RELOCATION

Relocation ("change to a child's living arrangements that make it significantly more difficult for the child to spend time with a parent") is defined as a "major long-term issue" such that once a joint decision-making order is made, those with parental responsibility are required to discuss and make a genuine effort to resolve the matter. See s 61DAA and the definition of "major long-term issues" in s 4(1).

The High Court decision in *U v U*

The Full Court in *Bolitho & Cohen* [2005] FamCA 458 (Bryant CJ, May and Boland JJ) said at [72]:

> "We discern that the decision in *U v U* [[2002] HCA 36] has ameliorated the somewhat rigid and/or formulaic suggested approach set out in *A v A [A & A: Relocation Approach* [2000] FamCA 751]. In *U v U* the High Court said that the proper approach to be adopted in a relocation case is a weighing of competing proposals, having regard to relevant s 68F(2) [now s 60CC] factors, and consideration of other relevant factors, including the right of freedom of movement of the parent who wishes to relocate, bearing in mind that ultimately the decision must be one which is in the best interests of the child."

The Full Court added at [84] that Hayne J in *U v U* at [171] and [172] "also dealt with the requirement, in some cases, for a trial judge to look beyond the proposals of the parties, in his or her … task of ensuring the parenting orders made are in the best interests of a child".

In *U v U* [2002] HCA 36 Hayne J as a member of a 5:2 majority of the High Court (with whom Gleeson CJ and McHugh J agreed) said at [170]-[176]:

"What have come to be known as 'relocation cases' present difficult questions. Much of that difficulty stems from the fact that to take a child from the place where one of the parents lives (and, in some cases, works) to some distant place will, if the other parent does not move, necessarily affect the way in which the child's relationship with that other parent can be maintained and allowed to develop. It follows that the needs and the wishes of *each* parent and the needs of the child (and, if of sufficient age, the child's wishes) all bear upon the question to be considered by the Family Court. In the end, as the … Act … makes plain [**Ed** – The footnote here that cites s 65E should now be read as s 60CA], the Family Court 'must regard the best interests of the child as the paramount consideration', but that does not deny the fact that there are at least *three* persons who will be affected by the order that is made: two adults and the child. And very often, of course, there will be other relatives of the child whose contact with the child will be curtailed if the child lives in one place rather than another.

In these circumstances, it would be quite wrong to treat the decision that is to be made as confined to a choice between whatever may be the particular 'proposals' that the parents may make for the residence of, and contact with, the child. So to confine the inquiry would, in this case, have required the … Court to ignore admittedly relevant evidence that was led about what the mother would do if it were decided that the child should live in Australia rather than India. More fundamentally, it would confine the Court's inquiry to what the *parents* suggested would be in the best interests of the child, regardless of whether those suggestions were informed, even wholly dictated, by the selfish interests of one or other of the parents. To confine the inquiry in this way would, therefore, disobey the fundamental requirement of the Act that the Court regard the best interests of the child as paramount. Those interests may, or may not, coincide with what one or both of the parents put forward … as appropriate arrangements for residence and contact.

That is not to say that the … Court is to embark upon some roving inquiry about the matter, unfettered by any regard for the evidence led and the matters which the parties seek to contest. Due account must be taken of the fact that proceedings … are conducted in a framework of adversarial procedure familiar to the common law. …

In this case, there were only three outcomes which were raised by the parties in the proposals which they made ... Put shortly … those … were that the child would reside with the father in Australia, with the mother in India or with the mother in Australia. All of those outcomes assumed that the father would remain in Australia.

There may have been some … compelling reason for the parties to make that assumption and to conduct the litigation on this premise. But neither the premise nor the reasons for adopting it were explored in evidence or in argument in the courts below and therefore these matters could not be tested or examined in this Court. The premise is not one which, in relocation cases, should be accepted as a matter of course.

When one parent … wishes a child who is, or is to be, resident with that parent to move to a place distant from the other parent, it should not be assumed that that other parent cannot, or should not, contemplate moving to be near the child. There may be … compelling reason for that other parent … not to move, but it would ordinarily be expected that these reasons would be explored in evidence and the validity of any assumption that the other parent will not move would be examined. Just as, in this case, the mother was asked what she would do, if she could not have the child reside with her in India, so too it might have been expected that the father would be asked what *he* would do, if the mother were to have the child reside with her in India. Such questions should not be treated as mere forensic tests of parental devotion, to which only one answer is seen as being satisfactory proof of being a loving parent. Rather, they are no more than a prelude to a deeper inquiry about where the best interests of the child may lie and what arrangements will best serve those interests.

It is now recognised as self-evidently true that, apart from some cases of abusive relationships, children benefit from the development of good relationships with both their parents. The right to know and be cared for by *both* parents and the right of contact on a regular basis with *both* parents are said to be principles underlying the objects of Pt VII of the Act [**Ed** – His Honour's footnote here cites s 60B(2)(a) and (b). While the *Family Law Amendment Act 2023* repealed those provisions they did contain s 60CC(2)(e) which acknowledged 'the benefit to the child of being able to have a relationship with the child's parents'.] If effect is to be given to those principles, it must *not* be assumed that one parent (the father) cannot move and that the mother must, in every case, subordinate her ambitions and wishes, not to the needs of the child, but to the wishes of the father to pursue his life in a place of his choosing. It is the interests of the *child* which are paramount, not the interests or needs of the parents, let alone the interests of one of them."

Other relocation cases

In *AMS v AIF* [1999] HCA 26, Hayne J (a member of a 6:1 majority) said at [217]-[218]:

> "Of course, the decision of a parent who is about to move and who seeks custody may well be affected … by whether he or she will have custody of the child if that proposed move is carried out. And it is, then, not surprising that counsel for the mother told the … judge (in effect) that if the mother's having custody of the child depended upon her staying in Perth then she would not move to Darwin. But that does *not* mean that the question for the Court is whether the mother is to be *permitted* to move to Darwin. And it does not mean that the question is whether the mother has shown a 'good' or a 'compelling' reason for wanting to move.

