

**TELEVISION EDUCATION NETWORK**

**CPD ESSENTIALS: FAMILY LAW: MISCELLANY OF THINGS THAT CAN GO  
WRONG**

**FRIDAY 19 MARCH 2010**

**OVERSEAS POSTINGS AND GOING HOME TO MOTHER:  
INTERNATIONAL RELOCATION**

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**Introduction**

Family Law cases involving the relocation or proposed relocation of children remain notoriously difficult to resolve.

The competing proposals of parents embroiled in such disputes can often be finely balanced and therefore the outcomes unpredictable.

Given that the “stakes” in such proceedings are so high, it is not surprising that there is such a vast body of case law in this area, both before and following the reforms that came into effect on 1 July 2006 with the introduction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

This paper will touch briefly on the “old” case law prevailing immediately prior to the 2006 reforms and cover a number of the leading cases that have been determined under the “new law”.

**General Principles**

*Case Law Prior to 1 July 2006*

Three of the leading cases prior to the introduction of the Shared Parental Responsibility legislation were as follows:

1. *A & A (Relocation Approach)* [2000] FamCA 751 where the Full Court of the Family Court suggested three steps that should be followed by the Court in a relocation matter, namely:
  - (a) to identify the relevant competing proposals;
  - (b) to consider the proposals and evidence in the terms of the relevant factors (then) set out in the Act which the Court must consider in determining the best interests of the child/children.
  - (c) explain why one particular proposal is to be preferred in terms of the best interests of the child/children.
2. *U & U* [2002] HCA 36 where the High Court considered the approach to relocation matters and said the Court may not be able in every case to treat each of the steps as discrete and explained that the objective is always the child’s best interests.
3. *Bolitho v Cohen* [2005] FamCA 458 where the Full Court of the Family Court said:

“We discern that the decision in *U v U* has ameliorated the somewhat rigid and/or formulaic approach set out in *A v A*. 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 S68F(2) 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”.*

### **Impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006***

On 1 July 2006, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* took effect. The salient provisions of that legislation are now legion but in short, pursuant to Section 60CA, in deciding whether to make a particular parenting order in relation to a child, a Court must [continue] to regard the best interests of the child as the paramount consideration.

Section 60CC provides that in determining what is in the child's best interests, the Court must consider the following matters:

- (2) The **primary considerations** of:
  - (a) the benefit to the child of having a **meaningful relationship** with both of the child's parents; and
  - (b) the **need to protect the child** from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
- (3) The “**additional considerations**” that must be considered by the Court in determining what is in the child's best interests, including such things as:
  - (a) any views expressed by the child and any factors relevant to the weight to be attached to the child's views;
  - (b) the nature of the relationship of the child with each of the child's parents and any other person (including any grandparent or other relative);
  - (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
  - (d) 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 (including any grandparent or other relative of the child) with whom the child has been living.
  - (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially effect the child's right to maintain personal relationships and direct contact with both parents on a regular basis;
  - (f) the capacity of:
    - (i) each of the child's parents; and
    - (ii) any other person to provide for the needs of the child, including emotional and intellectual needs.
  - (g) The maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents and any other characteristic of the child that the Court thinks are relevant.
  - (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 final 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.

A further critical section of the new legislation is S65DAA which provides that if an order is made that parents are to have equal shared parental responsibility, the Court must:

- (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
- (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
- (c) if it is, consider making an order to provide for the child to spend equal time with each of the parents.

S65DAA(2) provides that if an order for equal shared parental responsibility is made, and the Court does **not** make an order for the child to spend equal time with each of the parents, the Court must:

- (a) consider whether the child spending “substantial and significant time” with each of the parents would be in the best interests of the child; and
- (b) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
- (c) if it is, consider making an order to provide for the child to spend substantial and significant time with each of the parents.

In determining whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child’s parents, the Court must have regard to:

- (a) how far apart the parents live from each other; and
- (b) the parents’ current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
- (c) the parents’ current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
- (d) the impact that an arrangement of that kind would have on the child; and
- (e) such other matters as the Court considers relevant.

As was held by the High Court in the very recent decision of *MRR v GR* (referred to below) the reasonable practicability aspect will usually be of huge significance in relocation matters.

In the decision of *Goode & Goode* [2006] FLC93-286, the Full Court of the Family Court provided a very useful guidance to how parenting cases are to be determined under the new legislation.

## **Recent Cases – Post 1 July 2006**

### ***MRR v GR* [2010] HCA4**

#### ***High Court of Australia 3 March 2010 (Mount Isa to Sydney)***

This is the decision that has attracted considerable publicity involving an appeal from a Federal Magistrates’ Court decision made on 1 April 2008 dismissing her application to relocate with the party’s 5 yo child from Mount Isa to Sydney. The parties had resided in Sydney for 4 years and the father was then posted to Mount Isa for work and the family resided there from January 2007. They separated in August 2007.

The mother’s origins and supports were in Sydney and remaining in Mount Isa consigned her to great economic hardship forcing her to reside in a caravan park.

The focus of the Court was on the Federal Magistrate’s order that the parties have equal shared parental responsibility and his subsequent order that if the parties remain in Mount Isa, they have equal time with the child.

The judgment looks closely at S65DAA of the Act and in particular the “reasonable practicability” aspect of that section.

The Court held:

- (a) Each of sub-ss (1)(b) and (2)(d) of S65DAA require the Court to consider whether it is reasonably practicable for the child to spend equal time or substantial and significant

time with each of the parents. It is clearly intended that the Court determine that question.

