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Relocation Since Equal Shared Parental Responsibility

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RELOCATION SINCE EQUAL SHARED PARENTAL RESPONSIBILITY

Legislation

Family Law Act 1975 (Cth)	FLA
Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)	FLAA

Case Law

Pre- July 2006

A v A : Relocation Approach	(2000) FLC 93-035 (2000) 26 Fam LR 381	A v A
AMS v AIF; AIF v AMS	(1999) FLC 92-852	AMS
B and B: Family Law Reform Act 1995	(1997) FLC 92-755 (1997) 21 Fam LR 676	B v B
Bolitho v Cohen	(2005) FLC 93-224 (2005) 33 Fam LR 471	B v C
Cowling v Cowling	(1998) FLC 92-801	Cowling
D v SV	(2003) FLC 93-137 (2003) 30 Fam LR 91	D v SV
U v U	(2002) 211 CLR 238 (2002) 29 Fam LR 74	U v U
ZN v YH	(2002) 29 Fam LR 20	ZN

Post-July 2006

Crowe v Crowe	(unreported FCA 12.01.09)	Crowe
Goode and Goode	(2006) FLC 93-286 (2007) 36 Fam LR 422	Goode
H v H	(2007) 37 Fam LR 126	H v H
M v S	(2006) 37 Fam LR 32	M v S
Morgan v Miles	(2007) FLC 93-343	M v M
Read v Oakley	[2008] FamCAFC 77	R v O
Sampson and Hartnett (No 10)	(2007) FLC 93-350	Sampson
Taylor and Barker	(2007) FLC 93-345 (2008) 37 Fam LR 461	Taylor

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Relocation Prior To July 2006

A useful summary of the law prior to July 2006 in relation to relocation may be found in the judgment of Boland J in M v M.

Relocation cases prior to the FLAA coming into effect in July 2006 may be conveniently divided into two classes:

Long Distance Relocation

Where the relocation involved sufficient distance that weekend contact was likely to be rarely or never possible, the principles are those set out in A v A although they may be drawn from a line of authority dating from at least AMS. They may be summarised as follows:

1. The best interests of the child are the paramount but not the sole consideration. (Freedom of movement of the residential parent will, for example, also be a consideration).

2. The Court must evaluate the competing proposals of the parties but it is not bound to accept one or other of those proposals. It is open to the Court to formulate its own proposal in the best interests of the child.

3. The party seeking to relocate is not required to demonstrate compelling reasons for the proposed relocation.

4. Relocation is not to be determined as a separate issue but as part of the overall determination of where the child should live.

5. The Court must take into account a parent's right to freedom of movement but that right must defer if the welfare of a child would be adversely affected.

6. Relocation orders are parenting orders under FLA and should not be treated as a special class.

7. There is a presumption neither for nor against relocation orders.

Of course there are difficulties with these principles. It is one reason why they are often stated but rarely explained.

The first principle seems to leave open the possibility that a parenting order made by the court will not be in the best interests of the child. I do not recall a Court acknowledging that. Perhaps it is more likely to be invoked when it is not apparent where the best interests of the child lie. That seems more in accord with the fifth principle.

Whilst explicable on the basis that the proper emphasis is on the word "compelling", it is clear that the third principle should not be interpreted to mean that the party seeking to relocate is not required to satisfy a threshold test that there are proper reasons for relocation. Given that compelling reasons for opposing relocation are to be found in the objects and methods of the Act (see for example sections 60B &

60CC FLA), the party seeking to relocate almost always needs some good reason to move. To suggest that it is a clean slate upon which submissions are made is to undervalue the objects of the Act.

The fourth principle is simply beyond my powers of comprehension. Assume the mother wants to relocate from the father's place of living (A) to her preferred place of living (B). In practice the children might end up living with their mother at B, with their mother at A or with their father at A. Whichever way you look at it, it seems to be at least potentially a two step process - one step to determine the appropriate residential parent; the other the appropriate place of living.

