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PREPARING A SUCCESSFUL RELOCATION CASE

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Preparing a Successful Relocation Case

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Relocation cases, where one parent seeks to move a child away from the other parent, are just parenting cases decided on the same basis as other parenting cases and there are no special rules about these cases[1]. They are however notoriously difficult cases to prepare and run and very difficult to settle. The stakes are high for each parent as one adult's freedom of movement may end up being restricted by the court in the best interests of the children or the other adult's relationship with his or her children may be substantially changed by the children moving away. Whatever happens there could be significant financial impact on either or both parents if a move for the children is allowed or if a move is prevented. Add to that the costs of litigation and the stakes are high. In relocation cases it is particularly important to take a step back early in the preparation process and identify ways to present your client's story to the court.

Solicitors drafting affidavits in family law matters are accustomed to the idea of presenting a client's story to the court. A little background information about a client in an affidavit can help personalise a case and set the scene. In relocation cases however, we need to go a step further into strategic storytelling.

A most memorable example of strategic storytelling in law was in a contract and equity case I came across years ago. The High Court delivered it's decision in *Louth v Diprose* [1992] HCA 61 on 2 December 1992. At that time, I was working here in Perth as the Principal (meaning only) Solicitor of the fledging Consumer Credit Legal Service (WA). The facts, and the decision, took me by surprise. Mr Diprose was a solicitor. He was in love with Ms Diprose who was interested in pursuing a relationship with him but maintained a form of friendship with him whereby he bought her things and paid her bills (including school fees for her

[1] *B and B: Family Law Reform Act 1995* (1997) FLC 92-755 at 194.

children) and she gave him her company from time to time but no on-going 'benefits'. With what appeared to be lots of time to consider his actions, he bought the house she was living in from her brother-in-law and gave it to her. She started seeing someone else. The South Australian Supreme Court ordered her to transfer the house back to him.

She appealed. She lost 2-1 in the SA Full Court (but they did change the orders for her to pay him a sum rather than transfer the house). She got special leave to appeal to the High Court. The High Court dismissed the appeal 6-1 (Justice Toohey dissenting), reverting to the order to transfer the house back to Mr Diprose. The finding was that Ms Louth had created such an air of crisis about her insecure financial situation that she took unconscientious advantage of Mr Diprose who was in a position of special disadvantage by reason of his unrequited love for her. (The unrequited love was evidenced by a volume of 91 poems written during one of the periods she refused to talk to him). In the High Court, Justice Toohey was not satisfied that the emotional involvement Mr Diprose had with Ms Louth put him in a legal situation of special disadvantage sufficient for the Court to set aside the gift of the house.

A curious case.

It became even more interesting to me (and instructive for our purposes) when I came across an academic article a couple of years later by Lisa Sarmas. Sarmas, Lisa, "Storytelling and the law: a case study of *Louth v Diprose*", *Melbourne University Law Review*, Vol. 19, No. 3, June 1994: 701-728. Ms Sarmas analysed the case at each of its stages and drew out the differing story lines in the case – damned whores[2], romantic fools, damsels in distress and kindly gentlemen.[3] Louis Diprose is the romantic fool and Mary Louth the 'damned whore' who tricked him out of his house and took advantage of his love. For the minority judges, Mary Louth is the damsel in distress assisted by the kindly gentlemen

[2] Sarmas takes this term from Anne Summer's book *Damned Whores and God's Police: the Colonisation of Women in Australia* (1975)
[3] Sarmas 1994 at 718

Louis Diprose, who after all was a solicitor and knew what he was doing when he gave her the house.

The strong feminist analysis of the case prompted debate and an interesting article in reply by Justice Peter Heerey in "Truth Lies and Stereotypes; Stories of Mary and Louis", (1996) *Newc LR* Vol 1 No 3, pp1-31 where he points out that judges are constrained by the facts presented to them and need to focus on the parties before them rather than use cases to promote the interests of marginilised groups. He also notes that if the SA Chief Justice had sat on the appeal rather than as the trial judge and the minority judge on appeal Matheson J had taken his place as the trial judge, the result may well have been different. Sheer luck, he says, is perhaps not given sufficient weight in jurisprudential analysis.[4]

As we well know in family law, discretionary judgments are difficult to overturn on appeal. So we come back to the question – how do we win, not lose cases, in the first place. Which stories resonate with trial judges?

The Court continually reminds us (and itself) that a parent who wishes to move does not need to have a compelling reason to do so.[5] However, I can't recall a single successful relocation case where there wasn't a good reason put forward for the move. If you are going to have a chance at winning, focus on the reasons for the move and articulate them clearly.

