



Child Relocation Applications & Case update 2022

FLA 1975 Part VII Legislative
Pathway:
Mind the Potholes!

Presented by:

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FOLEY'S | LIST

**Relocation cases are just like
any other parenting case...
except trickier!!**

[Introduction]

- ❖ Part VII, FLA 1975: children's matters
- ❖ Complex (but important) "legislative pathway" to follow
- ❖ The pathway is not linear and it has some trips and traps. Mind the potholes!
- ❖ Relocation cases arguably made more difficult by the following competing factors:
 - Rise in equal /substantial shared parenting arrangements since 2006 'Shared Parental Responsibility' Act reforms; and
 - Post-global pandemic rise in desire for freedom of movement

[Part VII: Objects and Principles]

- **S.65D** All parenting orders are subject to the presumption of equal shared parental responsibility (“**ESPR**”)
- **S.60CA & S.65AA - Paramountcy Principle:**
 - In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

[Part VII: Objects and Principles]

S.60CC - How does the Court determine the best interests of the child?

- **S. 60CC(2) - PRIMARY** considerations:
 - a) the benefit to the child of having a meaningful relationship with both parents; and
 - b) the need to protect the child from physical or psychological harm or from being subjected to, or exposed to abuse, neglect or family violence
- S.60CC(2A) - where these two principles conflict, the latter is given greater weight

[Part VII: Objects and Principles]

S.60CC - How does the Court determine the best interests of the child? (cont'd)

s.60CC(3) - ADDITIONAL considerations:

- any views expressed by the child (with weight to be given in accordance with the child's level of maturity and understanding)
- the nature of the relationship of the child with their parents and other important persons such as grandparents
- the extent to which a parent has taken the opportunity (or not) to participate in making decisions about the major long-term issues in relation to the child, to spend time and to communicate with the child
- the extent to which a party has fulfilled their obligations to maintain the child;

[Part VII: Objects and Principles]

s.60CC(3) - **ADDITIONAL** considerations (cont'd):

- the likely effect of any change in the child circumstances (including separation from a parent or any other child or relative with whom they have been living);
- the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affects the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- the capacity of each of the child's parents and any other person (including grandparent or relative) to provide for the needs of the child, including emotional and intellectual needs;
- the maturity, sex, lifestyle and background of the child and the parents;
- the right to enjoy the child's Aboriginal or Torres Strait Islander heritage (if applicable) and the impact of any order upon that right;

[Part VII: Objects and
Principles]

s.60CC(3) - ADDITIONAL considerations (cont'd):

- the attitude demonstrated by each parent toward the child and to the responsibilities of parenthood;
- any family violence involving the child or a member of their family;
- any family violence order (past or present) involving the child or a member of their family and any inferences that can be drawn from the order;
- whether it would be preferable to make the order that would be least likely to lead to further proceedings; and
- any other fact or circumstance which the court thinks relevant.

[Part VII: Objects and Principles]

- **S.60B** - Objects and Principles of Part VII of the Act which apply in all parenting and Relocation cases:
 - (a) ensuring that children have the benefit of meaningful involvement of both parents to the maximum extent consistent with their best interests;
 - (b) protecting children from physical or psychological harm, neglect and family violence;
 - (c) ensuring children receive adequate and proper parenting to reach their full potential; and
 - (d) ensuring that parents meet their duties and responsibilities to children.

[Family violence]

Family Violence & Abuse

- *Defined in s.4AB of the Act*
- **s.60CG** – court must consider risk of FV and any FV orders and make sure the parenting order is consistent with any FV order;
- **s.68P & s.68Q** – where parenting orders inconsistent with FV orders, the latter is invalid to extent the inconsistency. Courts may make a declaration;
- **s.60I** – court requires parties to attend Family Dispute Resolution (“FDR”) prior to making parenting /Relocation application);
- **s.60I(9)(b)** – FDR exemptions in relation to FV and abuse/ risk;
- **s.69ZW** – court can make orders seeking information from a child protection authority

In this case it is better to ask
for PERMISSION than
forgiveness!

[Pre-emptive Relocation]

Relocating Unilaterally Outside Australia

- **Section 65Y** - criminal offence (3 years jail) for a parent (or their agent) to take, send or retain a child outside of Australia without the authenticated written consent of each other party or an order of the court, when there are:
 - parenting orders in force; or
 - parenting proceedings pending,
 - ss. 65Y(1), 65YA(1), 65Z(1) and 65ZAA(1) of the Act
- Exception where a person reasonably believes this is necessary to prevent family violence.
 - ss. 65Y(2), 65YA(2), 65Z(2) and 65ZAA(2) of the Act

[Pre-emptive Relocation]

Relocating Unilaterally Within Australia

- Inadvisable (other than cases of urgency or genuine risk to safety) to pre-emptively relocate children from their existing residence where:
 - court orders restraining/inconsistent with same
 - there is likely to be a dispute
 - there is no written consent.
- If a party does move pre-emptively, they should initiate proceedings seeking Relocation orders as soon as practicable thereafter, to mitigate any ongoing breach of orders.

Unilateral Relocation - Family Violence and Urgency

Deiter [2011] FamCAFC 82 [at 55]

- Full Court overturned an order requiring a mother to return with the children in the interim
- On the basis that the order was made without first “conducting a discrete hearing to deal with the allegations of violence” as alleged against the father, which should have occurred in those circumstances.

Moray & Schuler [2018] FCCA 3931

- mother initially travelled from Melbourne to Sydney with young children to visit the terminally ill maternal grandmother.
- Mother made a subsequent application to remain in Sydney until further order so that she could care for mother and children could spend time with their grandmother (aggressive brain tumour and limited life expectancy).
- The court permitted the mother to remain in Sydney pending final hearing

[Exceptions – interim
relocation]

Goode and Goode (2006) FLC

Morgan & Miles (2007) 38 Fam LR 275

[Goode's Case]

- Full Court found in **Goode** (upheld in **Morgan & Miles**) that the 2006 Shared Parental Responsibility reforms to the Act had effected a change to the legislative pathway to be followed by the courts in parenting / relocation matters
- Move away from the **Cowling** principle of “well-settled arrangements” (i.e. favouring status quo)
- where there is an ESPR order and the status quo is at odds with the new legislative pathway, the court must consider equal time as a first resort under s.65DAA (regardless of status quo)

Major Long-Term Issues – S.4

"Major long-term issues", in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

- (a) the child's education (both current and future); and*
- (b) the child's religious and cultural upbringing; and*
- (c) the child's health; and*
- (d) the child's name; and*
- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.*

To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a major long-term issue in relation to the child. However, the decision will involve a major long-term issue if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent".

[Major Long-Term Issues]

[Common Law Parental Responsibility]

s.61C - Common Law Parental Responsibility

S.61C - each parent of a child under 18 has parental responsibility for the child.

S.61B defines parental responsibility as “*all the duties, powers, responsibilities and authority which, by law, parents have in relation to children*”.

Concept of “common law parental responsibility”:

- different from statutorily imposed parental responsibility under the Act
- exercised *jointly and severally* by parents of a child.

s.61DA - Presumption of Equal Shared Parental Responsibility

The presumption of ESPR:

s.61DA - 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.

[PRESUMPTION of Equal
Shared Parental
Responsibility]

- applies unless there are reasonable grounds to believe that a parent (or a person who lives with a parent of the child) has engaged in abuse of the child or family violence;
- applies at an interim hearing, unless the Court thinks it would not be appropriate in the circumstances for it to apply; and
- may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

S.65DAC

Parties Must Agree on Major Long-term Issues

Where:

- 2 or more people share parental responsibility for a child; and
- The exercise of parental responsibility involves making a decision about a **major long-term issue** in relation to the child

THEN the order is taken to require the decision to be made jointly by those persons AND for such purposes that party is required :

- ✓ to consult the other person in relation to the decision to be made about that (major long term) issue; and
- ✓ to make a genuine effort to come to a joint decision about that issue.

The practical effect of **s.65DAC** is that if parties cannot come to a joint decision about Relocation after making a genuine effort to do so, the Court must decide the issue for them.

[Parental obligations where
court makes an order for
ESPR]

[s.65DAA –
Equal Time or Substantial &
Significant Time]

s.65DAA

Equal Time or Substantial & Significant Time

Step 1

- **Section 65DAA(1)** sets out the court's obligation to consider **equal time**, if it is in the:
 - best interests of the child AND
 - reasonably practicable.
- If not, then the court must move onto subsection (2).

Step 2

- **Section 65DAA(2)** sets out court's obligation to consider **substantial & significant time**, if in the:
 - best interests of the child AND
 - reasonably practicable.

**[s.65DAA –
Equal Time or Substantial &
Significant Time]**

Section.65DAA(3)

Definition of Substantial and Significant time:

“For the purposes of subsection (2), a child will be taken to spend substantial and significant time with a parent only if:

- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and*
 - (ii) days that do not fall on weekends or holidays; and**
- (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child's daily routine; and*
 - (ii) occasions and events that are of particular significance to the child; and**
- (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.”*

Subsection (4) provides that “subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.”

[s.65DAA –
Equal Time or Substantial &
Significant Time]

Section 65DAA(5)

Factors to which the court must have regard when
**determining if spend time is “reasonably
practicable”:**

- how far apart the parents live from each other;
- the parents’ current/ future capacity to implement equal or substantial/significant time;
- the parents’ current/ future capacity to communicate and resolve difficulties;
- the impact of such arrangements on the child; and
- such other matters the court considers relevant.

The Court has power under s.13C of the Act to order the parties to attend counselling, FDR and courses etc to improve their capacity to co-parent and work things out.

[s.65DAA –
Equal Time or Substantial &
Significant Time]

➤ **s.65DAA is triggered by an order for ESPR**

- In the majority of cases an ESPR will be made.
- If so, (or an ESPR an order already exists/ remains unchallenged) the court must follow the 2 steps under s.65DAA.
- Each step has two components:
 - best interests of the child AND
 - reasonably practicable.
- Both questions must be answered in the AFFIRMATIVE before the statutory pre-requisite for making of an equal time (or substantial and significant time) order is met.
- Otherwise, the court has no power to make such an order under this section.
- Although it does have general discretion thereafter, it is unlikely such an order would be made 'at large' if not made under s.65DAA

[The “REASONABLY PRACTICABLE” Test]

Leading case of MRR v GR - the “Reasonably Practicable” test

The High Court said it was not enough to find under s.65DAA(1)(a) that equal time arrangements were in the child’s best interests, as that was only half the test.

Such arrangements also had to be reasonably practicable under s.65DAA(1)(b), to meet the statutory requirements for an equal time order to be made.

Mother seeking to Relocate from Mt Isa, Qld (7yo in equal shared care) to Sydney (mother to have primary care)

Applying the “reasonably practicable” test was more than just considering what was reasonably practicable for the child **if the mother stayed in Mr Isa**

Rather, the court had to conduct a comparative assessment under s.65DAA(1) as to whether it was reasonably practicable for the child to spend equal (or substantial) time with her parents **if the mother moved to Sydney.**

MRR v GR [2010] HCA 4 (cont'd)

[The “REASONABLY PRACTICABLE” Test]

Clearly the answer to the latter question (equal time was between Qld and NSW) was no, so that court had to make the same assessment as to Substantial & Significant time

If substantial time between Qld and NSW was not reasonably practicable but:

- it was otherwise in the child’s best interests to remain in the care of the mother) and
- all of the other objects and principles in Part VII had been considered

The court has no power under s.65DAA(2) to make a substantial and significant time order

....so the “time spent” orders are then in the Court’s general discretion

MRR v GR [2010] HCA 4 (cont'd)

The proposed destination will almost never be as convenient as the status quo, but the Court must conduct a proper and robust analysis of ALL competing proposals

The court found it not be in the child's best interests to remain living in Mt Isa. The court made orders as follows:

- Parents retain ESPR;
- father's time with the child be reduced to each alternate weekend from Friday to Sunday afternoon and half holidays;
- plus every Thursday overnight if he lived within 50km of the mother; and
- 3 x weekly Skype/phone calls

[Orders made in *MRR v GR*]

[Summary of the LEGISLATIVE PATHWAY]

SUMMARY OF STEPS IN THE PART VII “LEGISLATIVE PATHWAY”

1. Identify the competing proposals of the parties
2. Identify the key issues in dispute
3. At an Interim hearing in particular, identify the agreed/disputed facts
4. Consider the relevant “additional considerations” in terms of the ‘best interests’ of the child/ren under s.60CC(3)
5. Look at the “primary considerations” under s.60CC(2) in light of the best interest factors and decide whether the benefit of a meaningful relationship is outweighed by a risk of harm
6. Consider presumption of ESPR under section 61DA:
 - a. Does not apply if reasonably evidence of FV or abuse;
 - b. Rebutted by evidence that it would not be in the child’s best interests
 - c. Does not apply if court does not consider it appropriate in the interim.