- (b) This obliges the Court to consider both the question whether it is in the best interests of the child to spend equal time with each of the parents **and** the question whether it is reasonably practicable that the child spend equal time with each of them.
- (c) It is only where **both** questions are answered in the affirmative that consideration may be given under S65 (1)(c) and (2)(c) to the making of an order.
- (d) A determination as a question of fact that it is reasonably practicable that equal time be spent with each parent is a **statutory condition** which must be fulfilled **before** the Court has power to make a parenting order of that kind.
- (e) In this case, the Federal Magistrate did not consider, as he was obliged to, whether it was reasonable practicable in all the circumstances for the child to have equal time with each parent. Since such parenting would only be possible if both parents remained in Mount Isa, the Magistrate was obliged to consider the circumstances of the parties, more particularly those of the mother, in determining whether equal time parenting was reasonably practicable.
- (f) Had the Magistrate given consideration to this question only one conclusion could have been reached, namely one which did not permit the making of the order, having regard to these matters:
  - (i) The mother's unsatisfactory accommodation and scarcity of suitable, good quality rental accommodation;
  - (ii) The mother's limited employment opportunities in Mount Isa (cf her employment prospects in Sydney);
  - (iii) The fact that the mother was despondent and depressed about being in Mount Isa given her poor living conditions and isolation from her family.
- (g) These matters all militated against a finding that an equal parenting order was "reasonably practicable" in all the circumstances – there was therefore no power to make the orders for equal time parenting.
- (h) It was necessary for the Federal Magistrate 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.

The orders were quashed and the matter was referred to the Federal Magistrates' Court for re-hearing de novo.

### ***Taylor & Barker [2007] FamCA1246***

#### ***Full Court of the Family Court 19 October 2007 (Canberra to North Queensland)***

This case involved an appeal from a decision of Federal Magistrate Brewster sitting at Canberra where the Honourable Federal Magistrate granted the mother's application to relocate to North Queensland from Canberra with the parties' 10 year old child.

At the time of the hearing the child had been in the care of his father six nights a fortnight and the rest of the time in the care of his mother.

The father filed an application seeking an order that the child live with him for half of the time and the mother cross applied for an order that she be at liberty to relocate the child's residence from Canberra to North Queensland.

The Court concluded that it would be in the child's best interests if the mother was permitted to relocate with the child to North Queensland.

The majority (Bryant CJ & Finn J) delivered a detailed judgment analysing each of the grounds of appeal raised by the father, including a detailed analysis of the impact of the new legislation upon cases of this kind.

Ultimately it would found that the learned Federal Magistrate had not fallen into appealable error. The Federal Magistrate had considered a number of scenarios including retention of the status quo, variation of the orders in the terms sought by the father (with the child and the

mother remaining in Canberra) and the possibility of the mother's new partner (to whom the mother had had a young daughter, and whom the mother hoped to marry) relocating from North Queensland to Canberra.

Ultimately the Federal Magistrate concluded that the issue of the mother's happiness and the corollary of her unhappiness, (were she to be unsuccessful in seeking orders permitting relocation of the child to North Queensland and thereby be forced to remain in Canberra) "was of more significance in all the circumstances".

In the context of considering relocation cases under the new legislation, the majority had this to say:

- a. "We agree that when dealing with a case concerning the future living arrangements for a child, and involving a significant change in the geographical place where the child is to live, the preferred approach according to established principle has been not to deal with that change, or relocation, as a separate or discrete issue, but rather as just one of the proposals for the child's future living arrangements, at least insofar as that approach is possible".
- b. The provisions of Section 65DAA must have particular significance in a case involving the proposal that there be a significant change in the place where a child lives.
- c. A relocation proposal should continue to be considered and evaluated, so far as possible, in the context of the making of the necessary findings in relation to the relevant S60CC matters.
- d. In considering the appropriate order in which the relevant provisions of the Act should be considered, the legislation gives no direction or guidance on this issue –  

*"However, given that the concept of the child's best interests is the determinative factor in the application of so many of the provisions of Part VII and given that S60CC(1) provides that in determining what is in the child's best interests, the Court must consider the matters set out in sub section (2) (primary considerations) and sub section (3) (additional considerations) of that section, it would seem only logical that the Court make the findings regarding the matters contained in those sub sections (so far as they are relevant in a particular case) before attempting to apply any other provision in Part VII in which the determinative factor is the subject child's best interests".*
- e. "We make it clear, however, that a failure to follow what we see as the logical approach would not lead to a appealable error unless such error arose from the failure to give adequate reasons or to have regard to the matters which the legislation requires must be considered".

### ***Morgan & Miles [2007] FamCA1230***

#### ***[Boland J Family Court of Australia 17 October 2007] (South Coast NSW)***

In this case the Honourable Justice Boland was required to determine an appeal from an interim parenting order made in the Federal Magistrates' Court at Canberra on 10 April 2007.

The substantive proceedings in the Federal Magistrates' Court concerned interim proceedings that arose in relation to the parties' two children who were aged 6 and 4 at the time of the interim hearing.

The mother had unilaterally relocated herself and the two children away from the town in which the children had been raised since birth to a small town on the south coast of NSW, 144 kilometres from the children's former home (which was in the same town their father lived in).

At the initial interim hearing, the learned Federal Magistrate made orders requiring the children, pending the final hearing, to live with the mother in their former town (effectively requiring her to return to that town). The mother submitted that the Federal Magistrate fell into appealable error.

Ultimately Boland J was not satisfied that there was any appealable error and the appeal was dismissed.

Whilst this is the judgment of only a single judge, Her Honour delivered what is likely to become somewhat of a seminal judgment in relation to how relocation matters ought be dealt with by the Courts in the context of the new legislation.