In practice, the principles are more useful in justifying a decision than in reaching it. A guide to the approach of the Court is best found by a consideration of relevant cases:

AMS

The mother wished to relocate from Perth to Darwin. There were competing residence applications. At first instance and on appeal to the Full Court, the mother was restrained from changing the child's place of residence. The matter was remitted by the High Court.

(per Gleeson McHugh Gummow Kirby Hayne) It was not required that the mother provide compelling reasons for relocation.

(per Gleeson McHugh Gummow) Without determining whether the restraint offended Section 92 of the Constitution, the restraint must be no more than is reasonably required to achieve the objects of the legislation.

(per Gaudron Kirby Callinan) The restraint did not offend Section 92.

Whilst no decision was required to be made, the Court appeared to be favourably disposed to relocation.

A v A

The mother wished to relocate from Sydney to Portugal. The mother made allegations against the father which had resulted in a suspension of contact. The trial judge made orders giving the mother residence as long as the place of residence was in Sydney.

The Full Court allowed the appeal and remitted the proceedings.

Relocation cases have three stages of analysis:

1. Identify the competing proposals;

2. Consider the proposals against the principles and factors set out in 60B and 68F(2) FLA (as it was) (now 60CC FLA); and

3. Explain why one proposal is to be preferred.

ZN

The mother proposed relocating to USA. Her current husband had lived in the town to which they proposed moving. Nicholson CJ restrained the mother from doing so.

He held that:

- The proposals of both parties must be evaluated with neither bearing the onus;
- The best interests of the child are the paramount consideration;
- It is a matter of balancing the detrimental effect of permitting relocaton against other competing rights and interests; and
- The mother's right of freedom of movement is relevant.

U v U

The parents were born in India although their child was born in Sydney.
The mother sought an order permitting her to relocate with the child to India.
She was restrained from doing so and the Full Court upheld that restraint.

(per Gummow Callinan Gleeson McHugh Hayne) The Court is required to give careful consideration to the proposals of the parties. It is not bound by those proposals.

(per Gummow Callinan Gleeson McHugh Hayne) Whatever weight is given to the right of freedom of movement it must defer to the expressed paramount consideration, the welfare of the child.

It is difficult to predict the response of the Court to an application for relocation on the basis of these cases. One might expect that relocation overseas would be more strongly resisted and require more careful consideration than competing proposals within Australia. It is not always so. In intra-Australia cases, the residential parent's right of freedom of movement will still be an important consideration.

Short Distance Relocation

Where "relocation" cases involve a distance between households which is such that weekend contact remains possible (even though the distance might preclude attendance at school meetings or midweek time) the principles are slightly different. D v SV is a seminal case.

It came before the Full Court on appeal from a decision at first instance which restrained the mother from moving a distance of 115 km (from an address in Melbourne's eastern suburbs to one near Geelong).

It was considered (without deciding) that, in the context of relatively short moves, it may be that the relocation principles do not apply.

It was held that in such cases the resident parent's freedom of movement should not be restricted. The inquiry should more be directed at alternative contact or shared residence arrangements.

In support of those propositions the Court referred to (without approving such arbitrary distances) US legislation which permits a parent to move 150 miles without notice (Wisconsin), 100 miles without notice (Michigan) and 70 miles without notice (South Dakota).

The Court confirmed these aspects of the relocation principles:

1. The Court must identify the competing proposals.

2. Those proposals will be tested against the criteria set out in the Act.

3. The ultimate issue is the best interests of the child and to the extent to which freedom of a parent to move impinges upon those interests that freedom must give way.

4. The residential parent is under no obligation to justify his or her move. Neither of the parties bears an onus.

5. The Court must be mindful of the rights of the party under Section 92 of the Constitution and it must consider the arrangements proposed by each party for time between the child and the non-residential parent.

6. The Court should indicate to which factors it has attached most weight.

Family Law Amendment (Shared Parental Responsibility) Act 2006

The issue is whether any part of this edifice was affected by the passing of the FLAA.

Express Amendment

In M v S, Dessau J noted that :

- The legislation has not prohibited relocation;
- It has not introduced a specific presumption against it; and
- It has not placed an onus of proof on the moving party.