[Summary of the LEGISLATIVE PATHWAY]

- If ESPR presumption prevails, the Court will make an order for ESPR and move onto the step 7.
- If no order for ESPR is made, the Court will skip s.65DAA (steps 7 and 8) and move directly to step 9.

7. Consider under s.65DAA(1) whether:

- a. **equal time is in the best interests of the child** (refer back to factors in s.60CC(3)); and
- b. **equal time is reasonably practicable**
 - i. refer definition in s.65DAA(5) and go through the four steps in sub-sections (a) to (d) to assess issues of reasonable practicability; and
 - ii. consider if there are any other matters the court thinks are relevant to the issue of reasonable practicability under subsection (5)(e)

8. Unless both questions in step 7 are answered in the affirmative, the court must then on to consider under s.65DAA(2) whether:

- a. **Substantial and significant time is in the best interests of the child:**
 - i. refer s.65DAA(3) for the definition of such time
 - ii. refer back to s.60CC(3) re: best interests factors;
- and
- a. **Substantial and significant time is reasonably practicable:**
 - i. refer definition in s.65DAA(5) and work the steps in subsections (a) to (e) inclusive as above

[Summary of the LEGISLATIVE PATHWAY]

9. Unless both questions in step 7 are answered YES, the court must consider:

- a. Making a **parenting order in the general discretion of the court** which is in the best interests of the child (refer s.60CC(3)); and
- b. In doing so, have regard to the paramountcy principle, the primary considerations (s.60CC(2)) and the objects under s.62B.

10. Assess the parties' competing proposals as a whole in deciding with whom the child should live and/or spend time:

- not treating the Relocation application as a separate issue,
- decide what is in the best interests of the child OVERALL.

This process should determine whether or not a party is able to relocate with the children.

NOTE:

If there is no order for ESPR (thus s.65DAA in the pathway is skipped) this does not preclude the Court considering the options of equal or substantial and significant time. It is just not obliged to do so.

[LEADING CASE PRINCIPLES – RELOCATION]

LEADING CASE LAW PRINCIPLES

- ***A v A: Relocation Approach*** [2000] FamCA
- ***B and B: Family Law Reform Act 1995*** (1997) FLC 92-755 at 194
- ***AMS v AIF; AIF v AMS*** [1999] HCA 26

1. The best interests of the child are the paramount but not sole consideration.
2. *“A court cannot proceed to determine the issues in a way which separates the issue of relocation from that of residence and the best interests of the child. There can be no dissection of the case into discrete issues, namely a primary issue as to who should have residence and a further or separate issue as to whether the relocation should be ‘permitted’.”*

A v A: Relocation Approach

3. “A “relocation case” is not a specific sub-category of parenting case and no principles specific to such cases apply. Such cases are simply cases in which parenting orders are sought in particular factual circumstances.”

Cowley and Mendoza [2010] FamCA 597 [at 31]

[LEADING CASE PRINCIPLES – RELOCATION]

4. Neither the applicant nor respondent bears an onus.
 - a. The applicant is not required to demonstrate “compelling reasons” for the proposed relocation; and
 - b. neither is there any onus on the person “left behind” to demonstrate why the other parent should not move.

Malcolm & Monroe and Anor [2011] FamCAFC 16

5. A court must evaluate and weigh the competing proposals of the parties against the relevant provisions of the Act. Subject to procedural fairness considerations, the court may formulate its own proposals in the best interest of the child.

6. The evaluation of the competing proposals (properly identified) must involve the court weighing the evidence and submissions and considering the advantages and disadvantages for the child's best interests of each competing proposal.

Taylor and Barker (2007) 37 Fam LR 461

[LEADING CASE PRINCIPLES – RELOCATION]

7. A parent's right of freedom of movement right must defer to the child, if the welfare of a child would be adversely affected.

- a. *"In determining a parenting case that involves a proposal to relocate the residence of a child, care must be taken by a court to ensure that where applicable, it frames orders which in both form and substance are congruent with a party's rights under s92 of the Constitution, where applicable."*
- b. Notwithstanding that the court must have regard to the best interests of the child as the paramount consideration, this does not oblige a court to ignore the legitimate interests and desires of the parents. If there is a conflict between these considerations however then priority must be given to the child's welfare/rights.

A v A: Relocation Approach

8. As stated in **Morgan and Miles**

- *"Sensibly, 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..."*

[RECENT CASES– RELOCATION]

Recent Cases – Relocation

- **Cording & Cording [2022] FedCFamC1A 51**

Appeal to a single Judge (Aldridge J) by a mother who was refused permission by the primary judge to relocate interstate with her children.

Key issue - was “reasonably practicable” for the mother to remain living in her local area?

Appeal was allowed on the basis that there were errors in relation to findings of fact (no evidence to support the findings that it was reasonably practicable for her to remain.

Orders refusing the relocation set aside with costs and remitted for rehearing in April 2022.

Take home message:

- Prepare your client’s evidence as to their current personal and financial situation very carefully – make it harder for the other side to challenge and easier for the court to accept without any doubt and without making assumptions

[RECENT CASES– RELOCATION]

Jefford & Jefford [2022] FedCFamC1F 539

First instance decision by the Honourable Justice Austin handed down in July 2022

- Mother's application to relocate with the children from Australia to the United Kingdom.
- Permission was granted to the mother to relocate but delayed until the end of 2023.
- Conditional upon her obtaining a declaration that the orders were registrable and enforceable in the United Kingdom.

The **s.65DAA** aspect of the pathway was not enlivened due to the order for sole PR (i.e. the lack of an order for ESPR) - no mandatory consideration of equal/substantial time was necessary.

Analysis of Primary Considerations (meaningful relationship vs risk & Additional considerations

Court drew distinction between an outcome which is positively deleterious and an outcome which is merely sub-optimal (but not harmful).

Court found the **mother's right of freedom of mobility should only defer to the paramountcy principle if the welfare of the children was adversely affected. As relocation would not harm the children (even if not the ideal arrangement) thus the mother should be free to go.**

Take-home messages

Relocation applications may be **more likely to be successful where there is a proposed delay**

If **challenging the presumption of ESPR**, ensure your client puts very clear (and if possible corroborated) **evidence of family violence, risk of abuse/neglect and/or other 'best interests' factors** which would support an outcome that the presumption does not apply

[RECENT CASES– RELOCATION]

Bergmann & Bergmann [2022] FedCFamC1A 38

Orders made at final hearing for 10 and 12 year old children (primarily attached to the mother) to live with the father in Australia; children to spend time with the mother in holidays whilst her residence is in France.

Mother successfully appealed to the Full Court on the basis that the primary judge “fell into error by finding, contrary to the available evidence, the father could not travel to France at all, or alternatively, could at best only do so once per year for a short period, regardless of whether or not pandemic travel restrictions were in place.” **This was a mistaken finding upon which the primary judge’s discretion was exercised:**

“The primary judge traded-off, on the one hand, the mistaken finding about the father’s practical inability to travel and the consequential deleterious effect upon the children of their separation from him and, on the other hand, the children’s closer emotional attachment to the mother and her enhanced ability to help the children adapt to changes.”

- Take home message:
- It is imperative that clear, consistent and supportable evidence is put before the court in relation to a party’s working commitments, travel flexibility, financial capacity and the general access ability of air travel in any (especially international) Relocation case

[RECENT CASES– RELOCATION]

Mallory & Mallory [2022] FedCFamC1F 697

- Judgment of the Honourable Justice Carter in Melbourne in September 2022
- Four children in split care:
 - older two children aged 14 and 16 years (with father, found to be estranged from mother, influenced by father, beyond repair)
 - younger children (with mother) were aged 11 and 9 years.
- Mother's Relocation application to relocate to Sydney with younger two children to be with new partner
- Mother alleged significant risks to the younger two children in the care of the father and asserted that his ability to support their relationship with the mother was negligible. Court agreed.

[RECENT CASES– RELOCATION]

Parties agreed father would have sole parental responsibility for the older two children living with him

Court found that mother was an “appropriate and responsible parent” and made an order (contrary to father’s application) that she have **sole parental responsibility for the two younger children** in her care. [This no doubt assisted her Relocation case too]

“As I am not making an order for equal shared parental responsibility I am not required to follow the legislative pathway set out in s 65DAA of the Act.”

Analysis of Primary & Additional considerations (best interests) – Discretion

Court said:

“The benefit to the children of having a meaningful relationship with him must be weighed against the risks to the children in maintaining that relationship with him, being the likely damage that will be done to their relationship with their mother. In all the circumstances, I have real concerns that if the father continues to have an ongoing relationship with the girls on an unsupervised basis, this will on balance, be likely to cause them more harm than good”.

The Court ordered the children spend time with their other parent and siblings “as agreed” and in relation to the father and younger children ordered that:

“any gifts, cards or letters from the father to the girls shall be forwarded via the mother and she may decline to pass on that material if she is of the view that it would not be appropriate to provide same”

[RECENT CASES– RELOCATION]

Take home messages:

- Even where ESPR is not ordered and thus the 'equal time' / 'substantial time' provisions of s.65DAA are not triggered/do not apply, **the balance of the legislative pathway must still be carefully followed** including but not limited to a consideration of:
 - the objects of the Act
 - thorough consideration of the s.60CC additional and primary considerations - meaningful relationship with both parents subject to any risk;
 - the Paramountcy Principle;
 - and a full consideration of the advantages and disadvantages of each parties' proposals.
- Following the legislative pathway and balancing all considerations holistically is the only way to arrive at an assessment of the best interests of the children which takes into account all of the relevant factors required by the legislation.
- This case reinforces that the question of Relocation is only one aspect of the overall parenting case and not an issue dealt with in isolation.

[CONCLUSION]

Conclusion

- **The law is quite well settled - it is the application of the law to the facts which is tricky!**

Often the outcome of a Relocation case is influenced by a lack of clarity in the evidence or by the fact that key evidence remained unchallenged.

- **We must understand and follow the legislative pathway in our preparation of Relocation cases, to ensure that all the relevant evidence is before the Court.**

*Prepare your Relocation case carefully in accordance with a clear **case concept**.*

- **Ensure that all relevant evidence supporting your “case concept” is put before the court in admissible form in a way which addresses all the key points along the legislative pathway**

Good luck!

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Child Relocation Applications & Case Update 2022

FLA 1975, Part VII Legislative Pathway: Mind the Potholes!

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*Leo Cussen Centre for Law
Family Law Conference
15 November 2022*

1. Introduction

The global pandemic, with all its associated restrictions and lockdowns, brought into sharp focus the issue of freedom of movement and also the desirability of being close to our family and loved ones. The adverse impact upon many people was significant, including children of separated parents relying on air travel and border crossings to enable them to spend regular time with their other parent. For some children the pandemic lockdowns meant a complete suspension of face-to-face 'spend time' arrangements with their other parent/household, due to grounded aeroplanes and difficult border crossings. Of course, accessible and affordable technology enabling parent/child communication by FaceTime and Zoom etc was a lifeline, but as we all know when it comes to children, there is no substitute for face to face time and physical affection/ interaction.

The need to balance an increasing demand for parental freedom of movement (particularly post-pandemic) against the importance of maintaining a child's right to have a safe and meaningful relationship with both parents including regular face-to-face time, is a difficult issue with which the Courts grapple every day in Relocation cases.

