

Moving

RECENT CASES ON CUSTODIAL PARENTS WANTING

Danny Sandor

In two recent judgments, the Full Court of the Family Court of Australia has considered the law governing a custodial parent's mobility rights. The issue in each was whether a custodial parent can change where she or he lives, in these cases by moving to another country, when the change would result in the other parent not being able to have contact with the child on a regular basis.

In *I and I* (1995) FLC 92-604 the Court (Nicholson CJ, Ellis and Buckley JJ) unanimously overturned the trial Judge and granted the custodial mother permission to move to England. In a decision handed down three months later, *Skeates-Udy v Skeates* (1995) FLC 92-626, the Court (Baker, Kay and Hase JJ) dismissed a mother's appeal against orders restraining her from taking the children out of Australia without the written consent of the father.

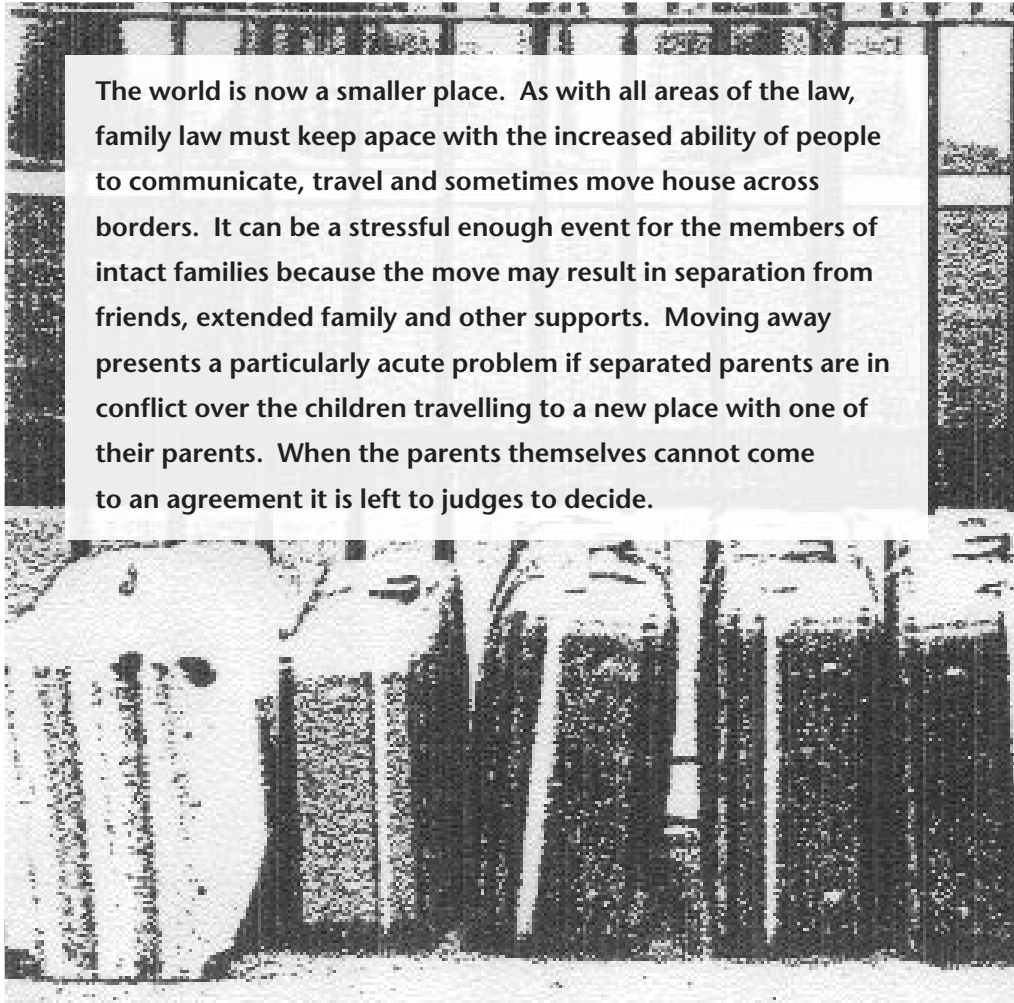
This case note briefly examines some of the similarities and differences between these cases and the direction they indicate for the development of the law in mobility cases.

