/cal-mig-exp.html>

⁴ Sarah L. Gottfried, Note, "Virtual Visitation: The New Wave of Communication Between Children and Noncustodial Parents in Relocation Cases", 9 CARDOZO L. J. 567, 568 (2003). See also David Wood et al, "Impact of Family Relocation on Children's Growth, Development, School Function, and Behavior", 270 J. AM. MED. ASS'N. 1334 (1993).

⁵ *In re Hamilton-Waller*, 123 P.3d 310, 313 (Or. Ct. App. 2005) (describing relocation cases as more fact dependent than any other type of case).

⁶ Theresa Glennon, "Still Partners? Examining the Consequences of Post-Dissolution Parenting", 41 FAM. L. Q. 101, 119 (2007).

parties can become involved in expensive, emotionally-charged and time-consuming litigation⁷. The custodial/residential parent's freedom of movement and "new life" opportunities bump against the nonresidential parent's interest in a continuing relationship with the child⁸. Public policy considerations in most states today encourage both parents to share in the rights and duties respecting their child, even after separation⁹. The child has an interest in a continuing and healthy relationship with both parents.

In addition to the legal confusion, there is little research on outcomes in relocation cases to guide parents, lawyers, judges or custody evaluators as to what is in the best interests of children. Relocation cases have become part of the "gender" wars as fathers' and mothers' groups, social scientists, mental health professionals and others weigh in on the topic¹⁰. Judges have difficulty deciding these cases because so little is known about what is good for children generally, how to assess the strengths and weaknesses of parent-child relationships in a particular family, and how to predict what impact any decision will have on any particular child and the members of that child's family.

II. Constitutional Issues in the United States

The United States Supreme Court has recognized a constitutional right to travel¹¹. Arguably, changing custody because the residential parent relocates infringes on that parent's right to travel¹². Many courts, however, have found that the parent's right is subject to the best interests of the child¹³. Although some appellate courts have criticized attempts to restrict a parent's right to travel either by parental agreement or by court decree¹⁴, others have upheld reasonable geographical restrictions on a parent's right to relocate¹⁵. A Florida court found that where the relocation would not allow a parent to exercise specific visitation provisions in a parenting plan, the court may find an implied restriction on the other parent's ability to relocate without consent or court approval¹⁶. Even if there are geographical restrictions, however, all states recognize that all custody and residency provisions are modifiable in the best interests of the child¹⁷.

Other constitutional rights that parents have asserted in relocation cases are the right of privacy, a custodial parent's fundamental right of autonomy in child rearing, due process and equal protection. To date, most of these challenges have been unsuccessful in court¹⁸.

⁷ See *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004)(taking over nine years in litigation). See also Patrick Parkinson, Judy Cashmore, & Judi Single, "The Need for Reality Testing in Relocation Cases", 44 FAM. L. Q. 1 (2010)(showing the high dollar and emotional costs involved with litigating relocation cases in Australia).

⁸ See *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 657 (Ark. 2003)(noting conflict in parents' interests); *Dupre v. Dupre*, 857 A.2d 242, 245 (R.I. 2004)(same); *Latimer v. Farmer*, 602 S.E.2d 32, 34 (S.C. 2004)(same); *Hawkes v. Spence*, 878 A.2d 273, 274 (Vt. 2005).

⁹ See e.g. TEX. FAM CODE § 153.001(a): "The public policy of this state is to: assure that children will be shown the ability to act in the best interest of the child; provide a safe, stable and nonviolent environment for the child; and encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage."

¹⁰ Compare Judith S. Wallerstein & Tony J. Tanke, "To Move or Not to Move - Psychological and Legal Considerations in the Relocation of Children Following Divorce", 30 FAM. L. Q. 305 (1996) with Richard A. Warshak, "Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited", 34 FAM. L. Q. 83 (2000) and Sanford L. Braver, Ira M. Ellman & William V. Fabricius, "Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations", APA J. OF FAM. PSYCHOLOGY (2003)(purporting to demonstrate harm to children from move of either parent but heavily criticized for both methodology and conclusions). See also William G. Austin, "Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives", 34 FAM. L. Q. 63 (2000)(purporting to have a risk assessment scale); Carol S. Bruch, "Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law", 40 FAM. L. Q. 281 (2006)(critiquing the social science research).

¹¹ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹² See *Watt v. Watt*, 971 P.2d 608, 615-16 (Wyo. 1999)(noting the right to travel carries with it the right of a custodial parent to move with the children); *Jaramillo v. Jaramillo*, 823 P.2d 299 (N. M. 1991). See Arthur B. La France, "Child Custody and Relocation: A Constitutional Perspective", 34 U. LOUISVILLE J. FAM. L. 1 (1996).

¹³ See *Braun v. Headley*, 750 A.2d 624 (Md. Ct. Spec. App. 2000), cert. denied; *In re Custody of D.M.G.*, 951 P.2d 1377 (Mont. 1998). See also *Tomasko v. Dubuc*, 761 A.2d 407 (N.H. 2000)(finding that parent waived the right to travel by agreeing to restrictions).

¹⁴ See *In re Marriage of Thielges*, 623 N.W.2d 232 (Iowa Ct. App. 2000)(disapproving provisions whether stipulated by the parties or mandated by the court that predetermine what future circumstances will warrant a future modification). See also *Hovater v. Hovater*, 577 So. 2d 461 (Ala. App. 1990); *Scott v. Scott*, 578 S.E.2d 876, 879 (Ga. 2003); *Allbright v. Allbright*, 215 P.3d 472 (Idaho 2009)(finding trial judge could not restrict mother to live in specific areas); *In re Marriage of Seitzinger*, 77 N.E.2d 282 (Ill. App. Ct. 2002); *Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003); *Zeller v. Zeller*, 640 N.W.2d 53, 54-55 (N.D. 2002); *Testerman v. Testerman*, 193 P.3d 1141 (Wyo. 2008)(noting that parenting plans should not discourage relocation).

¹⁵ See TEX. CODE §153.133(1)(A) and 153.134(5). See also *Buonavolonta v. Buonavolonta*, 846 So. 2d 649, 651 (Fla. Dist. Ct. App. 2003)(noting the purpose of a relocation restriction is to prevent a parent from moving a child without notice to the other parent); *In re Marriage of Carlson*, 661 P.2d 833 (Kan. Ct. App. 1983); *Ziegler v. Ziegler*, 691 P.2d 773 (Idaho 1985).

¹⁶ See *Shafer v. Shafer*, 898 So. 2d 1053 (Fla. Dist. Ct. App. 2005).

¹⁷ KAN. STAT. ANN. § 60-1610(a)(3)(Supp. 2009). See *In re Marriage of Pape*, 989 P.2d 1120 (Wash. 2000). For a discussion of modification of child custody, see LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE, Ch. 17 (2004 rev. ed. Supp. 2010).

¹⁸ See *Momb v. Ragone*, 130 P.3d 406 (Wash. App. 2006), rev. denied 149 P.3d 378 (Wash. 2006); *Mason v. Coleman*, 850 N.E.2d 513 (Mass. 2006); *Fredman v. Fredman*, 960 So. 2d 52 (Fla. Dist. Ct. App. 2007).

III. Lack of Uniformity in State Laws

*Our research has failed to reveal a consistent, universally accepted approach to the question of when a custodial parent may relocate out-of-state over the objection of the non-custodial parent. . . Across the country, applicable standards remain distressingly disparate*¹⁹.

The quote from 1990 remains true today. Prior to the 1980s many states allowed the sole custodial parent to determine the child's residence²⁰. With the advent of joint legal, and often physical, custody, states have rethought unilateral relocation²¹. The law in the United States is confused and confusing because the fifty states take different approaches²². There is little uniformity. Thirty seven states have statutes governing relocation that range from the very general to the extremely complex; all states have some case law. Three attempts to garner national consensus have been unsuccessful. The American Academy of Matrimonial Lawyers Model Act on Relocation²³ has been adopted in one state and the American Law Institute Principles of the Law of Family Dissolution²⁴ has two adoptions. The Uniform Law Commission set up and then dissolved a drafting committee for a Uniform Relocation Act²⁵. In August, 2010, a committee of the American Bar Association Family Law Section picked up the ULC draft and started work on a model act. In March of 2010, the Hague Conference on Private International Law hosted an International Judicial Conference on Cross-Border Family Relocation, which developed a "Declaration on International Family

Relocation."²⁶ These principles and the earlier attempts at unification may help shape the debate in the future.

The lack of uniformity in state laws applies to all aspects of the relocation case. The first question is whether a parent must get permission of the other parent or a court or give notice of the proposed move. The second question in most jurisdictions is whether the move constitutes a sufficient change of circumstances to justify a hearing on the child's best interests. The third issue involves whether there are any presumptions for or against relocation and who bears the burden of proof.

A. Notice Requirements

Some states require a moving parent to obtain either the consent of the other parent or judicial approval before moving²⁷. Twenty-five states require the moving parent to give notice but four states do not have a specified time period. The others list the amount of notice time the moving parent must give to the nonmoving parent in advance of the move²⁸. Notice requirements vary from thirty days in Georgia, Kansas, Maine, Montana and Virginia to forty-five days in Alabama, Maryland, South Carolina and South Dakota. Nine other states require sixty days notice and one state requires ninety days²⁹.

Most notice provisions require that the notice be sent by certified mail and include (1) the intended date of the relocation, (2) the address of the intended new residence, if known, (3) the specific reasons for the intended relocation, and (4) a proposal for how custodial responsibility should be modified, if necessary, in light of the intended move³⁰.

¹⁹ *Gruberv. Gruber*, 583 A.2d 434, 437 (Pa. Super. Ct. 1990).

²⁰ See Linda D. Elrod, "A Move in the Right Direction? Best Interests of the Child Emerging as the Standard in the Relocation Cases", 3 J. CHILD CUSTODY 29 (2006). See also Janet M. Bowermaster, "Sympathizing with Solomon: Choosing Between Parents in a Mobile Society", 31 U. LOUISVILLE J. FAM. L. 791, 884 (1992) (noting that custodial parents should be allowed to relocate with their child in good faith).

²¹ *Id.* See also Glennon, *supra* note 6, at 113-119 (discussing trend toward co-parenting and the conflict with relocation cases); Carol Bruch & Janet M. Bowermaster, "The Relocation of Children and Custodial Parents: Public Policy, Past and Present", 30 FAM. L.Q. 245 (1996).

²² Linda D. Elrod, "States Differ on Relocation: A Panorama of Expanding Case Law", 28 FAM. ADVOCATE 8 (2006).

²³ AAML Model Act on Relocation, 15 J. AM. ACAD. MATRIM. LAW 405 (1998) (hereinafter AAML Model Act). Louisiana's relocation statute is modeled after the AAML. See also *Karen J.M. v. James W.*, 792 A.2d 1036 (Del. Fam. Ct. 2002) (noting the AAML Act was persuasive). For discussion of legal issues and social science considerations, see Special Issue on Relocation, 15 J. AMER. ACAD. MATRIM. LAWYERS (1998).

²⁴ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 2.17(2) (2002) [hereinafter ALI PRINCIPLES]. Rhode Island, Vermont and West Virginia have cited the ALI version. See Janet Leach Richards, "Resolving Relocation Issues Pursuant to the ALI Family Dissolution Principles: Are Children Better Protected?" 2001 BYU L. REV. 1105 (advocating state adoption of ALI custodial parent relocation provisions).

²⁵ UNIFORM LAW COMMISSION, DRAFT OF RELOCATION OF CHILDREN ACT (2009) available at <http://www.law.upenn.edu/bll/archives/ulc/roca/postmeetingdraft%20102908.pdf>

²⁶ Declaration on International Family Relocation, available at http://www.icmec.org/en_XI/icmec_publications/Washington_Declaration_English_.pdf.

²⁷ See e.g. NEV. REV. STAT. §125C.200; N.J. STAT. § 9:2-2; N.D. CENTURY CODE §14-09-07 (unless noncustodial parent has not exercised visitation in a year or has moved 50 miles from the child).

²⁸ See Linda D. Elrod, "A Move in the Right Direction?", *supra* note 20, at Appendix.

²⁹ *Idem.* Appendix. See also Uniform Law Commission, Draft, *supra* note 25.

³⁰ ALI PRINCIPLES, *supra* note 24.

The requirement for notice does not mean that the proposed move is a material change of circumstances. If notice is given and the nonmoving parent either agrees to the move or fails to object to the move, generally the moving parent may relocate³¹. States are divided as to what happens when a parent fails to give the proper notice³². Some statutes provide penalties for not giving notice, either contempt or that the relocation is a change of circumstances.

B. Move as Change of Circumstances

Whether the removal case gets a hearing depends on whether the move is a change of circumstances that requires the court to reconsider physical placement of the child. In some states a proposed intent to move by itself may not be a change of circumstances³³. In other states, any proposed move is a change in circumstances³⁴. In others, a proposed move is a change if the parents share custody³⁵ or if the move is a certain number of miles away from the current residence³⁶. A proposed change in the child's residence, when considered in light of all relevant factors (i.e. hinder frequent contact between the children and a participatory nonmoving parent), can constitute a change in circumstances³⁷.

In modification cases generally, the party seeking to change the existing parenting time arrangement has the burden of proving the change of circumstances³⁸. In relocation cases, the courts look at the nature, quality, extent of involvement, and duration of the children's relationship with both parents. Courts are more likely to find no change of circumstances and to allow the primary residential custodian to move if the nonmoving parent is not actively involved in the child's daily life or if the move is not very far away.

C. Current Presumptions and Burdens

If relocation does constitute a change of change of circumstances, states differ on the burden of proof³⁹. The clear trend is moving in the direction of adopt a neutral "best interests" of the child test placing the burden equally on both parents to show the child's best interests⁴⁰. Some states, Arkansas, Oklahoma, South Dakota and Washington, retain presumptions favoring relocation⁴¹. California, Kansas, Montana and Wyoming somewhat favor relocation because they place the burden on the party opposing the move⁴². Alabama, which has the longest single list of factors, has a presumption against relocation⁴³.

³¹ See ALA. CODE § 30-3-169; MO. REV. STAT. § 452.377(7); S.D. COD. LAWS § 25-4A-19; WASH. CODE § 26.09.500. See also AAML Model Act, *supra* note 23, at § 301.

³² Compare *In re Marriage of Grippin*, 186 P.3d 852 (Kan. Ct. App. 2008) (finding that custody should not be changed in retaliation for the mother not giving the proper statutory notice) with *Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008) (changing custody to father where mother moved to Iowa without notice to father where child had close ties to father and extended family). See also *Buck v. Buck*, 279 S.W.3d 547 (Mo. Ct. App. 2009) (finding mother had failed to give required statutory notice; oral was insufficient).

³³ See *Giannaris v. Giannaris*, 960 So. 2d 462, 468 (Miss. 2007) (stating that "mere moving of custodial parent does not constitute a change of circumstances and allowing father to move with child to San Diego for new position with the Navy). See also *In re Marriage of Burgess*, 913 P.2d 473, 478 (Cal. 1996); *Hollandsworth v. Knzewski*, 109 S.W.3d 653, 658 (Ark. 2003); *Casey v. Casey*, 58 P.3d 763 (Okla. 2002); *Ferdinand v. Ferdinand*, 763 A.2d 820 (Pa. Super. Ct. 2000); *In re Marriage of Horner*, 93 P.3d 124 (Wash. 2004).

³⁴ OR. STAT. § 107.159.

³⁵ See *Mason v. Coleman*, 850 N.E.2d 513 (Mass. 2006); *O'Connor v. O'Connor*, 793 A.2d 810 (N.J. Super. Ct. App. Div. 2002); *Pearson v. Pearson*, 11 So. 3d 178 (Miss. Ct. App. 2009) (finding mother's move out of county (80 miles) constituted change of circumstances in joint legal and physical custody arrangement); *In re Marriage of Mayfield*, 577 N.W.2d 872 (Iowa Ct. App. 1998); *Hoover (Letourneau) v. Hoover*, 764 A.2d 1192 (Vt. 2000).

³⁶ See *Thompson v. Thompson*, 176 P.3d 722 (Ariz. Ct. App. 2008); *Bowers v. Vanderneulen-Bowers*, 750 N.W.2d 597 (Mich. Ct. App. 2008).

³⁷ *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004).

³⁸ *In re Marriage of Grippin*, 186 P.3d 852 (Kan. Ct. App. 2008).

³⁹ See AAML Model Act, *supra* note 23 (not recommending a specific burden of proof, but offering three alternatives: (1) the relocating person bears the burden of proving that the objection is made in good faith and the relocation is not in the best interests of the child; or (2) the nonrelocating person bears the burden of proving that the objection is made in good faith and the relocation is not in the best interests of the child; or (3) the relocating person initially has the burden of proving that the proposed relocation is made in good faith, and, if that burden is met, the burden shifts to the non relocating person to show that the proposed relocation is not in the best interests of the child).

⁴⁰ See Linda D. Elrod, "A Move in the Right Direction?", *supra* note 20. This is also the view taken by the Declaration on International Family Law Relocation, *supra* note 26, which provides that "... the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation."

⁴¹ See *Bliven v. Weber*, 126 S.W.3d 351 (Ark. 2003); *Mahmoodjanloo v. Mahmoodjanloo*, 160 P.3d 951 (Okla. 2007); *Heinen v. Heinen*, 753 N.W.2d 891 (S.D. 2008); *In re Marriage of Horner*, 93 P.3d 124 (Wash. 2004).

⁴² *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004); *In re Marriage of Grippin*, 186 P.3d 852 (Kan. Ct. App. 2008); *In re Marriage of Robison*, 53 P.3d 1279 (Mont. 2002); *Testerman v. Testerman*, 193 P.3d 1141 (Wyo. 2008).

⁴³ ALA. CODE § 30-3-169.3(a) (listing seventeen factors to consider).

The other states have combinations of burdens. Ten states, Arizona, Connecticut, Idaho, Illinois, Louisiana, Minnesota, Missouri, Nebraska, North Dakota and West Virginia, place the burden on the custodial or residential parent to show that the move would substantially improve the child's quality of life. As an example, the Connecticut Act Concerning the Relocation of Parents Having Custody of Minor Children provides the relocating parent has the burden of proving by a preponderance of evidence that proposed relocation is for a legitimate purpose, that it is reasonable in light of the purpose, and that it is in the best interests of the child⁴⁴.

Eight states use a shifting burden. The custodial parent must prove by a preponderance of the evidence that the proposed relocation was motivated by a legitimate purpose and the relocation bears reasonable relation to that purpose. The burden then shifts to nonrelocating parent to establish why relocation would not be in the child's best interests⁴⁵ or would harm the child⁴⁶. Three states favor relocation if there is a primary custodian, but not if the parents share equal residential time⁴⁷.

The definite trend abandons presumptions and requires each case be analyzed individually and at great length to determine what is in the best interest of the child before an individual decision can be reached⁴⁸. The New York Court of Appeals noted "it serves neither the interests of the children nor the ends of justice to view relocation cases through prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another. Courts should be free to consider and give appropriate weight to all of the factors that may be relevant to" a determination of whether proposed relocation would be in the best interests of the children involved⁴⁹.

IV. Factors to Determine Relocation Requests

*At the heart of the [relocation] dispute is the child, whose best interests must always be the court's paramount concern. Those interests do not necessarily coincide, however, with those of one or both parents*⁵⁰.

Statutes and case law have created numerous factors for the courts to review in determining if relocation with a child should be permitted. A 1976 New Jersey case set out factors that, although expanded and somewhat redefined, are still at the heart of the factors used by most courts⁵¹. Among the factors considered are the prospective advantages of the move in improving general quality of life for the custodial parent and the child; whether the proposed move is inspired by a desire to defeat or frustrate visitation; whether the custodial parent is likely to comply with substitute visitation orders; whether the noncustodial parent's opposition to the move is intended to secure financial advantage in respect of continuing support obligations; and whether realistic substitute visitation pattern can be devised. Statutes and cases have added numerous other factors. Usually the cases are decided on more than one factor.

A. Impact on the Child's Quality of Life

If the child's best interest is the touchstone, there must be a showing how the move will impact the child's physical, educational, and emotional development considering the child's age, developmental stage, and needs. General quality of life includes examining the quality of relationship with both parents, peers, other relatives; strength of ties to the community; the frequency of the contact between the child and each parent; the

⁴⁴ CONN. GEN. STAT. § 46b-56d.

⁴⁵ See e.g. *Allbright v. Allbright*, 215 P.3d 472 (Idaho 2009); *Abbott v. Virusso*, 862 N.E.2d 52 (Mass. App. Ct. 2007) (if parent shows a good reason for the move, the inquiry goes to whether the move is in the best interest of the child); *Potter v. Potter*, 119 P.3d 1246 (Nev. 2005); *MacKinnon v. MacKinnon*, 922 A.2d 1252 (N.J. 2007).

⁴⁶ See *Baures v. Lewis*, 770 A.2d 214 (N.J. 2001). See also LA. REV. STAT. § 9:355.13.

⁴⁷ TENN. CODE ANN. § 36-6-108(d)(1)-(3); WIS. STAT. ANN. § 767.327; W. V. CODE § 48-9-403 (2009).

⁴⁸ See FLA. STAT. ANN. § 61-13001(7)(2009) ("A presumption does not arise in favor of or against a request to relocate with the child . . ."). See also *In re Marriage of Ciesluk*, 119 P.3d 35 (Colo. 2005); *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003); *Jaramillo v. Jaramillo*, 83 P.2d 299 (N.M. 1991); *Tropea v. Tropea*, 665 N.E.2d 145, 151 (N.Y. 1996); *Latimer v. Farmer*, 602 S.E.2d 32 (S.C. 2004).

⁴⁹ *Tropea*, 665 N.E.2d at 151.

⁵⁰ *Ireland v. Ireland*, 717 A.2d 676, 680 (Conn. 1998).

⁵¹ *D'Onofrio v. D'Onofrio*, 365 A.2d 27 (N.J. Ch. Div.), affirmed 365 A.2d 716 (N.J. Super. Ctr. App. Div. 1976) (allowing mother to move to South Carolina where mother had increased benefits and father refused to keep children overnight).

child's preference; the input of the child's attorney; existence of educational advantages; extent to which moving parent's income may be enhanced; the distance between parents' homes and the cost of alternative arrangements. For a judge to weigh these factors requires sufficient evidence to show where the child's interests are. I have argued that a child in the middle of a high conflict custody dispute, which most relocation cases are, should have a voice and the best way to do that is to provide a lawyer for the child⁵². Judges generally need to assess several factors.

1. Quality of relationship with relocating residential parent

Numerous studies have now documented the harm to children caused by parental separation and divorce. The main protective factor for children is the quality of relationship between the child and the residential or relocating parent. A good relationship with a caregiver who shows warmth to the child and exercises an effective authoritarian parenting style enhances the child's adjustment to divorce generally. Emotional stability may be more important than geographical stability:

[T]he paramount need for continuity and stability in custody arrangements--and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker--weigh heavily in favor of maintaining ongoing custody arrangements⁵³.

What is the psychological stability of the relocating parent? If the relocating parent is clinically depressed, has a personality disorder, is not a warm parent, or is too wrapped up in the parent's issues to responsibly parent, then the child may have more difficulties with a relocation. Where the court believes that the move will genuinely improve the quality of life for the child and primary residential parent, courts have allowed the move. A

mother was allowed to move when she could marry her fiancé, move from an apartment to a house, obtain a better paying job with flexible hours that eliminated the need for daycare and allow her to take the child to and from school and allow the child to participate in extra-curricular activities⁵⁴.

2. Age of the child

Children react differently at different ages and need different things at different stages. Young children who may have attachment issues and teenagers who may have peer issues may be the most difficult to relocate. The age and maturity level may be extremely important. The older the child, the more relevant the child's preference. Some children may show better adjustments to relocation, depending on their ages⁵⁵.

3. Child's relationship with the non relocating parent.

Children of divorce do better statistically if they are able to maintain a warm and loving relationship with both parents. However, frequency of contact is not as important as quality and consistency of contact. The court will want to examine the relationship of the child and the non relocating parent. If the child does not have much of an existing relationship with the other parent, the child may not "miss" their presence. If, on the other hand, the other parent is involved in daily or weekly activities, the child may have a harder adjustment and lose tangible benefits from having the other parent involved in their lives on a regular basis⁵⁶.

4. Inter-parental conflict and violence

The studies show that children of high conflict do the worse post divorce than other children. Many states have added as a factor consideration of a history of actual or threatened domestic violence⁵⁷. To the extent that a

⁵² Linda D. Elrod, "Client Directed Lawyers for Children: It is the 'Right' Thing to Do", 27 PACE L. REV. 869 (2007).

⁵³ *In re Marriage of Burgess*, 913 P.2d at 478-79 (Cal. 1996). See *Veselsky v. Veselsky*, 113 P.3d 629 (Alaska 2005)(stability is often a function of parental attitude, not geography). See also ALI PRINCIPLES, *supra* note 7, at § 2.17, cmt. a. at 357 (the best interests of the child are more closely tied to the interests and quality of life of the primary caretaker). See also Wallerstein & Tanke, "To Move or Not to Move", *supra* note 10; William G. Austin, "Relocation, Research, and Forensic Evaluation: Research in Support of the Relocation Risk Assessment Model", 46 FAM. CT. REV. 347, 348 (2008)(citing studies).

⁵⁴ *In re Marriage of Collingbourne*, 791 N.E.2d 532 (Ill. 2003). See also *Hogrelis v. Martin*, 950 A.2d 345 (Pa. Super. Ct. 2008)(allowing a mother to relocate to Virginia with her new husband whose income was double that of mother and father combined because the child would benefit from higher standard of living, father was unhappy with Pennsylvania school the child would attend if the relocation were denied, and the mother's proposed a generous alternative schedule).

⁵⁵ Austin, "Relocation, Research, and Forensic Evaluation", *supra* note 53, at 352 (citing other studies).

⁵⁶ *Baxendale v. Raich*, 878 N.E.2d 1252 (Ind. 2008).

⁵⁷ See ALA. CODE § 30-3-169.3(a)(16); FLA. STAT. ANN. § 61-13001(7)(c)(j)(2009); LA. REV. STAT. ANN. § 355.12(A)(11); MICH. COMP. LAWS § 722.31(4); TENN. CODE § 36-6-108(e)(10); WASH. REV. CODE § 26.09.520(4).

relocation will lessen the conflict, the child may benefit. For example, in one case, the court allowed the mother to have sole custody and move to California because otherwise the children would be subjected to living in a perpetual high conflict environment. The move out of state would allow them contact with extended family and increased stability⁵⁸.

5. The distance of the move

The reason some states include mileage limits for a change of circumstances is because the shorter the distance, the easier it is to maintain the current parenting schedule. While estimates vary, some think that a move of less than 75 miles or a two hour drive is not worth going back to court to fight about. For children, however, depending on the age, changing schools can be traumatic.

International moves involve additional considerations⁵⁹. There may be significant cultural changes. The greater distance may make the additional costs of parenting time for the left behind parent prohibitive. Then there is the ever present problem of ensuring enforcement of custody orders in another country.

6. Proximity to the initial separation or divorce

Excessive instability can cause mental health problems for children. If the child has adjusted to the separation and divorce, will the relocation cause too much disruption at a time when the child has stabilized?

7. Adapting resources of a given child

Is the child doing well in the current environment? The fact that child has strong roots in a community may lead the court to find the child's quality of life might not be enhanced by the move⁶⁰. If the child is not doing well, does the move have the potential to offer additional opportunities for the child? If so, what are the potential

harms from moving the child? How does the child adapt and adjust to stress? In one case even though the parents had joint custody, the best interests of child did not warrant a transfer of primary physical custody of the child to the father even though, as a result of mother moving, the child had attended three schools over a five-year period. The father could not identify any negative impact on child as a result of the moves. The child had a learning disability and the mother had participated in the child's individualized education program while the father had not attended any of the meetings. He also had refused to permit child to visit his home for a period of several weeks because of her "attitude."⁶¹

B. Integrity of the Moving Parent's Motives

All courts seem to agree that the relocating parent should have a good reason for the move. If the parent has a good reason for the move, the issue then becomes what is in the best interests of the child⁶². Among the reasons that courts have found sufficiently good to justify a move are:

- (i) to be close to significant family or other sources of support,
- (ii) to address significant health problems,
- (iii) to protect the safety of the child or another member of the child's household from a significant risk of harm,
- (iv) to pursue a significant employment or educational opportunity,
- (v) to be with one's spouse or domestic partner who lives in, or is pursuing a significant employment or educational opportunity in, the new location,
- (vi) to improve significantly the family's quality of life⁶³.

Usually the move is desired for a combination of

⁵⁸ *Danti v. Danti*, 204 P.3d 1140 (Idaho 2009).

⁵⁹ *MacKinnon v. MacKinnon*, 922 A.2d 1252 (N.J. 2007). See generally Elrod, *supra* note 20, at 47.

⁶⁰ Compare *In re Marriage of Bradley*, 899 P.2d 471 (Kan.1995)(following the psychologist's recommendation to change custody to the father so the children could remain in Wichita mainly based on "the picture of proven stability" for the children with their schools, friends, and relatives) with *Schisel v. Schisel*, 762 N.W.2d 265 (Minn. Ct. App. 2009)(noting that just because children are ingrained in a community is not sufficient to justify a travel restriction).

⁶¹ *Perry v. Korman*, 880 N.Y.S.2d 815 (App. Div. 2009) (noting that transferring custody would have necessitated the separation of the child from her two half-sisters, to whom she was very attached).