Further, there has been an inevitable increase in the number of "equal time" parenting arrangements over the last 16 years since the *Family Law Act* 1975 Cth (**FLA or the Act**) was amended by the 'Shared Parental Responsibility Act'.² The tension between maintaining existing shared or equal time care arrangements and facilitating parental freedom of movement means that the family law courts have to deal with large and seemingly increasing volumes of Relocation applications. Relocation cases are often very finely balanced cases, which makes them difficult for parties and practitioners to prepare and often painstaking for Judges to consider and decide.

An important thing to remember is that Relocation cases are "just like any other parenting case" in that they follow the same legislative pathway set down for all other parenting matters in Part VII of the *Family Law Act* 1975.³ The outcome of each relocation case (as with any parenting case) turns on its own facts and thus cases need to be well prepared, with a keen eye for detail in terms of the evidence that will be relevant to the legislative pathway which the court must follow.

¹ Michele Brooks has been a member of the Victorian Bar and Foley's List practising in family law for the past 16 years. She has been a family lawyer for over 25 years. Michele is also a Nationally Accredited Mediator and Family Law Arbitrator.

² The *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth) came into effect on 1 July 2006. It provided a new pathway including a presumption of Equal Shared Parental Responsibility which, if applicable and not rebutted, mandated the court to consider making orders for "equal time" parenting arrangements (if reasonably practicable and in the best interests of the child) as the first port of call.

³ **B and B: Family Law Reform Act 1995** (1997) FLC 92-755 at 194

It goes without saying therefore, that to prepare the best case for their clients, practitioners must have an excellent working knowledge of the legislative pathway in Part VII of the Act which the court will be following when deciding these cases. The need to sharpen our skills in this area is only amplified by the fact that Relocation cases tend to be “high stakes” and notoriously difficult to compromise (which means they tend to ‘run’ more often than other parenting cases).

The purpose of this paper is to provide:

- an overview of the FLA Part VII legislative pathway in the specific context of Relocation Applications and a refresher of the leading Relocation case principles and themes; and
- an overview of some recent (2022) FCFCOA Appellate and Division 1 first instance judgments in ‘Relocation’ cases, with some suggested “take home messages” from those cases.

2. Part VII of the Family Law Act 1975: The Legislative Pathway

(a) Objects and Principles of Part VII of the Act – Overview of Key Provisions

S.65D of the Act provides that when making parenting orders, subject to the presumption of equal shared parental responsibility (“ESPR”), the Court may make such parenting order as it thinks proper.

S.60CA⁴ contains the “**Paramountcy Principle**” with which all family lawyers will be familiar:

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

The Act provides that the best interests of a child are to be assessed by the court having regard to the principles and factors in **S.60CC(2)** and **(3)** namely:

- Subsection (2) provides that the **PRIMARY** considerations are:
 - (a) the benefit to the child of having a meaningful relationship with both parents; and
 - (b) the need to protect the child from physical or psychological harm or from being subjected to, or exposed to, abuse, neglect or family violence (with the latter consideration to be given greater weight than the former)⁵
- Subsection (3) provides for **ADDITIONAL** considerations, summarised as follows:
 - any views expressed by the child⁶ (with weight to be given in accordance with the child’s level of maturity and understanding);
 - the nature of the relationship of the child with their parents and other important persons such as grandparents;
 - the extent to which a parent has taken the opportunity (or not) to participate in making decisions about the major long-term issues in relation to the child, to spend time and to communicate with the child;
 - the extent to which a party has fulfilled their obligations to maintain the child;

⁴ The Paramountcy Principle is also expressed in section **65AA**

⁵ **S.60CC(2A)** is the amendment to the Act which came into force on 7 June 2012 to clarify an issue arising from the 2006 legislative reforms, namely what happens when these considerations conflict?

⁶ Refer **s.60CD** of the Act (how the views of a child may be expressed), as well as **s.60CE** (a child is not required to express a view) and **s.62G** (the views of a child can be ascertained by obtaining a report from a Family Consultant)

- the likely effect of any change in the child circumstances (including separation from a parent or any other child or relative with whom they have been living);
- the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affects the child's right to maintain personal relations and direct contact with both parents on a regular basis;⁷
- the capacity of each of the child's parents and any other person (including grandparent or relative) to provide for the needs of the child, including emotional and intellectual needs;
- the maturity, sex, lifestyle and background of the child and the parents;
- the right to enjoy the child's Aboriginal or Torres Strait Islander heritage (if applicable) and the impact of any order upon that right;
- the attitude demonstrated by each parent toward the child and to the responsibilities of parenthood;
- any family violence involving the child or a member of their family;
- any family violence order (past or present) involving the child or a member of their family and any inferences that can be drawn from the order;
- whether it would be preferable to make the order that would be least likely to lead to further proceedings; and
- any other fact or circumstance which the court thinks relevant.

S.60B of the Act sets out the Objects and Principles of Part VII of the Act which apply in all parenting (including Relocation) cases, summarised as follows:

- (a) ensuring that children have the benefit of meaningful involvement of both parents to the maximum extent consistent with their best interests;
- (b) protecting children from physical or psychological harm, neglect and family violence⁸;
- (c) ensuring children receive adequate and proper parenting to reach their full potential; and
- (d) ensuring that parents meet their duties and responsibilities to children.

In all parenting (including Relocation) cases the court has certain obligations around matters involving family violence ("FV") and abuse, including:

- **s.60CG** – the court must consider the risk of FV and the existence of any FV orders and make sure that the parenting order is consistent with any FV order and does not expose a party to unacceptable risk of FV;
- **s.68P & s.68Q** – where parenting orders are inconsistent with FV orders, the latter is invalid to extent of the inconsistency. Courts may make a declaration about this for avoidance of doubt;
- **s.60I** – The court requires parties to attend Family Dispute Resolution ("FDR") prior to bringing a parenting application (including Relocation application) to court, however there are relevant exemptions e.g., **s.60I(9)(b)** in relation to FV and abuse or risk of same; and
- **s.69ZW** – the court can make orders seeking information from a child protection authority to assist the court in making a decision in the best interests of the children.

⁷ The underlined provisions in this list are particularly relevant in Relocation cases, for obvious reasons.

⁸ Family violence and abuse are defined in s.4AB of the Act

Morgan & Miles⁹ was Family Court appeal heard by the Honourable Justice Boland dealing with the issue of the mother's interim relocation, pending final hearing. The following extract from that case provides a pertinent summary of the *preliminary* steps in any Relocation case:

"In considering whether the child should live with the parent who proposes to relocate a court:

- *Must be satisfied the parties have, unless an exclusionary circumstance applies, genuinely attempted to resolve the dispute.*
- *Make orders having regard to the child's best interest as the paramount, but not the sole consideration.*
- *Be guided in its determination by the objects and principles underpinning the legislation. This requires a judicial officer when considering the primary and additional considerations to inform that consideration against a background of the objects including having regard to both parents having a meaningful involvement to the maximum extent consistent with the best interests of the child."*

(b) Pre-emptive or Unauthorised Relocation & FLA sections relevant to Relocation

International relocation

Section 65Y¹⁰ and the related provisions in Division 6 of Part VII provide that a person commits a criminal offence punishable by 3 years imprisonment if they or their agent take, send or retain a child outside of Australia at a time when there are parenting orders in force to which they are a party, or there are parenting proceedings pending, without the authenticated written consent of each other party or an order of the court. The only exception is where a person reasonably believes based on their perception of the circumstances that this is necessary to prevent family violence.¹¹

It is therefore imperative that practitioners advise clients who are seeking to internationally relocate children subject of court orders or proceedings (or indeed, in any situation where there is a dispute and/or no written consent has been provided) that they should not under any circumstances act unilaterally or pre-emptively. This is one situation where the adage "*better to ask forgiveness than permission*" definitely does not apply.

Interstate or Intrastate relocations

In relation to interstate or intrastate relocations within Australia, even though criminal law penalties do not apply, it is still highly inadvisable (other than cases of urgency or genuine risk to safety) for a party to pre-emptively relocate children from their existing residence in circumstances where there are court orders in place preventing same (or inconsistent with doing so) or in circumstances where there is likely to be a dispute and/or there is no written consent. If a party does move pre-emptively, they should initiate proceedings seeking Relocation orders as soon as practicable thereafter, to mitigate any ongoing breach of orders and/or to demonstrate their awareness of the importance of making proper arrangements for the children rather than just taking matters into their own hands.

Pre-emptive Relocation without consent or in breach of existing orders can create poor optics for your client as well as expensive and difficult logistical issues (especially, for example, if they have already sold a house, given notice to end a lease, or committed to a new residence elsewhere), not to mention what the court might regard as a lack of insight on their part in making a unilateral

⁹ (2007) 38 Fam LR 275 per Boland J at [79]

¹⁰ Subsection (1) in each of ss. 65Y, 65YA, 65Z and 65ZAA of the Act

¹¹ Subsection (2) in each of ss. 65Y, 65YA, 65Z and 65ZAA of the Act

move that unduly disrupts their children, in circumstances where it could have been predicted they might be brought back in the interim (on a recovery order or restraining order) pending trial. The court may have limited sympathy for parties who purport to 'tie the court's hands' by removing children unilaterally (absent urgency or risk) from their usual residence without permission of the Court or the other party. In the majority of such cases the Court will not hesitate to make an order that the party return the children to their usual location pending a proper hearing of the matter on an interim and/or final basis.

In **Morgan & Miles**,¹² the court made it clear that it will not adopt a different process in considering a case just because a party moves pre-emptively. The Court said at paragraph 55:

"It is illogical to suggest it is appropriate for an unauthorised unilateral move to occur, and that a court's discretion in determining a child's best interests, including time to be spent with the other parent, be inappropriately fettered by a move which has already occurred."

Family Violence and Urgency

However as indicated above in relation to urgency and risk, there are exceptions where appropriate and the court will consider the evidence and exercise its discretion. In the case of **Deiter**,¹³ the Full Court overturned an order requiring a mother to return with the children in the interim, on the basis that the order was made without first "conducting a discrete hearing to deal with the allegations of violence" as alleged against the father, which should have occurred in those circumstances.

There are many examples of the court allowing a party to relocate (or remain at a location to which they have travelled prior to coming to court) as a result of an interim hearing as to urgency, risk or other pressing matters, such that they can relocate pending trial, if the circumstances are appropriate.

For example in the case of **Moray & Schuler**¹⁴ (a case, incidentally, in which the writer appeared for the applicant mother) the mother initially travelled from Melbourne to Sydney with young children to visit the terminally ill maternal grandmother. She made a subsequent application (inter alia) to remain in Sydney until further order so that she could help care for her mother and so the children could spend as much time as possible with their grandmother, given she had an aggressive brain tumour and limited life expectancy.

It is noted that parties had previously lived in Sydney but had moved to Melbourne due to the husband's work commitments. The mother had other reasons for wanting to relocate back to Sydney in the long term (there were FV allegations and she also had connections and support there) however the pressing issue for the interim relocation was her mother's ill health. Her Honour Judge Harland permitted the mother to relocate/remain in Sydney pending final hearing and made orders for the father to spend time with the children on a regular basis in both Sydney and Melbourne in the interim.

Returning to the case of **Morgan & Miles**; her Honour then went onto consider in some detail the issue of what (if any) impact of the 2006 'Shared Parental Responsibility' amendments to the Act upon the Court's approach to Relocation matters, particularly in the case of a pre-emptive relocation.

¹² At paragraphs [55] and [77]

¹³ **Deiter** [2011] FamCAFC 82 [at 55].

