

# Moving on with the children

When families fracture, it is not uncommon that one parent (usually the mother) seeks to change where she lives and to take the children of the relationship with her. DCI - Australia President Danny Sandor looks at new Australian caselaw.

Chief Justice Nicholson, Justice Ellis and Justice Coleman summarised the correct approach in the following way:<sup>2</sup>

“Courts of first instance faced with cases involving a proposal to relocate the residence of a child should adopt the following guidance and should be able to expect that cases are presented in a way which addresses the following matters to the extent that they arise:

In determining a parenting case that involves a proposal to relocate the residence of a child either within Australia or overseas:

- The welfare or best interests of the child, as the case may be under the relevant legislation remains the paramount consideration but it is not the sole consideration.
- A court cannot require the applicant for the child’s relocation to demonstrate “compelling reasons” for the relocation of a child’s residence contrary to the proposition that the welfare of the child would be better promoted by maintenance of the existing circumstances.
- It is necessary for a court to evaluate each of the proposals advanced by the parties.
- A court cannot proceed to determine the issues in a way which separates the issue of relocation from that of residence and the best interests of the child. There can be no dissection of the case into discrete issues, namely a primary issue as to who should have residence and a further or separate issue as to whether the relocation should be ‘permitted’.”

- The evaluation of the competing proposals (properly identified) must weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child’s best interests.

- It is necessary to follow the legislative directions espoused in s.60B and s.68F of the *Family Law Act* (Cth) 1975. The wording of s.68F(2) makes clear that the Court must consider the various matters set out in (a) - (l) of that subsection.<sup>3</sup>

- The object and principles of s60B provide guidance to a court’s obligation to consider the matters in s68F(2) that arise in the context of the particular case.

- It is to be expected that reasons for decision will display three stages of analysis and:

1 A court will identify the relevant competing proposals;

2 For **each** relevant s68F(2) factor, a court will set out the relevant evidence and the submissions with particular attention to how each proposal is said to have advantages and/or disadvantages for that factor and make findings on each factor as the Court thinks fit having regard to s60B;

- As one, but only one, of the matters considered under s68F(2), the reasons for the proposed relocation as they bear upon the child’s best interests will be weighed with the other matters that are raised in the case, rather than treated as a separate issue.

Paragraph 9.63 of *B and B: Family Law Reform Act 1995* is no longer an accurate statement of the law.

Some features of the decision warrant particular note.

First, a relocation application is not just an inquiry into whether the children should move: it is the weighing of the various proposals for residence of and contact with the child prompted by the application to relocate. Thus, it may be the case that a court is called upon to consider a proposal involving a parent relocating without the children and the children going to live with the other parent. As there is no legal presumption or onus favouring either party at a trial of the issues, the “best interests of the child” principle has full force.<sup>4</sup> Moreover, the Full Court has asked courts to be proactive where

loss of contact is an issue, thereby reinforcing the principle that children’s proceedings in family law require courts to be more inquisitorial and go beyond what may be proposed by the parties.

Secondly, the guidelines are very child-centred and should result in better focussed evidence on how the proposal to relocate and the alternative options before a court, will affect the children rather than the parents. That should go some way to addressing the concern that relocation applications are vulnerable to turning into an interrogation of the moving parent’s reasons for wishing to relocate with the children. Indeed, previous case law

Relocations within the great expanse of Australia can have significant impacts on the capacity for children to maintain contact with the parent left behind and there are additional issues where the relocation is to another country. Many such disputes become court cases in which a party seeks “parenting orders” that permit relocation of the children.

In August, the Full Court of the Family Court published judgments in a pair of appeal cases where a mother was seeking to relocate the children with her: *A v A: Relocation Approach* [2000] FamCA 751 which set out guidelines for courts in hearing relocations applications and *H and L* [2000] FamCA 752 which applied the new approach to a further set of facts.<sup>1</sup>

- The ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges upon those interests then it must give way.
- Even where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves, despite the inevitable implications they have for the child’s contact with, and access to, the other parent.

3 On the basis of the prior steps of analysis, a court will determine and explain why one of the proposals is to be preferred, having regard to the principle that the child’s best interests are the paramount but not sole consideration.