⁶² *Preuett v. Preuett*, 38 So. 3d 551 (La. Ct. App. 2010); *In re Guthrie*, 915 N.E.2d 43 (Ill. App. Ct. 2009)(allowing mother to move with child to Arizona); *Coleman v. Kahler*, 766 N.W.2d 142 (Neb. Ct. App. 2009), rev. denied (allowing mother of out of wedlock children to move to Ohio for new job where children had always lived with the mother and were more bonded with her).

⁶³ ALI PRINCIPLES, *supra* note 24, at Section 2.17(4)(a)(ii)(presuming these are valid and putting the burden of proof on the relocating parent for others). See Glennon, Still Partners, *supra* note 6, at 125-138. See *In re Marriage of Bhati & Singh*, 920 N.E.2d 1147 (Ill. App. Ct. 2010) (allowing Indian mother to move with child to North Carolina where her social and economic status would improve); *Hains v. Hains*, 36 So. 3d 289 (La. Ct. App. 2010) (allowing a military mother to move to California to advance her career); *Mann v. Mann*, 299 S.W.3d 69 (Tenn. Ct. App. 2009) (allowing remarried mother to move).

reasons. A court allowed a mother to relocate with parties' nine year old son to New York state where she was the sole custodian of the son as well as an eighteen-month-old and a newborn from other relationships, she was having a hard time maintaining consistent employment, partly because she had no family support in her current location⁶⁴. A Rhode Island court allowed a mother and two children to move to Indiana for the better employment and housing opportunities, as well as proximity to maternal grandmother⁶⁵.

Courts are reluctant to allow a move on a whim. If there is no firm job offer, no new spouse, no improvement of the child's well-being, courts find reasons insufficient. An appellate court in Tennessee found that the trial court erred in granting the custodial mother's petition to relocate to her native Germany where she had no job offer or a plan to establish a business, noting that her plans "represent little more than belief and hope without a solid foundation."⁶⁶ A vindictive desire to interfere in the other parent's relationship with the child, as evidenced by a pattern of conduct to interfere with access, would weigh heavily against the parent seeking to relocate⁶⁷. Even if the moving parent has a good reason for the move, the court may find that the move is not in the best interests of the children⁶⁸.

C. Nonmoving parent's reasons for opposing move

The integrity of the nonmoving parent's motives for opposing the move are relevant. A parent may object to the child's relocation to secure a financial advantage, to exercise a measure of control over an ex-spouse as in a domestic violence situation, or to carry on a fight. A parent who has sporadically exercised parenting time in the past will have difficulty convincing the court that the motives

are pure. The parent who is actually coparenting can show a sincere desire to continue that relationship⁶⁹.

An example of when the nonmoving parent's reasons were not valid was a recent Connecticut case. The court allowed the mother to relocate to Virginia with parties' son. The father had not paid child support, contributed to medical expenses, or witnessed one of child's seizures. If the child stayed in Connecticut, child would be a pawn in father's power struggle with the mother whom the court found to be untrustworthy and unreliable in financial dealings. In addition, the father could afford to visit in Virginia⁷⁰.

D. Realistic Opportunity for Revising Parenting Time

The mere fact that the nonmoving parent's access may be more difficult will not keep most courts from allowing the move⁷¹. The moving parent should be prepared to show that there are the realistic opportunities for adequate parenting time to allow the nonmoving parent and the child to maintain a close relationship and that the parties can afford the costs. This generally means more block time in the summer and more holiday time when there can be longer stays. With the advent of modern technology, there are many more ways for families to stay connected through the internet, cell phones with video, in addition to traditional telephone and letters. Note, however, the mere availability of additional means to stay connected should not necessarily support the relocating parent's request⁷².

The moving parent must demonstrate a willingness to comply with the new arrangements. An Illinois trial court erred in denying mother's petition for relocation to North Carolina even though court found that move would diminish the father's visitation time. The Indian mother's

⁶⁴ *Taylor v. Taylor*, 990 A.2d 882 (Conn. Ct. App. 2010) (noting seven years of litigation with a nine year old was one reason to allow the move to reduce the conflict. Child was in counseling and had lived through four years of constant conflict; mother had support in New York).

⁶⁵ *McDonough v. McDonough*, 962 A.2d 47 (R.I. 2009).

⁶⁶ *Rogers v. Rogers*, 2009 WL 1034795 (Tenn. Ct. App. Apr. 16, 2009).

⁶⁷ See *Eniero v. Brekke*, 192 P.3d 147 (Alaska 2008) (discussing what "primarily motivated" by desire to make visitation more difficult means); ALI PRINCIPLES, *supra* note 24, § 2.17(4)(a)(iii) (a move for a valid purpose is reasonable unless "its purpose is shown to be substantially achievable without moving, or by moving to a location that is substantially less disruptive of the other parent's relationship to the child).

⁶⁸ See *Mantonya v. Mantonya*, 311 S.W.3d 392 (Mo. Ct. App. 2010) (requiring children to change schools not in their best interests where mother moved not that far away); *Storrie v. Simmons*, 693 S.E.2d 70 (W. Va. 2010) (denying children's move to South Carolina where their stability would be disrupted with other parent and extended family even though mother was moving for new husband's job).

⁶⁹ See *O'Connor v. O'Connor*, 793 A.2d 810 (N.J. Super. Ct. App. Div. 2002); *Brennan v. Brennan*, 857 A.2d 927 (Conn. App. Ct. 2004).

⁷⁰ *Lederle v. Spivey*, 965 A.2d 621 (Conn. Ct. App. 2009).

⁷¹ *Tropea v. Tropea*, 642 N.Y.S.2d 575 (N.Y. 1996).

⁷² See 750 ILL. COMP. STAT. ANN. 5/609(c).

⁷³ *In re Marriage of Bhati & Singh*, 920 N.E.2d 1147 (Ill. App. Ct. 2010).

⁷⁴ *In re Marriage of McPheter*, 803 P.2d 207 (Kan. Ct. App. 1990) (allowing trial court discretion to order relocating parent to pay half of transportation costs).

remarriage to a North Carolina doctor would elevate her social status, allow her to stay home with the child and generally improve both the mother and child's quality of life. The court stated that the standard is whether a "realistic visitation" schedule could be reached, not if the relocation would "impair visitation."⁷³

Courts may address the additional transportation requirements and costs. Some courts may reduce child support payments or help with the costs of transportation⁷⁴. In one recent case, the relocating parent had to subsidize the nonrelocating parent in maintaining contact with the children⁷⁵. On the other hand, some commentators feel that that courts should also consider the economic costs of not allowing a residential parent to relocate⁷⁶ or to consider whether the nonresidential parent can also relocate⁷⁷.

V. Conclusion

... a child's development is not something with which courts should experiment and risk disruption. Although ideally a child would develop a close relationship with his loving and caring parents through an equal division of parenting time, the ideal is difficult to achieve when ... the child's parents ... establish their homes in different communities. ... In ordering this change in custody the trial

*court forgot that the paramount consideration ... is the child's best interests, not those of his parents.*⁷⁸

Trying to predict the best interests of the child is always problematic. In another article, I noted that a child-centered parenting plan would focus more on the child's needs than the parents' "rights" and "wants." I believe the same is true in relocation cases. A parenting plan should include the child's voice and should:

- (i) maintain, or at least minimally disrupt, the child's stable positive relationships with the other parent, siblings, extended family members, friends, groups, and professionals, such as doctors, therapists and others;
- (ii) ensure that the child's education and activities are not, or are only minimally disrupted or affected; and
- (iii) ensure that necessary changes are handled in a way to minimize the negative impacts and maximize the child's ability to develop new or similar supports in the future setting⁷⁹.

Judges who decide relocation cases do have a tough job – and a huge responsibility. To protect children requires dedication to exploring the best interests of an individual child in the context of that child's family system.

⁷⁵ *Inman v. Williams*, 205 P.3d 185, 193-94 (Wyo. 2009)(requiring millionaire father to pay mother \$200.00 a day when she exercised visitation).

⁷⁶ See Glennon, *supra* note 6, at 136-144.

⁷⁷ See Merle Weiner, "Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation", 40 U.C. DAVIS L. REV. 1747 (2007). See LA. REV. STAT. 9:355:12(A)(10)(listing feasibility of the objecting parent relocating too as a factor).

⁷⁸ *Winn v. Winn*, 593 N.W.2d 662, 669 (Mich. Ct. App. 2000). [Emphasis added].

⁷⁹ Elrod, "Client-Directed Lawyers for Children", *supra* note 52, at 904-905.

Relocation of Children: Law and Practice in the United States

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I.

It is often helpful when speaking to foreign audiences about American law and legal topics to begin with a discussion of the nature of federalism in the United States. Federalism in America comes very much into play when the topic is relocation of children with a parent following separation or divorce, where the other parent is left behind.

Our federal system is made up of 50 different sovereign States¹ and a strong Federal Government. The U.S. Constitution, glossed by case law and statutory enactments, determines what authority is delegated to the Federal Government and what authority remains with the States. Generally speaking, the Federal Government, quite obviously, acts in the international and interstate spheres.

In contrast, each State is primarily responsible for matters that occur within its borders. Of course it is immediately apparent that this distinction is at once too facile. Individuals and organizations constantly act across State lines, but that fact alone does not automatically result in federal jurisdiction or even federal involvement in their activities. At the same time, actions that occur wholly within a given State may implicate rights guaranteed under the Federal Constitution, such as the right to due process or equal protection of the law or some other right and, depending on the circumstances, this may very well occasion federal jurisdiction.

Against this background let us consider the matter of the parent who may or may not have sole custody of a couple's child, who with the child, leaving the other parent behind, wishes to relocate from one of the 50 States to either a remote location within the same State, a different State, or even to a foreign country. Whose law applies and to what extent does the substance of one State's law materially differ from that of another?

Traditionally U.S. Courts, including the Supreme Court, have said that domestic relations law – of which of custody and visitation with the child are quintessentially a part – is a matter of state competence. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). Federal authorities, including Federal Courts, do not ordinarily get involved in these matters. Each of the 50 sovereign States has the authority to decide, among other things, which parent should be awarded custody of a child in a custody dispute, and what rights of access and visitation the non-custodial parent should receive.

But, again, federal considerations, including constitutional rights, may come into play. The Supreme Court has recognized, for example, that Americans have a constitutional right to travel, certainly from State to State if not to every country in the world. *Jones v. Helms*, 452 U.S. 412 (1981); see also, e.g. *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991). A custodial parent who wishes to relocate – for reasons of employment, health, remarriage, or just for a change of scenery – enjoys the right to travel and implicitly to move, which presumably entail the right to take the child with him or her. On the other hand, the left-behind parent, who effectively loses access to a child who has moved too far away for this to realistically occur, may be denied the fundamental right of parenting.²

As between different States of the United States – the one from which a parent who decides to relocate with the child departs and the second to which the parent and child intend to relocate – how, then, is it determined which State law will decide the propriety of the move and under what conditions? Does the answer differ where the child is to be relocated from one of the United States to a foreign country?

Over the years, the United States has attempted to come to terms with issues such as these. When relocation

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¹ The District of Columbia, while not a State, shares many characteristics of a State, although in several respects, unlike States, its law making remains subject to approval by the U.S. Congress. One often speaks of the 50 States and the District of Columbia, but for the sake of simplicity, I will refer to the 50 States.

² The Maryland Court of Appeals put the matter this way:

In a situation in which both parents seek custody, each parent proceeds in possession, so to speak, of a constitutionally-protected fundamental parental right. Neither parent has a superior claim to the exercise of this right to provide "care, custody, and control" of the children Effectively, then, each fit parent's constitutional right neutralizes the other parent's constitutional right, leaving, generally, the best interests of the child as the sole standard to apply to these types of custody decisions.

McDermott v. Dougherty, 869 A.2d 751, 770 (Md. 2005).

occurs within the same State where the parents reside, responsibility for custody and visitation are matters that invariably remain within the exclusive jurisdiction of the individual State and do not present a particularly problematic situation. And, here, as in the interstate context, which will be discussed presently, the deciding court may well cite the federal constitutional right of a custodial parent to travel, which is to say to move, balancing that against the right of the non-custodial parent to have reasonable access to and visitation with the child, without triggering federal jurisdiction.

We know, of course, that when it comes to the international relocation of a parent with a child, if the matter is not amicably resolved between the parents and the relocating parent does not first seek to litigate the matter in the courts of the parties' habitual residence and instead unilaterally removes the child from that place or wrongfully detains the child in the foreign venue, the Hague Convention on the International Abduction of Children is the available (unfortunately not always effective) instrument for getting at a proper decision. See Hague Convention, October 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501. The United States, along with some 70 other countries is a signatory to the Convention, and the important point for present purposes is that the U.S. Federal Government helped negotiate, then signed this Convention, and has designated the U.S. State Department (specifically its Children's Bureau) to coordinate and assist the various States in applying the Convention. Indeed, federal courts are given original concurrent jurisdiction with the courts of each of the 50 States when it comes to ruling upon these Hague Convention cases. But it is the core consideration of the Convention that merits attention here. The Convention does not purport to decide custody issues as to a wrongfully removed or detained child. It looks to the court of the child's "habitual residence" before the removal or detention took place to decide that question and requires the court in the jurisdiction to which the child

has been removed or detained to return the child to that court for the appropriate custody determination. Hague Convention, Preamble. As far as the United States is concerned, the child must be returned to the State court of the State which was the child's "habitual residence."

A similar concept of returning jurisdiction over custody determinations relative to the relocated child to the State to the child's habitual residence before the relocation is embedded in legislation dealing with cases among and between each of the United States. This is not primarily the result of a single federal law, however. It has come about because each of the 50 sovereign States (with slight variations from State to State) has adopted the Uniform Child Custody and Jurisdiction Act (UCCJA) or its revised version, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), both of which were drafted by the National Conference of Commissioners on Uniform State Laws, a non-governmental organization comprised of representatives from all the States that recommends uniform legislation to States in a variety of fields, in an effort to bring about greater uniformity with respect to those fields³. The Commission has had extraordinary success in having a number of its proposed uniform codes adopted by the several States, best known perhaps being the Uniform Commercial Code or indeed the Uniform Child Custody and Enforcement Jurisdiction Act. But, as with the Hague Convention on Child Abduction, the UCCJA and the UCCJEA deal with the resolution of jurisdictional disputes as between courts of different States; they do not establish the factors that courts are to consider when passing on the merits of custody and access or visitation claims. While, as to those matters, virtually all States, substantively speaking, follow the "best interests of the child standard," it is left to each State to define the specific relevant factors that define that standard.

What is most interesting, however, for this Conference, is that in recent years the Uniform Law Commission (ULC) attempted to draft a Relocation of Children Act, including

³ The Uniform Law Commission, organized in 1892, has drafted more than 250 uniform laws on numerous subjects and in various fields of law. Many of these have been adopted.

Following its introduction in 1968, the UCCJA was eventually adopted by all 50 States and provided that a court has jurisdiction to make a child custody determination when the State of that court has been the child's "home state" within six months before commencement of the proceeding. That concept was carried forward in the UCCJEA, introduced in 1997 to correct deficiencies in the UCCJA as well as to bring the UCCJA into compliance with a federal law, the Parental Kidnapping Prevention Act, which had been enacted by Congress in 1990 also to address deficiencies in the UCCJA. As of early 2009, all but a few States had enacted the UCCJEA and as to those few, adoption of the Act was under consideration.

a lengthy provision dealing with "Factors (to be) Considered."⁴ But only very recently, as it happens, the Commission gave up the effort. In her letter to the Chairperson of the Drafting Committee, dated February 10, 2009, the President of the Uniform Law Commission explained why:

... given that the various interest groups are contentious and the states have adopted varying approaches on how to deal with the issue of relocation of children, the members of the Scope and Program Committee and Executive Committees were concerned that any act drafted by the ULC on this subject, no matter how much an advancement of the law, would not be enacted in a significant number of states.

This perhaps is the most succinct summary of how the matter of relocation of children now stands in the United States. Until now, experts have simply been unable to devise a set of universally acceptable principles to apply to these cases. However the International Family Law Committee of the American Bar Association Section of International Law is interested in renewing the attempt to harmonize relocation law in the United States. Preliminary discussions are underway, and if fruitful, the product of that effort will be submitted to the Association's Board of Governors for approval, in the form of a model code.

That said, however, among the several States there are presently still a few basic approaches to common issues that can be addressed, none of which is self-evidently better than another, and all of which, taken together, point up the essential problem areas pertaining to child relocation in any interjurisdictional setting.

II.

A) U.S. literature dealing with the relocation of children by the custodial parent is extensive – ranging from pure legal analysis to statistical emotional/ psychological studies. Suffice it to say that a fair number of custodial parents (or those seeking to assert sole custody for the first time where it has not previously been established) will always relocate and will choose to do so for a number of reasons, from the more compelling (e.g. a parent in the military being posted out of State) to the less compelling

(e.g. moving to Florida where there is no state income tax, the sun always shines, and "the livin is easy"). And all relocations will invariably have some negative impact on both the child and the left-behind non-custodial parent. Participation of the non-custodial parent in the child's life is diminished and the child – depending on his or her age – has to leave a circle of friends and established activities, then adjust to what may be a new and unfamiliar environment. Visitation schedules that have to be re-arranged can be cumbersome. But these are precisely the sort of factors which in the particular case will be weighed by the courts and that, depending on the specifics at hand, may influence them in approving the relocation, with or without conditions, or not approving it at all.

For the time that remains we focus on the principal areas that have concerned American legislatures and courts when considering the matter of child relocation:

- What sort of notice of a proposed relocation, if any, must a relocating parent give to a non-relocating parent?
- Who has the burden of proving that relocation of the child should or should not be allowed?
- Do any presumptions come into play?
- What factors are relevant with respect to the proposed relocation?
- What factors are appropriate to consider in opposition to the relocation?

B) Bear in mind that there are at least thirty-seven states that have statutes on the subject of child relocation, ranging from the very brief, e.g. Massachusetts has a single section with two sentences, while Alabama has twenty sections containing seventeen factors⁵. The rest of the States have developed standards for relocation through case law established by their highest courts.

III.

A) Notice of Proposed Relocation and Objections to Proposed Relocation

As of 2008, nineteen of the 37 States with relocation statutes required the custodial parent to give the non-custodial parent some form of prior written notice of the contemplated move. Common courtesy, of course, would

⁴ In 1997, the American Academy of Matrimonial Lawyers (AAML) also proposed a Model Relocation Act which has not been adopted by any State. The Act also contains an extensive list of factors to determine contested relocation. See American Academy of Matrimonial Lawyers, Proposed Model Relocation Act, March 9, 1997, at § 405, available at <http://www.aaml.org/go/library/publications/model-relocation-act/> ("AAML Proposed Model Relocation Act").

⁵ This tabulation and those that follow are taken from Nat'l Conference of Commissioners on Uniform State Laws, Relocation of Children Act (Draft 2008) ("ULC Draft Relocation of Children Act").

seem to dictate that comparable notice be given in every state, whether or not required by statute, and, indeed, the failure to do so could conceivably become a factor that the court takes into account in determining whether the relocation of the child should go forward or whether custody or visitation should be modified⁶. Some States, e.g. Maryland, only require prior notice of relocation if the court has included it as a condition in a custody or visitation order. Notice statutes vary from state to state, but the required information tends to be similar.

Ideally notice would contain:

- the specific new proposed residence address;
- the new telephone number of the relocating parent;
- the intended date of the move;
- a brief statement of the reasons for the intended move;
- a proposal for a revised schedule of visitation by the non-relocating parent with the child; and
- a warning that within some specific time period, e.g. between 30 to 90 days, the non-relocating parent who wishes to challenge the move must file an objection with the court, with the further indication that, should no objection be filed, the relocation may take place; and
- a suggestion that the proper court should be asked to hear the matter on an expedited basis.

B) Presumptions and Burden of Proof

The next prominent issue in relocation cases in the U.S. has to do with burden of proof – who has it? Does the custodial parent have to demonstrate the propriety of the move or is it the non-relocating parent who has to show the impropriety? Or is the burden of proof equal? In some states, this question is answered by indulging certain presumptions. “The burden of proof or presumption applicable to relocation cases is the most controversial issue regarding the law of relocation.”

The standard proposed in the now archived draft of the ULC Relocation of Children Act would establish no presumption either in favor of or against relocation of the child⁸. Both parents would bear the burden of proving

whether or not relocation is in the best interests of the child. But in actual practice the states have taken contrasting positions on the question, demonstrating no doubt why the Uniform Law’s proposal of a neutral burden met its demise. In the past, some courts took the position that because removal of a custodial parent would deny the non-custodial parent access to the child, the relocation should be denied, in effect acknowledging a presumption against removal⁹. At least one state, Alabama, still has a presumption against relocation. Beginning in the mid-90’s, however, the trend was toward a presumption in favor of the move by the custodial parent, based in many instances upon recognition of the constitutional right of the custodial parent to travel and move¹⁰ and/or upon the importance of *res judicata* insofar as past court decisions regarding custody are concerned, both acknowledging the inherent right of the custodial parent to make decisions on behalf of the child, including where the child should live¹¹. Approximately four states, e.g. Oklahoma, have a presumption in favor of relocation and, what essentially comes to the same thing, five more, including California, place the burden of proving the impropriety of the relocation on the party opposing relocation.

Among those states which do not establish presumptions, eight, e.g. Florida, provide for a split burden of proof: Here, the party seeking the move must first show a good faith reason for the move; the burden then shifts to the non-custodial parent to demonstrate why the move is not in the child’s best interest.

Ten states, including Illinois, place the burden of proof on the party seeking relocation.

Finally, six States, including New York, either by statute or case law, track the recommendation of the Uniform Law Commission and entertain no presumptions, providing for an equal burden of proof.

C) Factors to Consider in Determining the Propriety or Impropriety of Relocation

This, of course, is the heart of the matter. What considerations militate in favor of relocation and what factors against?

Even where by law there is a presumption in favor of relocation or the non-custodial parent has the burden of

⁶ See e.g. AAML Proposed Model Relocation Act at § 206(1).

⁷ ULC Draft Relocation of Children Act at § 8.

⁸ *Id.* at Comment.

⁹ See “Relocation of Children by the Custodial Parent,” 65 Am. Jur. Trials § 127 (2009).

¹⁰ Florida’s then new relocation statute was tested by a parent who claimed that it unconstitutionally infringed on her fundamental right to move about and to travel, because the non-custodial parent had an equally important constitutional right to care and control of their children. *Fredman v. Fredman*, 960 So.2d 52 (Fla. 2d DCA 2007), review denied 968 So.2d 556, cert. den. 128 S.Ct. 1481, 170 L.Ed.2d 297.

¹¹ *Id.*

proving that relocation is contraindicated, the primordial question will almost always be – Is the proposed move to be made in good faith? Again, some reasons are more compelling than others – the posting of a custodial parent in the military overseas is obviously more persuasive than the decision of the custodial parent to seek a new life, far away from the old, with no job prospects, family or friends nearby. As a judge presiding in a court located in what for many people is a “destination state”, a significant portion of my relocation cases have involved people who had moved to Florida from elsewhere, leaving extended family and friends behind. When their marriages or live-in relationships rupture, they often seek to return to their places of origin, for financial and/or emotional support. Others establish new relationships with a partner whose employment requires a move. In the present economic climate, the need to relocate is often triggered by the opportunity to obtain new employment.

Almost certainly the concern next in importance is whether the non-custodial parent will be able to maintain reasonable access to and visitation with the child. When the parents possess the financial means to enable a new access plan, this tends to be an easier case. The child can be sent back to the non-custodial parent for periodic visits, some more extended as, for example, during school vacations. Modern technology, such as Skype videos which allow face-to-face video contact via computer, can augment the personal contact. The problem, however, intensifies when parents lack the financial resources to send the child back and forth with any frequency. There the issue of whether the child should be permitted to relocate or stay becomes more problematic.

The AAML and ULC Model Acts have formulated lists of specific factors for courts to consider (or not consider) in making their judgment, and all of these, in one form or another, tend to recapitulate considerations that have informed the decisions of various courts over the years. The most central of these considerations, as set forth in the ULC Draft Child Relocation Act, are: (a) “the quality and relationship and frequency of contact between the child and each parent,” (b) “the likelihood of improving the quality of life for the child;” (c) “the views of the child” (depending on the child’s age and maturity); and (d) the “feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the child.”

Other factors tend to be a subset of these core inquiries, e.g. whether, for example, in making the move or opposing it, either parent is acting out of spite; whether there has been a history of domestic violence or threats of domestic violence; what is distance involved in the move; and the proximity, availability and safety of travel arrangements. The list is not exhaustive. Indeed, a widely cited article by Judge W. Dennis Duggan that appeared in the April 2007 issue of the *Family Court Review* lists 36 relocation factors that he gleaned from the leading cases and statutory factors, none of which, he noted, “specifically mentions parks, schools, or weather.” W. Dennis Duggan, “Rock-Paper-Scissors: Playing the Odds With the Law of Child Relocation”, 45 *Fam Ct. Rev.* 193, 209-10 (2007). These 36 factors are listed in Appendix A to this article. As Judge Duggan points out, of course, the factors are “not all of equal weight and in different cases the same factor may have different weight.”

An esteemed American mental health professional devised an actuarial forensic relocation risk assessment model to predict the likelihood of children’s adjustment to moving with a custodial parent to a new residence distant from their habitual home and from the non-custodial parent¹². This tool is a means to measure the likelihood of harm to the children caused by adding the need for the children to make this adjustment to the adjustment to the break-up of the family. The risk factors that Austin identifies include age of the child, distance of the move, individual psychological resources of the child/ individual differences/temperament/special developmental needs, degree of nonresidential parent involvement, psychological resources/ mental stability/ coping skills of the relocating parent, parenting effectiveness of both parents, degree of inter-parental conflict/history of domestic violence, ability of the residential parent to support the relationship between the child and nonresidential parent, ability to be a responsible gatekeeper, and recentness since marital separation and divorce. The buffering or protective factors that he identifies include the emotional stability and temperament of the child, shorter geographical distance, higher psychological resources and good coping skills of the relocating parent, effective parenting, history of low conflict and good communication between the parents, and the ability of the relocating parent to be a responsible gatekeeper and not hinder the other parent’s access to the child. A highly significant factor is the quality of the relationship between the child and the relocating parent.

¹² Austin, William G. “Relocation, Research, and Forensic Evaluation: Part II: Research in Support of the Relocation Risk Assessment Model.” *Vol. 46 No. 2 Family Court Review* (April 2008), pg. 347.

Interestingly, few of the thirty-six factors that Judge Duggan identifies as being considered in some combination by different American states when deciding relocation issues correlate with the factors that Austin identifies as significant when weighing the likely impact of the residential relocation on the child.

This brief review, then, suggests the possible vortex into which American parents contesting relocation of a child may find themselves, with all its attendant misery and cost.

Obviously, an amicable agreement or even alternative dispute resolution are much preferable. But contested cases will continue to be brought and courts will presumably continue to do their utmost to decide them fairly and reasonably. Nominally speaking, they will continue to espouse the "best interest of the child" standard. But, of course, under that standard the result will often not be in the best interest of one or the other of the parents and that fact alone is likely to bring at least some grief to the child. Probably the most that courts in the U.S. and elsewhere can hope for, is that they will be able to render decisions, if not "the best interest" of the child, in the "overall interest of both the child and the parents."

The writers, Judge Peter J. Messitte (United States District Judge for the District of Maryland) and Judge Judith L. Kreeger (family court judge in Miami, Florida), found that both the literature and those "in the trenches" share virtually all the same conclusions. The first universal conclusion is that child relocation is one of the hardest issues to resolve¹³. The stakes are particularly high because an interstate or international relocation of a child frequently eliminates the non-relocating parent's relationship with the child, or at least will substantially interfere with the relationship¹⁴. Unlike other child custody or visitation cases, there is rarely a middle ground in relocation cases: either the parent may relocate with the child or the parent may not. A factor complicating

relocation cases, according judges and attorneys, is that the disputes are often between two parents, both of whom are much involved with the child. Less involved parents tend to be less likely to contest a proposed child relocation and more likely to settle these matters.

Even so, mediation has been used increasingly to resolve child relocation disputes¹⁵, having gained popularity in child custody disputes and family disputes in general¹⁶. Several states have incorporated mediation into their family dispute resolution regimes. California and Florida, for example, mandate mediation in child custody and visitation disputes, unless there is a history of family violence¹⁷. Other states, such as Virginia, grant courts discretion to refer appropriate cases to mediation. In Montgomery County, Maryland, the first step in family dispute resolution is a "scheduling hearing" held before a Domestic Relations Master¹⁸. At that juncture, unless the case involves domestic violence, the court can decide to refer child custody and visitation cases to mediation prior to trial by court order regardless of the parties' interest in mediation. Similarly in Miami, Florida, families with children are referred to mediators early in the process to try to resolve all custody and visitation issues. In Florida, all family law cases (with or without children) are referred to mediators shortly prior to trial, to try to resolve all issues unless there is a history of family violence. In Maryland if pre-trial mediation fails and the case has to be tried, the court may offer post-judgment mediation services, so long as both parties consent before it is done. Throughout the United States, parties to family law cases may also independently consult private mediators; many practitioners and retired judges offer such services, including in the child relocation context¹⁹.

That said, both the literature and practitioners concede that mediation has had modest results in resolving child relocation disputes²⁰. Again, quite simply, parents'

¹³ See in particular *Relocation Issues in Child Custody Cases*, 2 (Philip M. Stahl & Leslie M. Drozal eds., 2006).