¹⁴ **Moray & Schuler** [2018] FCCA 3931

In doing so the Court examined the pre-2006 leading case of **Cowling and Cowling**¹⁵ which focussed upon the importance of a preserving a “well settled environment” for children pending hearing of a Relocation application. This concept is what family lawyers might have traditionally referred to as an argument in favour of “*maintaining the status quo*” pending a final hearing. Her Honour also looked at the Full Court’s reconsideration of **Cowling** in the leading case of **Goode and Goode**.¹⁶

In doing so, her Honour found the Full Court in **Goode** had determined that the 2006 reforms to the Act had effected a change to the law which required reconsideration of the **Cowling** principle of “well-settled arrangements”. This was particularly relevant where the status quo parenting arrangements were at odds with the structure of the new legislative pathway requiring the court to consider equal time as a first resort under s.65DAA (regardless of the status quo) in matters where there was an order for equal shared parental responsibility (ESPR) in place. The Court in **Morgan & Miles** quoted **Goode’s** case at paragraphs 72-73 as follows:

72. *In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children’s lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable. This means where there is a status quo or well settled environment, instead of simply preserving it, unless there are protective or other significant best interests concerns for the child, the Court must follow the structure of the Act and consider accepting, where applicable, equal or significant involvement by both parents in the care arrangements for the child.*

73. *That is not to say that stability derived from a well-settled arrangement may not ultimately be what the Court finds to be in the child’s best interests, particularly where there is no ability to test controversial evidence, but that decision would be arrived at after a consideration of the matters contained in s 60CC, particularly s 60CC(3)(d) and s 60CC(3)(m) and, if appropriate, s 60CC(4) and s 60CC(4A).*

(c) Major Long-Term Issues

Section 4 of the Act provides the following definition:

“Major long-term issues”, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:

- (a) the child's education (both current and future); and*
- (b) the child's religious and cultural upbringing; and*
- (c) the child's health; and*
- (d) the child's name; and*
- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent. [my emphasis]*

To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a major long-term issue in relation to the child. However, the decision will involve a major long-term issue if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent”. [my emphasis]

¹⁵ **Cowling and Cowling** (1998) FLC 92-801

¹⁶ **Goode and Goode** (2006) FLC 93-286

Plainly it can be seen from the above **s.4(e)** that “Major Long-Term Issues” is defined in a way that probably covers every situation which could also be described as a Relocation. Put another way, if a party is not proposing changes to a child’s living arrangements which will make it significantly more difficult for the child to spend time with the other parent, it is probably not a Relocation.

In the latter case, the party should simply put a proposal to the other party making any necessary adjustments to existing parenting arrangements that might be necessary to facilitate their change of address (i.e. proceed on the assumption that it is a day to day issue, not a long-term issue) and just move forward without mentioning the issue of Relocation.

(d) Relationship between Major Long-Term Issues & Shared Parental Responsibility

s.61C - Common Law Parental Responsibility

S.61C of the Act provides that each parent of a child under 18 has parental responsibility for the child. **S.61B** of the Act defines that as “*all the duties, powers, responsibilities and authority which, by law, parents have in relation to children*”.

This is a concept which I termed “common law parental responsibility” in a paper I wrote on Parental Responsibility in 2013.¹⁷ Common law parental responsibility is different from statutorily imposed parental responsibility under the Act, in that it is exercised *jointly and severally* by parents of a child. The day-to-day reality for many intact (or amicably separated) families (in the absence of a Court order to the contrary) is that the exercise of this parental power tends to happen seamlessly because parents explicitly or impliedly delegate decision making to each other as needed in order to meet the needs of the children in relation to both day to day and major issues. Each of them will just make decisions for and on behalf of the other, often without much or any joint discussion, depending upon what is most practical and convenient as they go along.

Traditionally this might mean that the stay-at-home parent (or the primary caregiver, if amicably separated and with no Court orders) makes all the decisions for a child on behalf of both parents (e.g., everything from what to eat for dinner, where to live, what school the child attends and even authorising of a child’s elective medical procedure) and will only consult the other parent when a joint signature is required (e.g. passport). Similarly, if the children are with the other parent when such decisions need to be made then the other parent would feel free to make the decision, regardless of whether it was a day-to-day matter or a major long-term decision. This is all fine when parties trust each other and are cooperative in the absence of Court orders.

However, our experience as family lawyers tells us that this situation might make some separated parents very nervous! Each of them would be keen to take advantage of a mechanism that ensures the other parent doesn’t make any major decisions without their consent.

That mechanism is an order for “Shared Parental Responsibility” under the Act, i.e., the statutory form of parental responsibility order that the court make after parents are separated and come to court (or file an application for consent orders). There is a presumption that the parental responsibility will be equally shared (see below) although that is not always that case.

Why are parental responsibility orders important in Relocation cases?

The form of parental responsibility order made by the court is important, as this has a significant impact upon the steps in the Part VII legislative pathway which must be followed by the court when considering relocation applications.

¹⁷ [“Parental Responsibility – Using it and Losing it”](#) - (8 November 2013) – paper by Michele Brooks

Equal Shared Parental Responsibility (ESPR)

Let's consider the 2006 'Shared Parental Responsibility' reforms to the Act, which, *inter alia*, introduced the concept of Equal Shared Parental Responsibility (ESPR) and further, introduced a presumption of ESPR.

The presumption of ESPR:

- applies unless there are reasonable grounds to believe that a parent (or a person who lives with a parent of the child) has engaged in abuse of the child or family violence;¹⁸
- applies at an interim hearing, unless the Court thinks it would not be appropriate in the circumstances for it to apply; and ¹⁹
- may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.²⁰

In contrast to common law parental responsibility (which, as I mentioned above, is exercised jointly and severally) when a Court makes a parenting order it must apply the presumption of ESPR, unless any of the above exceptions apply. Anecdotal experience tells us that the majority of interim and final parenting orders do include an order for ESPR.

The existence of an ESPR order is significant in cases where a party to a parenting order/application seeks to Relocate, as it triggers additional steps in the legislative pathway under s.65DAA. This is discussed further below.

ESPR means that parties must agree jointly about major long-term issues

How does ESPR actually operate in practice?

S.65DAC of the Act provides that:

- Where 2 or more people share parental responsibility for a child; and
- The exercise of parental responsibility involves making a decision about a **major long-term issue** in relation to the child ²¹
- THEN the order is taken to require the decision to be made jointly by those persons;²²
- AND for such purposes this means that a party is required ²³:
 - to consult the other person in relation to the decision to be made about that (major long term) issue; and
 - to make a genuine effort to come to a joint decision about that issue.

Therefore, the practical effect of **s.65DAC** is that if parties cannot come to a joint decision about Relocation after making a genuine effort to do so, the Court must decide the issue for them. There is no legal scope for a party to act unilaterally when the parties cannot reach agreement about Relocation and an order for ESPR is in place.

Considering that the definition of Major Long-Term Issues (about which parties must consult and come to a joint decision) includes "decisions which make it significantly more difficult for a child to spend time with a parent", it becomes now increasingly obvious to us that:

¹⁸ S.61DA(2)

¹⁹ S.61DA(3)

²⁰ S.61DA(2)

²¹ S.65DAC(1)

²² S.65DAC(2)

²³ S.65DAC(3)

- FDR in potential Relocation matters is not only sensible but usually necessary in order to comply with s.65DAC (to show evidence of a genuine effort to reach joint decision). This is a reason to attend FDR *in addition to complying with s.60I of the Act and pre-action procedure requirements*; and
- Relocation cases are likely to be more expensive because unless parties can reach agreement, they must go to a final hearing and let the Court decide the issue for them (noting again that Relocation cases tend to be high stakes “all or nothing” cases which means that coming to an agreement is more difficult than in other cases).

(e) Overview of Steps in S.65DAA – Equal Time or Substantial & Significant Time

Step 1

Section 65DAA(1) sets out the court’s obligation to consider **equal time**, if in the best interests of the child AND reasonably practicable. If not, then the court must move onto subsection (2).

Step 2

Section 65DAA(2) sets out the court’s obligation to consider **substantial and significant time**, if in best interests of the child AND reasonably practicable.

- **Section.65DAA(3)** sets out the **definition of substantial and significant time**:²⁴

“For the purposes of subsection (2), a child will be taken to spend substantial and significant time with a parent only if:

- (a) *the time the child spends with the parent includes both:*
 - (i) *days that fall on weekends and holidays; and*
 - (ii) *days that do not fall on weekends or holidays; and*
- (b) *the time the child spends with the parent allows the parent to be involved in:*
 - (i) *the child's daily routine; and*
 - (ii) *occasions and events that are of particular significance to the child; and*
- (c) *the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.”*

- **Section 65DAA (5)** sets out the factors to which the court must have regard when **determining if time is “reasonably practicable”**. This includes:
 - how far apart the parents live from each other;
 - the parents’ current/ future²⁵ capacity to implement equal or substantial/significant time;
 - the parents’ current/ future capacity to communicate and resolve difficulties;
 - the impact of such arrangements on the child; and
 - such other matters the court considers relevant.

(f) Impact of ESPR upon legislative pathway in Relocation (to apply s.65DAA or not?)

If there is no parenting order in force at the time of Relocation Application being made, the court must proceed on the basis that there is a presumption of ESPR and make such an order (unless it is satisfied that ESPR does not apply due to FV; is not appropriate in the circumstances or that the presumption is rebutted by relevant evidence).

²⁴ Subsection (4) provides that “subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.”

²⁵ The Court has power under s.13C of the Act to order the parties to attend counselling, FDR and courses etc to improve their capacity.

➤ **s.65DAA triggered**

In the majority of cases this process will lead to an ESPR order being made. If an order for ESPR is made by the court (or such an order is already in existence and remains unchallenged) the court must follow the abovementioned 2 steps under s.65DAA.

Each step has two components which must both be met in order to meet the statutory pre-requisite for the making of the relevant equal time (or substantial and significant time) order as the case may be:

- The order must be in the best interests of the child AND
- The order must be reasonably practicable.

➤ **s.65DAA not triggered**

By contrast, if there are no current parenting orders in place and/or the Court finds at the interim hearing of a Relocation application that the presumption of ESPR does not apply (or is rebutted or not appropriate to be applied at an interim stage) then the court may award sole parental responsibility ("sole PR") to one party in relation to one or more major long-term issues. This means that:

- by definition, an ESPR order has not been made, thus **s.65DAA is not enlivened and the court does not have to consider equal time or substantial and significant time as a first resort**; and
- the Court can move directly to assessing what it thinks will be in the best interests of the children in its general discretion, provided always that the court still has regard to the other requirements of the Act including:
 - the Paramountcy Principle
 - the objects and underpinning principles of the Act
 - the s.60CC primary and additional considerations

Pre-requisites for making an Equal Time under s.65DAA

It is imperative to note that, if the court cannot find that both requirements of section 65DAA(1) are met (namely a finding that Equal Time is in the best interests of the child and reasonably practicable) then the statutory preconditions are not met and the Court has no power to make an order for Equal Time.

Conversely, if an order for equal time is made or upheld, this is usually inconsistent with the possibility of a Relocation. This is because living arrangements for equal time are rarely workable over long distance. Even if parents say they will commute a long way, children cannot attend two schools and whilst impact upon children of a long daily commute (return) might be lesser if done infrequently, when undertaken 50% of the time it is much less likely to be "reasonably practicable".

Pre-requisites for making a Substantial and Significant Time under s.65DAA

Similarly, if the court cannot be satisfied that both requirements of section 65DAA(2) are met, (namely a finding that Substantial and Significant time is in the best interests of the child and reasonably practicable) then no order for Substantial and Significant can be made by the court as the statutory requirements are not met.

Leading case of *MRR v GR* - the “Reasonably Practicable” test

MRR v GR²⁶ is a leading High Court authority in relation to the parenting issue of Relocation. The decision confirms that the court must follow the Part VII legislative pathway in any parenting matter and in doing so must address:

- **s.60CA and/or s.65AA** (“Best interests” or “Paramountcy” principle)
- **s. 60B** (objects of Part VII and underlying principles)
- **s.60CC (2)** Primary considerations
- **s.60CC (3)** Additional considerations to the extent applicable
- **if applicable, s.65DAA** Requirement to consider Equal time and if not, then Substantial and Significant time.

However, the case also tells us that we need to look at the practical reality of a child’s family situation arising from a proposed relocation. This case involved the mother of a then 7-year-old child (who was subject of final orders for ESPR and equal time to each party) successfully appealed those equal time orders to the High Court (after first unsuccessfully appealing to the Full Court). Instead, the mother obtained orders that the parties have ESPR but the father’s time with the child be reduced to each alternate weekend from Friday to Sunday afternoon and half holidays (plus every Thursday overnight if he lived within 50km of the mother) and 3 x weekly Skype/phone calls to enable her to relocate with the child. The relocation was from Mt Isa (a remote mining town in North-West Queensland) to Sydney where she had lived prior to separation. The issue was that the mother had moved to Mt Isa with the father during the relationship solely due to his work commitments and then had effectively been left ‘stranded’ there post-separation, a situation that had been ratified by the decisions of the primary judge and the Full Court – which decisions, fortunately for the mother – were overturned by reason of the fact that the High Court regarded them as having failed to apply the “reasonable practicability” test in s.65DAA correctly.