- The process of evaluating the proposals must have regard to the following issues:
  - a) None of the parties bears an onus:
    - In determining a parenting case that involves a proposal to relocate the residence of a child, neither the applicant nor the respondent bear the onus to establish that a proposed change to an existing situation or continuation of an existing situation will best promote the best interests of the child. That decision must be made having regard to the whole of the evidence relevant to the best interests of the child.
  - b) The importance of a party’s right to freedom of movement:
    - In determining a parenting case that involves a proposal to relocate the residence of a child, care

must be taken by a court to ensure that where applicable, it frames orders which in both form and substance are congruent with a party’s rights under s92 of the Constitution, where applicable.

- In determining a parenting case that involves a proposal to relocate the residence of a child and in deciding what is in the best interests of the child, the court must consider the arrangements that each parent proposes for the child to maintain contact with the other and, if necessary, devise a regime which would adequately fulfil the child’s rights to regular contact with a parent no longer living permanently in close physical proximity. If the Court is not satisfied that suitable arrangements have been made for the child to have contact with the other parent, it may be necessary for the Court to order a regime which would best meet the right of the child to know and have physical contact with both its parents.

c) Matters of weight should be explained:

- In determining a parenting case that involves a proposal to relocate the residence of a child, a court must consider all the relevant matters referred to in ss60B and 68F(2) and then indicate to which of those matters it has attached greater significance and how those relevant matters balance out.
- In a parenting case that involves a proposal to relocate the residence of a child, no single factor should determine the issue of which proposal is preferred by a court.

directed the attention of courts to the *bona fides* of the applicant’s reasons for wanting to move. The Full Court has put the emphasis where it belongs by seeking to anchor any such inquiry in the relevance it holds for deciding whether the children’s relocation should be permitted.

Thirdly, the approach reiterates the importance of courts making the chain of reasoning in a relocation decision plain. Discretionary judgments of a court which rely on the broad “best interests of the child” principle need to provide reasons for decision that show how the Court was persuaded on the evidence and arguments before it.

That explanation is a right of the adult parties and the children involved, and the Full Court’s specificity as to how the reasoning should be displayed is certainly a welcome reminder.

**Footnotes:**

1 Available at <http://www.familycourt.gov.au/html/2000.html>.

2 At paragraph 56 of *A v A: Relocation Approach* [2000] FamCA 751, their Honours acknowledged that the principles they set out may have relevance to “other proceedings for parenting orders in which the best interests of the child is the paramount consideration”. Understandably, they said that such broader application of the principles should await direct argument before the Full Court.

footnotes continue next page

3 "SECT 60B Object of Part and principles underlying it

(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children."

"SECT68F How a court determines what is in a child's best interests

(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

(2) The court must consider:

- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- (b) the nature of the relationship of the child with each of the child's parents and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
  - (i) either of his or her parents; or
  - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
  - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
  - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
  - (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

(4) In paragraph (2)(f):

Aboriginal peoples means the peoples of the Aboriginal race of Australia. Torres Strait Islanders means the descendants of the indigenous inhabitants of the Torres Strait Islands."

4 That is not to say however that courts would or should lightly alter established the residence arrangements of a child but that will be a question of fact in each case and will also be tempered by children's wishes, see for example H and L[2000] FamCA752.

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# Update on corporal punishment in New South Wales

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**DCI - Australia Vice President Dr Judy Cashmore highlights several recent developments in relation to the law on corporal punishment in New South Wales.**

## ***The Crimes Amendment (Child Protection - Excessive Punishment) Bill 2000***

The report on the Inquiry into this Bill was released by the Legislative Council's Standing Committee on Law and Justice on October 25 2000. The inquiry considered the Bill introduced by the Hon Alan Corbett MLC in May 2000.

The aim of the Bill is to provide some clarity and limits to the defence of 'lawful correction' so that it would be unlawful to hit a child on the head or the neck, or with a belt, stick or other implement or to cause harm that lasts for more than a short period. This would codify the common law in relation to 'lawful correction' in New South Wales, and for the first time in Australia provide some limits to the use of physical punishment by parents and others acting for parents. It would not, however, ban smacking.

**'There is no guarantee that the Excessive Punishment Bill will pass into legislation and even if it does, it ... will still allow limited forms of corporal punishment'**

The Committee has unanimously resolved to recommend that the Legislative Council support the Bill, subject to some minor amendments. It believes