Background

In *I and I*, guardianship, custody and access matters were in dispute. The wife hailed from England and came to Australia in 1987. The Spanish-born husband had lived in Australia since the age of four. There were two children of the marriage – boys aged four and a half and three years old. The parties married in December 1989 and separated in England while visiting the wife's parents in December 1992. They returned to Australia and remained living under the same roof until 1 May 1994 at which time the wife left the matrimonial home with the children.

From September 1991 to March 1993, the husband received treatment for a psychiatric condition. At trial there was evidence that he was suffering from 'morbid jealousy syndrome', a condition that was characterised by obsessional thinking and said to give rise to concerns about the wife's safety.

The parties agreed that the husband have access to the children on two days each week. In March 1994, the wife became concerned about the husband's sexualised behaviour with the children. After these allegations, no access took place until June 1994 when the wife successfully applied for orders requiring access to be supervised and there had been 13 such occasions prior to trial.



The world is now a smaller place. As with all areas of the law, family law must keep pace with the increased ability of people to communicate, travel and sometimes move house across borders. It can be a stressful enough event for the members of intact families because the move may result in separation from friends, extended family and other supports. Moving away presents a particularly acute problem if separated parents are in conflict over the children travelling to a new place with one of their parents. When the parents themselves cannot come to an agreement it is left to judges to decide.

The circumstances in *Skeates-Udy* were somewhat different. The parties initially became friends during their teenage years. After going their separate ways they became re-acquainted and commenced a relationship. They married in 1988 and had two children who were aged five years and two and a half years at the time of the appeal. In June 1993, the wife left the matrimonial home leaving the children in the husband's care. Consent orders were made a few days later providing for the wife to have very regular access to the family home and the children.

In September 1993, the wife left the children in the husband's full-time care while she attended a four-week training course in the United States. Upon her return, the husband moved out of the home leaving the wife in possession with the two children. Thereafter and up until trial, the husband had 'extensive overnight access' with the children.

The parties reached agreement on custody and guardianship issues on the second day

of the Family Court hearing. The sole issue which remained to be determined was whether the wife could remove the children to the United States.

The Applicable Law

The starting point in such cases is that, as with all decisions concerning the guardianship, custody, access and welfare of children, it is the welfare of the child that is the paramount consideration in relocation cases. To this end, the Full Court in *Holmes and Holmes* (1988) FLC 91-918 (Fogarty, Bell and Baker JJ) set out three particular issues to be determined: whether the application to remove the child is made bona fide; whether the custodial parent will comply with access orders and ensure the maintenance of a relationship between the child and the other party; and the general effect on the welfare of the child in granting or refusing the application.

With respect to the third consideration, the Court in *Holmes*, at p. 76,663, said: 'In this

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Picture: Howard Birmstahl

context the genuine wishes of an unchallenged custodian is an important consideration. That is so partly because the unhappiness of the custodian is likely to impinge upon the happiness and welfare of members of that person's household.'

The Full Court in *Fragomeli and Fragomeli* (1993) FLC 92-393 (Fogarty, Strauss and Smithers JJ) amplified this approach. While stressing that each case depends upon its own facts and circumstances, the Court said (p. 80,022): 'Generally, the custodian should be left to order his or her own life without interference from the other party or from the Court, so long as he or she does what may reasonably be expected to be done by him or her in all the circumstances.'

The Trial Judgments

In *I and I*, the trial Judge awarded the wife sole custody and also sole guardianship but refused to allow her to take the children to

England with her. His Honour found that he was unable to conclude whether the husband had engaged in sexualised behaviour with the children but found that if such had occurred, the children had not been harmed by it and that there was little risk it would occur again. On this basis, he made a further order requiring the wife to undergo counselling which was intended to assist the wife in accepting that the husband was unlikely to repeat his sexualised behaviour with the children that had raised her concerns.

The trial Judge was satisfied that the wife's application to go to England was bona fide and genuine but placed little weight on her reasons for wanting to move. Regarding the importance to her of having family around her, which would be the case in England, whereas her supports in Western Australia were limited, the trial Judge commented that she had friends in Australia and

had visited and been visited by her parents several times in previous years.