The High Court articulated that it was not enough to find under s.65DAA(1)(a) that equal time arrangements were in the child’s best interests, as that was only half the test. It found that such arrangements also had to be reasonably practicable under s.65DAA(1)(b) in order to meet the statutory requirements for an equal time order to be made. Both aspects of the provision must be answered in the affirmative for the statutory pre-requisites to be met, otherwise the court had not power to make an order for equal time under this section. The problem lay in the application of the “reasonably practicable” aspect of the section.

The High Court clarified that even if, based on the first half of the test, the court might think it was in the best interests of the child to remain in equal care of the parties in Mt Isa, that is only half the test. And in applying the “reasonably practicable” test this involved more than just considering what was reasonably practicable for the child **if the mother stayed in Mr Isa** (which tends to miss the whole point of the relocation application) but rather the court also had to conduct a comparative assessment under s.65DAA(1) as to whether it was reasonable practicable for the child to spend equal time with her parents **if the mother moved to Sydney**. In other words, this was the practical reality of what her application proposed, and thus the heart of the issue with which the court had to grapple.

The High Court found that it would only be reasonably practicable to have equal time if the mother remained in Mt Isa. The Court considered the practical reality for the mother by comparing her

²⁶ [2010] HCA 4

life in Mt Isa (isolated in a caravan, lack of work and better housing opportunities) to her proposed life if she relocated to Sydney. The Court found that on a proper and robust analysis of ALL competing proposals, not only would it not be in the child's best interests to remain living in Mt Isa (given her mother was unhappy, isolated, unemployed and living in a caravan with no personal support) but that it would also not be reasonably practicable for the parties to have equal time if the mother was living in Sydney.

Take home message:

- All competing proposals have to be analysed as if they might become reality, not just measuring reasonable practicability based on the status quo (as to do so kind of misses the point of a relocation application – as the proposed new destination will almost never be as convenient as the status quo).

The application of **s.65DAA** in practice is demonstrated later in this paper when we examine some recent case law decisions. However, at this stage it may be helpful to take stock and summarise what we have covered so far, in the context of the steps along the legislative (and procedural) pathway that the court would take when dealing with a Relocation Application:

SUMMARY OF STEPS THE COURT MUST TAKE ALONG THE LEGISLATIVE PATHWAY

From a procedural and statutory perspective the court will generally follow these steps, in roughly this order. Although please note that step 4 is a 'moving feast' as it comes up both under s.60CC and under s.65DAA (where applicable) and thus it will often be dealt with in whatever sequence the court considers most convenient:

1. Identify the competing proposals of the parties (including the ICL if there is one appointed)
2. Identify the key issues in dispute (which in a Relocation case is obviously the question of whether a party is permitted to move away from their current area, but there may be many other factors or sub-factors in the dispute)
3. At an Interim hearing in particular, identify the agreed/disputed facts (as the Court cannot make a finding of fact at an interim hearing but it can assess all of the risks and weigh them against the evidence). The most helpful way to do this is to establish which aspects of the evidence are agreed and which are not agreed²⁷
4. Consider the relevant "additional considerations" or factors in terms of the 'best interests' of the child/ren under s.60CC(3) and make findings about them (or an assessment of those factors if an interim hearing)
5. Look at the "primary considerations" under s.60CC(2) in light of the best interest factors and decide whether the benefit of a meaningful relationship is outweighed by a risk of harm (and if so make orders to ensure that the child is protected from abuse, neglect or family violence)
6. In relation to the presumption of ESPR under section 61DA, consider:
 - a. whether the presumption of ESPR applies or not, taking into account any evidence of FV or abuse;
 - b. whether the presumption of ESPR is otherwise rebutted by evidence that it would not be in the child's best interests to make such an order.
 - c. whether there is evidence such that the court does not consider it appropriate to make such an order in the interim.

²⁷ Goode's Case at paragraph [82]

If the presumption of ESPR prevails, then the Court will make an order for ESPR and move directly onto the step 7. **If no order for ESPR is made, the Court will skip s.65DAA (steps 7 and 8) and move directly to step 9.**

7. Consider under s.65DAA(1) whether:
 - a. **equal time is in the best interests of the child** (refer back to factors in s.60CC(3));
and
 - b. **equal time is reasonably practicable**
 - i. refer definition in s.65DAA(5) and go through the four steps in sub-sections (a) to (d) to assess issues of reasonable practicability; and
 - ii. consider if there are any other matters the court thinks are relevant to the issue of reasonably practicability under subsection (5)(e)

8. Unless both questions in step 7 are answered in the affirmative, the court must then move on to consider under s.65DAA(2) whether:
 - a. **Substantial and significant time is in the best interests of the child:**
 - i. refer s.65DAA(3) for the definition of such time
 - ii. refer back to s.60CC(3) re: best interests factors;
and
 - b. **Substantial and significant time is reasonably practicable:**
 - i. refer definition in s.65DAA(5) and work the steps in subsections (a) to (e) inclusive as above

9. Unless both questions in step 7 are answered in the affirmative, the court must then move on to consider:
 - a. Making a **parenting order in the general discretion of the court** which is in the best interests of the child (refer s.60CC(3)); and²⁸
 - b. In doing so, have regard to the paramountcy principle, the primary considerations (s.60CC(2)) and the objects under s.62B.

10. Assess the parties' competing proposals as a whole in deciding with whom the child should live and/or spend time (not treating the Relocation application as a separate issue, but as a part of the whole justiciable controversy) and decide what orders are in the best interests of the child. This process should determine whether or not a party is able to relocate with the children.

OTHER LEADING CASE LAW PRINCIPLES RELEVANT IN RELOCATION CASES²⁹

1. The best interests of the child are the paramount but not sole consideration.
2. "A court cannot proceed to determine the issues in a way which separates the issue of relocation from that of residence and the best interests of the child. There can be no dissection of the case into discrete issues, namely a primary issue as to who should have

²⁸ It is noted that if there is no order for ESPR (and thus the s.65DAA step in the pathway is skipped) this does not preclude the Court still considering the options of equal or substantial time anyhow, if it thinks that such an order would be in the best interests of the child (whether or not one of the parties was seeking such an order).

²⁹ These principles are drawn from numerous relocation cases referenced herein, but there is a helpful summary in the case of **A v A: Relocation Approach** (2000) 26 Fam LR 382; [2000] FamCA 751- which draws (inter alia) on the decisions of **B and B: Family Law Reform Act 1995** (above, n3) and the 1999 High Court decision in **AMS v AIF; AIF v AMS (1999)** FLC 1192 852; [1999] HCA 26

residence and a further or separate issue as to whether the relocation should be 'permitted'." ³⁰

3. "A "relocation case" is not a specific sub-category of parenting case and no principles specific to such cases apply. Such cases are simply cases in which parenting orders are sought in particular factual circumstances." ³¹
4. Neither the applicant nor respondent bears an onus.
 - a. The applicant is not required to demonstrate "compelling reasons" for the proposed relocation; and
 - b. neither is there any onus on the person "left behind" to demonstrate why the other parent should not move. ³²
5. A court must evaluate and weigh the competing proposals of the parties against the relevant provisions of the Act, and may subject to procedural fairness considerations, formulate its own proposals in the best interest of the child.
6. The evaluation of the competing proposals (properly identified) must involve the court weighing the evidence and submissions and considering the advantages and disadvantages for the child's best interests of each competing proposal. ³³
7. A court will take into account a parent's right of freedom of movement, but that right must defer if the welfare of a child would be adversely affected.
 - a. *"In determining a parenting case that involves a proposal to relocate the residence of a child, care must be taken by a court to ensure that where applicable, it frames orders which in both form and substance are congruent with a party's rights under s92 of the Constitution, where applicable."* ³⁴
 - b. Notwithstanding that the court must have regard to the best interests of the child as the paramount consideration, this does not oblige a court to ignore the legitimate interests and desires of the parents. If there is a conflict between these considerations however then priority must be given to the child's welfare/rights.
8. As stated in **Morgan and Miles** ³⁵

"Sensibly, 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..."

³⁰ **A v A: Relocation Approach** (above, n 28)

³¹ **Cowley and Mendoza** [2010] FamCA 597 [at 31]

³² **Malcolm & Monroe and Anor** (2011) FLC 193 460; [2011] FamCAFC 16

³³ **Taylor and Barker** (2007) 37 Fam LR 461

³⁴ **A v A: Relocation Approach** (above, n 28)

³⁵ Above, n 9 [at 92]

3. Recent Cases – Relocation

Cording & Cording [2022] FedCFamC1A 51

Summary

This case is an appeal to a single Judge (Aldridge J) by a mother who was refused permission to relocate interstate with her children. The key issue was whether it was “reasonably practicable” for the mother to remain living in her local area. The appeal was allowed on the basis that there were errors in relation to findings of fact (no evidence to support the findings). The orders refusing the relocation (made by the primary Judge in September 2021) were set aside with costs against the father and remitted for rehearing in April 2022.

Facts

The parties had two children born in 2014 and 2016; thus, the children were aged around 5 and 7 years respectively at the time of the first trial. The mother sought to relocate from NSW to Queensland with the children, however the primary judge made orders for the parents to have equal shared parental responsibility (ESPR) and equal time on a ‘week about’ basis.

The parties separated in mid-2018 and the father was spending time with the children, however there was a serious incident in late 2018 after which the mother suspended his time and subsequently moved to a different region in NSW. At around the same time, she formed a new relationship with Mr P. The father actually changed jobs and moved house to be closer to the children and eventually resumed supervised time with them.

By early 2019 the parties had reached consent orders providing for the children to spend alternate weekends and Thursday nights with the father. In late 2019 the mother moved (within the same region) to live a bit closer to the maternal grandparents (who were both very ill at that time). There was evidence before the Court that she provided significant care to them, although her relationship with them was poor. Around the same time (late 2019) Mr P moved to Queensland.

The hearing before the primary judge concerned the mother’s application to relocate the children to Queensland to be with her new partner, Mr P. At the time of the original hearing the mother was studying to be a professional. At the time of the appeal, she was about 12-18 months away from graduating. She was in receipt of Centrelink (sole parent and study/rent assistance) and \$69pw of child support. She was living in temporary/holiday accommodation with no money left to pay a new bond (having borrowed her previous bond money from friends).

The thrust of the mother’s case was that she had little or no support from the maternal grandparents because they were very ill during late 2019 (both hospitalised and close to death) and they were not able to be emotionally or financially supportive of her. Further, the maternal grandparents had not sworn affidavits because they were not physically or mentally capable of giving evidence, however they were supportive of her wish to move the Queensland, as they knew she and the children had spent a lot of time around hospitals supporting them and their *“relationship was never close to begin with.”*

The mother’s evidence was that rather, she had been reliant upon the emotional and financial assistance of Mr P (with whom she had not lived before, but they were in a serious relationship) and with whom she now wanted to live, in Queensland. The advantages of doing so were said to include the financial benefit of living in Mr P’s home (rather than paying rent on her own); better facilities to assist her complete her studies; and the availability of emotional support from Mr P.

Nevertheless, the primary judge found that the mother was *not without* support in her current location, saying [at 197]:

"I accept that there are financial benefits to the mother, potentially, in living at [Town X] (Qld). No question about that. I do not, however, consider, financially, that it would not be "reasonably practicable" for her to remain living in this area. I do not consider that her parents are so incapable of supporting her that she does not have, at least, some basic level of support." [my emphasis]

Appeal to Single Judge (Division 1) - Aldridge J

The appeal Judge found [at paragraphs 23 and 24 of the appeal judgment] that, given the mother's evidence about the state of her relationship with her parents or their capacity to support her had not been challenged in cross examination, there:

"was no evidence upon which the primary judge could find that the maternal grandparents could or would provide some basic level of support...It is not at all clear what his Honour considered that support would entail. There is no evidence that identifies any support and the primary judge does not say".