¹⁴ Two judges explained that Skype, i.e., electronic video conferencing, and social networking websites, such as Facebook, have helped in relocation cases because these technologies allow non-relocating parents to maintain regular contact with their children even after a substantial relocation. The new very detailed Florida statute, Fl. Stat. §61.13001, specifically authorizes the court to order the use of communications technology sufficient to ensure that the other parent will have sufficient frequently and meaningful contact to sustain the parent-child relationship. There never, of course, is any real substitute for in-person contact.

¹⁵ Robert E. Emery *et al.*, "Divorce Mediation: Research and Reflection", 43 Fam. Ct. Rev. 22, 22 (2005).

¹⁶ *Id.*; Nancy Ver Steegh, "Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process", 42 Fam. L.Q. 659, 659 (2008).

¹⁷ Ben Barlow, "Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?", 52 Clev. St. L. Rev. 499, 514-15 (2005).

¹⁸ Montgomery County Government, Child Custody and Access Mediation Program, http://www.montgomerycountymd.gov/cibtmpl.asp?url=/Content/CircuitCourt/Court/FamilyDivision/Mediation_Program/Mediation.asp#_Mediation_Process (last visited Feb. 9, 2010); Montgomery County Government, Family Division Services, <http://www.montgomerycountymd.gov/cibtmpl.asp?url=/content/circuitcourt/Court/FamilyDivision/FamilyDivision.asp> (last visited Feb. 9, 2010).

¹⁹ See, e.g., Carol Gersten, "Mediate the Move: Quelling Clients' Fears and Clarifying Options", 28 Fam. Advoc. 30, 31-33 (2006) (advocating mediation in the child relocation context).

²⁰ E.g., *Relocation Issues in Child Custody Cases*, *supra* note 13, at 2.

unwillingness to compromise in relocation cases makes these cases very difficult to mediate. But practitioners and judges identify other factors that tend to make relocation cases more difficult to mediate. Different cultural norms, for instance, can complicate the cases. Because at least one non-American parent may be involved, the cultural norms of that parent may be particularly influential. In some foreign cultures, such as those based in the Middle East, males are viewed as the dominant, hence invariably prevailing parent. A Muslim parent may insist on a Muslim upbringing for a child whose other parent is non-Muslim. In such cases, it has been difficult to convince parents to view each other as bargaining equals, an obvious hindrance to a mediated solution. Additionally, when relocation disputes involve young children, say between 5 and 12 years of age, there tends to be less room for compromise, since children in this age group often require more constancy and a home base than infants and older children.

Practitioners did observe, however, that certain factors, such as financial resources, may lead to more successful mediation in child relocation disputes; that is, financial resources that enable a custodial parent to remain in the locale of the habitual residence or that enable travel between the homes of both parents facilitate compromise.

One Montgomery County judge cited a case where a parent who opposed a relocation had substantial financial resources and offered to pay for a nearby apartment for the relocating parent in an effort to convince the relocating parent to let the child stay behind with the non-relocating parent. This proposal proved successful. Another judge reported a highly successful mediation in a case where one parent wished to relocate with the children from the United States to Canada, where the parents agreed in advance on funding to send the children to Canada for summers. In contrast, the prospects of compromise lessen substantially when parents have limited financial means.

Practitioners and judges have also found certain types of parents more likely to engage in successful mediation. More mature parents – those who embrace the concept of fair mediation from the outset – are among these. At the same time, if one parent is especially sensitive to the

emotional welfare of the child, he or she may be willing to take an extra step in the interest of reaching a compromise. Practitioners and judges have seen that wishes of the child and the experience level of the mediator may also affect the likelihood of successful mediation in these disputes.

Litigation of course, continues to be the main method of resolution for child relocation disputes, often with less than fully satisfactory results. Despite this, judges and practitioners uniformly agree that mediation still generally leads to better outcomes. Why? One particularly seasoned judge explained that parties “get to eliminate the gambling element [of litigation] and get to participate” in crafting the outcome. Instead of having a stranger fashion the result, as in litigation, mediation empowers parents to develop a mutually desirable solution²¹. Mediation can also avoid the cost of protracted litigation and the detrimental effects of litigation, which may include custody evaluations for the child, hurtful comments between parents and in front of children, and heightened conflict and distrust that can undermine all future family interactions.

A Domestic Relations Master has opined that mediation, as opposed to litigation, can result in better outcomes for parents of a lower economic status, who are less likely to be able to afford counsel. A mediator’s goal is to help both sides communicate and develop a mutually desirable parenting plan, regardless of whether the parties are represented by counsel. In contrast, unrepresented parties in litigation often have difficulty understanding court proceedings²², and in consequence obtaining a favorable outcome in litigation.

Finally, even when mediation is not successful, there is still good reason to find virtue in it. During the process, mediators may be able to clear up misunderstandings between the parents, encourage clearer communication between them, and at least move them in the direction of common ground²³. If the result is to preserve continuous, conflict-free (or a seemingly conflict-free or less conflicted) contact between both parents and the child, it is, as the saying goes, “worth keeping the lights low, so as to give the ghosts a chance.”

²¹ Research has also found a trend of greater compliance with mediated orders. Emery *et al.*, *supra* note 15, at 27.

²² Steegh, *supra* note 16, at 670.

²³ Teaching has become a growing part of family dispute resolution. Some family dispute resolution systems currently incorporate parenting education programs. *Id.* at 661. For instance, Montgomery County Circuit Court offers Co-Parenting Skills Enhancement classes. These classes teach parents how to communicate effectively, as well as how to act in a way that will be less damaging to their children after a divorce or separation. Montgomery County Government, Parent Education and Custody Effectiveness Program, http://www.montgomerycountymd.gov/cibtml.asp?url=/Content/CircuitCourt/Court/FamilyDivision/CoParenting_Program/CoParenting.asp#_W hat_is_PEACE (last visited Feb. 9, 2010). Similarly, Florida Statutes require that all separating and divorcing parents take, as expeditiously as possible, a four-hour parent education and stabilization course which is offered by the Florida Department of Children and Families and by other approved providers of educational services. Fl.Stat. §61.21. The Florida legislature prefaces that statutory requirement by stating that “[p]arental conflict related to divorce is a societal concern because children suffer potential short-term and long-term detrimental economic, emotional, and educational effects during this difficult period of family transition. This is particularly true when parents engage in lengthy legal conflict.”

Heading for the Light: International Relocation from Canada

Professor D.A. Rollic Thompson*

"I don't see nothing new but I feel a lot of change
And I get the strangest feeling, as I'm
Heading for the light"

– *Traveling Wilburys*¹

It is an accident of Canadian relocation law that the leading Supreme Court of Canada decision is an "international" case. In *Gordon v. Goertz*, the mother was allowed to move from Saskatchewan all the way to Australia with her six-year-old daughter.² Most Canadian relocation cases involve moves within provinces or between provinces within the country, not surprising in a country of our geographic size. About 15 to 20 per cent of our reported relocation cases involve relocation outside of Canada: 10 per cent are moves outside of North America, while the other 5 to 10 per cent reflect moves to the United States.³

For this article, I decided to separate out these "international" cases from the mass of domestic relocation cases, to take a harder look for any distinctive patterns to be found. I looked at the reported "international" cases from January 2005 to April 2010, listed in the Appendices. I have divided them into two groups: moves outside of North America in Appendix A, and moves to the United States in Appendix B.

Before I look more closely at the "international" case law, I will first set out the "modern" Canadian law of relocation, which starts from the *Gordon v. Goertz* decision of our Supreme Court of Canada in May 1996. In

2010, *Gordon* remains "the law". Despite continued unhappiness with much of *Gordon*, there have been no subsequent legislative changes concerning relocation, either to the federal Divorce Act or to provincial family law statutes.

Under the guise of *Gordon*, trial decisions have steadily, but silently, shifted away from permitting relocation, with cases approving moves declining from over 60 per cent to 50 per cent over the past ten years. In the second part of the article, I will set out the general trial context within which "international" cases get decided. Our provincial appeal courts have failed to develop any subsidiary or intermediate principles since *Gordon*, which I will discuss in the third part of the article.

According to the reported cases, an "international" move is more likely to be approved than a "domestic" move. Further, a move outside of North America is more likely to be approved than a move to the United States. To explain these general patterns, I will undertake a more careful analysis of the cases.

1. No Presumptions, No Burdens, Pure Best Interests: *Gordon v. Goertz*

Modern Canadian relocation law begins with the Supreme Court decision in *Gordon v. Goertz*.⁴ In *Gordon*, the Court rejected any presumptions or burdens, directing an individualised, case-by-case approach to relocation cases.

Gordon provided an anomalous set of facts upon which to construct a landmark decision, which may

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¹ "Heading For the Light" was on the Traveling Wilburys' first album, with the lead sung by George Harrison, accompanied by Bob Dylan, Roy Orbison, Tom Petty and Jeff Lynne, a true "super-group".

² *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 19 R.F.L. (4th) 177, 134 D.L.R. (4th) 321.

³ For the period May 1996 to June 2000, 10 per cent involved moves outside North America, while another 12 per cent were moves to the United States. These numbers are based upon two articles of mine for that period: "Relocation and Relitigation: After *Gordon v. Goertz*" (1998), 16 Can.F.L.Q. 461, Appendices A and B, also reprinted in Law Society of Upper Canada, Special Lectures 2000: Family Law: "Best Interests of the Child" (Toronto: Law Society of Upper Canada, 2001) at 287, along with "An addendum: twenty months later" at 352, Appendices A1 and B1. For the period January 2005 to July 2008, 9 per cent were moves outside of North America, while only 6 per cent were moves to the U.S., based upon the cases identified in Jollimore and Sladic, "Mobility – Are We There Yet?" (2008), 27 Can.F.L.Q. 341.

⁴ For the back story to *Gordon*, reviewing the law to 1996, see Thompson, "Beam Us Up Scotty: Parents and Children on the Trek" (1996), 13 Can.F.L.Q. 219.

explain some of the weaknesses in its analysis. First, by the time the case reached the Supreme Court of Canada, the mother had already left with the child to Australia, limiting the high Court's options, unlike the typical "before-the-move" case.⁵ Second, the mother was clearly the "custodial parent", with primary care since the 1990 separation, interim custody, and then sole legal custody since 1993. *Gordon* was a variation case, where the father applied to vary custody or to restrain the move. Third, the Supreme Court majority's factual analysis consisted of a single paragraph,⁶ with most of its reasons occupied by a vague and abstract discussion of general principles.

At one point, Justice MacLachlin (now Chief Justice) summarised "the law" in *Gordon*, in a passage repeated faithfully in almost every subsequent decision (although not always followed in practice):

The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what it is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case must turn on its own unique circumstances. The only issue is the best interests of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider

inter alia:

- (a) the existing custody arrangement and relationship between the child and the custodial parent;
- (b) the existing access arrangement and the relationship between the child and the access parent;
- (c) the desirability of maximizing contact between the child and both parents;
- (d) the views of the child;
- (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
- (f) disruption to the child of a change in custody; and
- (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, the extended family, and the community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?⁷

The majority decision is most coherent in its sweeping rejection of any presumptions of any kind in custody decision-making, including relocation cases.⁸ Once past the material change threshold on a variation application, "a full and sensitive inquiry" is required in each case, even if that may mean increased litigation. On that "inquiry", no party bears any particular burden to prove or lead evidence on any issue, as that too might resemble a presumption. One factor on that inquiry should be "great respect" for the views of the custodial parent, which has proven to be an important, if unpredictable, factor.

The most baffling and impractical part of the decision is its insistence that the "reason for the move" is irrelevant to the analysis of a relocation case. In practice, everyone ignores this direction: appeal courts, trial

⁵ The move was approved in a trial decision dated December 30, 1994 and the expedited appeal was decided by the Saskatchewan Court of Appeal on January 20, 1995. Some time after that, as there was no stay, the mother moved with the child to Australia. The Supreme Court of Canada heard the appeal on December 6, 1995 and handed down its decision on May 2, 1996. See Thompson, "Relitigation", above, note 2 at note 11.

⁶ *Gordon v. Goertz*, above, note 2 at para. 53.

⁷ *Ibid.* at paras. 49-50.

⁸ The breadth of the majority reasons is best understood as a response to the very strong version of the custodial parent presumption set out in the concurring reasons of Justice L'Heureux-Dube, explained at greater length in "Relitigation", above, note 3 at 471-73.

courts and counsel. Elsewhere, I have explained that this direction was a misguided attempt to shield the custodial parent from detailed judicial second-guessing about the move.⁹

Whatever the merits of *Gordon*, the Supreme Court has not been willing to revisit or refine its approach. It has now refused leave to appeal in relocation cases on thirteen occasions,¹⁰ including some controversial appeal decisions.¹¹ For our purposes, it is worth noting that a high proportion of these leave applications involved “international” cases: eight of thirteen cases, two moves to the United States and six outside of North America.¹²

In the absence of any further action by the Supreme Court of Canada, there has also been no attempt to amend family law statutes to address relocation issues, at the federal or provincial levels. The last attempt to amend the custody provisions of the federal Divorce Act was Bill C-22, introduced by a Liberal government in December 2002, but left to die on the order paper when Parliament prorogued in November 2003.¹³ That bill did not seek to make any changes to relocation law. There have been no legislative amendments on relocation in provincial custody statutes.

2. Trial Decisions After *Gordon*

There have been a number of studies of trial decisions after *Gordon*. In the first study of trial decisions after *Gordon*, for the period from May 1996 to December

1998, I found that moves were permitted in 61 per cent of the cases.¹⁴ In an update of those results, for the 20 months from January 1999 to June 2000, that percentage was 59 per cent.¹⁵

Around the year 2000, the percentage of moves permitted went down, to 50 per cent, or even slightly below, in studies done in 2001 and 2003.¹⁶ That pattern has continued in subsequent studies through this decade, especially the careful research by Elizabeth Jollimore, now a Justice of the Nova Scotia Supreme Court, Family Division. In her 2004 paper, looking at all Canadian cases for the period January 2003 to April 2004, Jollimore demonstrated that moves were allowed in exactly 50 per cent of cases.¹⁷ In a subsequent 2008 paper, updating her research, for the longer period January 2005 to April 2008, Jollimore found 51 per cent of moves permitted.¹⁸

In a world of case-by-case decision-making, there are patterns and trends in decisions, some stronger, some weaker, but *Gordon* does not permit any of these to rise to the level of principled discussion. Any discussion of “principles” risks a decision being reversed on appeal, as principles are seen as the antithesis of individualised decision, a sign of default thinking or presumptions or burdens. So facts are stated, the *Gordon* summary is dutifully recited, sometimes the facts are rehashed under the various *Gordon* factors, and a conclusion is reached.

In earlier articles, I have identified some of these “patterns”, patterns which may serve as a useful backdrop to my look at the international cases.¹⁹

⁹ *Ibid.* at 469-71.

¹⁰ *Chilton v. Chilton*, [1996] S.C.C.A. No. 574 (British Columbia); *Woodhouse v. Woodhouse*, [1997] S.C.C.A. No. 402 (Ontario); *Bjornson v. Creighton*, [2003] S.C.C.A. No. 17 (Ontario); *V.J. v. F.H.*, [2003] C.S.C.R. no. 154 (Quebec); *Singer v. Davila-Singer*, [2003] S.C.C.A. No. 451 (Ontario); *C.V. v. S.L.*, [2005] C.S.C.R. no. 199 (Quebec); *Swenson v. Swenson*, [2006] S.C.C.A. No. 253 (Saskatchewan); *Karpodinis v. Kantas*, [2006] S.C.C.A. No. 318 (B.C.); *MacPhail v. Karasek*, [2006] S.C.C.A. No. 392 (Alberta); *Beeching v. Beeching*, [2007] S.C.C.A. No. 107 (B.C.); *Turcotte v. Elliott*, [2009] S.C.C.A. No. 199 (Ontario); *P.R. v. L.P.*, [2009] C.S.C.R. no. 333 (Quebec); *Bourgeois v. Plante*, [2010] S.C.C.A. No. 357 (Prince Edward Island). More recently, leave was sought in a controversial appeal where a new trial was ordered, but the leave application was subsequently discontinued: *S.S.L. v. J.W.W.*, [2010] S.C.C.A. No. 126 (B.C.).

¹¹ Notably *Bjornson v. Creighton*, *Karpodinis v. Kantas*, *MacPhail v. Karasek* and *Turcotte v. Elliott*. The appeal cases are discussed in Thompson, “Ten Years After *Gordon*: No Law, Nowhere” (2007), 35 R.F.L. (6th) 307.

¹² *Chilton* (Hawaii), *Woodhouse* (Scotland), *V.J. v. F.H.* (France), *Singer* (Germany), *C.V. v. S.L.* (Italy), *Karpodinis* (Texas), *Beeching* (Argentina), *P.R. v. L.P.* (France).

¹³ An Act to amend the Divorce Act, the Family Orders and Enforcement Assistance Act, Attachment and Pension Diversion Act, and the Judges Act and to amend other Acts in consequence, 2nd Sess., 37th Parl., known as Bill C-22.

¹⁴ Thompson, “Relocation and Relitigation”, above, note 4 at 477.

¹⁵ Thompson, “Addendum”, above, note 3 at 352.

¹⁶ Thompson, “‘No Two Cases...’ No Tranquillity on Mobility” in National Judicial Institute, Ontario Superior Court of Justice Family Law Conference (Toronto, December 6-7, 2001). For the 15-month period from July 2000 to September 2001, moves were approved in 33 of 68 decisions, or 48 per cent of cases. An analysis I did of Ontario relocation cases from 2000 to early 2003 revealed 24 of 53 decisions permitted the move, or 45 per cent: Thompson, “Movin’ On: Mobility and Bill C-22” in County of Carleton Law Association, 12th Annual Institute of Family Law (Ottawa, June 6, 2003).

¹⁷ Jollimore, “Mobility: Where Are We Going?” in Federation of Law Societies of Canada, National Family Law Program (La Malbaie, Quebec, July 2004). Moves were allowed in 33 of 66 reported cases. Another study during this period looked just at Ontario cases, where 50 per cent of trial decisions allowed moves in the years 2004 and 2005: Bala and Harris, “Parental Relocation: Applying the Best Interests of the Child Test in Ontario” (2006), 22 Can.J.Fam.L. 127.

¹⁸ Jollimore, “There Yet?”, above, note 3 at 365. Moves were permitted in 116 of 227 cases.

¹⁹ Most succinctly in Thompson, “Movin’ On: Parental Relocation in Canada” (2004), 42 Fam.Ct.Rev. 398 at 404-06.

(a) Moves Permitted in 50 Per Cent of Cases

In general, over all types of cases, Canadian courts now allow parental relocation in 50 per cent of cases, down from 60 per cent in the latter part of the 1990s. The 50/50 split has now persisted for almost a decade. Very quietly, there has been a shift away from permitting moves after *Gordon*. That shift against moves has been even stronger amongst specialised family law judges, as opposed to generalist judges.²⁰ Any treatise, article or judicial decision that suggests any general tendency to permit custodial parents to move is just plain wrong.²¹

(b) Interim Moves Generally Not Permitted

Applications for interim moves, i.e. moves pending as full hearing or trial, are generally refused. Interim principles were most clearly stated in a case called *Plumley*, itself one of those rare cases where an interim move was permitted.²² "Compelling circumstances" or "a strong probability" of success at trial are required to upset the *status quo*.

(c) An Unspoken Primary Caregiver Presumption?

In practice, if a mother can attract the label of "primary caregiver", she will be allowed to move almost always, about 90 per cent of the time. Usually, only very badly-behaved primary caregivers are denied permission to move, discussed below. The precise label is still reserved for mothers, and is never used for fathers, not even when they perform the same functions. Typically, the term is applied to mothers who are home full time or work outside the home only part time, and much less often to mothers who work outside the home full time. In some cases, however, where both parents are working outside the home, courts will engage in more careful analysis of the actual caregiving roles of the two parents.²³

The label incorporates two elements, as I have explained previously, "both a positive and a negative assertion, i.e. the caregiver is the dominant figure in the

child's life and the non-custodial parent is much less important".²⁴ Of course, the term "presumption" never appears in the cases. And there are always shocking cases where well-behaved primary caregivers are denied a move, as in *Karpodinis v. Kantas*.²⁵

(d) A Reverse Onus for Shared Custody?

If the parents share custody in a meaningful manner, with each having the child for more than 40 per cent of the time, then a reverse "presumption" kicks in: the courts say "no" to moves in 60 to 70 per cent of these cases. A closer look at the shared custody cases supports this view, as most of the "no" cases are "ordinary" cases, whereas most of the "yes" cases present unusual facts. Again, this pattern is only occasionally acknowledged in the reasoning in these cases.²⁶

(e) Badly Behaved Parents Can't Move

By "badly behaved", I mean parents who move, or attempt to move, without notice and often without planning, disrupting their children's lives. Also included in this group would be parents with a history of denying access or failing to comply with court orders. Generally, such parents are denied permission to move, but not always.

(f) Few Assessments, No Expert Evidence

Expert assessments are relatively rare in mobility cases, available in less than 20 to 25 per cent of the cases. The sheer exigencies of relocation often don't permit waiting for assessments, especially at the interim or variation stages. Relocation assessments also appear to start from one or another view of the importance of the access parent, and thus they seem to have less influence on the outcome.

(g) The Reason for the Move Considered

Despite *Gordon*, almost every judge considers the

²⁰ This is based upon my sessions with judges, in various Canadian programs, as we sort through specific fact situations and discuss the outcomes.

²¹ See, for example, the English Canadian and Quebec authorities cited in *Droit de la famille* – 091332, [2009] J.Q. no. 5287, 2009 QCCA 1068, [2009] R.D.F. 439 at paras. 42-46, to support the statement: "Canadian law confirms a tendency of the courts to permit a move if it is made in good faith and the custodial parent takes measures to promote access" (translation by author). One of the authorities cited is McLeod and Mamo, *Annual Review of Family Law 2008* (Toronto: Thomson-Carswell, 2009) at 103.

²² *Plumley v. Plumley*, [1999] O.J. No. 3234 (S.C.J.).

²³ E.g. *Burns v. Burns*, [2000] N.S.J. No. 2, 2000 NSCA 1, 3 R.F.L. (5th) 189.

²⁴ "Relocation and Relitigation", above, note 3 at 478.

²⁵ [2006] B.C.J. No. 754, 2006 BCSC 555, affirmed [2006] B.C.J. No. 1209, 2006 BCCA 272, 27 R.F.L. (6th) 254, leave to SCC denied [2006] S.C.C.A. No. 318.

²⁶ For an appeal case that "sort of" recognizes this point, see *Young v. Young*, [2003] O.J. No. 67, 63 O.R. (3d) 112, 34 R.F.L. (5th) 214, as I explained in my "Annotation: *Young v. Young*" (2003), 34 R.F.L. (5th) 215. The trial judge's error was in treating the shared custody father "as an access parent".

reason for the move.²⁷ The moving parent always wants to show their "good reason" for the move. Further, it is usually not possible to separate the reason for the move from the effects of the move upon the children.²⁸

If the cases are sorted by the reason for the move, only one "reason" generates a consistently lower "success rate", namely the move back to family, with moves approved in 30 per cent or less of these cases. The other reasons show little variation in results: move for job or training, move for job and family, move for job of husband/partner, move to husband-to-be/partner. Judges have scrutinised reasons closely and often found qualitative weaknesses, whatever the type of reason: vague plans and undue haste, lack of necessity, no job, dubious economic benefits.

(h) Five Options, Or Maybe More

Because *Gordon* was an after-the-fact appeal, there were only two options left: allow the mother to stay in Australia, or order a change of custody to the father in Saskatchewan. In *Woodhouse*, a more typical before-the-move case, the Ontario Court of Appeal identified a "third option", that of restraining the move by the custodial parent, leaving the parenting arrangements in Ontario the same.²⁹ To this can now be added a "fourth option", that of the access parent moving to follow the custodial parent, and even a "fifth option", that of the custodial parent's new partner moving to the children, from his or her community to that of the custodial parent. There may be more options to come, as courts look for ways out of the moving dilemma.

(i) The Age of the Child Generally Does Not Affect the Outcome

Older children, those 12 and older, do not turn up often in the decided cases and, when they do, their preferences tend to drive the results. If we divide the younger children into two groups, those younger than 6 and those aged 6 to 11, the older cases suggested that the older group were slightly more likely to be permitted

to move.³⁰ A more recent review of all the cases from 2003 to 2008, by Jollimore, found no difference between these two age groups, with both around 50 per cent.³¹ More specifically, the 50/50 split was quite consistent across the board up to age 9, up with the percentage allowing moves rising sharply for ages 10 to 14.

(j) Changes of Custody When Relocation Is Denied

Slowly, but steadily, there has been an upward creep in the proportion of "no" cases where custody is changed. In almost half the recent "no" cases, judges not only refused the move but also changed custody to the other parent. I am not speaking here of "conditional" changes of custody, if the custodial parent moves, but actual changes of custody. There is no pattern to these cases, except it happens less often in Ontario. A proposed move just means a "fresh inquiry", a rebalancing of custody factors, and sometimes a different outcome, an inevitable consequence of relitigation.

All of these are just "patterns" or "trends" in trial outcomes. None of them reflect stated legal "principles", given *Gordon's* "pure best interests" approach. As a result, there is no need to explain the result in any particular case that is inconsistent with these trends, even strong trends.

3. Few Subsidiary Principles from the Appeal Courts, But Lots of Reversals

In a 2007 article, I reviewed all the relocation appeals before the provincial Courts of Appeal for the ten years after *Gordon* from 1996 to 2006, some 67 appeals.³² The results were both surprising and disappointing. Disappointing, because the appeal courts made little attempt to articulate subsidiary or intermediate principles to guide decision-making in these cases. Surprising, because the trial outcome was overturned in 45 per cent of all appeals. Appeals were thus allowed in almost half the cases.

The appellate language of deference is utterly misleading. Canadian appeal courts are highly

²⁷ The only custodial parents who want the court to follow *Gordon* and ignore the reason for their move are those who have no good reason for the move, e.g. *Ligate v. Richardson*, [1997] O.J. No. 2519, 34 O.R. (3d) 423 (Ont.C.A.).

²⁸ As the Ontario Court of Appeal did in *Woodhouse v. Woodhouse*, [1996] O.J. No. 1975, 29 O.R. (3d) 417, 20 R.F.L. (4th) 337.

²⁹ *Ibid.*

³⁰ Thompson, "Movin' On", above, note 19 at 406.

³¹ Jollimore, "Mobility Through the Ages" in National Judicial Institute, Family Law Seminar: Children (Toronto, February 3-5, 2010) at 11-12. Jollimore used the age of the youngest child to classify the 334 cases, from ages 1 to 14. The overall percentage in favour of moving for this body of cases was 51 per cent.

³² "Ten Years After *Gordon*: No Law, Nowhere", above, note 11.

interventionist in relocation cases, ready to jump right in and rebalance the factors, re-weigh the evidence and re-exercise discretion. Appeals were more successful against trial decisions that said “no” to the move, 55 per cent over the ten years, in contrast to only 32 per cent of appeals succeeding against “yes” decisions at trial. Even more interesting was the general rise in appeals against “no” decisions, which in turn reflected the increase in “no” decisions at trial after 2000.

There were a few subordinate legal principles which acquired some consensus, mostly around the procedural aspects of *Gordon*, rather than the substantive issues of relocation.

(a) Residence Restrictions Are Just a “Factor”

There was no residence restriction in *Gordon*. Subsequent appeal cases have treated a residence restriction as just another “factor” in the analysis, not creating any burden or presumption of any kind, consistent with the *Gordon* approach.³³ A residence restriction has only a procedural effect, requiring the moving parent to bring an application, although even that is not significant, as the other parent may apply first and competing applications are common anyway.

(b) *Gordon* Applies to an Initial Custody Determination

Gordon was an application to vary an existing custody order. The father had to show a material change in circumstances, before the court could consider the child’s best interests. The mother was clearly the “custodial parent”, whose views deserved “great respect”. On an initial custody determination, where one parent proposes to move away with the child, a truncated version of the *Gordon* factors has been applied.³⁴

In one appeal, the Ontario Court of Appeal ruled that a trial judge must engage in a two-step process: first

decide the custody issue and then, once the custodial parent has been determined, address the relocation issue in accordance with *Gordon*. Almost every other court of appeal has rejected this two-step, preferring a “blended approach”, that treats relocation as part of the parent’s custody plan and incorporates a truncated version of the *Gordon* factors.³⁶

(c) The Duty to Give Reasons

Relocation decisions have been reversed on appeal, for a failure to give reasons reflecting a “full and sensitive inquiry”, most notably in *Young v. Young*.³⁷

(d) The “Irrelevant” Question: Will You Move Without Your Child?

There is an emerging appeal court consensus on the unfairness of the perennial question asked of a custodial parent: “will you move without your child?” In *Spencer*, Paperny J.A. of the Alberta Court of Appeal explained “the classic double bind” for the custodial parent: if the parent answers “yes”, he or she is regarded as self-interested and discounting the child’s best interests, but if he or she says “no”, then the answer suggests the move is not so critical and leaves the status quo as an attractive option.³⁸ Canadian appeal courts now seem united that this question is “problematic” and even “irrelevant”.³⁹

(e) Insufficient Respect for the Custodial Parent

We may not have a presumption, but we have “great respect” for the views of the custodial parent. A number of appeal are allowed on grounds of “insufficient respect”, an approach that preserves the maximum flexibility and unpredictability for the appeal court.⁴⁰

(f) “A Happy Parent Means a Happy Child”

There is not the same consensus on this view, one which pops up periodically in trial decisions and appeals,

³³ *Ligate v. Richardson*, [1997] O.J. No. 2519, 34 O.R. (3d) 423 (Ont.C.A.).