The wife also argued that her employment/retraining prospects were better in England, against which the trial Judge found that there was no evidence apart from her own assertions.

After considering these aspects the trial Judge effectively found that the desirability of nurturing the father's relationship with the children and addressing the relationship between the husband and wife outweighed the benefits of permitting the wife to relocate.

In *Skeates-Udy*, the trial Judge refused the wife permission to take the children with her overseas 'in the foreseeable future'. He was not satisfied that the wife's application was bona fide and held that it was not reasonable for her to pursue three or more years of studies in circumstances where he did not accept that such study was necessary or reasonable for her prospects. He noted that counsel for the wife said that her proposed course was of only 'marginal significance' to the wife and conceded that the purpose was not to 'derive a greater income to support herself and the children' (p. 82,282).

Referring to past difficulties between the parties, the trial Judge also said he was not satisfied that the wife would ensure the continuance of the husband's relationship with the children.

In addition, he unreservedly accepted the evidence of the Family Court Counsellor's report that the husband's relationships with the children would be damaged and had evidence before him from the wife as to the close relationship between the father and the children.

The Full Court Decisions

In deciding appeals from a discretionary judgment, it is not enough that the appeal bench may have approached the case differently (*House v. The King* (1936) 55 CLR 499) – some plain error of law or mistake of fact must be found (*Gronow v. Gronow* (1979) 144 CLR 513).

In *Skeates-Udy* the Full Court were divided as to whether the trial Judge had made an error, but all members of the Court may be seen to have decided that even if it had the discretion to substitute judgment, the trial Judge's decision should be upheld. In *I and I* the Court found that the trial Judge's discretion had miscarried, therefore enabling the Full Court to exercise its discretion and it did so in favour of the appellant.

In *Skeates-Udy* an important issue was the assessment of the wife's bona fides. Baker J (at p. 82,286) considered that the trial Judge had erred in how he addressed the

issue, saying that: 'I am satisfied that, whether or not it is reasonable for the appellant in these circumstances to pursue studies at the Portland Centre was neither the issue nor the correct test to apply. The only issue for his Honour, in my opinion, was whether the appellant was genuine in her desire to attend the course. Therefore, for these reasons, his Honour addressed the wrong question and arrived at a conclusion which was simply not open to him, on the facts.'

Unlike Baker J, Kay and Hase JJ (at p. 82, 293) did not expressly decide there had been an error in the trial Judge's treatment of the bona fides question saying that: 'The issue of bona fides as discussed in *Holmes*' case goes to the issue of whether or not there is really an ulterior motive for removing the children offshore, namely trying to distance them from the non-custodial parent. There was no real challenge to the fact that the wife had wanted to do this course in Portland, or that in so doing she was acting in any way inconsistent with the course of her studies for many years. If his Honour was of the view that bona fides had something to do with either utilitarian benefits of the wife's proposal or the reasonableness of it then we are of the view that his Honour erred in applying such a test.'

In any event, after considering the trial judgment as a whole and other issues raised in the appeal, all three Judges were satisfied that the decision was correct for the welfare of the children and should not be disturbed.

In *I and I* the wife's bona fides were not in issue. The nub of the matter was that the trial Judge considered the maintenance of access with the husband to be the most weighty consideration in furthering the welfare of the children. The Full Court held that the trial Judge had fallen into error by not considering the significance of contact with other family members.

The Court said, at p. 82,020-1: 'It is apparent from his Honour's judgment that he gave the factor of the extended family very little significance, in effect equating it with the availability of other friends and acquaintances. In doing so we consider that his Honour fell into error. The value of access to an extended family consisting of grandparents, uncles, aunts and cousins to the welfare of children is obvious and of very great importance in most cases, including this one. When this is coupled with the obvious support that such a family can give to the children's caregiver it becomes a factor of great weight.'

This was a case where the children's welfare was viewed by the Full Court to have a particularly close connection to the circumstances of the caregiver who was in the relatively unusual position of having been awarded sole guardianship as well as sole custody.