Her Honour's judgment included the following very helpful guidelines:

1. There is no presumption of equal shared care to be found in the Act – the presumption is in respect of **equal shared parental responsibility** not equal shared care.
2. There is nothing in the legislation which provides that a parent who has an existing order which provides that the child spends 50% or more of his or her time with that parent, has the unilateral right to move the child (on the basis that this is in the child's best interests). Whilst such a move may, after exploring all relevant factors, be found to be in the child's best interests, those interests can only be determined by examination of the relevant factors in the structured exercise of discretion required by the legislation.
3. The amending Act did not effect any change to the paramouncy principle to be applied in making a parenting order, and the old Section 65E is replicated in Section 60CA of the Act.
4. The Act does not treat "relocation" cases as a special category of parenting orders. In that respect the amending Act has effected no change to the law.
5. It is therefore undisputed that in determining a parenting case where one party wishes to relocate, the child's best interests remain the paramount, but not sole, consideration.
6. The Act does not contain any presumption against a parenting order which involves relocation, nor any presumption in favour of a parent, with whom a child lives predominantly at the time of the application to obtain such an order. "The Act provides for the careful exercise of a structured discretion to determine the appropriate order to be made".
7. If a parenting order for equal shared parental responsibility has been made prior to any parenting application involving a relocation, "the parties have a primary duty under Section 65DAC to determine jointly the proposed living arrangements for a child would make it significantly more difficult for that child to spend time with the "leave behind" parent". She made reference to the FDR provisions of s60I.
8. If no order for equal shared parental responsibility has been made and S61C governs the situation, the parties can exercise parental responsibility either jointly or severally.
9. In making an order for equal shared parental responsibility, there is no distinction drawn between interim and final determinations, although such an order may not, in specific cases, be made on an interim hearing.
10. When dealing with an application involving an intrastate, interstate or international relocation of a child a Court may, in some circumstances, have to craft orders for the allocation of aspects of parental responsibility if it is impractical for the parties to equally share parental responsibility, and particular aspects of parental responsibility may, in some cases, need to be exercised solely by the relocating parent if the orders sought are made.
11. The Court must continue to carefully weigh and balance the primary considerations and the additional considerations in respect of the competing proposals.
12. Because each case presents different facts and issues for determination, no precise indicia can be categorically laid down as mandatory requirements requiring more or less weight in a relocation case, but developing law should provide general guidance.

### **Interim v. Final Determinations**

Boland J said it is important to note that there are no separate provisions in the Act dealing with interim, as distinct from final orders and "thus there is no legislative mandate to consider different criteria in interim parenting applications involving a relocation to final applications, although the former will of necessity, be an abridged enquiry".

Nevertheless Her Honour noted that the cases demonstrate that sensibly, Judges recognise that these very difficult cases, often with far reaching consequences for the child, required the full investigation which can only occur at a final hearing. She said this makes 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.

Her Honour also made the observation that it will usually be the case at a final hearing that a Federal Magistrate will have the benefit of a family report or other objective evidence to assess the nature and quality of the children's relationship with either party. In this particular case, the Federal Magistrate did not have the benefit of such a report and he had to make a determination based on such non controversial evidence as was available.

### **Extent of the Relocation - Intrastate, interstate, international or "local"?**

In *Morgan & Miles*, Her Honour pondered whether different considerations apply depending upon the nature of the proposed relocation and whether it is intrastate, interstate, international or local.

She made the point that it would be rare case that a parenting order providing for an international relocation would be made following an interim hearing. She also enunciated this oft-quoted dicta:

*"The artificiality of determining a parenting application involving relocation on the basis of distance is well demonstrated by the example given in the Family Law Council Report...this leads me to conclude that it is not distance per se which should be the determinative criteria. In many cases what is relevant is the **consequence** of the move or proposed move. The issues to be determined may be quite different for example, for an infant or toddler developing attachments, to those of older children; or for economically impoverished families where fuel costs may be unaffordable thus impeding maintenance of a meaningful relationship. Conversely, there may be little impact on maintaining a meaningful relationship between a child and the non relocating parent particularly if the child has a history of living predominantly with the relocating parent, and spending time with the other parent where, with alternate arrangements, the child's relationship with the non relocating parent can be maintained and fostered".*

She made the observation that the legislation does not seek to define "local", intrastate, interstate or international moves – "Rather, it requires a judicial officer to consider, on a case by case basis, the effect of a move on the particular child in determining the overall parenting application".

### ***Collu & Rinaldo [2009] FamCA461***

#### ***[Stevenson J Family Court of Australia 31 March 2009] (Dubai/North Queensland)***

This case involved a relocation dispute of the parties' 3 year old son. The parties during their relationship had lived in Sydney for the most part before the wife moved, with the child, to Dubai on 1 March 2007, pursuant to Consent Orders made on 12 December 2006 which permitted the mother to remove the child from Australia to reside in Dubai for a period of 13 months. This arrangement was struck to enable the mother to take up employment in Dubai.

It appears that the parties' relationship had not entirely concluded at the time of the mother's initial move to Dubai in March 2007 and indeed the parties were still residing together in their home in Sydney when she and the child departed for Dubai.

Immediately before she was due to return the child to Australia in accordance with the Consent Orders made in December 2006, the mother filed an application with the Court seeking orders enabling her to remain in Dubai with the child beyond 1 April 2008, being the date by which she was due to return the child to Australia.

The mother sought to have the application determined whilst she and the child remained in Dubai, however a Judicial Registrar refused to deal with the mother's application until she returned the child to the jurisdiction of the Court.

On 18 June 2008, interim orders were made which provided, in essence, that the child live with each parent on a month about basis in Dubai and Sydney.

At the time of trial, the wife sought orders in the alternative that she either be permitted to remain in Dubai with the child or, alternatively, that she and the child be permitted to relocate to

North Queensland where she had significant family support (the mother was from North Queensland).

The father on the other hand sought orders that the child live with him, in Sydney, in the event that the mother resides in Dubai or North Queensland.

In the event that the mother return to Sydney, the father proposed a shared care arrangement gradually progressing to a week about arrangement upon the child commencing school.

Evidence was led about difficulties the child experienced at changeovers at the Dubai Airport (when leaving his mother) and about other difficulties between the mother and the father with respect to parenting, and other, matters.

The Court was not impressed by some of the mother's conduct and suggested that the mother was "prepared to exploit past incidents between the parties in an attempt to strengthen her position in these proceedings".

A family report was prepared and the family consultant's evidence was accepted in its entirety.

The evidence of the family consultant was that the child enjoyed a loving, secure and high quality relationship with both his mother and his father. The Court was satisfied that the child currently has a meaningful relationship with both of his parents and that he would continue to benefit from such a relationship.

A further feature of the case was that the father had a 12 year old daughter from a previous relationship (the child's half sister) with whom the child enjoyed a good relationship.

