RELOCATION

Parental responsibility

Relocation ("change to a child's living arrangements that makes it significantly more difficult for the child to spend time with a parent") is one of the issues those with parental responsibility are required to discuss and make a genuine effort to resolve. See s 65DAC and definition of "major long-term issues" in s 4(1).

The High Court ruling in *Rosa's Case*

In *MRR v GR* [2010] HCA 4 (3 December 2009) a mother whose wish to return with her then 5-year-old child to Sydney from Mt Isa upon separation seven months after moving there for the father's new job was disallowed by Coker FM on 1 April 2008 won her appeal against that ruling in the High Court, the Court publishing its reasons for judgment on 3 March 2010.

The father was refusing to move from Mt Isa but the mother, when pressed for an alternative proposal upon relocation being refused, conceded terms that could apply if both parties were living in Mt Isa. The High Court at paras 11 and 12 noted:

> "Because the father had said he would not move from Mount Isa, the only possibility for equal time parenting would arise if the parties both remained in Mount Isa. In what follows his Honour was clearly of the view that they should do so. His Honour said:
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> > 'If [the] parties remain in Mount Isa as the father suggests, then they are in the same locality. They are proximate to each other and there can be the opportunity for equal time which would be, in my assessment, in the best interests of this child.'
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> > His Honour noted that the Family Consultant had recommended a continuation of the existing arrangements. His Honour said that he too did not consider it would be beneficial to the child if the parents lived 'thousands of kilometres apart'; it was in the child's interests that there be equal time spent with each parent.
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> His Honour concluded that the father's proposals of equal shared parental responsibility with the child living in Mount Isa most appropriately ensured the child's best interests and welfare would be met and on that basis made the orders in question."

After setting out the "imperative" provisions of s 65DAA(1) to be followed by courts when considering equal time, the Court at paras 15 and 16 said this:

> "Section 65DAA(1) is concerned with the reality of the situation of the parents and the child, not whether it is desirable that there be equal time spent by the child with each parent. The presumption in s 61DA(1) is not determinative of the questions arising under s 65DAA(1). Section 65DAA(1)(b) requires a practical assessment of whether equal time parenting is feasible. Since such parenting would only be possible in this case if both parents remained in Mount Isa, Coker FM was obliged to *consider the circumstances of the parties, more particularly those of the mother, in determining whether equal time parenting was reasonably practicable*. [our emphasis]
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> Had consideration been given to the question only one conclusion could have been reached, one which did not permit the making of the order."

The Court at paras 16-18 then reviewed the many adverse aspects for mother and child upon being refused a return to Sydney ("the *Rosa* factors" below), concluding at para 19:

> "The evidence before his Honour did not permit an affirmative answer to the question in s 65DAA(1)(b). It follows that there was no power to make the orders for equal time parenting. It was necessary for his Honour to proceed to consider whether substantial and significant time spent by the child with each parent was in the child's best interests (given that equal time was not possible) and whether that was reasonably practicable. That would require consideration of the mother being resident in Sydney. But without a finding as to practicability no conclusion could be reached. At the rehearing of this matter afresh, the necessary determinations will be made on the evidence as to the practicability of such orders, given the circumstances pertaining to the parties as they then stand."

The Court added at para 14 that his Honour's consideration of s 60CC factors "could be relevant only to the question posed by par (a) of s 65DAA(1) [would equal time be in child's best interests], not the question in par (b) [is equal time reasonably practicable], which required consideration of other, different matters" [those set out in s 65DAA(5)].

The case was remitted to the FMC for re-hearing *de novo*.

What to file?

For the order to seek; and samples of affidavit in support of a mother seeking to relocate and affidavit of father opposing relocation, see "final orders sought" and "affidavits for final hearings" in "precedents" below.

The *Rosa* factors

Note – These are not guidelines (but, indeed, factors not uncommon in relocation cases), but they *are* a guide as to the kind of evidence courts will be required to consider when deciding whether an applicant's "reality" in the particular circumstances of their case is the relocation sought or being required to stay where they are.

The factors set out by the High Court at paras 16-18 pointing to the mother's reality being in Sydney were as follows:

- At Mount Isa the mother "had been required to live in a caravan park, and live there with the child on alternate weeks".
- "Apart from the facilities being limited, it could not be said that such an environment is usually ideal for a child."
- "The availability of alternative accommodation did not seem likely. Rental accommodation is scarce in Mount Isa and the waiting lists for it long. The mother said that she could not afford good quality accommodation in any event and the cheaper rental properties were in 'rough' areas."
- "The mother had limited opportunities for employment in Mount Isa. When the parties lived in Sydney she had worked part-time. She had full-time opportunities available to her with her previous employer in Sydney which provided her with flexibility of hours. In Mount Isa the mother supported herself from social services payments and income from casual employment. The disparity between her income and that of the father had not been addressed by the time of the hearing. She said there was no employment in Mount Isa for someone of her experience and there were limited opportunities for flexible hours."