On the contrary, the primary judge had incorrectly noted (especially re: the borrowed bon monies) that [at 199]:

"The mother said that she would not be able to afford a bond. I struggle to accept that evidence in circumstances where she was able to afford a \$6,000 payment to get into the accommodation she is in now. Her partner says that he will continue to pursue the relationship with her if they cannot live together."

As a result, the appeal judge said [at 39 – 43] that:

*"It is difficult to reconcile that finding with the unchallenged evidence that this sum had been borrowed from friends..." "The primary judge did not identify what support the mother had that would make it "tough" to live in the local area but "reasonably practicable" (at [200]). It is true, as the father submitted, that the mother did not set out her financial position in any detail at all, but it is clear, as his Honour accepted, she was in real financial difficulty. **The support from the maternal grandparents was clearly a key factor in coming to that determination. That was a finding that was not available on the evidence**". [my emphasis]*

"It is an error of law to make a finding of fact where there is no evidence to support it (Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390)."

Ultimately, his Honour Justice Aldridge found on appeal that (whilst acknowledging not every error leads to a retrial) the finding as to the availability of "support" for the mother in her current location (a) was not a finding available on the evidence and (b) was 'material' and influential to the decision to refuse her application to relocate. Accordingly, he stated [at 48]:

"It cannot be said, in such a closely contested matter, that the result was so plainly correct that the outcome should stand notwithstanding the error."

Take home messages:

- **Prepare your client's evidence as to their current personal and financial situation very carefully**, with corroborating details and witnesses as necessary, to make it easier for the court to accept that evidence; and more difficult for the other side to challenge that evidence; and also to remove temptation for unfounded inferences or findings to be made which are contrary to your client's interests (which can lead to error/appeal, as was the case here).

- If your client's position is that they lack financial or other support in their current location and/or they are likely to be better supported in their proposed "relocation" destination, then consider:
 - Filing a **financial statement** setting out exactly how much money your client has in the bank and how much debt
 - *[noting in this case the mother had received \$55,000 property settlement from the father and the inference was made that it had all been spent, but the evidence was not clear, which may have led to the primary judge being less sympathetic to the mother than if she had been clear that all the money was in fact gone, if that was the case]*
 - Calling evidence from **witnesses (such as parents or family) in the current location** making it clear whether or not they can financially or otherwise support your client in their current location and if not, why not (and if so how / any limits on that support)
 - Calling evidence from **witnesses (such as new partner or family/friends in the proposed new location)** setting out the nature of the financial and other support they can offer (e.g. private accommodation; shared rent/living costs; employment; childcare; educational support; facilities/transport etc) and also emotional /personal support (e.g. affidavit from new partner saying that the relationship represents a serious, stable and long term commitment to a shared life, if indeed that is the case)
 - Providing **corroborating evidence as to comparative cost** of rent/bond or housing prices in both areas, if the issue of accommodation is one factor informing the wish to relocate; or the comparative availability of study facilities for your client and/or the children; or employment opportunities for your client (e.g. an affidavit from a prospective employer)
 - Providing **psychological evidence** (if relevant) as to your client's mental health and functioning/coping in the current environment and any factors which would improve the situation (such as more personal support, less financial pressure) that might be available in the proposed new location

Jefford & Jefford [2022] FedCFamC1F 539

Facts and summary of outcome

This is a first instance decision by the Honourable Justice Austin in respect of the mother's application to relocate with the children of the marriage from Australia to the United Kingdom. The judgment was handed down in July 2022. Permission was granted to the mother to relocate, but not delayed the end of 2023. It was conditional upon her obtaining a declaration that the orders were registrable and enforceable in the United Kingdom.

The case involved mutual allegations of violence, in respect of which positive findings were made of physical violence by the father (albeit that the evidence did not demonstrate the need for ongoing protection of the children from violence against them) and a finding of inferior parenting capacity with a risk of the children being neglected in his care due to him putting his needs above their own. Conversely the mother was a health professional who had a sound capacity to meet the physical, emotional and intellectual needs of the children.

The children were born in 2017 and 2019 and thus were aged 5 years and 3 years respectively, at the time of the hearing. The parties are physically separated in March 2020 and following separation the father was having either supervised time, or no time at all. The mother commenced the proceedings in May 2020 seeking permission to relocate with the children to the United Kingdom and for the father to spend no time with the children at all.

The parties had a conflictual relationship with poor communication. The mother sought sole parental responsibility and the father opposed this. However, the court found that as a result of family violence, the presumption of equal shared parental responsibility (ESPR) did not apply. Accordingly, the mother's application for sole parental responsibility (sole PR) was granted.

The mother was the unchallenged primary caregiver post separation however the issue in dispute was the father's time spent with the children (if any). He was seeking an increase of time in stages leading up to final orders on the basis of equal time. That position was rejected by the court and instead, orders were made providing for the father to have differing amounts of time depending upon the proximity of the parties' residences at any given time (noting the court took into account various factors including that the mother was not moving immediately to the United Kingdom; that there was a theoretical possibility that she might change her mind in the intervening time; and that there was also a possibility that the father might move to United Kingdom (if and when the mother relocated with the children).

Although it made orders permitting the Relocation, the court rejected the mother's application that the father should spend no time with the children.

Judgment handed down 22 July 2022

In his judgment, Austin J carefully stepped through and gave a clear summary of each relevant step of the legislative pathway in Part VII FLA, including:

- the meaning of a parenting order (section 64B), the head of power to make parenting orders (section 65D) and the objects of the legislation and the principles underpinning those objects (section 60B).
- The paramountcy principle (section 60CA) and the factors under section 60CC including the additional considerations as to how the court determines what is in the best interests of children.
- the meaning of parental responsibility (section 61B); the manner in which parental responsibility is to be exercised (section 61DAC); and the definition of major long-term issues (section 4)
- the rebuttable presumption of equal shared parental responsibility (ESPR) (section 61DA) and the fact that it does not apply in cases of abuse or family violence, or we rebutted because it is not in the best interests of the children to make such an order
- the fact that the court is required to consider under section 65DAA the option of equal time (or if not in the best interests of the children and reasonably practicable, the option of substantial and significant time)

Ultimately however, Austin J found that the **s.65DAA** aspect of the pathway was not enlivened due to the order for sole PR (i.e. the lack of an order for ESPR) and thus no mandatory consideration of equal/substantial time was necessary.

The court then went on to consider the section 60CC(2) aspect of meaningful relationship, subject to risk.

At the outset of the case, the mother alleged sexual abuse by the father of the older child, based on disclosure made by the child (who had apparently caught the father masturbating whilst using a sex aid) however that disclosure was never substantiated, and the father was never charged with any criminal offence. The mother put her case on the basis that the father was an unacceptable risk (as opposed to seeking a positive finding that he had engaged in sexual abuse of the child). By the end of the hearing though, the mother conceded through counsel that the evidence was insufficient to prove an unacceptable risk and the court confirmed that this was an appropriate and responsible concession in all of the circumstances.

The court recorded that those circumstances included that the father had always denied the allegation; that the mother admitted she accepted his denial and plausible explanation at the time the incident occurred; that the mother had left the children unsupervised with the father on many occasions since that incident, which was only reported to police much later after they ceased living together under one roof; and that at the time she was assessed by the family report writer, the mother's main complaint about the father was not that he was an unacceptable risk of sexual abuse at all, but only that she was concerned about his alleged addiction to pornography. Ultimately the court found that the child's disclosure was likely to be unreliable in any event.

The court was assisted by expert evidence in the form of an updated family report, prepared by a family report writer "whose evidence" the court said was "mostly accepted". Specifically, the court said [at paragraph 24 and 36]:

"...subject to the preservation of their physical and emotional safety, the children derive benefit from their meaningful relationships with the father, despite the mother's expressed doubts"

On the available evidence, an inference is reasonably open that the mother perceived some forensic advantage in making more of the elder child's disclosures than she earlier thought was deserved."

Accordingly, the court proceeded on the basis that the father was not an unacceptable risk to the children and that despite his lesser parental capacity, nonetheless they had a meaningful relationship. However, as stated, the court was cautious in relation to the father for other reasons, namely the risk of him neglecting them whilst in his care.

The alleged neglect related primarily to an incident during early 2020 where the father was solely responsible for the care of the children (then aged 8 months and 2 years of age) while the parties were living together under one roof and the mother was at work during the evening. During that time for a period of 90 minutes the father left the children at home alone to have a romantic dinner out with his then partner, now wife. After considering the parties' respective evidence and wholly rejecting the father's version of events and preferring the mother's evidence, the court said [at paragraph 57 and 58]:

"The father left the children alone, intentionally misled the mother, and gave false evidence in cross-examination about the incident.

Plainly enough, the father leaving such young children alone in the house at night so he could enjoy himself was an egregious dereliction of parental duty. That he fails to accept the fact and continues to manufacture evidence in an attempt to avoid criticism only serves to compound the dereliction. It is understandable why the mother now mistrusts the father and, in the absence of any contrition by him, fears such a situation could be repeated. She worries the children are at risk of harm through their neglect by the father. The single expert agreed. The evidence establishes the need to protect the children against such risk. Given the children's young ages and their dependency, it is a risk which will endure for some years yet."

There is no doubt that such a finding against the father in terms of risk of neglect, combined with various other findings by the court in relation to the section 60CC factors (including the father's payment of minimal child support at \$400 per annum and the fact that he provided inconsistent, substandard parental support to the mother and on more than one occasion placed his own needs above the needs of the children) "*vindicated the mother's beliefs*" and explained what the family report writer characterised as her "*reluctance to actively promote his involvement in the children's lives.*" The court accepted the family report writer's view that:

[83] "The children would obviously benefit from having a meaningful relationship with both parties; however if the father is not able to balance his own emotional needs in a manner which makes him an available and responsive parent, the risks of the children spending significant time with him may outweigh the benefits.... The father impressed as struggling with some psychological or personality characteristics which affects his ability to be reflective and balance the needs of the children against his own emotional needs."

The court addressed the issue of "reasonable practicability" in terms of the father spending time with the children, in the context of section 60CC(3)(d) (which deals with the "*likely effect of changes in the child's circumstances*", including the "*effect of separation*" from either parent).

The court found that the children would still be able to maintain contact and familiarity with the father if they lived in the UK, even if he remained in Australia, however it acknowledged their relationships would not be as rich as if they were able to spend time together more frequently. That said, **the court acknowledged a distinction between an outcome which is positively deleterious and an outcome which is merely sub-optimal (but not harmful).** The mother herself conceded that she would not be looking to relocate to be with her maternal family in London until September 2023 is that was when she would finish and have the results for her professional exams and conclude her studies in Australia.

The court acknowledged that the father's financial position (being unemployed) adversely impacted upon his ability to travel to the UK without financial assistance in the foreseeable future and it acknowledged that the children would be unable to fly unaccompanied for many years to come. Whilst this fact did not assist the mother's case, it was only one factor.

Based on the principles of the High Court case of **U v U**³⁶ the court found that the **mother's right of freedom of mobility should only defer to the paramountcy principle if the welfare of the children was adversely affected, but in this case, relocation would not harm or adversely affect the children and thus the mother should be free to go.** The court acknowledged that the mother was not obliged to provide compelling reasons for her relocation but confirmed its view that her reasons for moving to London were soundly logical, including to gain the benefit of support, financial assistance, childcare and emotional support from her family.

The court rejected the father's submission that arrangements ordered for the children's care would make it "not reasonably practicable" for him to spend time with them if they lived in the United Kingdom. Instead, the Court made orders that the father spend time with the children on a Sunday afternoon each week for 4 hours (plus a number of short visits each fortnight totalling eight hours of additional time) in the 18 months between the hearing and the mother's anticipated departure for the United Kingdom.