The family consultant also observed that the child appeared to be more strongly attached to his mother than to his father, primarily as a result of the 15 months period between March 2007 and June 2008 when the child resided predominantly in the mother's care in Dubai.

Whilst the Court was concerned that any proposal which would see the child separated from his mother for lengthy periods would hold more disadvantages than advantages to the child's best interests, it was concerned that the mother's proposal to remain in Dubai with the child and allow him limited time with his father would impinge on the development of his relationship with all of the child's paternal family and, similarly, the child's relationship with his maternal family would be compromised.

The Court also shared the family consultant's concerns about the mother's willingness and ability to facilitate and encourage a close and continuing relationship between the child and the father and evidence was referred to of the wife being "obstructive" and "indifferent" to the facilitation of the child spending time with his father – for example, when the father was visiting Dubai, the mother severely restricted his time with the child and insisted that she always be present, and refused to allow the father to spend time with the child at her apartment, even in her aunt's presence, while she was at work.

The Court formed an overall impression "that the mother found herself in a position of power over the father, once she arrived in Dubai, and she then used this advantage to severely curtail his time with the child".

These matters left the Court "with real concerns as to the mother's willingness and/or ability to facilitate the child's relationship with his father and paternal family. If the child remains in Dubai, these concerns become heightened by the problems of distance and the mother's apparent perception that she holds a position of power over the father. To a lesser extent, these same observations apply to the mother's proposal to live with the child in North Queensland".

Having regard to the primary and additional considerations set out in s60CC(2) and (3), the Court took the view that it was no doubt in the child's best interests that the proposal whereby the child and each of his parents live in Sydney would be the most advantageous to the child's best interests.

Whilst the mother was likely to suffer financially by leaving her employment in Dubai, she still had good prospects of employment in Sydney.

The Court also noted the obvious practical difficulties and expense in the child spending time with his father if he continued to live in Dubai with the mother. Similarly travel between Sydney and Far North Queensland also involved distance and expense.

Whilst the father appeared to be reasonably financially comfortable and travelled internationally in the course of his business activities, the distance between Sydney and Dubai still

represented a substantial impediment and those opportunities the father did have to spend time with the child in Dubai were “small compensation for the overall lack of opportunity for the child to develop his relationship with his father”.

The Court was also concerned about the mother’s attitude towards the father and expressed “real concerns that she underestimates the significance and importance to the child of his father and paternal family, including his half-sister...”. The Court was also concerned that the mother had by her actions indicated a wish “to diminish the father’s importance in the child’s life” and this tendency “would be allowed to flourish on her primary proposal to remain in Dubai”.

The mother’s attitude towards a change of surname application was illustrative of her attitude, in the Court’s view. That is, the mother was prepared to consent to the child having a hyphenated name (by the addition of the father’s surname), but only if one of the children’s given names was dropped. The mother suggested that the given name of the child which was identical to the father’s given name, be dropped.

In addition, somehow the mother had obtained a passport for the child without consulting the father.

These matters caused the Court real concerns as to the strength of the mother’s commitment to fostering the child’s relationship with his father and the paternal family which concerns were “exacerbated by the distance and power imbalance between the parties which flow from the child’s residence in Dubai”.

The Court found that the father’s proposed orders did as much as possible to meet the child’s best interests and ordered that within 30 days the mother arrange for return of the child to Sydney and it would then be a matter for the mother whether she remains in Sydney, returns to Dubai, or moves to North Queensland.

An order was also made for the child to be given a hyphenated surname (without the deletion of any given name).

The mother has appealed the orders. Her application for a stay of the orders was refused and with the appeal pending the child is continuing to reside with the parties on a month about basis between Sydney and Dubai.

The Court considered the relevant law and the approach to be adopted under the 2006 amendments to the *Family Law Act*.

### ***Dumarche v. Killon [2009] FamCA 827***

#### ***[Cronin J Family Court of Australia 4 September 2009] (Malaysia)***

This case involved competing parenting applications of the husband and the wife in relation to their 11 year old and 7 year old children. The wife sought orders from the Court that she be permitted to move to Malaysia with the children for up to a year to take on a short term posting in that country. The husband objected to the move.

The matter was dealt with on an urgent interim basis and the presiding Judge the Honourable Justice Cronin specifically relied upon the approach enunciated by the Full Court of the Family Court in *Goode & Goode* (2006) FLC93-286.

#### Facts

The parties had been separated for 11 months prior to the determination of the matter and in that time the children have lived predominantly with the wife. The wife was required to regularly travel overseas as part of her work during which time the children were cared for by either a nanny or with assistance from their grandparents. She was required to take up a posting in Malaysia for a period of between 9 - 12 months, and sought the leave of the Court to temporarily relocate the children to Kuala Lumpur for a period not exceeding 12 months.

The husband opposed the move of the children to Malaysia and sought orders that the children reside with him during the period of the wife’s posting in Malaysia. There were a number of disputed facts between the parties as to, for example, the extent to which the children had spent time in the care of their father since separation and the reasons why his time with the children was not as extensive as might otherwise have been the case.

The Court recognised the difficulty in testing evidence in an interim determination where no viva voce evidence or cross examination was provided.

It was clear, nonetheless, that the wife's proposal was the children's relocation to Malaysia was only temporary and she proposed that in the event that the relocation went ahead, the husband be permitted to spend time with the children on school holidays or whenever he was able to travel to KL during school term. In addition she proposed that the children maintain contact with their father electronically through Skype and telephone.

The Court noted that *"because the facts cannot be comprehensively tested, it is not appropriate that I do more than put in place some orders that will provide for the needs and interests of the children pending the final determination of the matters"*.

The Court accepted that the wife had been the parent primarily responsible for the daily care of the children and that she had successfully managed to structure her work commitments around the children, despite her requirement of travelling overseas and interstate regularly. In addition she took responsibility for things such as speech therapy and activities for the younger child.

Both parties were comfortably off financially and it was clear that the husband had sufficient financial resources to be able to travel internationally and he was self employed with flexibility to travel to Malaysia to visit the children.

The husband expressed the usual concerns about the impact on the children of a move to Malaysia and there was conflicting evidence about the children's views about the move, particularly the oldest child's views.

