INTERNATIONAL RELOCATION:
"PERMISSION" TO GO?

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The purpose of this short paper is not to be a discursive essay on international child relocation. The extensive case law emanating from the Family Court of Australia, the Full Court of the Family Court and the High Court of Australia since 1999 clearly sets out the law and the mandated approach trial judges are required to take.[1] The purpose of this paper is rather to summarise the approach to be taken and in that context to highlight the considerations that practitioners need to focus on in case preparation.

First, terminology is important in this area. Lazy use of terminology can easily set us on the wrong path in our case preparation. The courts have made it abundantly clear that "relocation cases", as we call them, are not a discrete type of parenting cases that receive different treatment. The courts apply the statutory framework set out in part VII of the *Family Law Act 1975 (Cth)* to all parenting cases. The courts have also made it clear that an applicant who seeks a residence order that will facilitate a child moving to another country is not seeking "permission" to move, in the sense that the applicant bears an onus to satisfy the court that the proposed move is in the best interests of the child.

Such terminology has inevitably developed because relocation cases are different from other parenting cases in some significant ways. First, they have unusual characteristics. They rarely settle because there is no middle ground. For the parties, there is ostensibly a winner and a loser. For the child, the consequences can be far-reaching, meaning almost a total change in environment if the application to relocate is successful. Such cases are often prioritized by the courts, as one party's life is on hold and they need an answer relatively quickly. Secondly, the practical considerations of one parent spending time with the child assume much greater significance in relocation cases, due to the burden of travel

[1] *AIF V AMS; AIF V AMS (1999) FLC 92-852; A and A: Relocation Approach [2000] FamCA 751; U v U [2002] HCA 36*

that is inevitably the consequence of one party's proposal. Other considerations can also assume greater significance, such as the child's age and developmental stage, which impact on the child's capacity to maintain and develop attachments from a distance. Cultural influences can also assume greater significance than they might in other parenting cases.

Whilst the need for a parent to show "compelling reasons" to move away with a child has not been the test for many years and there is no onus on the applicant, the first question that is naturally asked by us as practitioners taking instructions and by Judges seized of relocation cases is "why"? Having said that, the question of "why" would be asked in any case in which the applicant seeks to change a settled set of circumstances that impact on the child, regardless of whether or not it involves geographical relocation. In relocation cases, however, the question is always an important one. The question must be answered carefully and in context.

The Full Court of the Family Court carefully considered relocation cases in *A and A: Relocation Approach* (supra). This case was decided shortly after the High Court decided *AMS v AIF; AIF v AMS* (supra) and the Full Court delivered judgment in *Paskandy v Paskandy (1999) FLV 92-878* and *Martin v Matruglio (1999) 92-876.* The Full Court purposively set out guidelines for the presentation of relocation cases in *A and A* (supra) and the law has not significantly changed since. By way of summary:[2]

1. In determining a parenting case that involves a proposal to relocate the residence of a child either within Australia or overseas:
    a. The welfare or best interests of the child remains the paramount consideration but it is not the sole consideration;
    b. A court cannot require the applicant for the child's relocation to demonstrate "compelling reasons" for the relocation of a child's residence contrary to the proposition that the welfare of the child would be better promoted by maintenance of the existing

[2] *Largely extracted from A and A: Relocation Approach (supra) at paragraph 108*

circumstances;

c. It is necessary for a court to evaluate each of the proposals advanced by the parties;
d. The court is not limited to the proposals of the parties and may engage in a wider ranging consideration of what is in the best interests of the child[3];
e. A court cannot proceed to determine the issues in a way that 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';
f. The court must evaluate the competing proposals (properly identified) and weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child's best interests;
g. It is necessary to follow the legislative directions espoused in s.60B and s.60CC of the *Family Law Act (Cth) 1975*. The wording of s.60CC makes clear that the Court must consider the various matters set out in that section;
h. The objects and principles of s.60B provide guidance to a court's obligation to consider the matters in s.60CC that arise in the context of the particular case.

2. In light of the foregoing, it is to be expected that reasons for decision will display three stages of analysis, being:
    a. First, a court will identify the relevant competing proposals;
    b. Secondly, for each relevant s.60CC factor, a court will set out the relevant evidence and the submissions with particular attention to how each proposal is said to have advantages and/or disadvantages for that factor and make findings on each factor as the court thinks fit having regard to s.60B. In that context:

[3] *U v U* (supra) particularly at paragraphs 80 and 171

i. The reasons for the proposed relocation as they bear on the child's best interests will be weighed with the other matters that are raised in the case, but not treated as a separate issue;
ii. The ultimate issue is the best interests of the child and to the extent that the freedom of a parent to move impinges upon those interests then it must give way;
iii. Even where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves, despite the inevitable implications they have for the child's contact with the other parent.

c. Thirdly, on the basis of the prior steps of analysis, a court will determine and explain why one of the proposals is to be preferred, having regard to the principle that the child's best interests are the paramount but not sole consideration.

3. The process of evaluating the proposals must have regard to the following issues:
    a. None of the parties bears an onus. In determining a parenting case that involves a proposal to relocate the residence of a child, neither the applicant nor the respondent bear the onus to establish that a proposed change to an existing situation or continuation of an existing situation will best promote the best interests of the child. That decision must be made having regard to the whole of the evidence relevant to the best interests of the child;
    b. The importance of a party's right to freedom of movement. 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 s.92 of the Constitution, where applicable;
    c. In determining a parenting case that involves a proposal to relocate the residence of a child and in deciding what is in the best

interests of the child, the court must consider the arrangements that each parent proposes for the child to maintain contact with the other and, if necessary, devise a regime which would adequately fulfil the child's rights to regular contact with a parent no longer living permanently in close physical proximity. If the Court is not satisfied that suitable arrangements have been made for the child to have contact with the other parent, it may be necessary for the Court to order a regime which would best meet the right of the child to know and have physical contact with both its parents.

d. Matters of weight should be explained. In determining a parenting case that involves a proposal to relocate the residence of a child, a court must consider all the relevant matters referred to in ss60B and 60CC and then indicate to which of those matters it has attached greater significance and how those relevant matters balance out;
e. In a parenting case that involves a proposal to relocate the residence of a child, no single factor should determine the issue of which proposal is preferred by a court.

Like all parenting cases, relocation cases turn on their own facts and the weighing of the evidence in the discretion of the court. The irony for the parent opposing the relocation is often that the better that parent's relationship is with the child, the more likely the court is to make orders that facilitate the child moving away. That is because the court can be satisfied that the child's bond with the parent is strong enough to survive the move. Another irony is often that the more a residence parent is struggling to care for the child, the more likely it is for the relocation application to succeed. That is because another common thread in the cases is that the parent proposing to move (usually the mother) demonstrates that she will be happier and therefore a better parent if she can move to her preferred location. The more emotionally resilient she is and/or the greater the support and prospects she has in her current environment, the less likely she is to succeed in her application.

According to statistics published by the Australian Government, the rate of population growth in Australia has increased since the mid-2000s. Overseas migration is now the main driver of this, making up about 64 per cent of population growth (2017). According to the 2016 census, of Australia's population of 23,401,891, a total of 6,150,051 people were born overseas.[4] Also, of the top 10 countries of origin, one-half are not signatories to the *Hague Convention on the Civil Aspects of International Child Abduction.* That means that an increasing number of Australians may have overseas ties in countries where Australian family law orders are unenforceable. The significance of this for us as family lawyers is that international relocation cases may be likely to increase in number and the stakes might be higher than ever before.

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[4] Parliament of Australia website