³⁴ *Nunweiler v. Nunweiler*, [2000] B.C.J. No. 935, 2000 BCCA 300, 5 R.F.L. (5th) 442.

³⁵ *Bjornson v. Creighton*, [2002] O.J. No. 4364, 31 R.F.L. (5th) 242 (Ont.C.A.). This was a particularly odd ruling, since the parents had shared custody on an interim basis for the year between separation and trial. The trial judge had refused the move to Alberta, but granted the mother custody in Ontario. That was overturned on appeal and the mother allowed to go, on the basis that the trial judge had failed to give “great respect” to the now-custodial-mother’s views. The Supreme Court denied leave to appeal in this case.

³⁶ See *Falvai v. Falvai*, [2008] B.C.J. No. 2365, 2008 BCCA 503, 60 R.F.L. (6th) 296; *Gilles v. Gilles*, [2008] S.J. No. 469, 2008 SKCA 97, 54 R.F.L. (6th) 55; *D.P. v. R.B.*, [2009] P.E.I.J. No. 28, 2009 PECA 12, 66 R.F.L. (6th) 21.

³⁷ [2003] O.J. No. 67, 34 R.F.L. (5th) 214 (Ont.C.A.).

³⁸ *Spencer v. Spencer*, [2005] A.J. No. 934, 2005 ABCA 262, 15 R.F.L. (6th) 237. See also *H.(F.) c. J.(V.)*, [2003] J.Q. no. 671, [2003] R.D.F. 5 (Que.C.A.).

³⁹ *H.(F.) c. J.(V.)*, *ibid.*, called the question “irrelevant”. See also *D.P. v. R.B.*, [2009] P.E.I.J. No. 28, 2009 PECA 12, 66 R.F.L. (6th) 21; *Droit de la famille* – 091332, [2009] J.Q. no. 5287, 2009 QCCA 1068, [2009] R.D.F. 439; and *S.S.L. v. J.W.W.*, [2010] B.C.J. No. 180, 2010 BCCA 55.

⁴⁰ E.g. *Burns v. Burns*, [2000] N.S.J. No. 2, 2000 NSCA 1, 3 R.F.L. (5th) 189.

most prominently in *Bjornson v. Creighton*.⁴¹ Of course, the “happy custodial parent” argument could be made in every single mobility case, but it only turns up to bolster the approval of a move, usually in favour of a primary caregiving mother, like in *Bjornson*. Like “insufficient respect”, this notion is used to disguise a weak and erratic primary caregiver presumption, without calling it that.

(g) Emerging But Unfocussed Concerns for Custodial Restrictions

Most recently and prominently, the B.C. Court of Appeal has become concerned about geographic restrictions upon custodial parents. Odd as this may be coming from the Court that refused the move to the primary caregiving mother in *Karpodinis v. Kantas*, the concerns are expressed in two recent appeals.

In *Falvai v. Falvai*, the mother was granted sole custody of a four-year-old boy, but not permitted to move from Vancouver Island to the Lower Mainland. The Court of Appeal found the trial judge had erred in a number of ways, but particularly in imposing a residence restriction.⁴² In a baffling result, the appeal court struck the residence restriction and replaced it with a 60-day notice clause, apparently leaving the mother a chance to give notice and then go back to court and do it all over again. More remarkably, the appeal court relied upon Justice L’Heureux-Dube’s “concurring” opinion from *Gordon* in ruling that “the imposition of restrictions which narrow the geographic region in which a custodial parent shall live is contrary to the historical concept of custody”.⁴³ In *Gordon*, L’Heureux-Dube J. only concurred in the result, but espoused a very strong, even extremist, version of a custodial parent presumption in relocation cases, a position completely at odds with the majority reasons of Justice McLachlin, a “dissent”.

As a matter of law, on this point, *Falvai* is simply

wrong.⁴⁴ But *Falvai* is a symptom of appeal court unease with the trial trend against moves and its implications for parents. That same unease animates the B.C. Court of Appeal’s latest decision, with its equally baffling outcome.

In *S.S.L. v. J.W.W.*,⁴⁵ the mother wished to move from a community near Victoria to London, Ontario, with the two children, ages 12 and 9. The parents had a shared custody arrangement, with the children spending about 60 per cent of their time with the mother. The mother wished to move to London to join her fiancé who ran businesses there and to continue her own career which was increasingly centred in Ontario. The trial judge said no to the move, maintaining the shared custody arrangement, as the mother would not move without the children. The Court of Appeal was once again critical of the “double bind” occasioned by that question. More interestingly, the appeal court was also critical of the trial judge for not exploring the “fourth option”, that of the father moving to London where the shared custody could also be continued. The father was not prepared to move, even though he himself had grown up in Ontario and had family there. The matter was sent back for a new trial, for more detailed evidence about the options of shared custody in London or, alternatively, the father’s plan of care if the mother moved without the children. For more litigation, as in *Falvai*.

The B.C. court’s misgivings won’t have much effect in two of the thirteen Canadian jurisdictions, where the appeal courts have already signalled a general pro-move approach to relocation cases: Alberta and Quebec.⁴⁶

Who knows what the B.C. Court of Appeal would think of a recent Nova Scotia appeal, *Reeves v. Reeves*.⁴⁷ In *Reeves*, an experienced family law judge had ordered the mother as custodial parent to move to a specific geographic area after the sale of the matrimonial home outside of metropolitan Halifax, to reduce her

⁴¹ Above, note 26. See also *O.(A.E.) v. O.(K.)*, [2006] B.C.J. No. 2996, 2006 BCCA 523, 32 R.F.L. (6th) 253.

⁴² [2008] B.C.J. No. 2365, 2008 BCCA 503, 60 R.F.L. (6th) 296. The trial judge had erred by adopting a “two-step” approach to relocation on an initial custody application (rather than a blended approach), by considering the mother’s reason for the move contrary to *Gordon* (the mother’s reasons were weak), and by giving too much emphasis to the “maximum contact” principle. The father’s application for leave to the Supreme Court of Canada was subsequently discontinued.

⁴³ *Ibid.* at para. 33.

⁴⁴ In the end, after the Court of Appeal decision in December 2008, the mother gave the requisite notice and moved from Nanaimo to Surrey, maintaining the father’s 6-days-out-of-14 access schedule. By now, the boy was 5 and would be starting kindergarten in the fall. The father brought a variation application, seeking custody and the mother applied to vary his access. Smith J. maintained the mother’s sole custody, recognizing the move to Surrey, and modified the father’s access to every second weekend, plus any long weekend extended by non-instructional days, plus equal division of all holidays: *Falvai v. Falvai*, [2009] B.C.J. No. 1481, 2009 BCSC 997.

⁴⁵ [2010] B.C.J. No. 180, 2010 BCCA 55.

⁴⁶ See the strong statements found in *MacPhail v. Karasek*, [2006] A.J. No. 982, 2006 ABCA 238, 30 R.F.L. (6th) 324 (leave to appeal to the Supreme Court of Canada was denied) and *Droit de la famille – 091332*, [2009] J.Q. no. 5287, 2009 QCCA 1068, [2009] R.D.F. 439 (leave to the SCC was also denied in this case).

⁴⁷ [2010] N.S.J. No. 236, 2010 NSCA 35.

transportation costs and to ease the father's access, given their financial difficulties. The Nova Scotia Court of Appeal found that a judge did have the authority to make the wife's custody conditional upon her making the move, based on the best interests of the child, although such an order was "highly unusual and should only be used in rare circumstances".⁴⁸

No Canadian court yet has even considered ordering a non-custodial parent not to move away from the children, on the basis that such a move away would be against the best interests of the children. But this "sixth option" does seem an inevitable next step in relocation law.

4. The "Outside of North America" International Cases

In my research, I looked for all the international relocation cases from January 2005 until May 2010, slightly more than five years. In that time period, there were 47 reported decisions involving moves outside of North America, with moves being permitted in 32 cases or 68 per cent.⁴⁹ That is well above the typical 50/50 split we see in domestic cases. Why the difference? I will discuss that below.

(a) Destinations

The top two countries of destination will be no surprise: England (8 cases) and France (6), our historic mother countries.⁵⁰ Next was Australia (4), another historic connection, and Dubai, United Arab Emirates (3). Countries registering with two cases make up a short list: Israel, Netherlands, Japan. The rest were well-distributed around the world.⁵¹

(b) Primary Caregivers

There is one strong explanation for the higher percentage of moves: mothers in this group were more

likely to be called "primary caregivers" and therefore engage the unspoken "primary caregiver presumption". In 24 of the 32 "yes" cases, the mother was explicitly identified as the "primary caregiver", while there were only 4 so identified in the 15 "no" cases. That means 86 per cent of "primary caregivers" were permitted to move. Amongst the "yes" cases, there were another five where the court made fact findings that amounted to the role of primary caregiver for the mother, without using that term.

Three of the four moves rejected all involved "badly behaved" primary caregivers, i.e. no specific plans,⁵² abduction⁵³, or access problems.⁵⁴ Two of these four "no" cases involved moves to non-Hague-Convention countries, i.e. Dubai and Iran.⁵⁵

Below I will discuss the stated reasons for the move, but here it is worth mentioning that "primary caregivers" predominate in moves back home for family support or back home for family support and employment, the two main reasons for moves outside of North America. While moving "back home" within Canada is one of the least "successful" reasons for a move, the same is not true for this group of international moves. The story is a familiar one: young mother visits Canada, or comes to Canada with the father, she is home with young children, often without employment alternatives or language skills, and then after separation is isolated in Canada as a single parent who wants to move back home.

A well-behaved "primary caregiver" will almost always be permitted to move outside of North America to go back "home" to family, with or without employment. The presence of employment will make approval even more likely.

There is a "chicken-egg" issue here: does a judge tag a mother as "primary caregiver" on some independent basis and then permit the move, or does the label get affixed simply to bolster the reasons for the move?

⁴⁸ *Ibid.* at para. 37 per Farrar J.A.

⁴⁹ The percentage would have been even higher were it not for 2009, a year when more moves were rejected than allowed, contrary to the pattern for every other year. I should here note my debt to the exhaustive research undertaken by Jollimore and Sladic for the January 2005 to July 2008 time period, above, note 3.

⁵⁰ The general pro-move percentages held for these two countries: England, 5 of 8, or 62 per cent; France, 4 of 6, or 67 per cent.

⁵¹ Europe (Spain, Italy, Germany, Luxembourg, Norway); Africa (Ethiopia, Algeria, Mauritania); Pacific (New Zealand, Fiji); Asia (India, Taiwan, Hong Kong, Singapore); Mid-East (Saudi Arabia, Iran); Americas (Brazil, Argentina, Panama).

⁵² *Snelgrove v. Butler*, [2010] N.J. No. 150, 2010 NLUFC 11.

⁵³ *Werbicki v. Werbicki*, [2009] S.J. No. 112, 2009 SKQB 80, 66 R.F.L. (6th) 329. The mother was assisted by the Norwegian government knowingly issuing replacement passports.

⁵⁴ *M.S. v. K.R.*, [2005] B.C.J. No. 1825, 2005 BCSC 1171. I confess this was a surprising case, as there was just a diminution of access when the mother decided to move, but it was also an appeal from the Provincial Court to the Supreme Court and much was explained by the deferential standard of review.

⁵⁵ *M.S. v. K.R.*, *ibid.* (Dubai) and *Nadeali v. Zaree*, 2006 CarswellOnt 2489 (S.C.J.).

A review of the 22 “yes” cases certainly demonstrates that the term was properly applied to those fact situations. Only a few involved mothers working full-time outside the home or fathers exercising substantial access, which required more extensive fact-finding.⁵⁶ Sometimes the precise term was not used, but the fact-finding made clear that the mother was treated as such.⁵⁷ In one case, a custodial grandmother was treated in this implicit fashion.⁵⁸ In another, the abducting mother’s behaviour was described as “reprehensible” and it appeared the court could not bear to use the term “primary caregiver”, even though the mother plainly was.⁵⁹ Of the other five “yes” cases where there was no explicit or implicit finding of a “primary caregiver”, there did not appear to be any basis for such a finding.

Of the fifteen “no” cases, there were the four cases that explicitly found the mother to be the “primary caregiver”. There was only one “no” case where the court failed to find explicitly or implicitly that the mother was the “primary caregiver”, despite every fact pointing clearly in that direction.⁶⁰

(c) Stages of Proceeding

Gordon v. Goertz was a variation proceeding. Because of the prevailing law, interim applications are not common, just 3 out of the 47 cases in this group, although 2 out of 3 interim moves were permitted.⁶¹ Over 60 per cent of these cases are “original hearings”, first-instance custody decisions, rather than variations. This is not surprising, given the make-up of the parents in these cases, parents who want to move back home as soon as they can after separation in Canada. It made no difference to the outcome – move or not move – what

stage of proceeding was involved in this group: interim, original hearing, variation.

(d) Reason for the Move

A review of the cases revealed five main categories of reasons: (i) move home to family; (ii) move home to family and employment; (iii) move for parent’s job; (iv) move to new husband/partner; and (v) move for new husband/partner’s employment. There wasn’t much variation in approval of moves by the reason for the move, although moves to accommodate new husbands and partners did do noticeably worse.⁶²

(e) Shared Custody, Other Non-Primary-Caregiver Cases

There were seven shared custody cases, with only one move allowed. That one case was an interesting and unusual Quebec case: the older girl aged 11 really wanted to go to France with her mother, the father consented to her move, but not to that of her younger five-year-old brother.⁶³ Because the two children were very close, both were allowed to move. The other six “no” cases were more typical shared custody cases.⁶⁴ This is similar to the pattern we see in domestic Canadian cases.

If we remove the primary caregiver and shared custody cases, we are left with just 12 cases, in 7 of which moves were permitted. But two of these were split custody cases, where one child wanted to go with mother and the other wanted to stay with the father.⁶⁵ That means these cases really split right down the middle, 5-2-5. Two of the “no” cases were cases of father custody: one where the custodial father was not allowed to move and a shared custody order made,⁶⁶ and

⁵⁶ *Droit de la famille* – 081872, [2008] Q.J. No. 7431, 2008 QCCS 3584 (mother worked full-time as financial advisor and had nannies); *S.L.D. v. P.D.M.*, [2008] N.S.J. No. 125, 2008 NSSC 103 (father extensive access);

⁵⁷ *H.P.T. v. R.C.A.*, [2009] A.J. No. 1170, 2009 ABPC 311; *Droit de la famille* – 082488, [2008] J.Q. no. 9535, 2008 QCCS 4623; *Boquiren v. Thomas*, [2006] B.C.J. No. 2984, 2006 BCSC 1711;

⁵⁸ *I.R. v. L.R.*, [2007] B.C.J. No. 2684, 2007 BCPC 387, 48 R.F.L. (6th) 214 (“the only responsible parent the children have ever known”).

⁵⁹ *Elwan v. Al-Taher*, [2009] O.J. No. 1775, 69 R.F.L. (6th) 199 (S.C.J.).

⁶⁰ *E.L.C. v. E.S.B.*, [2009] B.C.J. No. 2247, 2009 BCSC 1543. The mother there was at home, and then back and forth to her ill mother in Australia, but always with the children. The father worked long hours in his restaurant as a chef.

⁶¹ *Brouse v. Lillini*, [2008] O.J. No. 2322 (S.C.J.) (foreign service posting of mother, yes); *Vashist v. Gupta*, [2008] A.J. No. 539, 2008 ABQB 285 (father ill, seeks adjournment, mother is PC, yes); *Prasad v. Lee*, [2008] O.J. No. 2072, 53 R.F.L. (6th) 194 (S.C.J.) (mother offered employment, but no urgency, mother’s affidavits attack father, full hearing needed, no).

⁶² Move home to family: 10/15; move home to family and employment, 10/14; move for job, 3/4; move to new husband/partner, 4/7; move for new husband/partner’s employment, 3/5. The other two cases had a child moving to India to attend school and live with her grandmother, and a custodial grandmother’s move to Panama for cheaper cost of living and private school for the children.

⁶³ *Droit de la famille* – 081937, [2008] J.Q. no. 7649, 2008 QCCS 4623.

⁶⁴ *Droit de la famille* – 092485, [2009] J.Q. no. 11185, 2009 QCCS 4642; *Vilardell v. Dunham*, [2009] B.C.J. No. 633, 2009 BCSC 434; *Droit de la famille* – 09766, [2009] Q.J. No. 2948, 2009 QCCS 1500; *Edwards v. Basaraba*, [2008] A.J. No. 1163, 2008 ABQB 648; *Meijers v. Hasse*, [2007] O.J. No. 2506, 39 R.F.L. (6th) 115 (S.C.J.); *Saunders v. Saunders*, [2005] N.S.J. No. 53, 2005 NSSF 10.

⁶⁵ *Droit de la famille* – 081465, [2008] J.Q. no. 5692, 2008 QCCS 2716; *M.C. c. C.G.*, [2006] J.Q. no. 2680, 2006 QCCS 1574.

⁶⁶ *Droit de la famille* – 092042, [2009] J.Q. no. 8520, 2009 QCCS 3850.

another where the mother had moved in the interim without her daughter.⁶⁷ The rest of these cases were a real mixed bag.

(f) Assessments

There were very few assessments in these cases, just 10 out of 47, slightly over 20 per cent of cases, a pattern entirely consistent with the domestic experience. Of those ten cases, the courts followed the assessor's recommendations, except for two cases.⁶⁸ Since these were mostly original custody hearings, involving moves to distant lands, the cases would seem to be prime candidates for assessments, but that didn't happen.

(g) Age of Children, Children's Wishes

Younger children, under six years of age, were more prevalent amongst these "outside of North America" cases.⁶⁹ These younger children were noticeably less likely to be allowed to move than those in the 6 to 11 age group.⁷⁰

In only six cases were the child's wishes considered and they were critical to the outcome in these cases. The wishes were obtained by way of assessments, a children's lawyer and a judicial interview in one case.⁷¹ The children whose wishes were considered were 15 and 11,⁷² 14 and 11,⁷³ 12,⁷⁴ 11,⁷⁵ 9⁷⁶ and 9.⁷⁷

(h) The Hague Convention, Abductions

The Hague Convention on Child Abduction was a consideration in two ways in these cases. In some cases, the Convention had been used to obtain the summary

return of the child to Canada, where the Canadian court then had to decide the relocation issue. In other cases, the Hague status of the destination country was treated as a factor in the court's decision on relocation, wrongly I will suggest.

In two cases, the Hague Convention had been used to bring the mother and the children back to Canada, for a hearing where the mother was then allowed to leave again, one to England and the other to New Zealand.⁷⁸

In another case, although the mother had taken the child to Saudi Arabia, a non-Hague country, she returned to Canada for a custody hearing after she was found in contempt.⁷⁹ Despite the mother's "reprehensible" behaviour, she and her daughter were allowed to return to Saudi Arabia, in accordance with an assessment and her daughter's wishes. There was one case where the mother moved to Singapore and obtained a consent custody order there when the father visited, but the father turned the tables on her when she visited Ontario and he obtained an ex parte order restraining her from leaving.⁸⁰ The Canadian court took jurisdiction, and then ordered custody to the mother and permission for her to move back to Singapore.

While on the subject of Hague oddities, there was the surprising *Werbicki v. Werbicki* case, where the Norwegian government knowingly issued replacement passports to the mother, to permit her to leave Canada and return with the children to her native Norway, after a custody hearing and before judgment. These government actions were strongly criticised by the judge, who made a final custody order in favour of the father.⁸¹

⁶⁷ *Reid v. Reid*, [2009] N.S.J. No. 95, 2009 NSSC 43.

⁶⁸ Both were appeals. In *Droit de la famille* – 091332, [2010] J.Q. no. 4739, 2010 QCCA 1018, the trial judge was held to have over-relied on the assessment and the trial decision against the move was overturned. In *Beeching v. Beeching*, [2006] O.J. No. 4956, 2006 CarswellOnt 7860, the trial judge had not followed the assessment's recommendation and allowed the move, upheld on appeal.

⁶⁹ 27 of 47 cases involved children under 6, or 57 per cent, compared to just 44 per cent found by Jollimore for all cases in the 2005-2008 period.

⁷⁰ Of those under 6, 16 of 27 cases allowed moves (59%), compared to 12 of 16 for the older group (75%).

⁷¹ *Droit de la famille* – 081465, [2008] J.Q. no. 5692, 2008 QCCS 2716. The 15-year-old boy wanted to stay in Quebec with his father, while the 11-year-old girl wanted to go to France with her mother. The mother did not dispute the boy staying, but the father did dispute the girl leaving.

⁷² *Ibid.*

⁷³ *M.C. c. G.C.*, [2006] J.Q. no. 2680, 2006 QCCS 1574. There was a split custody order, and the 11-year-old boy wanted to go to Italy with his custodial father.

⁷⁴ *H.S.S. v. N.S.*, [2005] A.J. No. 1184, 2005 ABQB 690. The girl went to live with her maternal grandparents and attend a private school in India, over the objections of the father.

⁷⁵ *Droit de la famille* – 081937, [2008] J.Q. no. 7649, 2008 QCCS 3649. The 11-year-old daughter wanted to go to France with her mother and the result was that her 5-year-old brother was allowed to go too, as the two children were close.

⁷⁶ *Elwan v. Al-Taher*, [2009] O.J. No. 1775, 69 R.F.L. (6th) 199 (S.C.J.). The mother had moved to Saudi Arabia without notice and then returned, but the daughter was "disconnected" from her father and wanted to go back to Saudi Arabia.

⁷⁷ *Reid v. Mulder*, [2005] O.J. No. 4473 (S.C.J.). The daughter wanted to go to Fiji.

⁷⁸ *Vashist v. Gupta*, [2008] A.J. No. 539, 2008 ABQB 285 (England); *A.H. v. N.K.*, [2008] B.C.J. No. 956, 2008 BCSC 660 (New Zealand).

⁷⁹ *Elwan v. Al-Taher*, [2009] O.J. No. 1775, 69 R.F.L. (6th) 199 (S.C.J.).

⁸⁰ *Hibbert v. Escano*, [2010] O.J. No. 944, 2010 ONSC 1445.

⁸¹ [2009] S.J. No. 112, 2009 SKQB 80, 66 R.F.L. (6th) 329.

The Hague Convention arose in a second, more dubious way. A few courts treated the non-Hague status of the destination country as a relevant factor weighing against relocation, but that is not correct. If the parent's move is approved in advance, then abduction and the Convention's applicability should no longer be a concern anyway. If the concern is the enforcement of access in the destination country, Article 21 of the Convention offers precious little practical help to a parent, even in Hague countries, so Hague status should not be given much weight on this front either. Nonetheless, in two cases, non-Hague status seemed to be enough for the court to refuse to allow a move, even by primary caregiver mothers, to Iran or to Dubai.⁸² In another case, a mother was not permitted her poorly-planned move to Mauritania, with its non-Hague status being one more factor weighing against the move.⁸³ Japan's non-Hague status was mentioned in *Takenaka v. Kaleta*, again incorrectly, as one more factor to justify requiring the mother to post a \$20,000 bond before moving to Japan with the child.⁸⁴ The mother had previously offered to post a bond to ensure her compliance with the access order and the court ordered her to do so.

Finally, there was another twist on Hague applicability, this time correctly considered by the court. In this Quebec case, the mother was allowed to move with the child from Montreal to England, but it was made a condition of the father's access that he not be permitted to take the child out of Canada, as he was of Lebanese origin, Lebanon is not a Hague signatory and his mother and family members still lived in Lebanon.⁸⁵

5. The United States Cases

I was surprised by how few American relocation cases there were over the past five years, just 25 cases. In my earlier review of the case law, from 1996 to 2000, the U.S. cases were about 12 per cent of all relocation cases, but that proportion dropped to just 6 per cent for the 2005-2008 period. Of the 25 U.S. cases, moves were

permitted in 15 of them, or 60 per cent, still higher than the usual 50/50 split.

That said, the American cases are less interesting than those outside of North America, as they resemble the patterns seen in domestic Canadian cases. This is not surprising, as our cultures are more similar and the distances are not as great. In fact, the distances in many of these cross-border moves are less than many moves within Canada.

(a) Stage of Proceeding

Like the first group of cases, the bulk of the U.S. cases involve original custody hearings or trials, 16 of the 25 cases, with just four variation applications. What is interesting is the relatively larger number of interim applications, five in number, with interim moves permitted in three cases.

(b) Primary Caregivers

In ten cases, the mother was explicitly identified as the "primary caregiver", and moves were permitted in 8 of those 10 cases, about the same proportion as we saw in the first international group. Of the two U.S. cases where the move was not permitted, one was an interim move, and thus understandable.⁸⁶ The other was the shocking and inexplicable case of *Karpodinis v. Kantas*.⁸⁷

Of the remaining seven "yes" cases, there were only two where the mother might have been described as "primary caregiver". In one, the court engaged in a careful analysis of the factors to consider in identifying a "primary parent", but then concluded that neither parent was "primary" in this sense.⁸⁸ In the second case, there was no analysis of this issue at all, where the father was a professor and the mother was a full-time school teacher.⁸⁹

Amongst the "no" cases, there was one confusing case where the mother was described at one point as "primary caregiver", but after her abduction and return with the children, a shared interim custody regime had

⁸² *Nadeali v. Zaree*, 2006 CarswellOnt 2489 (S.C.J.)(Iran); *M.S. v. K.R.*, [2005] B.C.J. No. 1825, 2005 BCSC 1171 (Dubai).

⁸³ *Droit de la famille* – 082827, [2008] J.Q. no. 11126, 2008 QCCS 5283.

⁸⁴ *Takenaka v. Kaleta*, [2006] O.J. No. 623, 38 R.F.L. (6th) 119 (S.C.J.).

⁸⁵ *Droit de la famille* – 101199, [2010] J.Q. no. 4739, 2010 QCCA 1018.

⁸⁶ *Downey v. Sterling*, [2006] O.J. No. 5043, 2006 ONCJ 490.

⁸⁷ [2006] B.C.J. No. 1209, 2006 BCCA 272, 27 R.F.L. (6th) 254, affirming [2006] B.C.J. No. 754, 2006 BCSC 555.

⁸⁸ *N.D.L. v. M.S.L.*, [2010] N.S.J. No. 86, 2010 NSSC 68. B. MacDonald J. acknowledged the mother's better understanding of the children and her relatively larger role in their care, but the evidence was "scant" on their respective roles.

⁸⁹ *Chakraborty v. Chakraborty*, [2008] O.J. No. 4399 (S.C.J.). There was certainly some evidence to suggest that the mother was the child's primary caregiver.

been imposed, lasting for almost two years. The mother's proposed move was rejected in *B.K.A. v. D.M.A.*, but she was granted primary residence under the joint custody order.⁹⁰ In *Copeland v. Tanaka*, the mother was at one point characterised as "primary caregiver" as between the two parents, where there had been a shared custody arrangement for eleven years.⁹¹

(c) Shared Custody, Other Non-Primary-Caregiver Cases

Once again, the shared custody cases reveal the de facto reverse onus, as only two of six proposed moves was permitted. In *Chernen v. Savenye*, a temporary move for two years was permitted for the mother to join her fiancé doing an M.B.A. in Arizona where she could complete her B.A.⁹² In another case, an interim order was varied to permit the children to spend their week-about residential time with their mother in Michigan rather than the parents "dual nesting" in Ontario, so that is a hard case to categorise.⁹³

Of the four "no" cases involving shared custody, two could be described as "typical", but two were odd. First, there was that one unusual abduction case, *B.K.A. v. D.M.A.*, mentioned above. Second, there was shared custody in *Larson v. Clinton*, where the court concluded that the mother had made false allegations against the father of physical abuse of herself and her daughter.⁹⁴

If we take out the primary caregiver and shared custody cases, we are left with nine, with moves allowed in five of them. Two were mothers with primary care under interim joint custody arrangements. Two involved fathers who had had custody, where the mothers sought

custody and a move.⁹⁵ The last "yes" case was a father with primary care of three children, a mother who suffered from mental illness and exercised limited access, and the doctor father was now in a relationship with the nanny, who was also a former patient and hence the father had lost his medical licence. As the world turned, the father was permitted to move to take a medical publishing job in Ohio.⁹⁶

Of the four cases refusing moves, three resulted in custody orders for the fathers; one with interim and final custody;⁹⁷ one with a change of custody after the mother's "precipitous" decision to move;⁹⁸ and one with a custody order after the mother had failed to return with the children for the trial.⁹⁹ The final case was an interim move, which was denied, with the mother continuing her interim custody in Quebec.¹⁰⁰

(d) Reasons for the Move

The reasons for the move in the American cases reveal a profile similar to reasons in domestic cases, rather than the outside of North America cases. Two reasons predominate: a move for the parent's employment (7 cases), or a move to a new husband/partner (10). There was one case of a temporary move for education reasons, mostly for the new husband but also for the mother. Moves back to family (3) and family and employment (4) were much less common. The numbers are so small that no strong conclusions can be drawn, but a move to a job is much more likely to succeed than average and a move to a new husband/partner is slightly less likely to succeed.¹⁰¹

⁹⁰ [2010] B.C.J. No. 897, 2010 BCSC 604.

⁹¹ 2005 CarswellBC 3494 (S.C.). The mother was noted as having "done somewhat more" and having the child "a little more of the time". The 14-year-old was with her father every weekend, plus Monday and Wednesday overnights.