Cronin made the observation that the proposed period of time in which the children would be living in Malaysia under the wife's proposal is "modestly short" and that this was not a parenting dispute where there would be a substantial absence of the father in the lives of the children. He said *"all of the indicators are that save for the experience that the children will have of being in a different environment, life will go on as normal but their parents will need to make an extra effort to ensure the connections with Australia are not lost if the move occurs"*.

It was significant in the Court's view that the children were not moving away permanently and there were no suggestions of any concern about the children being returned to Australia. It was also significant that there were going to be opportunities for the children to continue the relationship they have already formed with their father.

The Judge's main concern was about the impact on the children of being absent from their father if they went to Malaysia, given the wife's concession that the relationship between the children and the father was just beginning to blossom. The Judge expressed concern about a possible adverse impact on that blossoming relationship which may have serious consequences in both the short term and long term for the children. Nevertheless the Judge was impressed by the positive nature of the position adopted by each parent as observed by the Court appointed family consultant. The Court noted that that augured well for whatever order is made by the Court.

The family consultant also reported that the attachment between the children and their father had already formed and the separation between the children and their father was not going to affect either the bonding or the development of that relationship. He also reported that the wife was likely to foster the relationship between the boys and their father.

The Judge concluded that the temporary nature of the wife's move made all the difference to his interim determination of this matter. He said

*"...this is not a "relocation" in the sense of the word used to denote some permanent restructuring of parent and child relationships. It is simply a case of reorganising the way in which the husband and the children continue their existing relationship"*.

He went onto say that given the interim nature of the matter he was not prepared to contemplate the alternative position proposed by the husband.

Speaking generally about relocation cases, his Honour confirmed the view of Boland J in *Morgan & Miles* that it is artificial to determine a parenting application involving relocation on the basis of distance and that rather the relevant focus is the consequence of the proposed move.

In what might be described as a helpful check list, His Honour said that for the purpose of determining what the impact will be on the children in **this** case, there are a number of questions to be asked, namely:

1. What is the state of the respective attachments and in particular that between the children and the parent wishing to move away even for a modest period of time?
2. What are the economic factors at play which would make a substantial difference to the face-to-face contact but also how are the electronic communications to be implemented?
3. What time has history shown would be lost between the children and the parent remaining behind?
4. Having regard to the ages of the children and their emotional development, will they understand the time concept of their absence (for example) during school terms?
5. Could the Court be confident that the parent leaving the area would make a conscious effort to not only ensure that the electronic communication was maintained but also that there were sufficient reminders for the children that they have an absent parent?
6. In essence, can the proposed arrangements ensure the child's relationship with the parent remaining would be maintained and also fostered?

The Judge also noted that the Court is dealing with interim, or final, parenting applications, involving relocation, the approach will be the same.

Ultimately His Honour was satisfied that the temporary relocation of the children to Malaysia with their mother was in the children's best interests and that essentially nothing would change with respect to the relationship between the husband and the children and that, because of the duration of the trip and the proposed interaction between the children and their father, the children would adapt to the change away from seeing their father.

His Honour made orders in the terms sought by the wife which provided for the children to spend time with the husband for two weeks of each school term holidays and for one half of the long summer holidays and for any reasonable period in Malaysia should the husband visit there.

In addition orders were made to facilitate communication between the children and the husband by telephone, email, postal mail and by Skype.

### ***Starr v. Duggan [2009] FamCA 115***

#### ***[Watts J Family Court of Australia 8 July 2009] (New Zealand)***

This case was an appeal from orders made in the Federal Magistrates' Court on 26 February 2008 in relation to the parties' son who was nearly 22 months old at the time of the trial.

At trial, the mother had sought orders enabling her to relocate with the child from Brisbane to New Zealand. Both the mother and father were born in New Zealand, and both of them had resided in Australia since the late 1990s. The parties had lived in Brisbane for just over three years by the time of trial (i.e. all of the child's life).

The parties had been separated for almost 12 months by the time of the initial trial and the child was spending three nights per fortnight with his father, pursuant to orders made by consent in June 2007.

At first instance, the learned Federal Magistrate refused the mother's application to relocate with the child to New Zealand primarily out of concern about the drastic impact of such a relocation upon the child's excellent, and increasingly strong, relationship with his father.

There were four main bases to the mother's appeal against the Federal Magistrate's orders.

Watts J spent some time examining the legislation and those recent authorities dealing with relocation cases since the introduction of the Shared Parental Responsibility Act on 1 July 2006 namely *Taylor & Barker* [2007] FLC93-345 and *McCall & Clark* [2009] FamCAFC92.

The Court endorsed the approach to be adopted set out in *Taylor & Barker* and said:

*"Section 65DAA will provide a useful framework to consider the advantages and disadvantages, not only of the equal time and substantial and significant time scenarios, but also other outcomes which may be in the child's best interests, including the proposal to relocate".*

Ultimately the Court was satisfied that the Federal Magistrate had not fallen into error.

Whilst the Federal Magistrate had not followed strictly the approach recommended in *Taylor & Barker*, the Court pointed out that that approach is simply a guideline, not a binding principle, and the failure to follow that approach does not constitute appealable error.

The Court was satisfied that the Federal Magistrate carefully weighed all the relevant evidence and, after appropriate consideration of the relevant Section 60CC(2) and Section 60CC(3) factors, concluded it was in the best interests of the child that he spend substantial and significant time with his father on a regular basis, which was best achieved with the child remaining living with the mother in Brisbane.

Some of the salient findings made by the Federal Magistrate included:

- The child's close and loving relationship with both parents and members of the mother's and the father's wider family.
- The mother had many friends in Brisbane with young children.
- Both parents were willing and able to encourage and facilitate a close and continuing relationship between the child and the other parent.
- A relocation of the child to New Zealand would be a considerable reduction in the time the child could spend with his father and it was likely that the child's relationship with the father would be adversely affected.
- There was substantial expense if the mother relocated to New Zealand and neither party had the financial capacity to pay airfares between Australia and New Zealand.
- Relocation of the child to New Zealand meant that the child would spend only four periods of one week per year with his father, compared to the scenario if the child remained in Brisbane.
- The mother appeared resilient and was likely to obtain employment in Brisbane and to be visited regularly by her parents who lived in New Zealand.