In the paper by Serina Thomson and myself "Relocation Cases in the Family Court of Western Australia June 2013 - March 2015" [6], our review of reported and unreported cases for that period identified these reasons for wanting to relocate -

- Financially advantageous (such as higher paid employment)
- Professionally advantageous

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[4] Heerey J (1996) at 31

[5] *A v A: Relocation Approac*h (2000) FLC ¶93-035; *Morgan and Miles* (2007) FLC 93-343

[6] http://www.foleys.com.au/resources/Relocation%20cases%20in%20the%20Family%20Court%20of%20Western%20Australia_Swart%20&%20Thomson_30May2015.pdf

- Academically advantageous
- Family support
- Spouse employment
- Spouse location
- “Homesick” (wanting to return “home” due to being unable to settle in Perth)
- Cultural
- Religious
- Mental health

In *Plastow and Saville* [2013] FCWA 105 at para 80 Walters J stated “a better way of describing or contextualising a parent's "freedom of movement" is to regard the concept as falling within that parent's "legitimate interests and desires" which should not be ignored in the consideration of factors in the case (and ultimately the wife was permitted to move the children back to the UK.) Her reason for relocation was quite simple and her story well told. She had agreed to move from the UK 6 years or so earlier with the husband when it was not her preference, she had always been homesick but not such that her mental health was compromised and after separation, she wanted to go back. She was presented as a capable woman, she was expected to cope if unable to move back to the UK. After balancing each of the factors and finding in favour of the ‘UK proposal, his Honour stated at 272 –

“Because the wife is to be the children's unchallenged primary caregiver, it is not possible to strictly separate the children's best interests - as some form of abstract concept from the wife's circumstances, and her legitimate interests and desires. The law does not suggest that such a separation can be achieved, as the passage from the judgment of Kirby J in *AMS v AIF* that I have (twice) cited above makes clear. **The wife's happiness** and emotional health are clearly important considerations.”

I make a particular note of “the wife’s happiness” as I think that there has been a trend over the past few years of thinking that the story which needed to be told

in order to relocate was that there would be a severe impact on the wife's mental health (being the parent who most commonly seeks to relocate)[7].

Happiness of the primary care parent now appears to be a winning story line.

In the recent appeal of *Blanding & Blanding* [2016] FamCAFC 21 (24 February 2016), the trial judge had permitted the mother to move the 3 children from Sydney to the Central Coast of NSW and the father was not successful in reversing that decision on appeal.

There were 3 children born in 2003, 2006 and 2008. The parties separated in mid 2012 when the children were 9, 6 and 4. The parties were living in the east and south-eastern part of Sydney. The mother formed a new relationship in September 2012 with a partner who lived on the Central Coast north of Sydney. The mother had been the primary carer. The father issued for equal time orders in 2013 and the mother responded with a request to relocate. The father's time had progressed in 2014 to alternate weekends from Friday to Monday. With the move, Friday to Monday would be impossible. The mother proposed she would bring the children to Sydney one weekend a month and that the father could spend the other alternate weekend a month in the Central Coast area with the children.

The father had suffered from bi-polar and been an alcoholic but had sought treatment and was able to play a significant role in the children's lives and attend their extracurricular activities for the past 3 years. The parents relationship was hostile.

The trial proceeded on Monday 19 and 20 January 2015 and his Honour gave judgment that Friday. The orders were stayed pending the appeal and the mother and children remained in the Sydney area.

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[7] Mothers were the Applicant to relocate in over 90% of the 38 relocation cases before the Family Court of WA from July 2014 to October 2015 and were successful in 66% of cases. I am grateful to Elizabeth Warr of FCWA for sharing her research.

Judge Brewster had listed 10 factors about the proposed move set out in the judgment of Finn J at pp4-5–

- "the reduced time which the children would spend with the father;
- the travel and accommodation costs involved for the father in spending time with the children on the Central Coast;
- the fact that in Sydney the children would spend time with the father "in a normal domestic situation" while such time on the Central Coast would have to be spent in rented accommodation;
- the father 's ability to be involved in the children's schooling and sporting activities would be "gravely diminished" if they moved from Sydney;
- there would be "a greater then hitherto separation" from their extended family if the children moved from Sydney;
- the children would have to change schools;
- the children's friends are in the Sydney area and they will see much less of them if they move;
- the children's views as expressed to Dr R, who had prepared a family report (with such views being largely unsupportive of the move);
- the children would be moving into "an untested arrangement" should they share a residence with Mr W; and there would be three to four hours travel involved between Sydney and the Central Coast.

10. Having identified these ten matters, his Honour then said that there were "essentially only two reasons" why he had decided that the mother should be permitted to relocate (at [45])-[47]). The first of those reasons was the financial advantage to the mother of the move. The second, which his Honour described as "by far the most significant", was the unhappiness and frustration which the mother would feel if she could not pursue a shared life with Mr W, and which "would undoubtedly rub off on the children and … have an effect on her parenting capacity". His Honour also considered that the mother "would be extremely resentful of the father and see herself as trapped by him…"."

In their joint judgment, Ainslee-Wallace and Berman JJ state –

"144. Given his Honour 's findings about the importance of the relationship between the children and the mother, specifically that she had been their primary carer, as well as the strong recommendation of the single expert that she remain so, his Honour 's consideration of the mother 's happiness is thrown into clear focus.

145. We find no error in his conclusions in this regard."

The trial judgment was not separately published but much of it is quoted in the 2 appeal judgments.

So what is the story being crafted of the parties in this case?