⁹² [2007] B.C.J. No. 1069, 2007 BCSC 709. The father lived at home with his parents and worked fixed hours in a men's clothing store, including every Friday night and every Saturday. Shared custody had been arranged around his work schedule.

⁹³ *Lindahl v. Lindahl*, [2005] O.J. No. 4090 (S.C.J.).

⁹⁴ [2009] O.J. No. 1892, 69 R.F.L. (6th) 321 (S.C.J.).

⁹⁵ *Cox v. Darling*, [2008] O.J. No. 824, 2008 ONCJ 91 (father custody, CAS involvement, mother from Chicago obtains temporary custody, then allowed to move); *A.F.(D.) v. T.(M.)*, 2006 CarswellQue 7506, 2006 QCCS 4239 (mother denied move three years earlier, father granted custody, children still want to go, permitted to move to New York to live with mother).

⁹⁶ *Panella v. Axford-Gatley*, [2007] O.J. No. 4398, 47 R.F.L. (6th) 180 (S.C.J.).

⁹⁷ *Gilles v. Gilles*, [2006] S.J. No. 491, 2006 SKQB 363, affirmed [2008] S.J. No. 469, 2008 SKCA 97, 54 R.F.L. (6th) 55 (the mother went to New Mexico for various stays before the custody trial).

⁹⁸ *Droit de la famille* – 071944, [2007] J.Q. no. 8701, 2007 QCCS 3906.

⁹⁹ *Lien v. Lorenz*, [2009] B.C.J. No. 510, 2009 BCSC 359.

¹⁰⁰ *Droit de la famille* – 081387, [2008] Q.J. No. 5530, 2008 QCCS 2614.

¹⁰¹ A move for employment were allowed in five of seven cases (or six of eight, if we include the education case). The move to a new husband/partner was permitted in five of 10 cases. The move home to family/employment (combined) was allowed in four of seven cases.

(e) Assessments, Age of Children, Children's Wishes

Amazingly, of the 25 U.S. cases, there were only two where assessments were available. One recommended against the move and was followed,¹⁰² while the other recommended in favour of the move, but was not accepted.¹⁰³

Younger children were much less common in the U.S. cases than in the other international cases, with only about one-third involving children under six.¹⁰⁴ Children under six were only slightly more likely to be allowed to move than those aged 6 to 11, unlike the pattern in the other international cases.¹⁰⁵

Children's wishes were considered in five cases, where the children were 15 and 13,¹⁰⁶ 14,¹⁰⁷ 12,¹⁰⁸ 12 and 10,¹⁰⁹ and 10 and 8.¹¹⁰ In the first four cases, the outcome reflected the children's wishes, while in the last case the move was not allowed, despite the children's willingness to move.

(f) Hague Convention, Abduction

There were three cases involving unilateral removals of children and competing court applications, one relatively benign, the other two not.

First, the benign one. In *Lindahl v. Lindahl*, the parents moved to Ontario from near-by Michigan for the father's employment, but six months later they separated and the mother returned with the three children to Michigan and applied for custody there, on legal advice.¹¹¹ The Ontario court took jurisdiction, granted temporary custody to the father and ordered the children. The mother immediately complied and the court substituted a temporary shared custody order, with the parents "dual nesting" in the family home. The mother then returned to Michigan to obtain employment, and applied on an

interim basis to exercise her residential time in Michigan for the summer months, an application that was granted with the motion judge noting that the mother had "a strong case" for relocation.

The other two cases involve long sagas of multiple proceedings, including Hague applications, too long to repeat here. In *B.K.A. v. D.M.A.*, the mother had taken the two children to San Diego, California, for a "vacation", and only returned the children to British Columbia after three B.C. hearings and a Hague hearing scheduled in California.¹¹² She was found in contempt, with special costs of \$15,000 levied against her. In the end, Pearlman J. refused the move, despite an assessment in favour, in part because the children did not want to go. If the mother remained in B.C., she would have primary residence under a joint custody order, but if she left, sole custody would go to the father.

A much more tortuous story unfolded in *Lien v. Lorenz*.¹¹³ The mother moved without notice from Vancouver, British Columbia to Lincoln, Nebraska, but subsequently returned and she was granted interim sole custody and interim permission to move to Nebraska. What ensued were multiple proceedings in the courts of both countries. The Nebraska courts accepted the exclusive jurisdiction of the B.C. courts over custody, but there were allegations of neglect, physical abuse and sexual abuse against the father (eventually dismissed), which led to access issues in Nebraska and various suspensions of access there. Despite multiple orders, the mother never returned to B.C. with the child and the B.C. court ordered permanent sole custody to the father. While the Nebraska proceedings were under way, the state had adopted the provisions of the new Uniform Child Abduction Prevention Act.

¹⁰² *Copeland v. Tanaka*, 2005 CarswellBC 3494 (S.C.).

¹⁰³ *B.K.A. v. D.M.A.*, [2010] B.C.J. No. 897, 2010 BCSC 604.

¹⁰⁴ Eight of 25 cases, compared to 13 of 25 in the 6 to 11 age group, and four cases of children 12 or over.

¹⁰⁵ Of the eight U.S. cases with children under the age of 6, five were allowed to move (62%), versus seven of 13 cases for those aged 6 to 11 (54%).

Of the four cases involving children 12 or over, three were permitted to move.

¹⁰⁶ *A.-F.(D.) v. T.(M.)*, 2006 CarswellQue 7506, 2006 QCCS 4349 (children want to go, move allowed).

¹⁰⁷ *Copeland v. Tanaka*, 2005 CarswellBC 3494 (S.C.). The parents had shared custody for 11 years, and the daughter wanted to stay with her father in B.C., rather than moving to Indiana.

¹⁰⁸ *Chakraborty v. Chakraborty*, [2008] O.J. No. 4399 (S.C.J.) (child wants to go, move allowed).

¹⁰⁹ *B.K.A. v. D.M.A.*, [2010] B.C.J. No. 897, 2010 BCSC 604 (children don't want to go, move refused).

¹¹⁰ *Droit de la famille – 071944*, [2007] J.Q. no. 8701, 2007 QCCS 3906 (children want to go, but mother's move "precipitous" and custody changed to father).

¹¹¹ [2005] O.J. No. 4090 (S.C.J.).

¹¹² [2010] B.C.J. No. 897, 2010 BCSC 604.

¹¹³ [2009] B.C.J. No. 510, 2009 BCSC 359.

Appendix A

Moves outside of North America

YES TO MOVE

2010

***Droit de la famille* – 10286, [2010] J.Q. no. 1122, 2010 QCCS 531**

Montreal to Tokyo, Japan, girl 2, variation, mother and father cohabited on and off, mother to Quebec to learn French, but back and forth to Japan, her visa expired and facing deportation order, return to Japan to live with her father and job waiting in info technology, child 1 month old when parents separated, 2008 custody order to mother, mother as PC, father's access increased from six hours/week to three of four weekends per month

***Hibbert v. Escano*, [2010] O.J. No. 944, 2010 ONSC 1445**

Toronto to Singapore, boy 1 ½, original hearing, mother student, home to Singapore in 2009 without notice, mother as PC, custody order made in Singapore, consented to by father, but no jurisdiction, says Ontario court, father operates lawn care and snow removal business, long work hours, sole custody to mother, move permitted

***R.B. v. E.B.*, [2010] A.J. No. 62, 2010 ABQB 44**

Calgary to Israel, boys 7 and 4, original hearing, both parents from Israel, children speak Hebrew at home, wife home, father long work hours and travel (including Israel), his business deteriorating, "stern", mother as PC, mother's move well-planned, better employment prospects in Israel, animosity between parents, all their grandparents in Israel

***Droit de la famille* – 101199, [2010] J.Q. no. 4739, 2010 QCCA 1018**

Montreal to Reading, England, girl 5, mother from England, father from Lebanon, father posted around world, mother as PC, husband access 3 of 4 weekends, original hearing, mother to move home to family, likely to find employment, move allowed by trial judge in 2009, upheld on appeal, condition of father's access that he not leave Canada with child (concern that he take child to Lebanon, not a Hague signatory)

2009

***Droit de la famille* – 091332, [2009] J.Q. no. 5287, 2009 QCCA 1068**

Quebec to France, boy 5, girl 3, original hearing, mother from France, both engineers, father worked long hours, less involved with children, children visited France, mother as PC, trial judge ordered custody to mother, no to move, over-reliance on expert's assessment, reversed on appeal, mother allowed to go, good employment prospects and family in France

***H.P.T. v. R.C.A.*, [2009] A.J. No. 1170, 2009 ABPC 311**

Calgary to Australia, boy 11, original hearing, mother's new partner to Australia, temporary move for 2-3 years, 3-year-old child of mother's new relationship, interim order, mother with primary care, active access father [judge wrongly placed burden of proof on father]

***Novlesky v. Novlesky*, [2009] B.C.J. No. 1956, 2009 BCSC 1328**

Burnaby to Brazil, boys 10 and 7, original hearing, mother "clearly" PC, assessment in favour of move, mother had car accident in Brazil, trouble learning English, father bus driver, mother's family wealthy and can provide home, support her while doing real estate course, children speak Portuguese, spent time in Brazil, high conflict, father little insight re parenting

***Ryall v. Ryall*, [2009] O.J. No. 5894, 2009 ONCJ 687**

Toronto to London, girl 16 months, original hearing, mother as PC, parents met in Bermuda, lived in Toronto 16 mos., child 3 mos. old at separation, return home to mother's village in Suffolk, live with maternal grandmother, job offer at near-by spa, positive economic effects, "happy mother"

***Elwan v. Al-Taher*, [2009] O.J. No. 1775, 69 R.F.L. (6th) 199 (S.C.J.)**

Mississauga to Saudi Arabia, girl 9, variation, mother's without notice move to S.A. and return in face of contempt order, mother remarried in S.A., new husband wealthy, assessment in favour, child's wishes, she disconnected from father, mother's behaviour "reprehensible", but child allowed to go despite likely minimal access

2008

***McArthur v. Brown*, [2008] B.C.J. No. 1578, 2008 BCSC 1061, 57 R.F.L. (6th) 82**

Vancouver to London, triplet girls 9(one with autism), original hearing, mother as PC, demanding parenting, both parents from London, families there, father real estate agent and long hours, regular access, mother careful planning of move, part-time employment in family business, importance of "functional" parent

***Droit de la famille* – 081872, [2008] Q.J. No. 7431, 2008 QCCS 3584**

Montreal to France, boy 6, girl 4, original hearing, interim agreement, primary care with mother, mother as PC ("home for children"), father in family publishing business and travels 2 mos./year including Europe, competing assessments, mother financial advisor, mother home to family and fiancé, father family there too, mother likely to promote contact

***Droit de la famille* – 081937, [2008] J.Q. no. 7649, 2008 QCCS 3649**

Quebec to France, girl 11, boy 5, variation, mother in France since 2006, back and forth to Quebec for alternating shared custody, two weeks with mother, four weeks with father, assessment, older daughter wants to go with mother, father consents re her, not re son, 2 children very close, mother new partner in France and extended family

***Droit de la famille* – 082488, [2008] J.Q. no. 9535, 2008 QCCS 4623**

Montreal to Algeria, girls 15 and 7, with mother since 2002

separation, custody to mother in 2004, variation, father little contact with children, previous domestic violence, mother from Algeria, there for two-year project with employer, also her new husband, her family there

***Brouse v. Lillini*, [2008] O.J. No. 2322 (S.C.J.)**

Ottawa to Taiwan, boy 7, girls 5 and 1 ½, interim hearing, shared custody in Ottawa, but mother as PC, also primary wage-earner, father home, emergency motion by mother as 3-year foreign service posting, couple mostly lived abroad (India, China), father repartnered and children barely know his new partner or her two children, economic stability

***Vashisht v. Gupta*, [2008] A.J. No. 539, 2008 ABQB 285**

Calgary to London, girls 2 ½ and 10 mos., interim emergency hearing, father seeks adjournment, depression/panic, mother says father feigning, father lawyer/business, unemployed, mother as PC, mother to England in 2008, initially to holiday with her sick mother, Hague order to return, waiting for hearing since, "international couple", interim move, mother needs to get back to home and possible work to create stability for children

***Droit de la famille—081465*, [2008] J.Q. no.5692, 2008 QCCS 2716**

Quebec to France, boy 15, girl 11, variation, mother has custody, mother had plans to marry and go to France, boy wants to stay with father and friends, to which mother consents, judge interviews children, girl wants to go with mother, starting secondary school

***S.L.D. v. P.D.M.*, [2008] N.S.J. No. 125, 2008 NSSC 103**

Halifax to Australia, boy 11, 2 blended families, variation, mother's husband lost job, found job in Australia, no equivalent employment available in North America and he primary financial contributor, 4-year-old child of mother's new marriage plus husband's two children 18 and 20, mother with primary care since 2000 separation, mother as PC, father "extensive" access and involved father, child support paid into fund to cover father's travel costs for access

***A.H. v. N.K.*, [2008] B.C.J. No. 956, 2008 BCSC 660**

Vancouver to New Zealand, girl 3, original hearing, mother from NZ, her parents to Canada when mother 10, mother doctor, father hospital technician, originally from Iran, "grandiose self-image", on long-term disability after accident, March 2006 mother in fear went to New Zealand, with relatives there, father used Hague Convention, mother charged with abduction, returned Jan. 2007, emotional abuse by father found, sole custody to mother

2007

***H.(M.) v. D.(J.)*(*Droit de la famille—071925*), 2007 CarswellQue 7194, [2007] Q.J. No. 8227, 2007 QCCS 3763**

Montreal to Country A, girl 3, mother with primary care, variation, mother as PC, father with weekend access, mother's employer opened subsidiary in A, mother from there and family there, child speaks language, spent time there

***Benson v. Benson*, [2007] O.J. No. 3540 (S.C.J.)**

Thunder Bay to Germany, girls 13 and 10, variation, 2005 agreement and divorce order, joint custody, primary care to mother, pulp mill in Red Rock closing down, father leaves to Welland, mother return to Germany for family/home, girls speak some German, mother as PC, father not exercised much access

***I.R. v. L.R.*, [2007] B.C.J. No. 2684, 2007 BCPC 387, 48 R.F.L. (6th) 214**

Kelowna to Panama, boys 10 and 7, variation, grandmother with custody since birth, mother involved with criminal father, crack cocaine addiction, grandmother move to Panama as cheaper to live and private school for boys, mother agreed, changed mind

2006

***M.Z.P. v. K.G.P.*, [2006] B.C.J. No. 240, 2006 BCPC 40**

Vancouver to Australia, girl 4, original hearing, mother primary care since birth and after 2003 separation, mother as PC, father anger management problems, counselling and repartnered, overnight access just started Sept. 2005, mother's new partner admitted to occupational therapy program in Australia (rejected by UBC), gone for 3 years, mother operated day care in Vancouver, likely to find employment in Australia

***Takenaka v. Kaleta*, [2006] O.J. No. 623, 38 R.F.L. (6th) 119 (S.C.J.)**

Toronto to Japan, girl 6, original hearing, mother from Japan, father from Poland, met in New York City, move to Canada in 2002, mother home, father worked and school, 2005 temporary custody order to mother, Saturday access to father, child's first language Japanese, many trips to Japan (6 mos. total), mother to Japan to live with her parents and job offer, mother as PC, sole custody to mother and move, Japan not Hague signatory, so bond of \$20,000 to be posted by mother

***M.C. c. G.C.*, [2006] J.Q. no. 2680, 2006 QCCS 1574**

Montreal to Naples, Italy, 2005 split custody order, variation, girl 14 with mother, boy 11 with father, father unemployed in Quebec, job in Italy, live with his mother, his sister checked out schools, boy wants to go, father encouraged access with mother

***Ben-Tzvi v. Ben-Tzvi*, [2006] O.J. No. 2986 (S.C.J.)**

Toronto to Israel, girl 5, both parents from Israel, father post-grad studies in Toronto, mother working to support, father presses mother to leave and go back to Israel, father no plan for child, doing Ph.D., long hours and little pay, original hearing, mother no choice but to leave as immigration status ending, mother as PC, mother live with her mother and support for studies in Israel, father can return to Israel and sooner if he wishes

***Boquiren v. Thomas*, [2006] B.C.J. No. 2984, 2006 BCSC 1711**

Vancouver to Hong Kong, boy 4, variation by father, mother from Philippines, father from Caribbean, met in London, mother accountant, father not employed, separated in 2003 after

incident of domestic violence, 2004 Provincial Court sole custody to mother, 2005 divorce order same, father's access "sporadic and minimal", mother and fiancé to Hong Kong where both employment and fiancé owns residence

***Beeching v. Beeching*, [2006] O.J. No. 4956, 2006 CarswellOnt 7860 (C.A.), affirming 2006 CarswellOnt 8739 (S.C.J.), affirming 2006 CarswellOnt 8744 (C.J.)**

Toronto to Argentina, boy 12, original hearing, 2002 separation, interim custody to mother, no dispute re mother's custody at trial, father with various degrees and telemarketing job, father's personality disorder, mother legal assistant and translator, child developmental delays early and ADHD/behavioural problems, mother as PC, father's access supervised, limited, assessment against move, to family/ home/ employment in Argentina

2005

***Dittberner v. Dittberner*, [2005] B.C.J. No. 722, 2005 BCSC 481**

Vancouver to Luxembourg, girls 8 and 5, interim agreement, primary care with mother, original hearing, mother as PC, family/home/new partner in Luxembourg, father South African, long hours at work, income declining, mother teacher and counselling, children in French immersion

***Sheikh v. Sheikh*, [2005] O.J. No. 1712, 17 R.F.L. (6th) 303 (S.C.J.)**

Toronto to England, boy 2 ½, mother from England to marry father, father from Kenya, working in Waterloo, both Muslim, original hearing, married 1 ½ years, interim custody to mother, mother as PC, mother's family in London suburb, part-time employment in uncle's business, mother with master's in information science, mother isolated in Canada, happy mother, access 70 days/year

***M.Z. v. S.G.*, [2005] A.J. No. 638, 2005 ABPC 138**

Calgary to Ethiopia, 4 children 14 to 1, original hearing, mother from Ethiopia, home there, singer there, three prior separations and each time home, father's physical, verbal and emotional abuse, mother left home, interim custody order to mother and emergency protection order, mother as PC, father moved from Calgary to Vancouver in 2005, minimal access after, failed to provide financial support while mother on social assistance

***H.S.S. v. N.S.*, [2005] A.J. No. 1184, 2005 ABQB 690**

Edmonton to India, girl 12, mother and father in Edmonton, variation, mother with sole custody in 1999, mother sends girl to attend excellent private school in Punjab, run by maternal grandmother, and to live with grandparents, left in April 2005, mother and girl thought father consented, girl wanted to go, her wishes considered, father opposed, mother police officer in Edmonton, daughter to return at end of school year, for time with father and to decide whether to return to India

***Reid v. Mulder*, [2005] O.J. No. 4473 (S.C.J.)**

Hamilton to Fiji, girl 9, original hearing, maternal

grandmother from Fiji and now there, mother has dual citizenship, Dec. 2001 separation agreement, father agreed to mother's temporary custody and one year trip to Fiji, back Dec. 2002, father every weekend access, 2003 incident, father charged with assault, agreed to peace bond, no access for 5 mos., 2004 supervised access, 2005 Sunday-to-Monday weekly access, mother as PC since birth, mother offer of television/entertainment employment in Fiji, OCL investigation, girl wants to go, 45 days in summer plus 10-day visit, no spousal or child support, father pay travel costs

NO TO MOVE

2010

***Snelgrove v. Butler*, [2010] N.J. No. 150, 2010 NLUFC 11**

St. John's to England, girl 3, twin boys 2, mother piano teacher from England, father chartered accountant from Nfld., tumultuous relationship, 2008 interim joint custody, primary care to mother, original hearing, mother as PC, but father's considerable involvement, 118 days in 2009 while mother visiting England, mother's move lacks specifics re home, education, joint custody, father's share of parenting to increase

2009

***E.L.C. v. E.S.B.*, [2009] B.C.J. No. 2247, 2009 BCSC 1543**

Vancouver to Australia, girls 7 and 4, original hearing, mother from Australia, 3-month trips home with children in 2008 and 2009 as maternal grandmother ill, new boyfriend there, father Sicilian, restaurant/chef, long hours, mother home with children, father had promised to move to Australia, father access, move would mean loss of father at this age, joint custody, 5 days/week with mother, 2 days/week with father, plus 2 evenings/week [mother not identified as PC?]

***Droit de la famille-092485*, [2009] J.Q. no.11185, 2009 QCCS 4642**

Montreal to France, girl 2, mother and father from France, to Quebec to school, in 2008 mother to France for 3 months, assessment recommends shared custody, original hearing, interim joint custody, with primary care to father, mother to return to France to live with mother, not seek employment, not much of plan, shared custody ordered in Montreal

***Droit de la famille-092042*, [2009] J.Q. no.8520, 2009 QCCS 3850**

Quebec to France, children 6 and 4, parents from France, original hearing, interim custody to father in 2008, father in matrimonial home, mother to work in nearby town, father engineer, no work, wants to return to France and family, father no clear plan, mother studying to be nurse, assessment recommends shared custody, shared custody ordered in Quebec, stability for children

***Vilardell v. Dunham*, [2009] B.C.J. No. 633, 2009 BCSC 434**

Vancouver to Spain, girl 5, original hearing, mother Spanish, father English, met in England, father job as professor at UBC,

both self-represented, equal shared interim custody, mother veterinarian, job options in Canada as veterinarian, her bad record re access, mother not PC, no advantage as parent, mother's parents in Spain, mother there 8 mos. in 2005-06

***Droit de la famille*–09766, [2009] Q.J. No.2948, 2009 QCCS 1500**

Montreal to Dubai, girl 5, variation, shared custody since 2006, both mother and father from Iran, mother back and forth to Dubai where new partner/husband, husband has 12-year-old daughter with him, mother and new husband will return to Quebec in future, assessments recommends move, another expert says no, sole custody to father

***Werbicki v. Werbicki*, [2009] S.J. No. 112, 2009 SKQB 80, 66 R.F.L. (6th) 329**

Saskatoon to Norway, girl 7, original hearing, mother back and forth to Norway, false allegations of sexual abuse, mother as PC, after hearing and before judgment mother goes to Norway with replacement passports, Hague issues, order for shared custody in absence

***Reid v. Reid*, [2009] N.S.J. No. 95, 2009 NSSC 43**

Halifax to Netherlands, girl 2 ½, original hearing, mother went in 2008 to join new partner, he employed, mother not, new partner shares custody of his two children aged 11 and 7, 2008 interim consent order, child with father in Halifax and his new partner and her 2 older children, primary care to father, mother's decision to go to Netherlands without children

2008

***Droit de la famille*–082827, [2008] J.Q. no.11126, 2008 QCCS 5283**

Beauharnois to Mauritania, girl 5, 2004 custody order to mother, father agreed to mother's move, then changed mind, after she threatened he wouldn't see child again, variation, mother unable to work, disability, totally dependent on new partner, he no job in Mauritania, her plan vague, Mauritania not a Hague signatory

***Edwards v. Basaraba*, [2008] A.J. No. 1163, 2008 ABQB 648**

Edmonton to London, girl 6, original hearing, mother's family in Reading, mother employed by United Airlines out of Heathrow, mother also tennis official, shared parenting since 2005 separation, mother away 6 months of year since 2003, father chiropractor, serious anger problems, mother "more resilient" (?), mother can travel

***Prasad v. Lee*, [2008] O.J. No. 2072, 53 R.F.L. (6th) 194 (S.C.J.)**

Oakville to Cardiff/Bristol, boy 16 mos., interim hearing, mother offered employment in Bristol as rheumatologist, family in Cardiff, mother's affidavits attack father, full hearing required, no urgency

2007

***Meijers v. Hasse*, [2007] O.J. No. 2506, 39 R.F.L. (6th) 115 (S.C.J.)**

Toronto to Netherlands, boys 6 and 5, 2005 separation agreement, joint custody, primary care to mother, original hearing, mother from Netherlands, Ph.D., works for Netherlands pharmaceutical company, boyfriend there, shared custody in practice, no one primary parent on facts, mother says "happy mother" if move, mother had falsely alleged that move "required" by employer

2006

***Nadeali v. Zaree*, 2006 CarswellOnt 2489 (S.C.J.)**

Newmarket to Iran, girl 4, original hearing, mother from Iran to Canada to study fashion design, various jobs, father from Iran, controlling, taped conversations, failed to pay support, mother older sister in Iran (sister who raised her) and secretarial position, Iran not Hague signatory, mother not seeking work as hairdresser despite training, OCL investigator recommends no to move, mother as PC, father only brief periods of access

2005

***Saunders v. Saunders*, [2005] N.S.J. No. 53, 2005 NSSF 10**

Halifax to Dubai, boy 10, 2003 minutes of settlement, equal shared custody, variation hearing, mother seeks primary care and move, mother remarried, new husband took job as pilot with Emirates Air in Feb. 2004, father also pilot, with Air Canada Jazz, repartnered with nurse, boy plays hockey year round (goalie), no one primary parent, major disruption to child

***M.S. v. K.R.*, [2005] B.C.J. No. 1825, 2005 BCSC 1171**

Vancouver to Dubai, boy 9, variation 2004 Provincial Court order of custody to mother, after separation father to jail for marijuana cultivation in Calgary, mother to Victoria, her mother there, father plumber now in Calgary, access once every 3 months in Calgary, decrease since mother decided to move, mother's fiancé from Iran, engineer, offered job in Dubai, family there, but possible jobs in B.C., mother as PC, Provincial Court Judge ruled against move, upheld on appeal, standard of review, one factor that Dubai not a Hague signatory, mother less willing to provide access, might foreclose father's relationship

Appendix B

Moves to the United States

YES TO MOVE

2010

***N.D.L. v. M.S.L.*, [2010] N.S.J. No. 86, 2010 NSSC 68**

Halifax to Missouri, girl 6, original hearing, mother from Missouri, live with her parents there, sisters there, do social work degree, father convicted of assault on mother and charged again, sole custody to mother, continued counselling for father a condition of access

***Templeman v. Whelen*, [2010] N.J. No. 68, 2010 NLUFC 3**

St. John's to Minneapolis-St. Paul, Minnesota, girl 7, original hearing, mother as PC, de facto custody all her life, father violence/drinking, mother to join U.S. serviceman husband, husband 2 sons there, mother always employed and likely to find job, father not in position to parent

2009

None

2008

***Blais v. Blais*, [2008] B.C.J. No. 2536, 2008 BCSC 1785**

Nanaimo to Bellingham, Washington, boy 7, girl 4, interim hearing, interim primary residence to mother in 2006, 2007 relocation application "premature", mother as PC, father injured, on workers' compensation, mother now married to new husband in Wash., another child by new husband

***M.J.M. v. A.D.*, [2008] A.J. No. 1484, 2008 ABPC 379**

Calgary to Seattle, Washington, girl 2 ½, mother sole guardian, father's variation application, mother had dating relationship with father, father in Cochrane, mother worked for IBM, transfer to Seattle, can work from home, mother as PC, conflict, father's criminal convictions, disregard for court orders

***Chakraborty v. Chakraborty*, [2008] O.J. No. 4399 (S.C.J.)**

London to Knoxville, Tennessee, boy 12, ADHD, special needs, 2005 separation agreement, primary care to mother, father access, original hearing, mother married to research Ph.D. with position in Knoxville, child wants to go according to OCL child's lawyer

***Cox v. Darling*, [2008] O.J. No. 824, 2008 ONCJ 91**

Toronto to Chicago, Illinois, boy 9, mother in Chicago working, while father in Jamaica caring for son, father goes to Toronto, charged with assault on son with belt, no-contact in father's bail conditions, mother granted temporary custody, but not move in 2007, interim hearing, mother can't work in Canada, risks loss of U.S. job, move permitted, not "typical temporary mobility case"

***Droit de la famille* – 081677, [2008] Q.J. No. 6571, 2008 QCCS 3127, affirmed *Droit de la famille* – 083180, [2008] J.Q. no. 13120, 2008 QCCA 2381**

Montreal to Florida, boy 9, mother and father from Cuba, variation, mother as PC, separated 2002, mother with primary residence, children speak Spanish, mother has new husband and offer of job in Florida

2007

***Panella v. Axford-Gatley*, [2007] O.J. No. 4398, 47 R.F.L. (6th) 180**

Newmarket to Cleveland, Ohio, girls 12, 5 and 3, original hearing, father with temporary care since 2005, mother mental health problems, no access since Dec. 2006, father physician, lost licence, few jobs available, job as medical director of publishing company in Ohio

***Chernen v. Savenye*, [2007] B.C.J. No. 1069, 2007 BCSC 709**

Vancouver to Phoenix, Arizona, boys 9 and 5, Provincial Court custody order, shared custody, original hearing, mother's new boyfriend lawyer and businessman from Vancouver, but doing 2-year MBA in Arizona, mother can finish her B.A., more time with children with flexible schedule, father living with his parents, working fixed hours

***Kennan v. Sayler*, [2007] M.J. No. 30, 2007 MBQB 29**

Winnipeg to West Virginia, girl 21 months, mother 3 children of previous marriage aged 10, 6 and 5, dating relationship with father from South Dakota who spent half year in Winnipeg, original hearing, interim custody to mother, joint custody, primary care with mother, family/home/employment on mother's parents' farm, mother as PC, father agreed then opposed move, father long hours and much of time in South Dakota

***Aneziris v. Aneziris*, [2007] O.J. No. 62 (S.C.J.)**

Toronto to Saginaw, Michigan, girl 7, boy 5, original hearing, 2005 temporary joint custody, primary care to mother, mother home, then on social assistance after separation, father electrician, little earnings declared and living with parent, mother as PC, mother's brother operates businesses in Saginaw, offers mother employment and apartment there, mother often visited there

2006

***A.-F.(D.) v. T.(M.)*, 2006 CarswellQue 7506, 2006 QCCS 4239**

Montreal to New York, boy 15, girl 13, 2002 custody to mother, 2003 variation of custody to father when mother wanted to move to New York to be with new partner, boy various serious handicaps, lawyer for children says both children want to go with mother and have for three years, mother's careful plan, especially re son

***Joudrey v. Joudrey*, [2006] N.S.J. No. 349, 2006 NSFC 34**

Truro, Nova Scotia to Nebraska, boy 4, mother from Nebraska, father long-haul trucker, mother to N.S. in 2001, high conflict, separated 2005, original hearing, mother's family arranged apartment and job in small-town Nebraska, mother

can't work in Canada for 2 years, mother as PC, father impulsive and manipulative, mother's access proposal insufficient, custody to mother and move, increased block access

2005

Rask v. Rask, [2005] S.J. No. 242, 2005 SKQB 159

Saskatchewan to Nevada, boy 7, girl 5, original hearing, 2003 agreement for joint custody, primary care to mother, father lawyer, long hours to build practice, mother Ph.D. in soil science, mother as PC, mother's job ended in Saskatchewan, offer of move to Winnipeg by employer, but much more travel required, mother's only option one-year tenure-track position with University of Nevada in Caliente (pop. 800), but good salary and no travel, both mother's and father's families in Saskatchewan, boy dyslexia

Lindahl v. Lindahl, [2005] O.J. No. 4090 (S.C.J.)