One of the grounds of the appeal was that the Federal Magistrate had made certain findings as to the strength of the relationship between the father and the child, and the likely impact of the relocation upon the child of relocating to New Zealand, despite the absence of any family report and/or the appointment of an Independent Children's Lawyer.

The Court noted that it was open to the Court of its own motion to seek evidence to assist it in the determination of the matter, including relevant research on the establishment of primary and significant attachments of infants and young children.

Whilst the Court did not have the benefit of such expert evidence before it, the Appeal Court found that this did **not** vitiate the Federal Magistrate's findings about what was necessary for the child to have the benefit of a meaningful relationship with both his parents.

Indeed, the evidence before the Court was not in doubt and the wife acknowledged the relationship between the father and the child was "fantastic" and the child appeared to be thriving from the care provided by both of his parents.

The Court referred to this extract from the decision of *McCall & Clark*:

*"We accept that the availability of family support including such things as reliable quality child care, financial assistance, and emotional support for parenting a child, can be very important considerations in any parenting case particularly one involving relocation, and are all matters to be balanced and weighed when considering competing proposals. But those factors, or a lack of them, do not automatically support a finding that a party's parenting capacity will be compromised particularly when they may be counter balanced, at least in part, by other benefits, including the sharing of day to day care of the child....."*

In this case the Court was satisfied that the Federal Magistrate had carefully weighed factors relevant to the mother's happiness as part of his overall consideration of what was in the best interests of the child and referred to some of the findings set out above.

The mother's appeal was dismissed.

**[Family Court of Australia 30 June 2008] ( Ireland)**

This case involved the application of the mother for orders that she be permitted to relocate with the parties' 7 year old and 4 year old children from Sydney to Ireland.

The mother was Irish and she had met the father and commenced a relationship with him when backpacking around Australia in 1999.

The parties have lived in South Australia for the bulk of their relationship.

The parties' relationship was somewhat turbulent and plagued by violent and controlling behaviour on the part of the father. When the children were very young, the mother left the father and lived in a safe house for approximately two weeks.

To illustrate:

*"I am satisfied that the mother was the victim of violence at the hands of the father and for many years suffered his controlling and oppressive behaviour. Apart from acts of physical violence, some of which are detailed below, I am satisfied that in many respects the father sought to control the mother's life and to dictate what she could and could not do. He was highly suspicious of her activities outside of the home and even imposed rigid time limits and transport arrangements on her school and shopping trips. He became angry if she was late or delayed leaving because she was chatting to another parent. He kept the front gates to their property locked so that she could not leave in the car without his knowledge or agreement. He screened her mail, frequently stood over her while she was speaking on the telephone and reviewed her SMS text messages. He threw things at and near her. He was prone to fits of rage, shouting, abuse, dominance, erratic behaviour, manipulation and derogatory references. He used marijuana regularly and was guilty of moody and anti-social behaviour. He resented a visit by the mother's sister and [her partner]...and behaved poorly towards them and towards the mother and the children in their presence".*

In May 2005 when her father died, the mother sought the father's consent to take both children with her to Ireland to visit her family and attend the funeral, but the father refused to sign a passport application for the younger child and the mother went to Ireland with the older child only.

In December 2005, the mother fled Australia for Ireland with both children where they remained for nine months, before the mother agreed to return to Australia with the children after the father brought Hague Convention proceedings for the return of the children.

The mother then settled in Sydney with the children and had been residing there for sixteen months at the time of the hearing. The father was living in Adelaide.

Injuries sustained by the mother as a result of the father's violence were well documented and she had contemporaneously reported some assaults including a particularly brutal one where she was shoved, pulled, slapped and had a pram thrown at her abdomen.

During their nine month stint in Ireland, the children thrived. They lived on the farm of their maternal grandmother and were surrounded by their mother's large extended family (she had seven siblings) including their maternal cousins. The older child settled well in a local school and very favourable evidence was received about that child's academic progress whilst in Ireland.

The father's relationship with the children on the other hand was particularly problematic.

He did not see the children for almost two years and from late 2007 was only able to enjoy supervised contact with the children for approximately six months from late December 2007 to mid June 2008.

The evidence of the family consultant and the Children's Contact Service was that some of those contact visits had not proceeded well although there was evidence of a significant improvement as contact progressed closer to the time of judgment.

Whilst the Court made it clear that it was inappropriate for the mother to profit from her removal of the children to Ireland in late 2005, it also noted that the father was very much the author of

his own destiny and had brought many of the problems upon himself by way of his appalling conduct towards the mother.

In considering the relevant legal approach, the Court referred to the judicial guidance given in the leading cases prior to the Shared Parental Responsibility Act coming into force on 1 July 2006, and subsequent decisions including *Morgan & Miles* [2007] FamCA 1230 and *Taylor & Barker* [2007] FamCA 1246.

The Court said that in its view the evidence presented in these proceedings on a relocation issue and issues of credit were best discussed in the context of consideration of the factors requiring its attention pursuant to Part VII of the Act.