'The effect of his Honour's order was, however, to require the wife, whom he had found to be the only suitable custodial parent and guardian, to remain in what is for her a foreign country, with no means of supporting herself and the children other than social security and such amount as the husband is required to pay by way of child support

if he obtains employment. This situation would continue upon an indefinite basis, with the wife cut off from her extended family and likely to be subject to harassment and abuse and, if Dr T's evidence [in relation to morbid jealousy syndrome] is correct, worse from the husband.'

The Full Court's approach to the wife's circumstances was accompanied by a number of differing conclusions on the facts. For example, the trial Judge supported his reasons for refusing relocation with reference to his concern to have the wife counselled to accept that the alleged abuse, if it occurred, was unlikely to re-occur. The Full Court doubted that counselling was appropriate to such circumstances and placed more emphasis on the psychiatric evidence which had been taken into account by the trial Judge in relation to guardianship and custody, but not in relation to the application to take the children overseas.

Concluding Comments

The differences between the Full Court's treatment of these cases on their facts make an interesting comparison.

In *Skeates-Udy* the wife was seeking to relocate for reasons which were connected neither to family matters nor, according to the Court, enhanced economic or professional benefit. There was seen to be little ostensible value for the children in the move and, based on the Counsellor's evidence, a strong detriment in the children's separation from the husband – a parent who had been an intermittent primary caregiver. The Court was not satisfied that the wife would ensure the continuance of the relationship between the husband and the children while they were overseas.

In *I and I* the wife had been made sole guardian and custodian of the children. The loss of regular contact with the husband which would result from relocation was seen to be balanced by contact with the extended family. Even if there was uncertainty about the outcome of the wife's retraining and employment prospects, the proposed move was materially connected to such a goal. Moreover, there was evidence concerning the wife's positive attitude to access which the trial Judge had found, and there was expert evidence indicating the desirability of physical distance between the wife and the husband.

What ought not be overlooked in a focus upon the differences between the cases is what seems to be a strengthening judicial emphasis upon viewing the welfare of the children as intrinsically connected to the psychological and economic wellbeing of the primary caregiver. The growing favour of such an approach was highlighted by Full Court's consideration in *I and I* of English and particularly Canadian authorities which, while refusing to establish any absolute presumption in favour of a custodial parent's mobility, have decided cases with emphasis on the reality that it is the custodian's daily circumstances, not that of the access parent, which will have greatest impact on the welfare of children.

The Honourable Madam Justice Rosalie Abella of the Court of Appeal for Ontario has recently expressed, in forceful terms, what she considers to be the appropriate policy in these situations: a presumptive deference to the decisions of a responsible custodial parent:

'When, therefore, a court has been asked to decide what is in a child's best interests, and a choice must be made between the *responsible* wishes and needs of the parent with custody and the parent with access, it seems to me manifestly unfair to treat these wishes and needs as being on an equal footing. When one adds to this the dimension that a court's decision ought to favour the possibility that the former partners can get on with their lives and their responsibilities, one reaches the admittedly difficult conclusion that a parent with custody, acting responsibly, should not be prevented from leaving a jurisdiction because the move would interfere with access by the other parent with the child, even if the relationship between the child and the access parent is a good one.

'To conclude otherwise may render custody a unilaterally punitive order. No court could – or would – prevent a parent with access from moving anywhere or at any time he or she chose . . . Whether or not the motivation was benign and whether or not the loss of the visits was harmful to child, it is inconceivable that a court would insist that the parent with access remain in the jurisdiction for the sake of the child's best interests. To do so would be an unwarranted intrusion into an entirely personal decision.

'I have difficulty understanding why, then, courts should not feel equally constrained in interfering with the right of a custodial parent to decide where to live. In my view, it is not for a court to pass judgment on whether a move is "necessary" for the custodial parent, any more than it would be for a court to pass judgment on a similar decision by the parent with access. It is hard enough for members of a former family to adjust to separation without courts telling them where they should live.' (*MacGyver and Richards*, Court of Appeal for Ontario, Grange, Labrosse and Abella JJA, unreported judgment released 23 March 1995, pp. 22–23, emphasis added).

If one can assume that the tests set out in *Holmes* and in *Fragomeli* answer the question of whether a parent is acting 'responsibly', there is scope for the Family Court of Australia to adopt her Honour's approach. Some might consider it is already well in the vicinity of doing so.

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