Kitchener to Michigan, boys 13 and 11, girl 10, interim hearing, mother and father Americans, moved to Kitchener for father's employment, 6 months later separated, mother took children back to Michigan, ordered returned to Ontario, temporary shared custody order, week about with "dual nesting" in family home, no removal, mother to Michigan for employment as office assistant at local school (can't work in Canada), OCL lawyer for children says they want to go with mother, mother "strong case", temporary order varied to permit children to spend residential time in Michigan til trial

NO TO MOVE

2010

B.K.A. v. D.M.A., [2010] B.C.J. No. 897, 2010 BCSC 604

Vancouver to San Diego, California, boy 12, girl 10, original hearing, mother took off to California, father sole custody afterwards, return, then shared custody, mother's move to minimise contact with father and nursing job, assessment recommended move, children don't want to go

2009

Larson v. Clinton, [2009] O.J. No. 1892, 69 R.F.L. (6th) 321 (S.C.J.)

Guelph to Santa Barbara, California, girl 8, original hearing, urgent motion to move, 2006 California settlement agreement, father to Guelph for employment in 2006, mother followed for landscape architecture studies, finished studies Dec. 2008, week-about shared custody, mother found job in Santa Barbara and family there, mother's false allegations of physical abuse against father, shared custody to continue, unless mother moves

Lien v. Lorenz, [2009] B.C.J. No. 510, 2009 BCSC 359

Vancouver to Lincoln, Nebraska, girl 11, mother moved with no notice, returned, permitted to move in 2000 on interim basis, allegations of child abuse of by mother against father, original hearing, mother does not return for trial, mother did not comply with access orders, alienated child, custody to father

2008

Droit de la famille-081387, [2008] Q.J. No.5530, 2008 QCCS 2614

Montreal to U.S., boy 18 mos., interim hearing, mother from U.S., 2008 interim agreement, custody to mother, access every Sunday to father, young baby, contact important, also change to

all-English environment if move, mother's family there, but mother in Quebec for 8 years and good job, no interim move

2007

Droit de la famille-071944, [2007] J.Q. no.8701, 2007 QCCS 3906

Montreal to Pennsylvania, girls 10 and 8, original hearing, mother remarried to husband in Penn., children want to go, mother's move "precipitous", mother no job, father chef in restaurant, change of custody to father

2006

Karpodinis v. Kantas, [2006] B.C.J. No. 1209, 2006 BCCA 272, 27 R.F.L. (6th) 254, affirming [2006] B.C.J. No. 754, 2006 BCSC 555

Vancouver to Houston, Texas, boy 3, parents separated before birth, with mother since, mother as PC, mother sole custody, father access 2 days/week, not overnights, mother's employer closed operations in Vancouver, offered mother job in Houston, pay cut for any other job in Vancouver, variation, father lived in suite in parents' home, lower income job, mother could find another job

Gilles v. Gilles, [2006] S.J. No. 491, 2006 SKQB 363, affirmed [2008] S.J. No. 469, 2008 SKCA 97, 54 R.F.L. (6th) 55

Saskatchewan to Alamogordo, New Mexico, girl 11, original hearing, mother plans to marry internet boyfriend and pet-shop owner in New Mexico, child in father's interim primary care for 14 mos. while mother made trips to New Mexico, including one 3-month trip, doubts re mother's parenting (father's too), mother's evidence re move skimpy (premature and more facts needed), custody to father

Downey v. Sterling, [2006] O.J. No. 5043, 2006 ONCJ 490

Toronto to Texas, boy 9, mother custody after short cohabitation and 1999 separation, mother married to Texas engineer in 2006, 6-year-relationship, 8-month-old child and mother pregnant (due April 2007), father's emergency motion to stop move a surprise to mother, interim hearing, mother as PC, many factors in mother's favour, but trial of issue required, few more months to investigate and full hearing

2005

Copeland v. Tanaka, 2005 CarswellBC 3494 (S.C.)

Port Coquitlam to Indiana, girl 14, original hearing, shared custody since 1994 separation, mother remarried, new husband specialist engineer from Indiana, moved to B.C. but couldn't find employment, return to Indiana, mother described as PC, assessment recommends against move and daughter does not want to go, stay with father

A.D.P. v. T.E.W., [2005] N.S.J. No. 497, 2005 NSFC 22

Nova Scotia to Georgia, boy 3, mother and father equal shared custody since birth, original hearing, mother met new husband on internet, move to small town in Georgia, husband a Navy veteran, medical and financial benefits, works as graphic artist/photographer/reporter, could move to N.S., father initially agreed to move, then changed mind, mother some past mental difficulties, once stabbed father, broke his jaw, but no diagnosis, no primary parent

Relocation Decisions: Do Culture, Language and Religion Matter in the Rainbow Nation?

Latiefa Albertus* and Julia Sloth-Nielsen**

1 Introduction

In the 1990s, before South Africa entered the democracy which was born with the adoption of the Interim Constitution and an all party settlement in 1994, the world press had highlighted the 'Zulu Boy' story. To recapitulate, the central question in the case was whether or not it was in the interests of a nine-year-old South African boy to remain in the United Kingdom with foster parents, or to be returned to his biological – Zulu – South African family. The child had been brought to England in 1992 when the child was 18 months old, by the foster mother, a former employer of the child's mother (who was her domestic worker). The parents had consented to the removal on the basis that it would benefit the child's education; however, the parents launched proceedings two years later to have the child returned, upon discovering that the foster mother had commenced adoption proceedings in the United Kingdom. The substantive hearing took place when the child had already been in England for some years (four), and in the care of the foster mother for even longer. Giving judgment,¹ Lord Justice Neill said that the child had the right to be reunited with his Zulu parents and with his extended family in South Africa.

The conflicts in this case were sharply drawn between the interests of prospective adoptive parents *versus* the interests of biological parents; the views of the child who had stated that he did not wish to return to South Africa, *versus* the views of his biological parents; between culture and biology on the one hand and nurture on the

other. But in a clear allusion to the importance of culture, the Court was swayed by the child's primary cultural background:

'the child's development must be, in the last resort and profoundly, Zulu development and not Afrikaans or English development'².

Reports have it that the return order was not successful and that the child did not settle in South Africa and that after six months in South Africa, he had returned to England with his biological parents' consent.³

When this case was decided, 16 years ago, race was the dominant criterion for much welfare-related decision making in South Africa, although it was wrapped up in cultural packaging for most of the time.⁴ So what has changed, if anything? Do culture, language and religion play a role, definitive or otherwise, in international relocation decisions in contemporary South Africa? It is quite clear that the applicable standard for adjudication is the best interests of the child,⁵ that this standard has differential application from case to case and from one set of facts to the next. What we seek to examine is whether the peculiarities of South Africa, as highlighted by factors such as culture, language and religion are in any way at stake, and to what extent these three factors are considered in determining the best interests of the child in relocation decisions.

Cultural and religious rights are for many largely communal in nature, a means of expressing a common sense of identity, values and traditions.⁶ As a result of South Africa's multi-cultural and linguistic framework,

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¹ *Re M* (Child's upbringing) (1996) 2 FLR 441; see J. Fortin 'Children's rights and the developing law' [2003] London: Butterworths 435; M. Freeman 'Article 2: the best interests of the child' in A.L. Alen et al (eds) *A commentary on the United Convention on the rights of the child* [2007] Leiden/Boston: Martinus Nijhoff Publishers 29.

² *R v M* (child's upbringing) *op cit*.

³ See Fortin (note 1 above) 427. B. Mezmur *Intercountry adoption in an African context* (unpublished LLD thesis, University of the Western Cape, 2010 at 122 notes that the English judgment was the subject of much criticism: *The Independent* 10 March 1996).

⁴ For a fascinating account of the use of children's courts and the apparatus of welfare legislation to enforce racial segregation of children deemed, by appearance to be other than 'white', see N. Zaal, *Court services for the Child in Need of Alternative Care: a critical Evaluation of Selected Aspects of the South African System*, unpublished LLD thesis, University of the Witwatersrand (2008), chapter 2.4.

⁵ Section 7 of the Children's Act 38 of 2005, elaborated more fully below.

⁶ I. Currie and J. de Waal [2005] *The Bill of Rights Handbook* [5ed] Juta and Co 624.

culture, language, and religion are constitutionally protected⁷ and in practice remain hotly contested - for example, in the educational context with respect to the language policies of South African schools.⁸

The first part of this article turns to culture, language and religion as constitutional constructs in South Africa, in an attempt to clarify their importance generally. The position prior to the Children's Act⁹ will then briefly be discussed. Thereafter, the article will review available case material, and legal criteria and practical trends will be drawn from this. Finally, the threads drawn from this will be pulled together in attempting to provide some insight into contemporary judicial views in South Africa on the influence of culture, language and religion in the field of relocation disputes.

2 The importance of the constitutional rights to culture, language and religion

In terms of section 15 (1) of the South African Constitution everyone has the right to freedom of conscience, religion, thought, belief and opinion, which includes the right to have a belief; to express that belief publicly; and to manifest that belief by worship and practice, teaching and dissemination.¹⁰

Section 30 of the Constitution provides that everyone has the right to use the language and to participate in the cultural life of their choice, provided that the exercise of such rights is not in conflict with provisions in the Bill of Rights. In terms of section 29 (2) everyone has the

right to receive education in the official language or languages of their choice¹¹ in public educational institutions where that education is reasonably practicable.

Section 31 (1) provides that persons belonging to a cultural, religious or linguistic community may not be denied, with other members of that community the right to (a) enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

The notion of culture remains a contested concept as a result of its many possible multi-layered and context-dependant meanings.¹² However, as a general concept, culture ensures that group identity is protected so that one cultural group can be distinguished from another.¹³ Cultural identity has been held as being one of the most important parts of a person's identity as it flows from belonging to a community.¹⁴

Cultural rights are also dependent on the right to education, thus, the right to participate in cultural life is linked to the right to education, which it is argued, can only be meaningfully exercised once a certain minimum level of education has been achieved.¹⁵ In addition, cognitive development expands from social interaction and is directly influenced by culture. The extent and degree of one's social development are both arguably also determined by one's cultural background and identity.¹⁶

⁷ See section 31 of the Constitution of the Republic of South Africa Act 108 of 1998 (hereafter the Constitution), which is based on Article 27 of the International Covenant on Civil and Political Rights 1966 which provide "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language" I. Currie and J. de Waal (note 6 above) at p623; see also J.D. van der Vyver 'Cultural identity as a constitutional right in South Africa' [2003] *Stell LR* 51 at p52 where the author states that 'these provisions were intended to afford constitutional sanction to the international norm proclaiming the right to self-determination of the cultural, religious and linguistic communities within the body politic'.

⁸ See Minister of Education, *Western Cape v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA); *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC); M.H. Smit 'Language rights and the best interests of the child' [2008] 71 *THRHR* 38.

⁹ 38 of 2005. Hereafter the 'Children's Act'.

¹⁰ I. Currie and J. de Waal (note 6 above) at p339.

¹¹ It should however be noted that the right only applies to the 11 officially recognised languages and not all languages (such as various San languages). The right also does not provide for a right to mother-tongue education, as the right is subject to the limitation provision that education in the preferred language must be reasonably practicable see R. Malherbe 'The constitutional dimension of the best interests of the child in education' [2008] *TSAR* 267 at p 283.

¹² A.A. du Plessis and C. Rautenbach 'Legal perspectives on the role of culture in sustainable development' [2010] *PER* 27 at p30.

¹³ T.W. Bennet and C.H. Powell 'Restoring land: The claims of Aboriginal title, customary law and the right to culture' [2005] *Stell LR* 431 at p 441.

¹⁴ *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) 493D.

¹⁵ B. Bekink and M. Bekink 'Children with disabilities and the right to education: a call for action' [2005] *Stell LR* 125.

¹⁶ Du Plessis and Rautenbach (note 12 above) 40-41.

In what is regarded as the leading case on the right to religion, coincidentally involving a child, *MEC for Education, Kwazulu-Natal v Pillay*,¹⁷ the South African Constitutional Court, without attempting to provide definitions for culture and religion said:

religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two: religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.¹⁸

Religion is said to play a significant role in 'believers' lives and in their search for life's ultimate meaning. Furthermore, it is a source of identity that is closely connected to self-respect and dignity, as well as moral values.¹⁹ Religious rights also impact on the right to education, as section 15 (2) of the Constitution provides that religious observances may be conducted at state or state-aided institutions.²⁰

Language is critical for cognitive development as it provides the concepts for thinking and therefore a means for expressing ideas. Language is also considered to be both a precondition for thought and a bearer of thought, and ultimately influences the extent to which a child's intelligence is actualized. Furthermore, we use words to construct our interpretation of experience; our experiences shape our language; and in the culture of schools, a concept does not exist until it has been named

and its meaning shared with others. Language also enables learners to interact with more capable peers and adults (including parents) and later with written material which allows them to share their accumulated knowledge. Since all teaching is given through the medium of language, language and education are interrelated.²¹

3 The position before the Children's Act

Prior to the Children's Act commencement, relocation applications by the primary caregiver were generally granted by the courts.²² The approach adopted in the older cases was that the primary caregiver had the right to decide where the child should live, unless the non-primary caregiver could demonstrate that the proposed relocation would be detrimental to the child. Although the interests of children were taken into account, they were not central to the inquiry. Instead, the rights of the primary caregiver were seen as being paramount²³. This approach was later rejected, and the paramount consideration in relocation disputes became the 'best interests of the child' principle.²⁴ This standard was, nevertheless, applied in a rather vague and general way, with no guidelines or list of factors to assist the courts; the result was different outcomes on whether or not relocation should be allowed.²⁵ Although the standard eventually became a constitutional imperative,²⁶ the Constitution, too, did not provide guidance on how the best interests of the child should play a role, other than to provide that these interests should be of paramount concern.

Broadly speaking, the jurisprudence prior to the Children's Act has been reasonably well traversed²⁷ and the following factors highlighted as relevant to judicial decision-making in the context of relocation: contact

¹⁷ Note 14 above.

¹⁸ 491B-D.

¹⁹ P Lenta 'Taking diversity seriously: Religious associations and work-related discrimination' [2009] *SALJ* 827 at p833.

²⁰ R. Malherbe 'The constitutional dimension of the best interests of the child as applied in education' [2008] *TSAR* 267 at p280.

²¹ H. Botes and A. Mji 'Language diversity in the mathematics classroom: does a learner companion make a difference?' [2010] *South African Journal of Education* 123 at p124.

²² E. Bonthuys 'Clean breaks, custody and parents right to relocate' [2000] 26 *SAJHR* 489.

²³ Bonthuys (note 22 above) at p 489.

²⁴ Bonthuys (note 22 above) at p 490 relying on *Shawzin v Laufer* 1968 4 SA 657 (A).

²⁵ See also L. Albertus 'Relocation disputes: has the long and winding road come to an end? A South African perspective' [2010] *Speculum Juris* 70.

²⁶ C.J. Davel and A. Boniface 'Cross border relocation of children and custodial parent: *Jackson v Jackson* 2002 2 SA 303 SCA' [2003] *THRHR* 139.

²⁷ Bonthuys (note 22 above) at p 486; J.M. Kruger 'Immigration by a custodial parent after divorce' [2001] *THRHR* 452; G.M. Barrie 'The approach of the courts regarding South African custodian parents going into the diaspora' [2008] *TSAR* 571; A.M. Skelton 'Child Law, The Child and South African Private Law' in C.J. Davel *Child Law in South Africa* [2009] Juta and Co at p88-90; B. van Heerden 'Judicial Interference with the Parental Power; The Protection of Children in *Boberg's Law of Persons and the Family* [1999] Juta and Co, Cape Town at p568.

with the non-primary caregiver, the child's relationship with the primary caregiver, any conflict between the parents, the bona fides of the primary caregiver (reasons for emigrating), the need for stability, the children's preferences and the relationship with new family members.²⁸ Kruger adds to this list as a separate factor the 'fundamental rights of the custodian parent', which would include such constitutionally protected rights as the right to freedom of movement (s 21(1) of the South African Constitution), the right to leave the Republic (s 21(2)), not to mention the right to freedom of association and dignity rights. Barrie makes more explicit the 'requirement', if it can be termed such, that the 'reasons' must be grounded in 'reality, that is, they must be concrete rather than comprising 'wish lists''. Maternal preference as a basis for decisions involving care of children has diminished considerably in recent times. Indeed, any evident bias towards mothers who are primary care-givers is now eschewed by courts.³¹

A brief discussion of cases decided before the commencement of the Children's Act now follows, in an attempt to illustrate the extent to which factors such as culture, language and religion were considered in their respective contexts.

In *Shawzin v Laufer*,³² one of the main arguments raised by the appellant (father) was that the children's standard of living would not be as high in Canada as it is in South Africa. A higher standard of living did not carry much weight. It was said by Rumpff, JA:

'I do not think that to be able to live in affluence is of educative value to boys of that age; their education and happiness in these formative years depend, or should depend, on other things in life'.³³

Another concern of the appellant was that his

children would not be brought up in the atmosphere of the Jewish faith if relocation was allowed. The respondent (mother) assured the court that the children will have proper religious training including the observance of religious holidays and the Sabbath; her current husband was also fluent in Hebrew.³⁴ The religious factors do not appear to have been considered further, nor were they material in the context of the best interests of the child test which was applied to grant the relocation application.

In *Van Rooyen v Van Rooyen*³⁵ the applicant sought the court's consent to relocate to Australia permanently; her support system – parents and siblings – being located there. Her financial position was poor, and her employment opportunities would allegedly be better in Australia- her being a foreigner and unable to speak Afrikaans resulted in her not being able to find employment in South Africa.

The court acknowledged that the children's lives having been disrupted by the divorce would be further disrupted by the limited contact they would have with their father should the court grant consent. Their mother would, however, be equipped to cope and assist the children with the initial difficulties they may experience.³⁶ Although the children would have to adapt to a new culture, the court was satisfied that they would have the necessary support structures to assist in coping with the change.

In *Godbeer v Godbeer*,³⁷ the applicant mother adduced her status as a single mother, being fearful of driving at night and being anxious of her children's well-being when they were alone at home. These concerns, she alleged, would magnify in nature as the girls grew older and became more socially active. The Court allowed the application to the United Kingdom (UK),

²⁸ Bonthuys (note 22 above) 490-499.

²⁹ Kruger (note 27 above) 457.

³⁰ Barrie (note 27 above) 571.

³¹ *van der Linde v van der Linde* 1996 (3) SA 509 (O); *van Pletzen v van Pletzen* 1998 (4) SA 95 (O).

³² 1968 (4) SA 657 (A). .

³³ 669A-B.

³⁴ 660C-G.

³⁵ 1999 (4) SA 435 (C).

³⁶ Before granting the application for relocation, King, DJP stated: 'I trust that it will be recognised and accepted by both parents that there is no winner and no loser in this matter; there are two concerned parents each seeking what is best for the children; a Court can only lay down the rules, the parents must see that they are observed' (at 441C- D).

³⁷ 2000 (3) SA 976 (W).

citing the stable job environment to which the mother would proceed, her 'at least average' earnings there, and the plan to live in 'acceptable surroundings' close to a school. Although a slightly lower standard of living might ensue, the Court noted that 'the composites of life are manifold and other things might fall to be balanced against that'.³⁸

In *Schutte v Jacobs*³⁹ the applicant sought an order which would allow her to relocate to Botswana with her child, aged four and a half. She sought such order as her partner had been transferred to Botswana for work purposes. The evidence indicated that suitable arrangements were or would be made in future regarding the accommodation, schooling and church membership of the child. That the child was only four and a half would also not result in a serious disruption in her life as she had not yet started primary school, and would easily adapt to a new environment.⁴⁰

*F v F*⁴¹ further illustrates pessimism about life in South Africa. Indeed it was alleged by the applicant in the lower court that the quality of life in Gotherinton, in the UK (to which she wished to relocate) was better than in South Africa. The crime rate in South Africa was unacceptable and she was living in an area constantly patrolled by armed guards. She averred that the social security system in the United Kingdom was better and that the standard of schools in South Africa was deteriorating and had not kept pace with international standards.⁴²

In this case, the court was swayed by the vague nature of the custodian parent's plans which were, in short, fluid: by the time the matter went to oral evidence, she had only secured a temporary low-paying job in the UK. There was uncertainty about her employment prospects, aftercare for the child, and a variety of other long-term issues relevant to the child's future.⁴³ In summary, the applicant's motives were indeed relevant, however, her implementation prognosis of those

intentions was insufficiently concrete and certain to warrant dislodging the *status quo* in South Africa. It was this that provided the major objection to the application to relocate: indeed the Court left open the possibility of a different verdict were more solid evidence to be placed before a court at a later stage of the minutiae of the planned move. This signals that the court neither accepted nor rejected the claims that a safer and educationally more advantageous environment obtained in the UK as factors which could influence their decision.

In *H v R*⁴⁴ the reasons for wishing to relocate were employment opportunities as well as the high crime rate in South Africa, the uncertain state of the economy, the overburdened social services in South Africa, the limited opportunities for white male South Africans and the impact of HIV in South Africa. The applicant, who had remarried, had, however, found good schools in the UK and 'done her research'. Despite the father's very close bond with the child and the excellent education opportunities for both schooling and higher learning in South Africa, his objections were overruled. The main reasons were the fact that the relocating parent had carefully considered the move and done everything possible to ensure that minimum disruption to the child's relationship with his father would ensue. The order of the Court reflected considerable detail as to the form and shape of such future contact.

In general terms, the leading South African case is *Jackson v Jackson*.⁴⁵ The applicant (custodial parent) was the father of two girls aged 7 and 9½. He brought an action for leave to remove the children from South Africa to Australia. Such leave was granted by the trial court of first instance, but was overturned by the full court of the Natal Provincial Division. An appeal against this latter decision was lodged with the Supreme Court of Appeal. In examining the factors relevant to the decision as to whether it was in the best interests of the children to emigrate to Australia, Cloete AJA focused on the

³⁸ At 980H.

³⁹ (*Nr 1*) 2001 (2) SA 470 (W).

⁴⁰ 476E-F. It should be noted that the court required certain matters to be investigated further by the Family Advocate before a decision was made. The application was however granted in *Schutte v Jacobs* (*Nr 2*) 2001 (2) SA 478 (W).

⁴¹ (2006) 1 All SA 571 (SCA).

⁴² Barrie (note 27 above) 568.

⁴³ At 579 (20)-(21).

⁴⁴ 2001 (3) SA 623 (C).

⁴⁵ 2002 (2) SA 303 (SCA).

following: the custodial parent (appellant in the Supreme Court of Appeal) in responding to the trial court's questions had stated that in his opinion, people in Brisbane were happier and safer than in South Africa and that specifically in Durban things had become worse; that people in South Africa were depressed and had forgotten how to have fun; that children (like his two girls) were suppressed and could not lead a normal life as he did as a child; and that South Africans had become burdened with crime, AIDS, education problems and health care problems that would be passed on to his children. Such factors, he concluded, convinced him that it would be in the best interests of his children to move to Australia. These statements are quoted at length in the reported SCA judgment, and, in the words of Cloete AJA (who penned a separate judgment), were not disputed.

Scott, JA, for the majority, did not detail the impact of 'crime free' Australia in so many words, other than to note that:

'Although it would suit him to live in Australia, his principal reason for wishing to emigrate was his conviction that Australia was a better country in which to bring up children and that it was in their best long term interests that they make Australia their home rather than remain in South Africa'.⁴⁶

In the event, the decision did not turn on the relative merits of Australia versus South Africa as a destination, but of course, on the relationship between the children and their non-custodial mother, and the effects of the envisaged separation upon that. Nevertheless, it is clear that the attractions of Australia were relevant as to the motive of the parent wishing to relocate.

Marais, AJA, for the minority, made the following point about 'country comparisons':

'The reluctance of the Courts to make or to be seen to be making findings of fact which may reflect adversely about the quality of life in the countries in which they are situated is entirely understandable. It is an invidious task. However,

if they are to do their duty by children whose future is in their hands, it is, in my respectful view, an obligation which cannot be avoided if that quality of life is the dominant reason advanced for the contention that it would be in their best interests to emigrate...'⁴⁷.

However, the learned judge did note that the comparison made between South Africa and Australia did not relate to trivial things, but to aspects of life which are critical and fundamentally important to the growth and development of healthy, happy and stress-free children.⁴⁸

It can be asserted that culturally speaking, Australia and South Africa might be regarded as quite similar for certain groups of the South African population as regards lifestyle, educational standing and so forth. Some might question whether 'quality of life' issues are relevant to 'culture' at all. This point is addressed in conclusion.

On balance, the leading cases reviewed here demonstrate that language, culture and or religion were not central to determining the best interests of the child in the period before the Children's Act.

4 Culture, Language and Religion in the Children's Act

The main features of the Children's Act that affect relocation concern section 7 (the best interests of the child), section 10 (child participation) and the new rules concerning parental rights and responsibilities, which, seen as a whole, replace the common law concepts related to parental authority (access and custody). Section 11 (dealing with the rights of children with disabilities) has also assumed some relevance with regard to relocation. As a general proposition, children's rights to language, religion and culture feature particularly strongly in the Children's Act, as will be apparent from some examples cited below.

Cases are only now emerging in which the real impact of the Children's Act is coming to the fore.⁴⁹ It cannot be said, at this relatively early stage, that the Act has had a

⁴⁶ 320A.

⁴⁷ 325H-I.

⁴⁸ 325J-326A.

⁴⁹ The principal sections dealt with in this article came into force on 1 July 2007. These include the chapter on children's rights (chapter 2) and the chapter on parental responsibilities and rights (chapter 3). The remainder of the Act, with its accompanying Regulations and Forms, was put into effect on 1 April 2010. Judges and lawyers alike took a while to cotton on to the newly operationalised sections on parental responsibilities and rights, which to some extent explains the relative lack of contemporary jurisprudence on the new provisions.

major impact from the case law perused. However, the Act could be the locus of quite a shift in emphasis in future, as will now be explained.

The starting point for discussion is section 7, which enshrines the South African equivalent of the so-called 'welfare checklist'.⁵⁰ However, as might be expected, the adaption of the checklist to South African exigencies is apparent.⁵¹ Section 7 contains a long list – more than fourteen subsections in all – of factors which comprise the best interests of the (South African) child. Two of the most prominent in the context of relocation concern the nature of the personal relationship between the child and the parents or any specific parent and the child and any other caregiver or person relevant in those circumstances (section 7(1)(a)); and the attitude of the parents or any specific parent, towards the child and the exercise of parental responsibilities and rights in respect of that child (7(1)(b)). However, relocation features more directly than this: for instance, it is now a legal principle that consideration be given to:

'the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
(i) both or either of the parents; or
(ii) any brother or sister or other child or any other care-giver or person, with whom the child has been living' (section 7(1)(d)).

Here we find not only explicit mention of the wider family circle (a notable feature of the Act as a whole insofar as the extended African family kinship system acquires legislative recognition in a variety of different ways), but also reference to the interests of other siblings, which must include the siblings attached to newly-formed family units (as is evident from the phrase 'any other child').⁵²

This line of thinking is reinforced by section 7(1)(f) which explicates the principle of the

'need for the child –

(i) To remain in the care of his or her parent, family and extended family; and

(ii) To maintain a connection with his or her family, extended family, **culture** or tradition'⁵³

as factors to be taken into account in determining the child's best interests. These, as we have seen, had not surfaced explicitly in relocation case law hitherto.

Another factor which warrants consideration in this analysis is that contained in section 7(1)(e), insofar as it brings the practical difficulty and expense associated with maintaining 'personal relations and direct contact' with the parents or any specific parent on a regular basis directly to bear. In short, independent of the personal relationship between child and either parent (section 7(1)(a)) and their capacity to provide for the needs of the child, including the child's emotional and intellectual needs (section 7(1)(c)), a range of other relevant and relocation-oriented considerations are now statutorily relevant.