Thereafter, it was ordered that if the father remains in Australia after the mother relocates to the United Kingdom in late 2023, the children spend time and communicate with the father:

³⁶ [2002] HCA 36 – High Court decision handed down on 5 September 2002

- on 7 consecutive days in July to coincide with UK school holidays
- 7 consecutive days in December/January to coincide with the Australian School holidays
- by video call each Sunday

Take-home messages

- It is important to prepare your relocation case bearing in mind a **clear case concept**. Making an allegation of unacceptable risk where the evidence is muddy or unclear can be counterproductive. If the court perceives that your client is trying to exaggerate evidence or inflate their fear of risk to obtain a forensic advantage, this may backfire.
- **Acknowledge shortcomings** and deficiencies in parental conduct and behaviour where appropriate. Giving inconsistent or demonstrably inaccurate accounts of an incident; or appearing to change your story; or telling lies under oath are entirely counter-productive. This conduct significantly diminishes the credibility of a party in the eyes of the court - perhaps even more so than if the party had admitted the shortcoming and showed insight in relation to that issue in the first place (particularly considering how many factors the court has to weigh up and the fact that nobody is perfect).
- Relocation applications may be **more likely to be successful where there is a proposed delay** on the relocation (particularly in the case of young children) as it gives time for the non-travelling parent and the children to consolidate their bond prior to the relocation and it softens the blow in terms of the children being a bit older by the time of the move and everybody having had time to adjust to the idea and plan for the move (mentally, emotionally, financially, practically etc).
- If **challenging the presumption of ESPR**, ensure that your client puts very clear (and if possible corroborated) **evidence of family violence, risk of abuse/neglect and/or other 'best interests' factors** which would make it such that the presumption does not apply (where applicable).
- An applicant for relocation appears to have a greater chance of success / lower hurdle to overcome in circumstances where **no order for ESPR** is made (i.e. an order for sole PR in relation to some or all aspects of the children's major long-term issues is made), noting that:
 - The mandatory requirement for the court to consider equal time or substantial time (s65DAA) is not enlivened if there is no order for ESPR;
 - The "spend time" arrangements for the other parent are therefore entirely in the court's discretion if no order for ESPR is made and s.65DAA does not apply (subject always to the usual statutory requirements such as considering s.60CC factors, upholding the paramountcy principle and taking into account the objects and underpinning principles of the Act).
 - The court may be more likely to order something less than substantial and significant time where an order for sole PR is made, which allows for more flexibility to relocate. This observation is made on the basis that the "best interests" factors which would otherwise have been considered in respect of the suitability of making a substantial and significant time order under s.65DAA(2) (had it been applicable) will often overlap with the best interests and other factors which informed the reasons behind the ESPR order not being made in the first place (often, but not always);

Bergmann & Bergmann [2022] FedCFamC1A 38

Facts

Orders were made at final hearing for the children to live with the father in Australia; and for the children to spend time with the mother, making allowance for the fact that her residence is in France. The father was to hold the children's passports. The balance of the orders (including orders for ESPR) were either by consent at final hearing and/or not appealed.

The children were born 2008 and 2011 and were aged 10 and 12 years respectively when the final orders were made. The mother had travelled extensively overseas for work when the children were young, leaving the children in the father's care in Sydney, NSW, who used the help of the maternal grandparents and a nanny. The parties shared a home for a period of time following separation in December 2015 but ultimately the mother moved out to another address in Sydney. The father issued proceedings shortly thereafter. The mother proposed in May 2016 that the children move to live with her (at her new home in NSW) but the father refused.

Interim orders made in May 2016 provided by consent for the parties to have equal shared parental responsibility (ESPR) and to share the care of the children, with a restraint on removal from Australia, other than for holidays. Further interim orders made in October 2016 provided for the parties to spend exactly equal time with the children, with each week broken into increments.

During 2018 the mother was regularly travelling to Europe during the week which the children were not in her care, for work purposes. Mother reported that she felt isolated working alone in Sydney and close that office, moving permanently to Europe to live with her new partner in May 2019. Her work, relationship and new home was by that time exclusively based in Europe.

The mother's time with the children was thus frustrated during 2020 by reason of the global pandemic and further interim orders were made to adjust the arrangements to permit the mother to visit the children whenever she was able to come to Australia.

The mother argued before the primary judge that the children should live with her in France. The father's position was that the children remain living with him in Sydney. Both parties agreed to equal shared parental responsibility. Upon the conclusion of the trial, orders were made that the children live on a "month about" basis with each parent in Australia until such time as judgment was delivered.

The final orders and reasons were delivered in August 2021 providing that the children live with the father in Australia. The mother appealed, asserting a range of errors.

Full Court (Division 1) - Austin, Tree & Strum JJ

- Ground: Denial of Procedural Fairness:

In respect of the appeal grounds relating to denial of procedural fairness, the issue identified was that the court relied upon a Judgment in another case which was released after the trial had concluded, thereby not giving the mother and opportunity to be heard in relation to same. The primary judge had said at paragraph 864 in his judgment:

As at the finalising of this judgment the Full Court delivered a decision in the matter of [Denham & Newsham (2021) FLC 94-043] on this very issue, namely, a relocation to Europe of a child. The Court held the impact of restrictions on travel and evidence in relation to international border restrictions due to COVID-19 are material facts to be taken into account in such judgments. Their Honours held that there was a material error as the judgment proceeded on the basis of freedom of movement across borders and this was incorrect.

The Full Court rejected the mother's argument that the matter should have been relisted to give the mother and opportunity to be heard and make submissions in relation to the suitability and relevance of this other Full Court authority, in her case. The Full Court said that "*Procedural fairness is a practical, not abstract, concept and is only designed to avoid injustice*" and for such purposes it is required that "*each party needs to know what case the opposing party seeks to make, how that party seeks to make it, and be given the opportunity to meet it*". The Full Court was of the view that the reference to **Denham & Newsham** did not impact the final orders made and that if there was any denial of procedural fairness it was only technical and immaterial and "*to conclude otherwise would corrupt the inherent requirement of pragmatism*".

- Ground: Error of law – applying the wrong test in a Relocation matter:

This ground is the one of particular interest to us in the Relocation case. The wife asserted that:

- the court applied a test of "*Which party's proposal creates the least uncertainty for the children?*"
- and in doing so it applied the wrong test; and
- further, it elevated that consideration above all others prescribed by section 60CC of the Act

However, the Full court took a different view, noting that:

- the primary judge was obliged to deal with uncertainties created by each party's proposal because the single expert gave opinion evidence on those proposals about which he and the parties were cross-examined;
- In any event, s 60CC(3)(d) of the Act required her Honour to consider the likely effect of any changes in the children's circumstances, including the likely effect upon the children of their separation from either parent;
- The primary judge exhaustively canvassed the evidence and made numerous other significant factual findings, including the following:
 - there was no risk of harm to the children in either household (at [728] and [853]);
 - the children would retain meaningful relationships with both parties regardless of the outcome (at [543], [644], [729], [753] and [852]);
 - each party could count on family support to help care for the children (at [265]), but the children had deeper emotional support from the paternal family in Australia (at [758]);
 - the mother had concrete reasons for wanting to live abroad (at [269], [279], [357] and [850]); and
 - the father's work commitments are more restrictive than the mother's and hamper the ease with which he can travel (at [296], [306], [410], [494], [533], [691] and [693]);
- Because there was little to differentiate the quality of the parties' respective proposals, the primary judge identified the pre-eminent factors which were likely to influence the outcome as (at [789]):
 - the children's expressed views;
 - the weight which should be afforded to those views;
 - the changes and uncertainties which would arise from uprooting the children from their established home with the father in Australia; and
 - the parties' respective capacity to support the children's relationships with the other parent.

- the primary judge then turned to “calibrate the factual findings with the mandatory considerations prescribed by s 60CC of the Act to determine what orders would meet the children’s best interests” (at [840]–[897]).

Ultimately the Full Court concluded that there was no legal error and the ground failed:

“So analysed, there was no legal error in the primary judge’s approach. The wrong test was not applied. The uncertainties attending the children’s future under either proposal was a mandatory consideration, so it was considered and it duly proved to be influential, but it was not dispositive in isolation from all other mandatory considerations. It properly took its place among others. This ground fails.”

- Ground: inadequate reasons & orders contrary to the expressed views of the children

It appears that the older child had expressed a wish to live with her mother in France but the younger child was ambivalent. There was no mistake in the court understanding the evidence. The mother’s complaint was simply that she was not satisfied with explanation given (in relation to the discretionary process in terms of the weight which was put upon those wishes) by the court in its judgment.

The primary judge found that the older child was influenced by the mother’s inability to refrain from discussing the issue of relocation with her and that impacted upon the child’s views, even if it was not deliberate. Further the court thought the older child might be idealising the romantic notion of living in France because she had been restricted from spending time with her mother due to the pandemic and was missing her. The child had herself also acknowledged that in fact her mother would be more upset if she didn’t go to live in France, than the child herself would. Further, the court had to consider the issue of *not splitting siblings* and in that context, it was mindful of “not pulling the younger child into a move to France” based on the older child’s views.

The Full Court was satisfied that the primary judge gave a satisfactory explanation as to how he had applied his discretion in relation to the issue of the children’s views and accordingly, this ground failed.

- Ground: Mistaken findings

The Full Court allowed this ground of appeal, finding that the primary judge “fell into error by finding, contrary to the available evidence, the father could not travel to France at all, or alternatively, could at best only do so once per year for a short period, regardless of whether or not pandemic travel restrictions were in place.” The Full Court further found that:

“In the...reasons for judgment (at [895]–[897]), the mistake of fact critically fed into the exercise of discretion, causing it to miscarry. The primary judge traded-off, on the one hand, the mistaken finding about the father’s practical inability to travel and the consequential deleterious effect upon the children of their separation from him and, on the other hand, the children’s closer emotional attachment to the mother and her enhanced ability to help the children adapt to changes. This ground succeeds.”

Take home messages:

- It is imperative that clear, consistent and supportable evidence is put before the court in relation to a party’s working commitments, travel flexibility, financial capacity and the general access ability of air travel in any (especially international) Relocation case;
- The Court was mistaken as to some of the key matters making up the factual substratum of this case. Getting the facts right is critical to the proper assessment of the overall Relocation case outcome.

- Specifically, this was a case where the older child had a wish to live with the mother in France and the primary judge had found that the children had a closer emotional attachment to their mother; and she had a greater ability to help them adapt to change. When comparing the competing proposals and considering the advantages and disadvantages of them both, these factors in the mother's favour were held to have been inappropriately outweighed by perceived disadvantages favouring the father's position (in relation to the father's capacity to travel to France to visit them) – which was problematic, because those perceived disadvantages were based on a mistaken understanding of the facts.
- It remains to be seen whether, upon those factual matters being properly put in evidence and considered afresh in the overall context of this relocation case, would result in the court permitting the mother to relocate with the children to France.

Mallory & Mallory [2022] FedCFamC1F 697

Facts

This judgment was delivered by the Honourable Justice Carter in Melbourne in September 2022 in relation to the mother's Relocation application whereby she sought to relocate to Sydney with the younger two (of four) children of the marriage in circumstances where the older two children lived with the husband and were rejecting a relationship with the mother. The mother alleged significant risks to the younger two children in the care of the father and asserted that his ability to support their relationship with the mother was negligible. The father also alleged risk against the mother and it was clear the children had been involved in the parental conflict.

At the time of final hearing in July 2022, the older two children were aged 14 and 16 years and the younger two children were aged 11 and 9 years respectively. The father was a 47-year-old unemployed single man on a carer's pension with depression (managed by his GP) who said he had previously been employed as an educator. The mother was a 46-year-old woman who were self-employed and living in a three-bedroom home with the younger two children. She had re-partnered with Mr H who lived in Sydney.

The parties had a litigious history, involving child protection, overholding by the father and estrangement of the older two children W and X from the mother, in the fathers' care. Earlier final orders (prior the Relocation application) were made in 2018 following a final hearing before (then) Judge Williams who found (inter-alia):

- the father had influenced and exacerbated the negative views that W and X had for their mother;
- the father's entrenched views of the mother were unlikely to change;
- the father did not recognise the importance of the children's relationships with their mother; and
- the father was never likely to encourage a relationship between the children and their mother.

Judge Williams made in order that all four children lived with the mother and that there be a moratorium on the father's time for a period of six months in relation to the older children and for a period of eight weeks in relation to younger children. The father appealed those orders in 2019 but was unsuccessful. At around the same time the older children resumed spending time with him however the mother reported that her relationship with them deteriorated as a consequence,

saying that they soon began refusing to attend school and were aggressive and abusive toward her.