> To translate the question into this form – has the mother shown a good, or good enough, reason for wanting to move – focuses attention upon the reasons and motives of the mother. But that is not the proper focus of inquiry. The proper focus is which is better for the child – to be in the custody of the father (in Perth) or to be in the custody of the mother (in Darwin). That, of course, requires attention to what benefits will the child have, and what detriments will the child suffer, from being in the mother's custody in Darwin. If the mother had wished to move to marry and establish a new family in Darwin, or to take up new and better employment or training in Darwin, it may well have been possible to conclude that in all the circumstances the child's welfare would be advanced by his being committed to the mother's custody. The circumstances to be considered would include not only the fact of relocation but also all of the consequences that would follow – separation from the non-custodial parent, the creation of a new family in which the child would thereafter live (with all the concomitant advantages and disadvantages), the better economic position of the custodial parent, and so on. In that sense, inquiring about why the mother wished to move was relevant but it was only one inquiry among the many that go into deciding the ultimate question. (…)"

An applicant's fall-back concession should not be treated as a proposal: *Jurchenko & Foster* [2014] FamCAFC 127 (FC comprising Bryant CJ, Thackray and Duncanson JJ). The Full Court also at [111] cited the passage from Hayne J's decision in *AMS v AIF* set out above.

Note – Except where their reasons turn on an interpretation of sections of the Act introduced in 2006 but repealed by the *Family Law Amendment Act 2023*, the following decisions may be useful not as factual comparisons but as to the types of evidence where relocation was allowed and "relocation" principles where pre-2006 decisions have been discussed.

Also see *Cowley & Mendoza* [2010] FamCA 597 (overseas relocation disallowed as court found child-focused parents' proposals equally legitimate; but allowed in *Hannigan & Sorraw* [2010] FamCA 807 where respondent father was abusive, lacked insight). See *Hunt & Planey* [2013] FamCA 442 (mother with "major depression and anxiety" was "unable to function fully as a parent" if not allowed to move to the US); *Mallahan* [2010] FamCA 631 (poor parental communication, mother's move from Gold Coast to Vic allowed); *Collu & Rinaldo* [2010] FamCAFC 53 (FC) at [332] to [346] ("month about" time between Dubai and Sydney). In *Wendland* [2017] FamCAFC 244 F unsuccessfully appealed an order that M be permitted to relocate wherever she was posted in her employment with the ADF; also see *Bryce & Bonig* [2010] FamCA 999 where Dawe J allowed an overseas relocation where the applicant was granted sole parental responsibility.

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.

Unilateral relocation

Note – Despite the repeal by the *Family Law Amendment Act 2023* of the "equal time" sections introduced to the Act in 2006, any post-2006 cases that follow may still be useful where principles that applied prior to 2006 are discussed or pre-2006 authority or research is cited.

In *Morgan & Miles* [2007] FamCA 1230 Boland J upheld Brewster FM's interim order for the mother to return a child after she had moved 144 km away before the interim hearing. Boland J analysed the issue of relocation at [58]-[61] and [72]-[74], interim relocation at [83] (which cites *Cowling*, which we deal with under "the court's approach to interim hearings") and local v interstate v overseas relocation at [89]-[91], saying at [88]:

> " … [T]he very difficult issues in cases involving a relocation (…) make it highly desirable that, except in cases of emergency, the arrangements which will be in the child's best interests should not be determined in an abridged interim hearing, and these are the type of cases in which the child's present stability may be extremely relevant on an interim basis. It further appears to me the comments of Warnick J in *C and S* remain apt and relevant to determination of these cases."

In *C & S* [1998] FamCA 66 Warnick J (expressing the Full Court's view) said:

> " … [I]t is clear that the interests of any child … are very much connected with any questions directly affecting (the child), such as a relocation, being determined by a court without the impediment of a situation of recent development, which … significantly alters the relationship … or circumstances of the child with regard to one of its parents from what it or they had been immediately beforehand."

In *Deiter* [2011] FamCAFC 82 the Full Court set aside a return order made without first "conducting a discrete hearing to deal with the allegations of violence" alleged against the father (F) ([55]). In *Chapa* [2012] FMCAfam 1420 an anxious mother (M) with no home support who alleged child abuse and family violence by F was not sent back where F's own case supported hers.

Interim relocation was allowed in *Robson & Johns* [2008] FMCAfam 721 given the "short period [7 months] before the final hearing" (M soon to give birth; allegedly angry F granted fortnightly time at a contact centre); in *Pace & Wilson* [2009] FMCAfam 367 (a 5-year-old had not seen F for 3 years); and in *Franklyn* [2019] FamCAFC 256 at [29] (the move did not prevent M from adhering to order for child to see F once a fortnight). But in *Silas & Barry* [2009] FMCAfam 448 M was ordered to return and injoined from changing a child's name.

In *West* [2012] FamCA 35 an interim order allowed M to relocate from Sydney to Newcastle where her new partner (to whom she was pregnant) lived and worked, as the children's relationship with F would not be compromised. M's unilateral relocation was allowed in *Wadsworth & Gale* [2009] FMCAfam 537 where F, who did not protest for several months, was held to have acquiesced in the relocation and in *Moreau & Trejo* [2009] FMCAfam 1184 where F in a letter had agreed to the move.

For more cases, search "unilateral relocation" at our online "case notes – children". For an injunction see our precedent "interim orders sought" and "affidavits for interim hearings".