Section 7(1)(h) is thus not irrelevant, insofar as it speaks of the need to consider 'the child's physical and emotional security and his or her intellectual, emotional, social and cultural development' (emphasis inserted).. A particular feature of the Act is its sensitive treatment of disability and this is emphasised in a variety of different areas of legislative concern. Not least of these is section 11 (which falls in the overarching chapter dealing with children's rights) in which it is stated that due consideration must be given to striving for certain outcomes if a matter concerns a child with a disability, to be achieved in ways spelt out in this particular article.⁵⁴

It must be stated that it appears at first glance that

⁵⁰ The leading discussion on the Children's Act (C.J. Davel and A.M. Skelton, *Commentary on the Children's Act* [2007] Juta and Co, Cape Town) does not dissect the contents of the checklist in section 7 in minute detail.

⁵¹ For instance, the Australian Family Law Act of 1975 from which this provision is clearly derived is, on the face it, quite similar: yet two substantive differences can be discerned: the Australian variant does not expressly refer to brothers and sisters as are alluded to in section 7(1)(d) (but only to 'any other child'), nor does the Australian Family Law Act mention 'care-givers'. Care-givers occupy a very special place in the Children's Act overall, in recognition of the large numbers of children being raised by persons who are not biological mothers (for instance). Hence care-givers can even, in some instances, consent to medical treatment and to HIV testing, a necessary development given the HIV aids pandemic in South Africa.

⁵² The intention of this article was also to give practical effect to the CRC and ACRWC presumptions against separation of children from their families: article 9 CRC and article 25 ACRWC.

⁵³ Emphasis inserted. The Australian Family Law Act 1975 refers to the Aboriginal or Torres Strait Island culture of the child, though there are also references generally to children's lifestyle and background (including lifestyle, culture and traditions): section 60(3)(h).

⁵⁴ Providing the child with parental care, family care or special care as and where appropriate; making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have; providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and providing the child and the child's caregiver with the necessary support services; section 11(1)(a)-(d).

the principles in section 7 function independently of each other: that is, they may 'weigh in' separately from factors such as the personal relationship a child has with either parent (section 7(1)(a)), and the capacity of parents to provide for the child's needs (section 7(1)(c)). This reading is reinforced by a textual analysis, as the subsections of section 7 are not linked with the word 'and'. However, the fact that each principle counts independently does not entail rejecting the approach of the court in *AC v KC*,⁵⁵ discussed in more detail in section 4 of this article.

Parenting plans are a new feature introduced by the Children's Act,⁵⁶ in an effort to encourage disputing parents to work out their differences in an orderly manner. Indeed, the Act seeks to prevent litigation from ensuing by requiring parties to first seek to agree on a parenting plan in some situations⁵⁷, if needs be with the assistance of a social worker, psychologist or family advocate, or after mediation.

The contents of a parenting plan are not detailed in any way in the Act, nor do the Regulations provide further enlightenment.⁵⁸ However, it is worth recording that in providing examples of what may be included in a parenting plan (s 33 specifies that a parenting plan may determine **any matter** in connection with parental responsibilities and rights), and apart from providing the child with a place to live and maintaining contact with the child, the Act makes mention of only two further incidents of parental responsibility, namely: the schooling and the religious upbringing of the child.⁵⁹

The legislature was alive to the difficulties occasioned by child rearing in a multi-cultural and multi-religious society where schooling-related issues frequently provide the fulcrum for disputes about culture. As will be shown briefly in conclusion, 'schooling' is for many South Africans a pseudonym for language and heritage claims, or, seen differently, a roundabout way of alluding to

culture in practical terms.

In the next section we undertake a brief discussion of relocation cases since the advent of the Children's Act. These focus only on case law where language (and implicitly, culture) or religion surfaced.

5 The impact of the Children's Act

In *K v K*⁶⁰ the relocation was sought by a father wishing to go to Israel where his parents and sisters lived, and where he was born. He averred that his daughter would enjoy a better education in Israel, and there is some suggestion that the application for relocation was motivated by a robbery during which the applicant's current wife and the child for whom the order was sought were held at gunpoint at the home of the applicant, which left the child traumatised.⁶¹

However, the future plans of the applicant appeared to be uppermost in the mind of the court:

'It appears that if she goes to Israel that L will be attending a school where the classes will be given in Hebrew. It is not in dispute that L does not speak Hebrew. The applicant in reply says that L is attending Hebrew lessons and that the Israeli Immigration Department and the Modiin Municipality provide intensive Hebrew study programmes to facilitate integration into the community and the country. No detail is provided of either of the programmes nor is any detail provided of how L is coping with her Hebrew lessons. Whilst it is probable that L would eventually learn sufficient Hebrew to enable her to communicate it is not possible to determine how long this would take nor what effect her inability to speak Hebrew would have on her school career. It is self-evident that if she cannot speak Hebrew, which is the language of

⁵⁵ (A389/08) [2008] ZAGPHC 369 (13 June 2008).

⁵⁶ Sections 33 and 34, read with sections 30 and 31 and the Regulations promulgated on 1 April 2010.

⁵⁷ Section 33(2) provides that '[i]f the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child'.

⁵⁸ This is in contrast to earlier versions of the Regulations and Forms which contained a *pro forma* parenting plan: the author of this article was the main contractor who drafted the Regulations for Government.

⁵⁹ Section 33(3)(d).

⁶⁰ (17189/08) [2009] ZAGPJHC13 (6 May 2009).

⁶¹ With some irony, the court continues to point out that 'since the robbery appears to be an isolated incident and no further incident has occurred since January 2008'. The applicant provides no details of the incidents of crime in the area in which he lives, nor is there any detail provided of crime statistics in Modiin. As pointed out by the Judge, the applicant simply ignores the fact that Israel is in a constant state of war with the Palestinians or its neighbours...! at p 14-15 (17.7).

instruction, that this could have a detrimental effect on her schooling. No detail has been provided of whether L will be able to integrate socially and culturally in Israel. In particular whether she will be able to make friends in Israel having regard to the language barrier'.⁶²

As a result the Court was not in a position to determine whether it would be in the child's best interests that she be removed from her school and friends in South Africa. Although the child expressed the view that she wished to emigrate to Israel as it would take away hurtful memories and solve her problems, the Court felt that her views were naïve and unrealistic and could not be decisive. The Court held that she was not of an age to appreciate the effects of a removal her from her established friends and familiar school and surroundings and then being thrust into a foreign environment, where she does not speak the language required for schooling or social activities. Furthermore, no assessment had been made regarding the suitability of the child to be educated in a language that she could not speak.⁶³ The necessary permission to relocate was therefore not granted.

*AC v KC*⁶⁴ provides another recent example. The applicant mother (who was successful in the court *a quo*, and who was therefore the respondent on appeal) was a cytologist who had received an attractive contract offer (for three years) to work in Abu Dhabi. The applicant had a job in South Africa, but the job offer to which she was attracted was reportedly destined to pay three times as much, once tax breaks and allowances were added.

The children had been schooled in Afrikaans, and one assumes from this that Afrikaans was their mother tongue. Nevertheless, the oldest child (aged about 10-11) was a 'top 10' learner and was 'proficient in English'. The second child, aged about 9-10, was an average learner with a concentration problem. Both children attended an Afrikaans medium school. The children were obviously not able to be educated in Arabic, but the plan

was to attend an American English medium school in Abu Dhabi, with Arabic as a subject. Afrikaans would clearly not be part of the curriculum.

The report by the Family Advocate, the statutory authority with the responsibility to provide the Court with an assessment of the best interests of the child,⁶⁵ contained reservations about the younger child, citing his 'possible problems with education through the medium of English' given his learning problems.

The appellant raised concerns regarding the lack of information concerning the respondent's financial position generally, the education of the children, the possible problems relating to where they would live, and whether the court was in a position to make a determination about all the aspects in section 7 of the Children's Act. He alleged that her decision was *bona fide* but not reasonable, and complained that the lower court did not deal 'with all the aspects that the legislature regarded as important as contained in section 7'.⁶⁶

However, the court was informed that there was quite a large Afrikaans community in Abu Dhabi as well as an Afrikaans church, from which one can discern an intention on the part of the respondent to maintain cultural ties.

With reference to the section 7 checklist, Hartzenberg, J opined that the court had to take an overall view of the situation:

'...it is not like marking a mathematics test where the score is counted and one can see whether the candidate has passed ... it is more like marking an essay where one reads it and takes cognisance of the contents thereof and then makes a value judgment to decide on the mark that is to be given...'.⁶⁷

We deduce that the approach is not to take each aspect of section 7 *seriatim* and tick them off, as it were, but obviously, equally, the factors enumerated in section 7 which now constitute the legislative embodiment of the child's best interests cannot be ignored or

⁶² 11-12 (17.1).

⁶³ 15 (18).

⁶⁴ (A389/08) [2008] ZAGPHC 369 (13 June 2008).

⁶⁵ The Office of the Family Advocate was created by the Mediation in Certain Divorce Matters Act 24 of 1987.

⁶⁶ par 9.

⁶⁷ Par 11.

overlooked. The impression obtained is that a composite approach is what is required, and a weighing up of all the relevant factors elaborated in section 7 will suffice.

Stating that:

'if the bread winner gets a job offer which looks as if it would be to the advantage of the family, usually it will be accepted....'.⁶⁸

the court premised its final decision virtually exclusively on the reasonableness of the applicant's decision and motives. The court quaintly reminisced about the *bonus paterfamilias* or reasonable man (*sic*)... who is 'not a timorous faint-heart... but on the contrary... ventures out into the world, engages in affairs and takes reasonable chances'.⁶⁹ But the further educational and cultural 'fit' of the proposed move for the children received barely a mention. It is thus obvious that the appeal court was swayed by the perceived advantages of the move, which sounded almost purely in money. Economic betterment of the parent's position, it must be concluded, was the primary rationale for allowing the relocation.⁷⁰

One could argue that the children's cultural needs would be catered for because of the Afrikaans community in Abu Dhabi, but no mention is made of the support structures that would be in place to assist the younger child to cope with his educational and intellectual needs - as is clearly required by the Children's Act.

*Cunningham v Pretorius*⁷¹ saw an application for relocation to Austin, Texas. A remarriage and new life

with the reconstituted family was at stake.⁷² The child's mother tongue was Afrikaans, and it was common cause that even at the age of four, a significant 'backlog' existed: he could be said to have a 'language disability'.⁷³ He struggled with Afrikaans and as a result, it could be inferred that section 11(1) of the Children's Act was of application; it will be recalled that this section concerns the rights of children with disabilities and requires that the child be provided with appropriate care within the family and community, making it possible for the child to actively participate in sound cultural, religious and educational activities in such a way as to promote the child's dignity, self-reliance and active participation.

The Afrikaans language problem notwithstanding, according to one expert report, the child appeared more comfortable speaking English, chose to play with English speaking children and understood English instructions better than Afrikaans. However, another expert was of the view that schooling in a second language could pose a barrier to the child's learning, on the basis that language is a significant predictor of academic success overall.⁷⁴

It was contended by the applicant that the child would benefit from a better education system and superior facilities in Texas. However, the respondent argued that it would not be in the best interests of the child to be schooled in English, when he had not yet mastered his first language.⁷⁵

The issue did not seem to revolve around language as a method of communication with the left-behind parent,

⁶⁸ Par 12.

⁶⁹ Par 13.

⁷⁰ This decision has been criticised by one of the authors in Albertus (note 25 above). She argues that the 'reasonable man' test should not have been allowed to displace the best interests of the child, as seems to have occurred. Further that the allegations of the appellant father that related to the second child's emotional and intellectual needs should have been properly addressed; and, at minimum, due consideration should have been given to the child being provided with support systems whilst abroad. Finally, she points out that 'although appropriate weight should be attached to the primary caregiver's interests, courts must guard against the assumption that a decision taken by the primary care-giver is equivalent to the child's best interests as was emphasised in *F v F* (2006) 1 All SA 571 (SCA) at 577(13)'.

⁷¹ (31187/08) [2008] ZAGPHC 258 (21 August 2008).

⁷² Interestingly, the father alluded to his new family - a new sibling was on the way - but this was regarded only as a potential vehicle providing him with comfort in the absence of the relocating child! The implications for the child of the removal away from his siblings in section 7(1)(d), noted above, were not explored. In *B v M* [2006] 3 All SA 109 (W), the applicant (mother) had remarried and wished to relocate to Cape Town as a result of her current husband being offered a once in a lifetime opportunity in his field of expertise. One of the factors taken into account in determining the best interests of the children was their relationship with their half-brother (born of the mother and her current husband). In fact, the court held that as upper guardian of the half-brother, his best interests also needed to be considered in the application. This approach more readily approximates the stance we advocate of considering independently each of the factors in section 7, insofar as they are relevant to a particular case.

⁷³ Reports from an educational psychologist, speech therapists, social workers and other were presented: six reports in all.

⁷⁴ 16-17 (26).

⁷⁵ 17-18 (27).

but rather the more abstract notion of language as a learning medium **generally**.⁷⁶ The judge was extremely sensitive to the child's language needs:

'...whether it is an intrinsic developmental deficit or a product of his present acrimonious environment, all of the options he faces will pose additional challenges....whichever way it goes... will impact on his language and intellectual development. The relatively privileged environment to which he will move in Texas, the equal if not superior support systems likely to be on offer there, as well as his mother's adaptable, focussed and efficient character lead me to believe that his disability, if it is indeed such, will be adequately managed in Texas with dignity and in a manner promoting his ultimate self reliance'.⁷⁷

It is axiomatic that the application was granted. It could be argued as the child was young, it would not have an unduly adverse effect on him if his mother tongue were to be forgotten and his culture (possibly) lost altogether. In the Zulu boy case, the child's culture was as foreign to him as the country itself by the time he returned. The *Pillay* case⁷⁸ sets international standards in recognising the child's right to practice her religion, and it is to be questioned whether courts would adopt the same position with regard to a child's culture or language, more especially where a young child is concerned. However, if the child is of an age where his culture has been ingrained, then such factor should be considered in detail by our courts.

6 Analysis and Conclusions

First, the discussion above has revealed an uneven pattern in which culture and language (in particular) have been brought to the fore in relocation cases. Religion has played a marginal role thus far and has not been central to the courts' inquiry. The reason for this could be that where religion became a point of concern, the applicant had indicated that the child would continue to practice

his/her religion.

Second, in the majority of cases where language and culture were raised in relation to proposed relocation applications, these were raised in opposition to the relocation. Therefore, it has only been in answer to the opposing parent's concern that courts have taken into account language and cultural factors.

Third, South African jurisprudence can be singled out for the reason that the rights isolated for discussion in this article are not mere principles of domestic law, but find constitutional expression. Hence the right to religion, for instance, is as much a right of the child as any other:

'A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues'.⁷⁹

It is also said that:

'Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions'.⁸⁰

It is argued that as culture, language and religion are constitutional rights, they should be central to the court's enquiry in those instances where they are at stake. After all, it is not the adaptability of the primary caregiver in the foreign country or ex-home country that is at issue, but that of the child.

That brings out the fourth issue, namely the continued dominance of parental interests in the actual decisions of courts, even in the face of a newly enacted charter which expressly sets out the interests of the child.⁸¹ The conclusion is inescapable that the cultural rights of the child are still regarded as inextricably bound up in those of the relocating parent, and even mother-tongue education rights have not dislodged that premise

⁷⁶ If this is true, then language issues may be more relevant in relocation disputes involving younger children, as for older children, it may be argued that their learning techniques and skills are ordinarily more assured.

⁷⁷ 43 (71).

⁷⁸ Note 14 above.

⁷⁹ *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) 496-497G.

⁸⁰ 493D-E.

⁸¹ It can be deduced that the central theme of child participation which runs through the Children's Act is one that will yet play a role in influencing relocation decisions.

(provided the relocating parent's plans are reasonably clear and concrete).⁸²

As for indigenous culture, of the Zulu variety referred to in the introduction, it is apparent that the cases adduced concern predominantly Afrikaans, and Xhosa, Sotho and Pedi language rights (for instance) have not surfaced. This may be a function of the socio-economic reality that relocation applications must be pursued in the high cost environment of the High Court, often only accessible to 'high net worth' English and Afrikaans speaking clients; but it may also indicate that in the case of other South African indigenous peoples - that is, in the case of other language groups - it is perceived to be inevitable that children will be exposed to multiple languages during their youth. It is even possible that for language groups other than English and Afrikaans, exposure to new languages is seen as an asset and not a liability.

A further possibility is that that Afrikaans language speakers identify language with the preservation of their culture and heritage in a way that is different from other language speakers, which then also explains why the language policy of schools has been hotly contested in South African jurisprudence.

Sixth, a note on 'culture', crime and HIV: earlier cases discussed in this article evince a strong 'cultural' argument that life in other culturally similar countries, including the UK and Australia, may be preferable to growing up in South Africa. Indeed, South African emigrants (and others) refer quite frequently to the culture of crime, the dropping of educational standards, the prevalence of HIV/Aids and other ills of this society. However, these are not truly cultural factors, as constitutionally understood, and simply pertain to **parental** motivation. Thus, these concerns should not be

considered under section 7 of the Children's Act, unless they relate to the need to protect the child from physical or psychological harm (section 7(1)(l)) or the 'child's need for development and to engage in play and other recreational activities appropriate to the child's age' (section 6(2)(e) which falls under the heading 'General Principles').

However, in a country which lacks a comprehensive social security system to provide for workers who lose their jobs, or persons who are unemployed, the realities of employment opportunities abroad for the parent who wishes to relocate, or his or her partner, cannot be underestimated, nor can the economic imperatives be dealt with on the same basis as they may be in jurisdictions where there is a safety net for non-working care-givers. And in a country where the child maintenance system has been sorely tested through chronic non-payment of child support by parents,⁸³ we would argue that a parent's need to provide economic support for a child must weigh heavily against the child's right to culture, religion and language.

Finally, it has been asserted in this article that the major change that the Children's Act as whole has brought about is the child-focussed nature of the enquiry that is required: no longer can relocation be approached solely from the basis of the vantage point of the parents. It is recommended that in those instances where language, culture and religion are at stake, courts should be conscious of these rights being diminished as a consequence of relocation. These factors should independently form part of the balancing process to determine the best interests of the child, especially if the child is of school going age and his or her culture, religion and language is established.⁸⁴

⁸² The primary caregiver's need, for example, to return to her home country; accompany her new spouse; or career opportunities are always mentioned first. Then comes the reassurance that the child's educational needs will either be of a higher standard or adequately provided for.

⁸³ *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC).

⁸⁴ J. Heaton 'An individualized contextualized and child centre determination of the child best interests, and the implications of such an approach in the South African Context' [2009] *TSAR* 1 at 14 agrees that 'in view of our constitutional values of tolerance of and respect for diversity and pluralism, the child's best interests must be determined in a manner that takes cognizance of and is sensitive to culture and religion. Like all other factors, culture and religion must be viewed in a child centre manner. The focus should be the role that culture and religion play in the child's life.'

Themes from the reunite Relocation Research Project

Marilyn Freeman *

Introduction

In addition to being Co-Director of the Centre for Family Law and Practice, I am head of the **reunite** Research Unit. For those who don't know, **reunite** is the International Child Abduction Centre based in England which specialises in international childrens' issues, especially international child abduction, relocation and international contact.

The **reunite** Research Unit undertook a one-year qualitative research project, commenced in June 2008, and funded by the Ministry of Justice, in order to consider the outcomes of contact orders, as well as other issues arising in relocation cases. Our report was published in July 2009 and is available on the **reunite** website (www.reunite.org)¹ as well as in hard copy from the **reunite** office.

I am going to consider with you some of the key issues which have emerged from our research, but I want to start by saying that relocation cases are generally regarded as some of the most difficult cases which face the judiciary. Professor Patrick Parkinson of the University of Sydney refers to them² as "the San Andreas Fault of family law"³, and it is easy to understand why – relocation is somewhere that a major earthquake is very likely to occur because of the enormous stress levels involved

In England and Wales, we refer to this issue as "leave to remove" although it is more generally known as relocation.

In this article, I shall use the terms interchangeably. However we refer to it, England and Wales is known as a pro relocation jurisdiction⁴ so that, where the mother's plans are reasonable, and the tests in the leading Court of Appeal case of *Payne v Payne*⁵ are satisfied, the mother will be allowed to relocate.

In *Payne*, Lord Justice Thorpe stated:

"[t]hus in most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability" (para 32).

He summarised the position when he said that the primary carer will be granted leave to remove unless that move is incompatible with the welfare of the children (para 26)⁶.

An unsuccessful challenge was made to *Payne v Payne* in *re G*⁷ so, in England and Wales, the position remains that the child's best interests are equated with those of the primary carer parent, usually the mother. This position has attracted a great deal of criticism. Lord Justice Wall, in a hearing for permission to appeal a leave to remove (relocation) order, added his qualified support for a review of *Payne v Payne* on 9th February 2010 when, although deciding that the case he was hearing was not the right

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¹ Relocation – the **reunite** Research [2009] hereafter the **reunite** report www.reunite.org

² "The Need for Reality Testing in Relocation Cases" - Patrick Parkinson, Judy Cashmore and Judi Single, Faculty of Law, University of Sydney, FLQ 2010 (in press) – since published Vol 44, pp1-34, hereafter "Reality Testing".

³ A quote which he attributes to Richard Chisholm, "The Paramount Consideration: Children's Interests in Family Law" 16 AUSTL. J. FAM. L. 87 (2002) at 107.

⁴ Foley, Lawyer to the Court of Appeal, Civil Appeals Office, *Varying Approaches among Member States to the 1980 Hague Convention on Child Abduction*, October 2006. See **reunite** report p5

⁵ [2001] 1 WLR 1826 [2001] EWCA 166

⁶ Lord Justice Thorpe's suggested discipline in *Payne v Payne* which involves asking whether the primary carer seeking to relocate with their child or children can first establish that the move is realistic and not motivated by selfish reasons, that is, a desire to exclude the father from the child or children's life. The motives of the contesting parent must also be examined. Assuming the relocation is motivated by good faith, the parent must then establish the proposed relocation is reasonable, including the logistics of the move, career opportunities, education, availability of housing and distance from current residence. The court will also consider the child's relationship with the primary carer and the present and future contact arrangements with the non-primary care giver and the impact of the future arrangements on their relationship. The child's wishes will be taken into account where appropriate depending on age and maturity. The third limb of the discipline is to consider the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal. Lord Justice Thorpe explains: [i]n suggesting such a discipline, I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.

⁷ [2008] 1 FLR 1587. which was heard by the Court of Appeal (LJ Thorpe, Arden, Wall). The father argued that that the leading authority on leave to remove, *Payne v Payne* [2001] 1 FLR 1052, was outdated, and out of step with modern views of the dynamics of family life, reflecting the view of a past age in which joint residence orders would only be made in wholly exceptional circumstances. At the oral hearing the father retreated somewhat from this position, arguing instead that some judges were misapplying *Payne*, in that they were inappropriately prioritising the impact of refusal on the primary carer, and were disregarding modern views on the importance of co-parenting.

case for a challenge to *Payne* before the Supreme Court, and thus refused the father's permission to appeal, he stated:

"There has been considerable criticism of *Payne v Payne* in certain quarters, and there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done of children by a permanent breach of the relationship which children have with the left behind parent".

He went on to say:

"This is a perfectly respectable argument, and would, I have no doubt, in the right case constitute a 'compelling reason' for an appeal to be heard" (*re D (Children)* [2010] EWCA Civ 50).

There are therefore signs in the air of the winds of change. Lord Justice Wall has recently been appointed as the new President of The Family Division of The High Court, and Lord Justice Thorpe has written an article for this issue of the journal, outlining his views, as well as having written an article for the first issue of our journal (*Journal of Family Law and Practice* [2010] 1FLP addressing the question of relocation).

The interests

We knew when we started the research that there were likely to be a variety of reasons that parents wish to relocate following the breakdown of their relationship⁸. Very often, as with cases of abduction⁹, those wishing to relocate from this jurisdiction, as well as other jurisdictions (although less usually in Australia and New Zealand), are returning home where they can receive comfort and practical support at a time of emotional stress¹⁰. Sometimes, the relocating parent wants to be with a new partner who comes from the country to which she wishes to move; in other cases the relocating parent simply wishes to start afresh in a new country, with which she has no connections, sometimes with the offer of employment for herself, schooling for the children, and accommodation for the family to tempt her. At other times, it may be simply a lifestyle choice: she would prefer to live somewhere else. However, it is also possible that the

relocating parent has a different type of reason for wanting to move away, in that she wishes to escape the obligations of co-parenting with the other parent and is prepared to, quite literally, go to the other side of the world in order to do so. This will include those who have good reason to want to escape, in that they are truly "escaping", that is from violence or abuse from which they have not been protected by their home States¹¹.

Bruch addresses this issue ("The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases", hereafter "Unmet Needs", 38 *Fam LQ Volume* 38, Number 3, Fall 2004 at p534) when she says:

"..[T]he statistics on recidivism indicate that courts are seriously misguided when they assume that the judicial system of the habitual residence will be able to protect the victim or – even worse – that a denied return order in abuse cases will offend the state of habitual residence because it suggests that the country's ability to prevent violence is imperfect. Of course every legal system is imperfect in this regard".

But it is not always the case that mothers are relocating to escape violence or abuse, as we shall come onto discuss shortly.

The distress of relocation will potentially affect **all** the parties involved: those who are left behind following the child's departure; those who are refused permission to leave after a relationship breakdown; and, of course, the child(ren) themselves.

This is really the point in a nutshell. There are, or at least may be, several different interests which exist in this one issue, and they are all legitimate, but they do not sit very happily together.

(i) Mothers' interests

Mothers are traditionally the primary carers for their children. This means that, following relationship or marriage breakdowns, mothers are usually the applicants for relocation decisions, and in our sample this was no different; in 94.11% the applicant for relocation was the mother. Although, as we have seen, there are many reasons for mothers wishing to relocate, the overwhelming

⁸ See 5.3 (vii) The **reunite** report [2009]

⁹ See further - "The Outcomes for Children Returned Following An Abduction" (hereafter "Outcomes") September 2003 at p20 which details the reasons for abduction in the research sample for that project www.reunite.org

¹⁰ In our current sample, this was the largest category, see 5.3 (vii) The **reunite** report

¹¹ e.g. see "Outcomes", p 35 which details the violence faced by one mother having returned with her child under the Hague Convention following her abduction of her child, notwithstanding her well-founded expressed fear of violence from the father should the child be returned.

majority of those in our sample were “going home”. For mothers who are in countries which are not their homes, where they live **because** of the relationship with the father of their child which has now broken down, where they do not have family around them; where, at times, they cannot work or access state support; a relocation decision which means that they have to remain in that jurisdiction can feel like the cruellest punishment being imposed on both them and their children. Mothers report their desperation at being unable to leave a country which is not their home and where they live only because of the relationship which has now failed. Where domestic violence is involved, this is often not believed by the authorities when reported by the mother, and this includes the courts. One mother, who unsuccessfully applied to relocate against a background of domestic violence which had necessitated court protection, noted that the court “simply does not get the domestic violence context”. Even where there is no domestic violence, several mothers who were not allowed to relocate have told us that they are miserable and unhappy, that they lack emotional and financial support, and that they wish, above all else, to go home where they can provide a better life for their child(ren). In some of these cases, the fathers are having only sporadic contact with the child(ren), which makes the mothers feel especially aggrieved at, in their view, being imprisoned because of this infrequent contact for the fathers benefit. In others, the contact is more regular and may be equal with the mother, even where this was not the situation pre-separation. One mother reports that, leave to remove having been refused by an EU state, she has been threatened that her children will be removed from her care if she re-applies, notwithstanding that the current high level and quality of contact is, in her view, detrimental to the well-being of the child(ren). She explains that she feels trapped in a society which encourages shared post-separation parenting in high conflict cases, even where this was not the pre-separation arrangement. Other mothers, who were refused permission to relocate, have described their shock, sadness and ongoing depression at having to remain in a country which is not their home, and where they do not want to be, and the inability to get on with their lives that is created by this situation. Some do cope,

notwithstanding these emotions, while others are struggling to manage, undergoing counselling if they are fortunate enough to be able to access it on a funded basis, which is not often the case. Several mothers talked of their suicidal thoughts.

A mother may understandably want to put a failed relationship, and all its painful memories, behind her as she seeks a new life elsewhere, perhaps with a new partner. She may question why her ability to do so is restricted, while her former partner’s ability to get on with his life is not. Again, Bruch explains:¹²

“For noncustodial parents, the choice is theirs. So long as they are prepared to adjust when or where they will see the children, relocation is always possible. Their reasons are irrelevant. So are the custodial parent’s possible objections. It does not matter if the custodial parent fears that the children will suffer, that parent-child relationships will change, that revised visitation arrangements will be more inconvenient or costly, or that more child care will be necessary. No court will punish the moving parent. The children’s needs will be legally relevant only if there is litigation concerning visitation or support in light of the new circumstances”¹³.

Weiner explains why this issue is significant¹⁴:

“The lack of attention given to the noncustodial parent’s mobility is problematic for a variety of reasons. Most courts assert that they are resolving these disputes according to the “best interest of the child,” yet a failure to consider the noncustodial parent’s mobility may unnecessarily deprive some children of the best solution in their cases. For some children, the best way to resolve the dispute may be for the custodial parent, child, and noncustodial parent to move together to the new location. Simply, if the noncustodial parent also moved, a child could experience the advantages of the move, whatever those advantages might be, and maintain the same relationship with the noncustodial parent without extensive travel.”