If, as a result of the enactment of the FLAA, there are impediments to relocation which did not previously exist, it is an implicit result of the framework created by the legislation.

The Scheme of the FLAA

The starting point is the emphasis on the role of both parents in the lives of the children:

60B. Object of Part and Principles Underlying it

(1) The objects of this Part are to ensure that the best interests of children are met by —

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child

The emphasis on co-parenting existed under the earlier formulation of the underlying principles but the objects now begin with the proposition that the participation of both parents should be : "*...to the maximum extent consistent with the best interests of the child ...* "

That object is to be achieved by a circuitous route which begins with a presumption of shared parental responsibility:

61DA Presumption of equal shared parental responsibility when making parenting orders — FLA s. 61DA

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

The presumption is rebuttable but it will generally only be rebutted infrequently and as a result of bad behaviour. If it is not rebutted, or if equal shared parental responsibility is otherwise ordered, there is a consequence which flows automatically:

65DAA Court To Consider Child Spending Equal Time Or Substantial And Significant Time With Each Parent In Certain Circumstances

(1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, 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 (or including a provision in the order) for the child to spend equal time with each of the parents.*

(2) *If—*

(a) *a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and*

(b) *the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents,*

the court must—

(c) *consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and*

(d) *consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and*

(e) *if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.*

Not only are these considerations mandatory but the meaning of "to consider" in the context is a "...consideration tending to a result, or the need to consider positively the making of the order": Goode at 80,898.

Even if the presumption of equal shared parental responsibility is not applied, the Court may make any order it regards as appropriate in the best interests of the child ie even if there is not to be equal shared parental responsibility, the Court will still be required to evaluate the competing proposals including a proposal for orders providing for equal or substantial and significant time. Having afforded procedural fairness, the Court will consider making such orders whenever to do so would be in the best interests of the child: Goode at 80,899.

In Goode the Court went on to consider whether that scheme had fundamentally altered the law as it had been applied in *Cowling* and in interim parenting cases generally. That law might be loosely summarised in this way: where a child is, at the date of an interim hearing, living in a well-settled environment, the child's stability will generally be promoted by a continuation of those arrangements until final hearing.

The Court considered that the FLAA had altered the law. There is still a concession to the inability of the Court to make final determinations of factual conflict as set out in Section 61DA:

61DA Presumption Of Equal Shared Parental Responsibility When Making Parenting Orders

......(3) *When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.*

However, "...the reasoning in *Cowling* ... must now be reconsidered in light of the changes to the Act": Goode at 80,901.

Relocation After July 2006

The issue is whether the presumption of equal shared parental responsibility and the mandatory consideration of equal time and substantial and significant time arrangements have resulted in a change of the law as it relates to relocation.

The starting point is that the amendments make no specific reference to relocation. In contrast, there is a specific reference to interim hearings.

The decided cases are instructive:

H v H

In H v H the children had always lived with their mother. The parties had a long history of conflict. They had lived together for a short period. They had both remarried. The proposed relocation was from Brisbane to Cairns. Altobelli FM considered the law before and after FLAA and put forward these conclusions:

1. If the presumption of equal shared parental responsibility is not rebutted, the Court must consider the practicality of equal time and, after that, substantial and significant time for the children with the other parent.

2. Both are effectively inconsistent with relocation.

3. If, in a relocation case the Court gets to the point of such a consideration, (an application for) relocation is not likely to succeed: H v H at 138.

To put those propositions in the terms of the headnote:

..parenting orders which would have the effect of permitting one parent to re-locate with the child would ordinarily not be made unless the presumption of equal shared parental responsibility was rebutted. (at 126).

To that argument there are two objections which I amplify below:

1. It places undue emphasis of whether equal shared parental responsibility is appropriate;

2. It does not provide sufficient discretion in the application of Section 65DAA FLA:

65DAA Court To Consider Child Spending Equal Time Or Substantial And Significant Time With Each Parent In Certain Circumstances.

(1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, 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 (or including a provision in the order) for the child to spend equal time with each of the parents.