The Court made a number of findings all of which pointed to the mother's application to relocate the children to Ireland being granted, namely:

- The mother is clearly the most important person in the children's lives. She provides a loving, close and nurturing environment for the children.
- The father on the other hand lacked a child focused approach and at times struggled to relate well to the children and had a number of shortcomings as a parent.
- The children had at times been exposed to the father's violence.
- Despite the difficulties in the relationship between the father and the children, the children appeared to be enjoying their supervised times with their father and their relationship was gradually improving.
- The mother was able to offer the children significant extended family relationships in Ireland and had substantial practical and financial support from her family.
- The father on the other hand had a distant relationship with members of his family and in fact had not seen either his mother or his sister for nine years. This did not bode well for the father's capacity to maintain a sense of family for the children, were they to remain in Australia.
- The mother on the other hand enjoyed a good, civil relationship with the father's mother and sister and the Court was satisfied that she would promote the children's relationship with those members of the father's family even in the event of relocation to Ireland [indeed, it was the mother's case that if she and the children be permitted to relocate to Ireland, that the father spend time with the children in Australia a few weeks each year supervised by the paternal grandmother and paternal aunt in Queensland].
- Despite the mother's abduction of the children to Ireland in 2005, the Court was satisfied that the mother had demonstrated the willingness and ability to facilitate an ongoing relationship between the children and their father, particularly since her return from Ireland in September 2006.
- The Court was satisfied that the effect upon the children of a move to Ireland would be beneficial and that "the accommodation and physical and emotional support on offer and available to the mother and to the children in Ireland, significantly outweigh that available to her and to the children in Australia". The mother had only one relative in Australia and had never received nor been offered any nurturing or support from paternal extended family members.
- The children had become very familiar with their surrounds in Ireland and the Court was satisfied that any change in the children's circumstances from Australia to Ireland would be beneficial rather than detrimental.
- The mother's proposed forms of communication between the children and their father were suitable and appropriate and were likely to be very effective in maintaining a relationship between the children and their father.
- Similarly the mother would receive financial assistance from her extended family to assist her in making contributions towards the cost of airfares in flying the children from Ireland to Australia to see their father.
- The children had through their mother been exposed to their Irish heritage and culture and had experienced life in Ireland and had additional significant exposure to their Irish culture through their extended maternal family.

- Despite the mother having fled Australia for nine months in 2005, the Court was confident that the mother would abide by any orders of the Court and accepted that the mother now recognised the importance of the children maintaining a relationship between the father and the children, provided that relationship is maintained in a safe and secure environment.

The Court made orders permitting the mother to relocate to Ireland within six months of the making of the orders (at the end of the Australian school year) and in addition made orders that she should have sole responsibility for the children, she having hitherto demonstrated a vastly superior parental capacity than the father.

The Court concluded that the mother's close and extended family support in Ireland was a critical factor bearing favourably upon the children's future well being and had no doubt that the children's best interests would be served by them being permitted to relocate to Ireland with their mother.

On the other hand, forcing the mother and the children to remain in Australia would serve the father's best interests, but not those of the children. The advantages and benefits to the children of being able to relocate with their mother to Ireland were numerous and significant.

Orders were made for the father to spend time with the children for a period of two consecutive weeks on two occasions per annum, to be taken in either Ireland or Australia at the discretion of the father, and then from 2011 two times per year for a period of three consecutive weeks. At all times the father's time with the children was to be supervised by either or both of the children's paternal grandmother or paternal aunt, the children staying overnight with those relatives.

In addition, orders were made for the children to communicate with the father by letter, by email, by telephone, webcam or Skype and by providing the father with a video/DVD recording of the children at least once every six months.

### ***Mayne & Sowden [2009] FamCA 83***

#### ***[Federal Magistrates' Court of Australia 12 March 2009] (Thailand)***

In this case the parties were the unmarried parents of a 7 year old boy and 6 year old daughter. The mother was a Thai national who sought the permission of the Court to relocate permanently with the children to Thailand, from Sydney.

For his part, the father sought orders that the children reside with him in Australia and the mother spend limited time with the children in Australia only (not Thailand). The father amended his application late in the piece but he was not prepared to commit to orders that would allow the children to visit their mother in Thailand in the event that the children were to remain in his care in Australia.

The parties met when the father spent a short period of time in Thailand in 1999 and they subsequently commenced a relationship. Both children were born in Thailand and resided there with the mother on a full-time basis until November 2006 when they were brought to Australia.

The parties separated in 2007 with the father reconciling with his former wife [the mother of his two older children] whom he (re)married in late November 2008.

The parties' relationship was somewhat turbulent and in late 2007 the father brought ex-parte proceedings and was successful in obtaining orders that the children reside with him, that the mother spend time with the children as agreed and that she be restrained from taking the children out of Australia.

The mother then spent substantial periods of time in Thailand and there was a period in the order of 12 - 15 months where the father was, for the most part, the children's primary carer, with assistance from his new wife, when he was required to work interstate and overseas.

The mother returned to Australia in 22 October 2008 and immediately filed an application seeking the leave of the Court to relocate the children to Thailand with her. Thereafter matters became quite problematic between the parties. There was evidence that the mother was under considerable pressure during this period, with her previous role as the children's primary carer being supplanted.

It was the father's case that she had mental health difficulties and had threatened suicide and interim orders were made for her extremely limited time with the children to be supervised.

The father's conduct towards the mother was less than ideal and it appears that he exploited his superior position vis-à-vis the mother given her language difficulties and financial constraints, as well as her limited visa status.

The court found that the father had engaged in controlling and "punitive" behaviour towards the wife and the Court was not satisfied that he would foster and encourage the mother's relationship with the children were she to return to Thailand without the children.

The father had for example corresponded with the Department of Immigration and Citizenship about the mother's visa, in particular to indicate that he had withdrawn his financial support for any further stay or visits by the mother and he sought to have the visa granted to the mother, with his financial support, cancelled. In that same correspondence he accused the mother of abducting the children and overstaying her welcome.

The Court was satisfied that the wife did not have mental health issues and that the behaviour she had exhibited in the lead up to the trial was a reflection of the pressure she was under, including the pressures of some health difficulties suffered by another child, her 12 year old son, who was residing in Thailand with her parents.

The family consultant appointed to prepare a report made the following observations:

- The father would have been a somewhat remote figure to the children until about two years ago when they came to Australia.
- Prior to that, the mother was the primary carer of the children and the children were more attached to the mother than the father – although the children also had a close relationship with the father and it was apparent that they were comfortable with his family (consisting of his wife and 11 year old and 21 year old daughters)
- There was nothing to suggest that the children would not be safe with either parent, neither of whom posed a risk to the children.

#### Security and Other Risks – Thailand

The father submitted that Thailand posed some particular risks to the children, namely by reason of its political instability (high threat of terrorist attacks in particular regions) and health risks (e.g. malaria and other infectious diseases).