The issue of the father’s mobility was considered in the

¹² “Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law”. *Family Law Quarterly*, Volume 40, Number 2, Summer 2006 at p283, hereafter “Sound Research”.

¹³ Parkinson accepts the gender issues involved in relocation when he states “the gender issue is unavoidable in relocation cases, because it is almost always women who want to move and men, being the non-resident parents, who oppose that move”. However, he suggests that the question of the non resident parent being able to move may be differently viewed as being one where, instead of providing the non-resident parent with greater freedom, his freedom of movement is, in fact, more constrained than that of the resident parent. He (or she) cannot move away and compel the children’s primary carer to follow. The primary carer is the one with the trump card. If she moves and the non resident father wants to retain good contact with the children, he is compelled to follow her. If he moves, she is not going to follow him. “Relocation: What We Know Now and Why it Matters”, Paper presented at The 11th Australian Family Lawyers’ Conference, Fiji 5-9 June 2009 pp 4,5

¹⁴ Weiner, *Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation*. University of California, Davis [Vol. 40:1747] at 1750, 1751

Australian case of (*U v U*, [2002] 211 C.L.R 238 (High Court of Australia) which held there to be an obligation to consider this issue. However, does this go far enough? It is crucial not only to consider the possibility of a move by the non residential parent, but also the reasonableness of that move must be taken into account, and the same mobility issues relating to the mother's new partner may need to be addressed if they are relevant to the decision-making, and the best interests of the child, in the particular case (see Parkinson et al, *Reality Testing*, at p17 who discuss the overwhelming moral case for the new partner's consideration of such a move). This was debated and reflected in *The Washington Declaration* which we will discuss shortly.

(ii) Fathers' interests

Fathers, usually the left-behind parents in relocation cases, very often suffer severe consequences when their children relocate. There are many cases where the left-behind father is a good and involved parent, where there has been no history or violence or abuse, and where the child's relocation is the cause of great sacrifice and readjustment for the left-behind father and family. In many such cases, these fathers, and families, will bear those emotions and the consequences of the relocation with resigned realism as they face the practical fallout of a failed relationship. However, in some cases, the grief and despair are too much to bear, resulting in a complete loss of the parent-child relationship, and serious practical and emotional problems for the left-behind father and families. Many fathers spoke in terms which suggest that extreme thoughts of self-harm and violence are in no way unusual. They frequently feel that their identities have been lost – one father expressed it as: "one minute you are a father, then you are nothing in your child's life". Some such fathers say that they are made to feel like expendable, unnecessary accessories in their children's lives by the relocation decisions that are made in their cases.

In one extreme case, the father had been denied contact with the children for approximately one year during the time when the mother had abducted the children, and following their return under The Hague Convention, pending the leave to remove (relocation) hearing. He had been advised by his legal representative that, in most cases, mothers in this jurisdiction are awarded leave to remove. He complained of feeling that he was "at the end". Tragically, the father killed the mother after she obtained leave to remove the children. Although,

thankfully, an extreme case, the desperation felt by this father is not untypical of the way which many left-behind parents describe feeling when their child moves away to another country.

(iii) Childrens' interests

So, a father will, understandably, want to maintain his regular relationship with his child and does not want the child to move abroad. The mother will, understandably, want to get on with her life after a relationship breakdown and this may involve moving away. What of the child? The child will, usually and understandably, want to continue seeing both sides of his family, and in particular, not only the potentially left-behind parent, but also the wider family of that parent, that is the grandparents, cousins, uncles and aunts with whom he has been involved as a family.

Different interests, one problem, one solution. The consequences of failing to satisfy any of these interests can be extremely grave.

The research

Our aim was to interview a representative sample of parents who have been involved in relocations, including those cases which were resolved between the parties without court intervention. The criterion for inclusion was that a relocation issue had arisen between the parents which caused one or both of them to have contact with one or more of the agencies through which we made contact with the parents. Our initial plan was to restrict our sample to cases where leave to remove from the United Kingdom had been sought from January 2006 to the present time. We were also planning to include successful relocations into the United Kingdom during the same period as we were hoping to be able to include interviews with the children of the latter category. However, we expanded the range, both because of the difficulties in obtaining a sample within the original parameters, and our recognition of the advantages of being able to obtain data across a broader spectrum of dates, thus providing a better indication of the longitudinal outcomes of relocation, and being able to include both retrospective and prospective considerations. The final range of cases is the 10-year period 1999 – 2009. Although we were ready to consider documentation provided to us, especially court judgments, this was not a requirement of our research as our primary interest was in the data produced by the semi-structured interviews, rather than corroborating evidence which could not be scientifically

evaluated without full forensic investigation of both parties' evidence, which could not be achieved within the parameters of this project.

The sample was collated through several sources including: use of the **reunite** database; a "post-box" system where lawyers passed on our requests for assistance to clients who might be interested in participating in our research; a consultation process with organisations with a significant interest in relocation matters; and contacts made directly by our Research Unit with parents who had been involved in relocation disputes which fell within the research criteria. It was decided that the interviews would be conducted by telephone with the author, as principal researcher.

Although we remain committed to direct involvement of children, both in terms of the significance of the research understanding that is thereby provided, and as a tangible demonstration of the proper regard paid to the views of children, it was not possible on this occasion to include them within our project. We are hopeful that we will be able to develop this aspect of our research in our future work.

Our final sample comprised 36 interviewees. We were able to interview both parties in two cases, therefore our sample concerned 34 separate cases in total. One of the 34 cases involved a relocation from a jurisdiction outside of the United Kingdom but we included it in our sample because of its specific interest, the applicant being the father.

The sample of 36 interviews comprised:

- 25 interviews with fathers, in two of which the fathers were the parent seeking relocation, one such application was granted and one was refused. In all the remaining 23 father interviews, the mother had sought relocation (NB In two of these cases, the mothers were also interviewed. See below). Fifteen of these mother applications were granted outright, one was granted retrospectively, one application was withdrawn after vigorous opposition from the father, five were refused (but one mother abducted after the refusal), 10 did not proceed to a final hearing as the mother abducted in advance of the hearing.
- 11 interviews with mothers. All the mothers

interviewed were the parent seeking relocation in their case. seven applications were granted, four were refused.

The applicant for relocation was therefore the mother in 32 of the 34 cases in the sample (94.11%).

It is not surprising that there is a much higher incidence of father than mother participants in our sample as fathers are more usually the left-behind, and therefore disappointed, parent in relocation cases¹⁵, and are willing participants in research of this type. We are aware of the impact that this may have on the desire for a representative sample, and the almost inevitable imbalance thereby caused in such studies as those who are satisfied with whatever process is being considered are less likely to wish to participate. Those likely to be satisfied are those who have relocated, which are likely to be mothers. Therefore, the information provided by mothers who have relocated, and those who have been refused permission to relocate, has been especially welcome in this project.

We used a semi-structured interview format, based on a questionnaire devised to address the issues which we understood to be of greatest interest and concern in relocation cases. However, the format allowed for the interview to be expanded and/or changed in order to deal with the matters which the interviewee parent felt to be of significance in their own relocation case. The data produced by the interviews was then analysed in terms of the categories of issues which form the findings below.

Findings

1. Jurisdictions, reasons for application, and outcomes to the application

Our sample included three interviews concerning domestic relocations¹⁶, in all of which relocation was permitted, although one appeal is still pending.

The remaining 33 interviews concerned international relocations, four of which concerned incoming relocations to England and Wales, 28 of which concerned outgoing relocations from the United Kingdom (but within the outgoing international category we had interviewed both parties in two cases, therefore these interviews concerned 26 separate cases), and one case which was outgoing from another jurisdiction. Of the 27 outgoing cases, relocation was permitted in 16 cases (59.2%).

¹⁵ See our finding that 94.11% of applicants in our sample were mothers.

¹⁶ By this we mean intra-United Kingdom cases, i.e. between England and Wales, Northern Ireland and Scotland. Notwithstanding the separate legal jurisdiction in Scotland, these cases do not attract an application of the principles set out in *Payne v Payne* but are decided instead under the criteria in S8, The Children Act 1989, usually as a residence order or a prohibited steps order.

The largest number of outgoing cases (seven cases, representing 25.9% of the 27 outgoing cases considered) involved relocations to the United States. There were three cases to Germany (11.11%), two cases each to Sweden, Spain, The Netherlands, and New Zealand (7.40% each). The other jurisdictions which involved one case each, were:

India
Tanzania
Brazil
South Africa
Singapore
Japan
Australia
Malaysia
Hong Kong

The four incoming cases were from the following jurisdictions, three were successful, one application from Italy was not granted:

Switzerland
Italy x 2
France

Therefore, 22 of the 34 (64.70%) cases considered resulted in relocation being permitted. Of the remaining 12 cases, 1 (from Italy to England) was not granted, eight from the United Kingdom were not granted and the parent seeking relocation remains in this jurisdiction, one was not granted but the parent seeking relocation (the mother) went anyway in contravention of the court order and remains in the other jurisdiction,. In one case leave to remove was granted retrospectively to the mother who had failed to honour an agreement to return to this jurisdiction. The final case concerned a mother who left before the relocation hearing took place and while the children remained wards of the English court, and who remains in the other jurisdiction.

Although multiple reasons were cited by some interviewees, the overwhelming majority of relocating parents in our sample (24) were going home. The remainder were either re-partnering (5) or wanted to relocate for work or lifestyle purposes (7).

2. Marital status and ages of children

Although the greatest number of children were subject to a relocation decision when they were between 3-4 years of age, this may simply be related to the age of the

children at the time of the relationship break-down and does not provide any reliable data about the ages at which children are most likely to be subject to a relocation in their lives. The statistics relating to the marital status of the parents are largely reflective of the overall trends in marriage and cohabitation in this jurisdiction.¹⁷

3. Themes

(i) Maintaining Contact

A recurring theme in our interview sample was that children are regularly “lost” to left behind parents through the relocation decisions made by the United Kingdom courts. Many parents complained that there were constant problems in exercising the contact that had been ordered by the court granting permission to relocate, including that relating to indirect contact, which is often part of a contact order and is designed to supplement the infrequent physical visits between a parent and child; in practice, indirect contact does not appear to work effectively, and cannot be relied upon as a method of maintaining contact. The Brussels 11 Revised Regulation¹⁸ (B11R) provides in article 9 that in cases within the European Union (other than Denmark), jurisdiction is retained by the original State of habitual residence which makes the contact order (where the contact parent remains in that jurisdiction and has not participated in proceedings in the new State of habitual residence) for 3 months following the lawful removal of the child. This is in order that the contact order may be modified, if required, but after the three months have elapsed jurisdiction passes to the new country. This short period of time only relates to modification of the original order and does not prevent the new State of habitual residence from making a new order. Once the three months have elapsed, a change of circumstances might well persuade the new State of habitual residence to alter the order made by the court granting the original order. The protection of article 9 is therefore of limited value. Outside of Europe, even this limited protection is not available. The difficulties in financing international contact, when it does occur, mean that, for many left-behind parents, relocation is the end of any meaningful direct relationship with their children. It is simply prohibitively and unrealistically expensive to maintain for most families.

¹⁷ There were 17.0 million families in the UK in 2004 and around 7 in 10 were headed by a married couple, see

<http://www.statistics.gov.uk/cci/nugget.asp?id=1161> Our sample contained 79.41% of married couples – roughly in line with government statistics.

¹⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Entered into force 1 August 2004, applied as from 1 March 2005, repeals Brussels 11 (Council Regulation (EC) No 1347/2000. Applies to all EU Member States except Denmark.

(ii) The Distress Argument, levels of contact and shared residence

Many parents have spoken of the over-emphasis by the courts of this jurisdiction on what is often called "the distress argument", i.e. that the mother's distress at not being allowed to relocate will impact so negatively on the well-being of the child that permission is given to the mother to move. These parental concerns focus on the undermining of the child's need for contact with both parents, and the potential subjugation of the child's interests to those of the mother. It is interesting to note that it is not only left-behind fathers who have raised the over-emphasis of the distress argument; it was also an issue of concern for some mothers. One relocating mother was especially emphatic about this point and believes that the emphasis is wrongly stated. She says that her own experience has taught her that it is a happy child that makes a happy mother, and not the more commonly expressed happy mother that makes a happy child. She regrets being allowed to relocate and to remove her child so far from his father. She says that there is a definite bias in favour of women in the courts of this jurisdiction and that men would not receive the same treatment if they wished to relocate abroad in order to marry someone from another jurisdiction and to take the children of the marriage with them. She believes that this is because of the unspoken assumption that mothers are the better primary carers for their children, and that fathers are able to move on with their lives without their children. This can be seen in those cases where both parents share residence of their children but, where the mother wishes to relocate, and she is allowed to do so¹⁹.

(iii) Representing the Child

Although it is possible for Cafcass to be appointed as guardians *ad litem* in relocation cases,²⁰ the usual

situation is for Cafcass to be appointed in relocation cases under S7 Children Act 1989 to undertake a report for the court which will include recommendations on whether the relocation should take place (however, in some cases, for example where the children are very young, the proposals are clear and the parties are well represented, Cafcass may not be appointed). It is therefore extremely important that a child's situation is well understood, and that his or her views are properly represented by the Children and Family Reporter in the Cafcass report. Although some Cafcass officers are extremely experienced in this field, and provide an excellent service, many have no such experience. This variation, and the consequent non-specialist status of many Cafcass officers in relocation issues, has caused great anxiety amongst those who participated in our research. The anecdotal evidence from our practitioner respondents is that very often Cafcass officers do not appear to understand the law or procedure in relocation cases. Their reports do not focus sufficiently on welfare and the impact of relocation on the child, paying too much or exclusive attention to the wishes of the primary carer applicant, wrongly believing that this is what they are required to do, sometimes treating the case as if it does not involve a relocation at all.

(iv) Legal Representation and presumption in favour of residential parent

Many interviewees expressed disappointment about the legal advice and representation that they received. The general tenor of advice, to both mothers and fathers, has been that mothers will inevitably be granted leave to remove from the jurisdiction, and that fathers should not bother to defend such applications as it is better to try to make good contact arrangements. Many parents accept that there is no point in trying to do what they perceive to be in the best interests of their child because it will just

¹⁹ See *Ford v Ford* below where the South African court did not allow relocation in such circumstances. Also see *Re T (A Child)* [2009] EWCA Civ 20 where at para 36 Wall LJ stated: "[i]n my judgment, therefore it is wrong in principle to apply different criteria to the question of internal relocation simply because there is a shared residence order. ... I respectfully agree with counsel that it is not, in effect, a trump card preventing relocation".

²⁰ rule 9.5 Family Proceedings Rules 1991. (Statutory Instrument 1991 No 1247 (L20)) **Separate representation of children 9.5**—(1) Without prejudice to rule 2.57, if in any family proceedings it appears to the court that any child ought to be separately represented, the court may appoint—(a) the Official Solicitor, or (b) some other proper person, (provided, in either case, that he consents) to be the guardian ad litem of the child, with authority to take part in the proceedings on the child's behalf. (2) An order under paragraph (1) may be made by the court of its own motion or on the application of a party to the proceedings or of the proposed guardian ad litem). This is governed by a Practice Direction issued by the President of the Family Division: 5.4.04 see <http://www.hmccourts-service.gov.uk/cms/949.htm>. which sets out a list of examples of cases in which it might be appropriate to join the child as a party to the proceedings. However, guardians are seldom appointed in these cases and, even more so, where the child is very young. These are, perhaps, the cases where a guardian would be most useful, to consider the impact on such a young child of relocation in terms of the loss of contact, and identity, which relocation might involve. It is also possible to appoint NYAS (National Youth Advocacy Service) under rule 9.5. NYAS is funded by the Legal Services Commission and has a team of inhouse lawyers who can represent children. Some parents have reported their experiences as NYAS being the more child-centric of these two organisations - see Charan Martin, "The Future of Separate Representation", *Seen and Heard*, Volume 16, issue 4, p32 who describes the "holistic, socio-legal approach ... to get the best outcomes for children. It provides multi-disciplinary training on advocacy, children's rights and issues of current interest for professionals and agencies working with children and their families within both public and private law family proceedings". A protocol exists between Cafcass and NYAS determining when NYAS can be appointed.

cost time, money and emotion, and all to no avail. This negative perception of the relocating parent's case by legal advisers, and others, means that many cases are settled on the basis of the general position, rather than the position of the individual child in the particular case. Legal practitioners tell us that, in their experience, although, in *Payne v Payne* Thorpe LJ said that there should be no presumption that a parent with a residence order is permitted to relocate, in reality, if that parent's case is well argued and the criteria well thought through, then that parent will most probably be allowed to relocate.

(v) Monitoring relocation, and research into the outcomes and effects of relocation

Parents complained that there was no monitoring system in place after the relocation in their cases and felt that it was both necessary and helpful that some form of compulsory follow-up after removal should exist in order to know what happens after a child has relocated²¹. It is only in this way that information about the practical aspects of court orders may be ascertained.

(vi) Links between international child abduction and relocation, and reasons for relocation

It is often argued that, if the relocation process is too restrictive, parents wishing to relocate may be encouraged to take the law into their own hands and simply leave the country without the required consents. Conversely, if the process is too liberal, potential left-behind parents may feel that they have nothing to lose by abducting the child before the court has a chance to make the relocation decision. The data that our sample has produced would suggest that the above arguments concerning restrictive and liberal jurisdictions are overly simplistic. Abductions occur for a variety of reasons and, although a restrictive relocation regime might discourage parents from applying to relocate in the belief that, as in a liberal regime, it would inevitably be granted, it does not follow that it would

necessarily increase the incidence of abduction. Much will depend on the reasons that parents wish to relocate (see above). The legal and social environments will, to some extent, influence the thinking of those who wish to relocate and the alternatives that they may consider. It is submitted that much of this area is connected with expectation. If it is expected that, unless the circumstances are exceptional, you will not be allowed to relocate before the child reaches a certain age, then it is equally arguable that people's attitude towards relocation will be moderated by that expectation. It may even be the case that the probability of having to remain in a country if there is a child of a failed relationship may concentrate the minds of those contemplating having a child in a country which is not their home as our research found that this was not an issue which was considered in advance by those in our sample. Work and lifestyle choices may be modified if the opportunities to relocate do not easily exist at that time for those people. Re-partnering may prove a more difficult problem but, in the light of a different expectation, the solutions may be more flexible than currently envisaged, and may include the routine consideration for a potential new parental partner of a move to the state of habitual residence of the child. One relocating mother stated that parents must be prepared to stay in the same country while their child is growing up and that this issue needs publicising.

(vii) Mediation in relocation cases

There is no current requirement in England and Wales to mediate in a relocation case. **reunite** has conducted a research project into mediation²² and recognises the assistance that mediation is able to offer some parents in international children cases, and which might also be useful to parents in international relocation cases²³.

The Hague Conference on Private International Law has considered mediation in terms of both international child abduction and wider cross-border matters²⁴. A

²¹ . There is no "follow-up" of relocation orders, which is one of the reasons that **reunite** decided to engage in this research – to try to discover how the practical circumstances worked out for the parties, especially the children, subject to relocation orders.

²² "Mediation In International Parental Child Abduction", October 2006 www.reunite.org

²³ "[w]hen considering the 28 cases which progressed to a concluded mediation, the overwhelming response is that there is a clear role for mediation in resolving these highly contentious and emotional disputes, and that parents are willing to embrace the use of mediation.. whilst it would be true to say that mediation would not be appropriate, or suitable, in every case, and that mediation cannot resolve all cases where it is attempted, it is a facility that should be offered in all cases of international parental child abduction". *Ibid* at p51

²⁴ Preliminary Document No 5 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Note On The Development Of Mediation, Conciliation and Similar Means To Facilitate Agreed Solutions In Transfrontier Family Disputes Concerning Children Especially In The Context Of The Hague Convention Of 1980 (hereafter "Vigers"). The note focuses on the use of mediation in international child abduction cases. However, it discusses the inclusion of mediation within the duties of central authorities in B11R and 1996 Hague Conventions (the 1980 Convention does not specifically refer to mediation but requires central authorities to take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues) which Vigers states highlights the importance placed upon the use of mediation in international family disputes (p6).

feasibility study on cross-border mediation in family matters²⁵ was undertaken and The Council on General Affairs and Policy of The Conference²⁶ invited the Permanent Bureau to continue to follow, and keep Members informed of, developments in respect of cross-border mediation in family matters, asking the Permanent Bureau to begin work on a Guide to Good Practice on the subject which will focus on the use of mediation in the context of the 1980 Child Abduction Convention. As a first step, a Guide to Good Practice is to be prepared and submitted for consideration at the next meeting of the Special Commission to review the practical operation of the 1980 Convention, which is likely to be held in 2011²⁷.

International child abduction cases involve many of the same issues as relocation cases. Mediation is not an answer for everyone, and will not provide solutions in all cases, as it requires openness and a willingness to move away from polarised positions by examining the parties' issues and interests, especially those of the child(ren), and all the available options. Not everyone is able or willing to do that. However, we believe it is possible that, with skilled and experienced specialist practitioners, mediation might well provide an environment in which these issues can be successfully addressed in relocation cases, in a realistic and productive manner, as it is now being recognised may also be achieved in cases of international child abduction.

(viii) Systemic problems

Generally, it was felt that children are not well served by the current relocation system and that insufficient attention has been paid, to date, to the effects of relocation on the child. A far more child-centric approach is being urged by the majority of the interviewees, and our practitioner commentators, to be based on a thorough enquiry of the motives of both parties, scientific evidence on the effects of relocation and the impact of maternal

(primary carer's) distress on the child, together with the routine appointment of a guardian²⁸ to safeguard a child's interests and determine the evidence which is required in the circumstances of the particular case.

Conclusions

We considered the legal provisions governing international contact and concluded that, though helpful, none could guarantee that contact would actually take place. This means that relationships between the relocated child and the left-behind parent and wider family are often severely affected as problems with the maintenance of contact are likely to occur. The continuity and familiarity of personal relationships are crucial features of most people's sense of being and security. Their loss is usually suffered through bereavement and causes well documented effects as children struggle with grief, and to come to terms with losing their loved ones²⁹. These losses change people and their personalities. We cannot do anything about mortality, and we need to deal with this aspect of life, at whatever age it strikes. It is questionable, however, whether children should routinely have to deal with such losses in circumstances where they may be avoided. We appreciate the frustration and distress of mothers, most often the primary carers of their children, who wish to return home or, in some way, to move on with their lives. The refusal of relocation applications has a potentially disproportionate impact on women because of the traditional primary carer role that most women play in their children's lives. It may be that the corollary of the privilege of primary caring is the requirement for willing self-sacrifice. This was considered by Lord Justice Thorpe, who stated³⁰:

"[o]f course I accept that the refusal of this application is likely to be a huge disappointment to the mother and any inroad in her sense of

²⁵ The General Affairs Council in a meeting in April 2006 invited the Permanent Bureau to prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject. The feasibility study provided an overview of the development of mediation in family matters within national systems, and the current status of mediation in international family matters. The Council of 2007 gave the mandate for the Permanent Bureau to invite Members to provide comments on the feasibility study and responses to a questionnaire before the end of 2007. The Council of April 2008 studied the written comments on the feasibility study and the responses to the questionnaire. Preliminary document no 10 of March 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference – www.hcch.org; Annual Report 2008, Preliminary Document No. 12 of March 2009 for the attention of the Council of March/April 2009 on General Affairs and Policy of the Conference <http://www.hcch.net/upload/wop/genaff2009pd12e.pdf>, Projects Concerning The Children's Conventions, Maintenance, Adults and Cohabitation – Planning for 2009-2010, Preliminary Document No 6 of March 2009 for the attention of the Council of March/April 2009 on General Affairs and Policy of the Conference p7. In spite of the earlier discussion on the possible development of an instrument on cross-border mediation, this has not been taken forward as there does not seem to be support for such an instrument. <http://www.hcch.net/upload/wop/genaff2009pd06e.pdf> which details the group of experts on international mediation currently being consulted regarding the formulation of the Good Practice Guide on Mediation, including Denise Carter, Director, reunite.

²⁶ Report of the Council on General Affairs and Policy of The Conference of 1-3 April 2008

²⁷ *Ibid* p15 – see <http://www.hcch.net/upload/wop/genaff2009pd01e.pdf>

²⁸ See full report (www.reunite.org) regarding the position in Jersey relating to the appointment of guardians.

²⁹ See, e.g., Dora Black, "Bereavement in Childhood", *BMJ* 1998 March 21; 316(7135) 931-933

³⁰ *MH v GP* [1995] 2 FLR 106 LJT at 111

well-being and fulfilment is likely to have an adverse effect on D. But parenting is enormously demanding and often requires considerable self-sacrifice. I have no doubt at all that the mother has both intellectually and emotionally anticipated the prospect of refusal. I have no doubt at all that she will make the necessary adjustment and sacrifice, and that her alternative plans, although for her a poor second best, will ensure for D consistent and continuing primary care”.

We conclude that this insightful comment may need to be revisited in relocation cases.

We discuss the vagueness of the current welfare test, and the lack of transparency regarding parental interests in the welfare evaluation, which we conclude could be addressed by amendments to the welfare checklist applicable in relocation cases. The Australian legal system specifically considers the benefit to a child of a meaningful relationship with both parents and the practical difficulty and expense of spending time with and communicating with a parent, and whether that will substantially affect the child’s right to maintain personal relations and direct contact with both parents³¹. The New Zealand legal system similarly contains provisions which provide for these considerations to be taken into account in the decision whether to allow relocation. However, this alone will not be enough. Parkinson discusses the need for a process change³², which involves a more active role for practitioners in helping the parent parties in a potential relocation case to make informed choices about the way the matter proceeds and, where possible, to avoid the dispute being litigated. This idea resonates with the findings of our research. Parents have reported that they wish this approach had been adopted in their own cases and that they had been made aware of alternatives and consequences. We, too, would support a form of process change which enables informed decisions to be taken by parents involved in relocation issues and which may include a combination of mediation³³, education programmes and practitioner information sessions.

We also believe that a guardian should be routinely

appointed in relocation cases, rather than in the rare cases in which one is currently appointed. This is especially important in cases involving very young children, where the relocation has the potential to threaten the heart of the relationship-building in which a young child engages with its parents and wider family. Relocation cases are the closest relations in private law proceedings to care proceedings in public law, or adoption proceedings. In neither of the latter two types of proceedings would it be thought conceivable to proceed without a guardian, and separate representation of the child. Relocation cases are not cases simply about contact in the usual sense – they are cases about relocation, and continued relationships in those circumstances – and the general impact of relocation on the child concerned. This is the root of the issue. This is where the child’s best interests must be addressed and considered.

It is clear from this project that there are often seriously negative effects of relocation on the left-behind parent and family, as well as on those primary carer mothers who are not allowed to relocate. Although we may feel great sympathy for their position, the primary concern in family jurisdictions which are based on the best interests principle must be with the children involved in these cases. We need to know whether our policies regarding relocation are, in fact, working in the best interests of the children whom we seek to serve with our laws. Perhaps, therefore, the greatest imperative is for large scale collaborative international research to be urgently undertaken, specifically investigating the outcomes of relocation and the effects of relocation on children. Without this scientific evidence, we are working almost entirely in the dark in an area of potentially dramatic impact on a child’s life. We do not know whether, in general, relocation works well for children who adapt quickly and suffer no significant emotional loss, or whether, alternatively, relocation impacts negatively and substantially on a child’s life and development and, if so, in which ways. This information is vital in order that policy in this area may be informed through a sound research basis so that we might achieve what is required – a truly child-centric approach to this extremely difficult familial issue.

³¹ NB We note Patrick Parkinson’s suggestion that guidance is also required on how judges should apply the terms of the welfare checklist regarding the requirement to maintain contact with both parents. He states that: In determining whether a parent’s proposed change of location is in the best interests of the child in cases where: (i) there parents have or will have equal shared parental responsibility (ii) the child has been consistently spending time on a frequent basis with both parents, and (iii) the child will benefit from maintaining a meaningful relationship with both parents, an outcome that allows the child to continue to form and maintain strong attachments to both parents, and to spend time on a frequent basis with both parents, even if it is not as frequent as before, shall be preferred to one that does not”. *Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation* - http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1181442

³² Parkinson, “The realities of relocation: Messages from judicial decisions” (2008) 22 *Australian Journal of Family Law*, pp 35-55 at 55

³³ See above

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Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)
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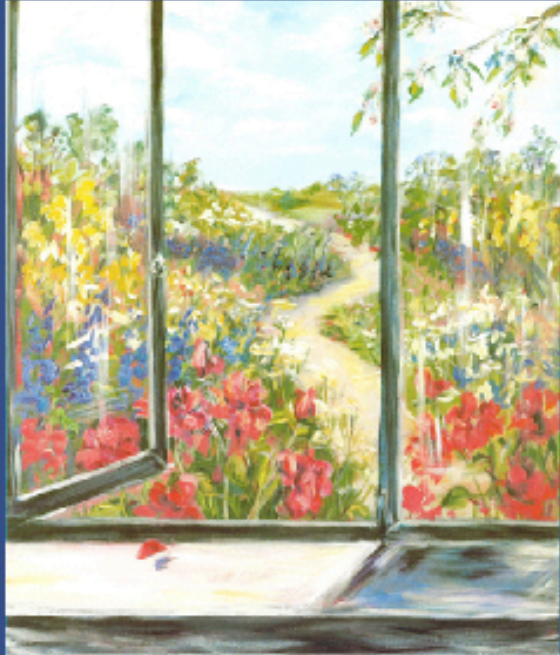
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