(2) If—

(a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and

(b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents,

the court must—

(c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and

(d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and

(e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

In arguable confirmation of the first of those objections, Altobelli FM rebutted the presumption of equal shared parental responsibility and permitted the relocation.

The difficulty with elevating the question of equal shared parental responsibility to such a position is fourfold:

Firstly, whilst it has symbolic importance in terms of sharing parental responsibility, the reality is that, in most cases, shared parental responsibility, at least insofar as it relates to long-term decisions, involves making decisions about a child's education. It is not the appropriate battleground to effectively determine relocation issues.

Secondly, if it is given the prominence with which Altobelli FM invests it, in circumstances where the judicial officer favours relocation, it will be artificially denied to one of the parties, as it arguably was in H v H.

Thirdly, to the extent to which the legislation promotes false allegations of violence or abuse because they are the touchstones for parental responsibility, that tendency will be further encouraged.

Fourthly, the whole scheme of the Act seems to be directed to a different purpose which that interpretation strains. Shared parental responsibility is presumed because, in the absence of good reasons why a parent should not make decisions about the future of his or her children, it should be presumed. Without express statement, it is impossible to believe that the virtual elimination of relocation was intended to be presumed at the same time.

M v S

In M v S the child was 8 years of age. Her parents separated when she was very young. She had lived with her mother all her life. The child saw her father very regularly. The mother wished to relocate to England where her current husband had employment. In permitting relocation Dessau J made these determinations:

1. The parents should have equal shared parental responsibility (at 35);

2. Neither equal time not substantial and significant time are reasonably practicable. They are not reasonably practicable if the mother lives in Melbourne or London (the father lived in Canberra) (at 35); and

3. In those circumstances, the matter is to be determined having regard to the best interests of the child.

In permitting relocation Dessau noted that there had been a proposal which was defeated to place a specific onus on the party seeking to relocate (at 37). Her Honour expressly rejected a submission that there was now such an onus on the applicant for relocation (at 39).

Had it been intended that all relocation applications would be disallowed as a matter of course, the FLA would have been amended accordingly.

Taylor

Taylor provided the first opportunity for the Full Court to comment on the issue.

The appeal related to orders of a Federal Magistrate which permitted the Mother to relocate from Canberra to North Melbourne. Her partner lived in North Queensland and had both stable employment and his own children in that area.

The Court held that the proper approach was to first explore the option of the child spending equal time or substantial and significant time with both parents. That consideration must be separate (to a consideration of relocation) and real. The Full Court held that, if it was determined that such arrangements were not in the best interests of the child, there was no need to consider the practicability of the competing proposals. It confirmed the decision in Goode that, where such considerations are not compelled by a finding that there should be equal shared parental responsibility, the Court is " .. at large to consider what arrangements will best promote the child's best interests." (at 81,912)

If the option of the child spending equal or substantial and significant time with a parent is both in the best interests of the child and practicable, the advantages and disadvantages of that option must be balanced against the advantages and disadvantages of any relocation proposal.

In undertaking that process, the law is reasonably clear that the parties must consider competing proposals and any other proposal consistent with the best interests of the child. In U v U the Court emphasised that real consideration should be given to alternate possibilities (such as a relocation of the non-residential parent); in Taylor, the Full Court determined (at 81,919) that these cases should not be determined on the basis of the likely effect of any order on the decision-making of the

partner of the parent proposing relocation. The trial judge considered this to be, and the Full Court appears to agree that it is, a form of "social engineering".

The decision in Taylor was largely based on the proposition that the Mother's happiness was best assured by relocation and that the happiness of the Mother was in the best interests of the child. Since the Mother's happiness was said to be enhanced by living with her partner in Queensland, it follows that whether the partner could or would have relocated to Canberra if the application for relocation was unsuccessful must be relevant. The Full Court appears to have pulled the rug from that line of inquiry: "*... we do not understand it to have yet been suggested that such cases could, or should, be determined on the basis of what might be the likely response of the partner proposing relocation*" (at 81,919).