Whilst the Court acknowledged these risks, it pointed out that the father had spent eight weeks a year in Thailand over many years and was content to leave the children in Thailand with the mother until they attained school age and moved to Australia. Further, there was no evidence that the particular area in Thailand where the mother and children would be residing had been particularly identified for terrorist activity.

The Court undertook a detailed analysis of the relevant Section 60CC considerations and concluded the following:

- Only limited weight could be attached to the children's views given their young ages and relative immaturity.
- The children had a strong relationship with both parents but a greater attachment to their mother given the children were 5 yo and 4yo respectively when they left Thailand and until then they had been almost exclusively in the care of their mother and other members of her family, with their father being only occasionally with them.
- The father had since mid 2007 shown "a readiness to control the mother's time with the children" in view of what is convenient to him and lately had severely restricted the mother's time with the children on the basis of his concerns that the mother would remove them despite the possibility of a Watch List order and the relative ease with which he was able to stay in touch with her. It said "...there must be a concern that the father would not behave differently if the mother came to Australia to see the children if orders were made on the basis of his proposal".
- The Court found that a serious difficulty with the father's proposal that the children remain in Australia with him was that over time, their relationship with their mother would be unlikely to be maintained on the basis of the evidence before the Court.

- The father had greater means to spend time with the children in Thailand (he was earning in excess of \$150,000.00 per annum) and also to arrange their visits to Australia in order to maintain his relationships with them. The wife on the other hand was in very difficult financial circumstances and less able to afford the cost of transporting herself or the children between Thailand and Australia (and vice versa) to spend time with the children on a face to face basis.
- The children were close to their maternal grandparents who had looked after the children in Thailand when the wife was at work and on the father's own evidence, the maternal grandparents and the mother's sister-in-law had had important roles in the upbringing of the children. There was little likelihood that members of the mother's extended family would have the means to come to Australia to visit the children if the children remained in Australia.
- As a result the Court found that the father's proposal would mean that the children would have no relationship with members of their extended maternal family, including those who had assisted in raising them.
- The father had not made good previous promises to take the children to Thailand to visit their mother and indeed, from the time of the commencement of the proceedings until the final hearing, the mother's time with the children had been minimal despite orders made in her favour.
- There was clearly a lack of trust between the parties and the Court found that the father had not shown a willingness and ability to facilitate a close and continuing relationship between the children and the mother (*cf* the mother in *Dumarche v. Killon*).
- In considering the likely effect of any changes in the children's circumstances including the likely effect on the children of separation from either of their parents, the Court placed considerable weight in the opinion of the family consultant that if the children live with their father in Australia, the mother's absence from Australia, and her lack of English, suggested she would become less significant for the children as time passes. The Court agreed with this.
- It was common ground that the children should not be separated.

The Court concluded that separation from the mother was a greater risk to the children than separation from their father and found that this consideration favoured the mother's proposal, especially in light of the Court's finding that the father had not shown a willingness to facilitate a relationship between the children and their mother.

The Court had concerns about the father's capacity to provide for the children's emotional needs, particularly their need for a relationship with their mother, having regard to his conduct towards the issue of the children's contact with their mother since late 2008. On the other hand the Court was satisfied that the mother had the capacity to meet the children's emotional needs (although it found that the father had shown generally that he could meet the children's emotional needs also, his actions in not appropriately fostering the relationship between the children and the mother ultimately went against him).

#### Cultural Matters

In considering Section 60CC(3)(g) the Court noted that cultural issues are relevant in this matter, the children having been born in Thailand and having spent their formative years there absorbing the Thai culture.

The Court found that the chances of the children retaining connections with their Thai background and culture were limited, if not existent, under the father's proposal.

Indeed it found that the father had shown "little appreciation of the children's cultural background" and his proposal to enrol the children in Thai language classes was considered a superficial gesture. The father was not committed to these matters borne out, for example, by the lack of commitment on the father's part in taking the children regularly to Thailand.

The Court was concerned that the father's lack of concern about cultural matters, which meant that the children would have virtually no relationship with their extended family in Thailand, was an indicator of his lack of recognition of the significance of the children's background. By way of example, when enrolling the children at an after school care

centre, the father made no reference to the mother's Buddhist faith and asserted that the children practised no religion.

In summary, the Court found that the father's proposal would mean that over time, the children's connection with their Thai background and culture would diminish, a consideration which favoured the mother's proposal.

In addition, the Court found that the father's beliefs "are likely to result over time in excluding the mother from the children's lives. This means a loss of what she can bring to the children in terms of their emotional needs, family connections and cultural background".

In considering the relevant law, the Court had regard to the principles summarised above *A & A* [2000] FamCA 751, *U & U* [2002] HCA 36, *Bolitho v Cohen* [2005] FamCA 458 and *Taylor & Barker* [2007] FamCA 1246.

Ultimately the Court made orders in the terms sought by the mother but providing for the children to spend the maximum amount of time with their father which was reasonable, including at least two block periods of time totalling a minimum of six weeks each year in Australia and at any time the father is in Thailand. In addition orders were made for telephone and/or electronic communication.

### **Other Recent Cases**

#### ***McCall & Clark [2009] FamCAFC 92***

##### ***Full Court of the Family Court 29 May 2009 (Dubai)***

Left behind father's appeal against Federal Magistrates' Court Orders upheld with respect to 4yo child and strong and "meaningful" relationship not yet established.

#### ***Fitzpatrick & Power [2010] FamCAFC 22***

##### ***Full Court of the Family Court 22 Feb 2010 (Country NSW to Qld)***

Mother permitted to relocate to Qld with 10 month old child for 18 months employment contract. Father's appeal dismissed save with respect to the making of a sole parental responsibility order.

#### ***Horton & Guan [2010] FamCAFC 32***

##### ***Full Court of the Family Court 8 March 2010 (Short annual holiday to China)***

Aggrieved father's appeal against Federal Magistrates' Court Orders permitting mother of 4yo son to travel to China for annual holiday (subject to provision of \$5,000 security) dismissed.

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