At around the same time in mid-2019 the father took all of the children to a doctor and reported the mother to protective services alleging that she was physically violent to the children and mentally ill. After an investigation, child protection found no evidence of the allegations and on the contrary, found evidence that the older children were being coached against the mother by the father. All four children were placed in the mother's care in circumstances where 'the Department assessed the father as responsible for harm "due to the strong element of controlling and coercive behaviours" he demonstrated, and the impact those behaviours had on the relationship between the mother and the children'.

As a result, supervised time was introduced between the father and the older two children however it was wholly unsuccessful. The children's negative view of the mother encouraged by the father was so entrenched it was impossible to overcome. Ultimately the mother had to acknowledge that older children would not settle in the mother's care and in late 2019 they returned to live with the father.

Meanwhile, the younger two children remained in the mother's care and spent supervised time with the father (and their siblings), moving to unsupervised time in due course. After numerous episodes of overholding of the younger two children and dubious further allegations against the mother successfully sought a recovery order and also obtained an order that all of the father's time with the children be suspended. Subsequently orders were made for the father to spend supervised time with the younger two children, however he failed to engage with the supervision service and accordingly at the time of final hearing he had not seen them for over a year.

Aside from attending the same school campus and seeing each other from time to time at school, the pairs of siblings had also not in time with each other on a regular basis in the couple of years leading up to final hearing.

Competing proposals of the parties

The father's position at a final hearing was changeable but ultimately, he sought that all children live with him and he have sole parental responsibility. The mother conceded that the older two children spend time with her in accordance with their wishes, live with the father and that he have sole parental responsibility for them (subject to him keeping her apprised of any decisions made in that capacity), which was obviously a difficult concession for her to make but she acknowledged the estrangement between her and the older children meant that any different order would be unrealistic.

In relation to the younger two children, the mother sought orders that they live with her and she have sole parental responsibility for them (and she would reciprocate by keeping the father apprised of any decisions she made in that regard). The mother also sought that:

- she relocate with the children to Sydney where they would live in the home of her new partner
- all time between the younger children and the father be suspended on the basis that he cannot be trusted not to coerce and manipulate them against her, and that long-term/interstate supervised time was unsustainable
- the father be at liberty to communicate with the younger children via cards and letters (with other restraints to be put in place in relation to communication between the Father and the younger children)

Reasons

In her reasons, her Honour found that the father was not an impressive witness and further stated that he ‘demonstrated little insight into the impact on the children of his behaviours and attitudes towards the mother’; took ‘almost no responsibility for the conflict’; and ‘was unable to countenance any suggestion that he has contributed in any meaningful way to the older children’s rejection of their mother.’ He was relentlessly negative about the mother, openly critical of the Independent Children’s Lawyer (who he said influenced the Family Report Writer to prepare a damning report against him) and he was also critical of final orders made by the previous Judge saying that her Honour’s conclusions were ‘guesswork based on inaccurate assumptions’. Further, the court did not accept the father’s evidence that he had done nothing to undermine the children’s relationship with their mother, stating that: ‘If he has not deliberately done so, he has at least acted with reckless disregard for, or indifference to, the implications and impacts of his comments and behaviours.’

By contrast, the court found that the mother was a highly credible, impressive, sensible, reflective and thoughtful witness who made concessions against her own interest and demonstrated insight into her own behaviour, including as to steps that she had taken to improve herself as parent. The mother was found to have acted protectively in relation to the children including a motion way for example not telling them that the father had failed to take up the option of supervised time with them, when he failed to do so. She also acknowledged some positives about the father and his contribution to the children. The court was also impressed by the mother’s new partner who gave evidence in so far as he presented as being very insightful to the situation and giving child focused answers. The court accepted that the new partner appeared genuinely motivated and committed to ensuring that he would provide the mother and the younger children with the support they would need in order to re-settle comfortably in Sydney.

Her Honour accepted the Child Court Expert’s evidence (Ms L) who prepared a report in March 2022, that:

“Given his ongoing lack of accountability, combined with his historic pattern of behaviour, the writer remains concerned that [the father] has limited capacity to support [Y] and [Z] in having a meaningful relationship with [the mother].”

Her Honour accepted the evidence of the Family Consultant who prepared a child inclusive memorandum in mid-2021 that the negative statements against her mother during the assessment process by the youngest child seemed to be hollow; her complaints seemed ‘rehearsed and repeated’ and she was ‘unable to provide any details’ of her ‘alleged concerns’ about the mother.

It is worth repeating here as a reminder, that the Court distilled the following legal principles applicable to Relocation matters from relevant case law:

- *the best interests of the children are the paramount, but not the sole consideration;*
- *the person wanting to move does not need to provide compelling reasons to do so;*
- *the court must evaluate the competing proposals, considering the advantages and disadvantages for the children’s best interests of each proposal;*
- *the question of whether there should be a relocation is not to be treated as a separate or discrete issue to that of the question of residence;*
- *neither party bears an onus to establish that an order permitting or restraining relocation is in the children’s best interests; and*
- *the Court must weigh the competing proposals and consider all the relevant factors, including the right of freedom of movement of the parent who wishes to relocate.*

Turning to the issue of the presumption of equal shared parental responsibility (ESPR) the court found that the presumption was clearly rebutted by evidence that it was not in the best interests of the children for the parties to have ESPR. The court noted the relentless conflict between the parties and observed:

“...the parties cannot genuinely liaise with the other. Their ability to communicate is extremely limited, and the level of conflict is such that I could not be satisfied that the parties could have respectful discussions with each other about important long term aspects of their children’s lives.”

The parties agreed that the father would have sole parental responsibility for the older two children in his care however the court made a finding (contrary to the father’s application) that the mother was an appropriate and responsible parent, and she should have sole parental responsibility for the two younger children who should remain in her care. The court then went onto observe:

“As I am not making an order for equal shared parental responsibility I am not required to follow the legislative pathway set out in s 65DAA of the Act.”

The court then turned its mind to s.60CC(2) “Primary Considerations” providing that the children should have the benefit to the children of having both of their parents being meaningfully involved in their lives, to the maximum extent consistent with their best interests. This necessitated a consideration of risk issues and the balancing of the “twin pillars” of those primary considerations. At paragraph 169-170 her Honour stated:

169 *“Having carefully considered the evidence before me, and having had the opportunity of seeing the evidence tested with each of the parties subjected to cross examination, I do not find that the girls are at risk in their mother’s care. However, there are significant risks to them, and to their relationship with their mother in the care of their father if their time is not carefully monitored.*

170 *It is clear that the father has been unable to set aside his disdain for the mother – and indeed has been unable to reflect on his shortcomings in this regard – despite multiple opportunities to do so”.*

The court formed the view that:

- *“the father does not appreciate the benefit to the children in having a meaningful relationship with their mother and that he will not support or facilitate those relationships”, which was a view supported by the experts and the ICL.*
- *“The benefit to the children of having a meaningful relationship with him must be weighed against the risks to the children in maintaining that relationship with him, being the likely damage that will be done to their relationship with their mother. In all the circumstances, I have real concerns that if the father continues to have an ongoing relationship with the girls on an unsupervised basis, this will on balance, be likely to cause them more harm than good”.*

Her Honour then traversed all of the relevant subsections of section 60CC(3) and made findings in respect of those matters. Consideration was then given to each of the proposed arrangements of the parties and the advantages and disadvantages of those proposals (by which the court noted that it is not bound).

The court acknowledged that if the younger girls were permitted to move to Sydney, this would make it very difficult for them to spend time with their father on a practical level (particularly given that unsupervised time was considered an unacceptable risk by the court) and also with their siblings. The court noted that this would likely cause them distress and grief. However, the court also accepted that the mother would make every effort to visit Victoria regularly and endeavour to facilitate time between the siblings (even if the father would not take the same initiative).

Another disadvantage was the change in school and loss of contact with their siblings at the same campus of their school in Melbourne. On the other hand, the court considered that there were significant advantages to the younger two children relocating to Sydney with their mother, including that their mother would enjoy a happy relationship where she would be well supported and stable; and that they also had extended family in Sydney. The court acknowledged from the expert evidence provided to the court that children of that age still rely heavily upon the stability and safety of home and their attachment to their primary caregiver and observed that a safe and happy home life with a happy primary carer would give the younger children the foundation they need as they mature.

Further, the court observed the significant advantage in the younger two children being removed from the immediate parental conflict in Melbourne and the advantage of the father not being given the opportunity to erode and undermine their relationship with the mother, as the court found he had done with the older two children. By contrast of the younger two children were to live with their father and their siblings the court was of the view that the children would come to reject their mother and lose their relationship with her, as the older siblings have. Similarly, living interstate would provide some protection from the younger child being influenced negatively by her father to “vote with her feet”, as had occurred in the past. Accordingly, the Court made orders that:

- (a) *the father have sole parental responsibility for W and X (the older children);*
- (b) *W and X shall live with him and spend time with the mother in accordance with their*
- (c) *wishes;*
- (d) *the mother be at liberty to send W and X cards, letters and gifts;*
- (e) *Z and Y (the younger two children) shall with their mother, who shall be permitted to relocate to Sydney with them;*
- (f) *the mother shall have sole parental responsibility for Z and Y;*
- (g) *any gifts, cards or letters from the father to the girls shall be forwarded via the mother and she may decline to pass on that material if she is of the view that it would not be appropriate to provide same;*
- (h) *time will otherwise be on such terms and conditions as agreed between the parties; and*
- (i) *the father is otherwise to be restrained from contacting the girls. That includes the additional restraints sought by the mother and the Independent Children's Lawyer restricting the father from contacting the girls' schools, attending at their schools or contacting their medical and allied health practitioners without the mother's consent.*

Take home message:

- Even where ESPR is not ordered and thus the ‘equal time’ / ‘substantial time’ provisions of s.65DAA are not triggered/do not apply, **the balance of the legislative pathway must still be carefully followed** including but not limited to a consideration of the objects of the Act (including the object of a meaningful relationship with both parents subject to any risk); the Paramountcy Principle; a thorough consideration of the s.60CC additional and primary considerations and a full consideration of the advantages and disadvantages of each parties’ proposals.
- Following the legislative pathway and balancing all considerations holistically is the only way to arrive at an assessment of the best interests of the children which takes into account all of the relevant factors required by the legislation.
- This case reinforces the fact that in Relocation cases, the question of relocation is only one aspect of the overall parenting case and not an issue dealt with in isolation.
- We must understand and follow the legislative pathway in our preparation of Relocation cases, to ensure that all the relevant evidence is before the Court.

4. **Conclusion**

As we have seen, from time to time first instance judgments in Relocation cases are successfully appealed. However recent appeal cases (including the sample taken here from 2022) suggest that appeals are more likely to be on a technicality in relation to the evidence or misapplication of the law, rather than a revision of the law and legal principles themselves. Put another way, there has been no significant change in the recent past to the court's approach to Relocation cases in terms of the existing body of case law and accepted principles as set out in this paper.

In short: the law is quite well settled - it is the application of the law to the facts which is tricky!

Happily, the courts continue to refine and articulate for our benefit the legal process which applies to parenting cases in the specific context of Relocation applications with each new case they decide. In terms of gaining a richer understanding of the court's legal and practical approach to deciding Relocation cases - prior to preparing for a new Relocation case - it is helpful to review the leading Relocation cases and also to peruse recent judgments (noting that Division 2 has a large volume of Relocation decisions which are also very instructive) to assist in consolidating an understanding of the Part VII pathway and the manner in which the courts to approach same in the context of Relocation. When we reflect upon themes from relocation cases, a clearer picture emerges as to the circumstances in which relocations are more likely to be granted and we also gain a better understanding as to the factors which tend to play into relocation applications being refused.

Often the outcome of a Relocation case is influenced by a lack of clarity in the evidence or by the fact that key evidence remained unchallenged. There is a lesson in this for all of us as sometimes these issues result in a successful relocation order where if the evidence was properly put and/or more robustly challenged, that might not have occurred.

Practitioners should ensure they prepare their client's Relocation case carefully in accordance with a clear case concept and that all relevant evidence which supports that case concept is put before the court in cogent and admissible form, in a timely manner. This will help remove obstacles which are often encountered in these cases, which might otherwise come between your client and the outcome which they are hoping to achieve. Relocation!

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