Faulks DCJ (dissenting) said that there was insufficient evidentiary foundation for the happy mother/happy child argument especially as it seems to have been the decisive argument (at 81,923). No doubt closer attention to that evidence may be expected in the future despite the preparedness of the majority to accept the inferences which the Mother sought to rely on.

As for whether the case signifies a change of direction, I make these points:

1. The Full Court upheld the Magistrate's exercise of discretion. It was a compelling case. It is an over-simplification to suggest that, because the Mother was permitted to relocate, the law is unchanged.

2. The process of consideration has changed at least to the extent of the mandatory consideration of shared time arrangements.

3. There was no suggestion of error in following the approach in A v A, suggesting that the fundamental approach remains the same.

4. It still appears to be a matter of weight to determine which factors are of most significance although the recasting of the objects of Part VII (s 60CC FLA) requires an additional factor to be weighed in the balance.

Sampson v Hartnett

The mother relocated from Sydney to Geelong with two young children. The trial judge required residence to be established in Sydney. The Court considered three methods by which the freedom of movement of the residential parent might be curtailed:

1. The Court might require the residential parent to live in Sydney. [In practice such an order is not made]

2. The Court might require the residential parent to fulfil an obligation which can only be met at a specific location eg the Court might create "spend time" orders which compel the Mother to live in close proximity to the Father.

3. The Court might require the child to live in a place, knowing that the Mother will remain.

The essential issue, then, was whether the Court had power to give effect to each of those orders:

There is no doubt that the Court has power to give effect to the third type of order. (see Section 65D FLA).

It is the other two types of orders which hold more interest. The Court made these findings:

1. An order requiring a parent to live in a particular place is not a parenting order under Section 64B FLA..

2. There is power to make such an order under Section 114(3) FLA as long as the injunction is no more than is necessary to secure the best interests of the child.

The Court did qualify the power by indicating that its exercise would be rare.

Crowe

Judgment was given in this matter in January 2009. Cohen J seems to have taken a very adverse view of the mother who wanted to relocate from Beecroft to the Lower Hunter Valley.

In denying her application, his Honour determined that *the orders the wife seeks would make it impractical for the father to spend substantial and significant time with the children* (at Para 48).

He dealt with the freedom of movement argument in these words: *No order of mine will prevent the wife from living in the Hunter Valley* (at Para 77). The relevant order was *That the wife is hereby restrained from moving the children's home when they are living with her to any place outside the circumference of the area within a radius of 30km from the Sydney GPO.* The father had made no application for the children to live with him.

Morgan v Miles

Morgan dealt with young children (6 & 3 years) living with their mother on the south coast of New South Wales. She wanted to live in, and moved to, a town 144 km from the Father. The Father sought to restrain the move at an interim hearing.

The matter first came before Brewster FM on 10 April 2007. He required the mother to return them.

Her Honour Justice Boland upheld that exercise of discretion but made these determinations:

1. Consistent with Goode, arrangements which alter the child's present stability should not be determined at an abridged interim hearing.

2. The consequences of the proposed move (measured against, inter alia, the financial capacity of the parties, the developmental stage of the child and the relationship of both parents with the child) may often be more important than distance.

I understand that there are at least two cases awaiting the decision of the Full Court which will set out the current approach to relocation.

Summary

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1. There is nothing in the new provisions which expressly alters the previous approach to relocation.

2. There is however a fresh approach to the involvement of both parents in the lives of their children.

3. It will still be the case that interim hearings will be largely committed to preserving the status quo.

4. It is still a matter for the Court to determine the weight to attach to each of the relevant factors.

5. It may be that there is now no longer any relevant distinction between a relocation which is sufficiently distant to preclude effective mid-week time with the non-residential parent and a relocation over a much longer distance.

6. It seems likely that the Court will find it easier to deny an application to relocate. Firstly, because the Court has claimed the power to restrain the residential parent . Secondly, because it is now a relatively simple matter for the non-residential parent to claim that even a short distance relocation will preclude substantial and significant time and will subvert the purposes of the FLA.

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