The impression of the mother from the judgment is of a calm long-suffering woman with a tendency for understatement. Her relationship must have been difficult as the father's mental health problems were significant, bipolar disorder and alcoholism but her affidavit is described as matter of fact in its description of all the issues. Post–separation the father sought treatment and despite the parenting relationship being described as hostile, there is no criticism of the mother and the children who had been in her primary care had a good relationship with their father.

She is patient. She didn't rush into court. She only applied to relocate when faced with the equal time application. She allowed the father to attend many extracurricular activities for the children beyond the time in the orders. She had waited many years to live close to her partner but was planning to rent separately at the Central Coast to ease the children into the new relationship.

She called no evidence to say she wouldn't be able to cope if she couldn't move but calmly discussed her hopes about her relationship with Mr W with the family reporter. She didn't make a big fuss about her hopes of happiness but his

Honour obviously felt that she deserved the chance of happiness. She is the archetypal good woman, a good mother. At least that's the story we read about her. And 4 judges stand up for her legitimate interests and desires.

The father on the other hand filed an application for equal time orders. A strategically bad idea as all judges know that if such an arrangement needs to be ordered it is probably doomed to fail for the children. Wouldn't you have tried to talk your client out of that application? From the very start of the court action, the story being told about the father is that he is not aware of issues that may be difficult for his children. Were it not for the mental health issues, he would be labelled the archetypal controlling man. And possibly still with the mental health issues.

The father's application for trial was that the children should live with him if the mother wished to move without them. A common enough order but what story does it tell about him? Yes he loves his children. He'd got his life in order and posed no risk other than if they were to live with him, the stressors of the untested change may cause relapse problems for him. But was it realistic to let him make that application? Wouldn't he have been better off seeking an extended weekend to enable the children to stay where they were, at the schools they were comfortable in, working cooperatively with the mother to enable her to have time with her partner without moving?

How strategic was the father's story? Not strategic enough to win!

My final curiosity comes from an interim parenting decision on relocation where the mother was self-represented.

In *Timms & Payton* [2015] FCCA 3324 (18 December 2015) the matter had been listed for final hearing in Wollongong NSW in September 2015 when the only issue had been the time the father was to spend with the 11 year old daughter working around his roster. Property matters had resolved by consent in 2014. At final hearing, the self-represented mother announced that she had purchased

a house and was moving in December to a town in excess of 2 hours drive south and wanted to change the times and changeover arrangements for the child's weekends with the father, and her school (for year 6, the last year of primary school). The case was adjourned off, an ICL was appointed and the parties and child ordered to attend a Child Inclusive Conference conducted by a family consultant employed by the Court. Altobelli J heard argument on 9 November 2015 and delivered a brief interim judgment on 18 December 2015.

The Family Consultant advised that the 11 year old did not want to move or change schools and particularly wanted to attend a special performing arts secondary school near the father's home, that she loved and was loyal to each parent but that she was well settled in the care of her mother.

The father opposed the move (as did the ICL) and proposed the child live with him (for which he would need great assistance to get her to school etc) but was also prepared to spend time with the child on alternate weekends and holidays, subject to his roster. He was able to meet for changeover as proposed by the mother.

The difficulty his Honour faced was that the mother had indicated to the Court "in the clearest possible terms" that whatever order the court made, she was moving to the new house in December 2015 and the father was an unknown quantity as a residence parent and his proposed care arrangements whilst he was at work were "highly problematic, to say the least".

At paragraph 28 his Honour states –

"Of real concern to the Court is the attitude of the Mother in suggesting that she will move, irrespective of whether X comes with her. This is a worrying attitude. It prioritises her needs over those of X. The reasons that she gives for the move are primarily financial and lifestyle, but have not been carefully scrutinised and, quite frankly, sound hollow. Nonetheless, the Court has to make a decision that is

in the best interests of X, and not allow itself to be distracted by issues of parental culpability."

His Honour scrutinised the history of the dispute noting that there had been allegations of poor parenting against each parent in the past but neither of them raised those as continuing concerns. He then solved the problem for a year by allowing the mother's proposed orders and bringing it back for final hearing in December 2016 so a final decision could be made before the start of high school in 2017.

Apparently no one told Ms Payton that good mothers do not categorically state that they will leave their children and move anyway. She failed to solve the court's dilemma by conceding that she would stay as the mother did in *U v U* [2002] HCA 36 when she conceded she would not return to India without the child, as the mother did in *Jurchenko & Foster* [2014] FamCAFC 127 when she conceded she would not leave Perth for the Pilbara without the child, despite her desire to be with her new partner. She stood her ground and exercised her right to have the court properly consider and assess the parties' proposals (although summarily at an interim stage).

Ms Payton, little though she realised or intended to do so, forced the court to challenge the stereotypical story which has played out many times in relocation cases.

Justice Heerey may say litigation has a large component of sheer luck. Don't rely on it. Take the time to think through and be strategic when you help your clients tell their stories to the court. We can't tell clients how to answer questions in cross-examination but we can help them to articulate and think through their issues strategically.