

Relocation Dispute Decided

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The possible impacts of the reforms to the children's provisions of the Family Law Act have been considered recently by the Full Court of the Family Court in the case of *B and B: Family Law Reform Act*. (For a previous discussion of the law's response to re-location cases see Sandor 1995).

The dispute centred around the intention of a mother with custody under the

'old' law to move from northern Queensland to central Victoria with the children of her former marriage in order to re-marry. The two children, aged 12 and 10 at the time of the appeal, had lived with their mother since the separation in early 1991. Their father lived in the same area and had had significant contact with them since that time. When the mother advised the father of her proposed move he sought custody

of the children and she applied for a variation of the access arrangements.

The first bearing

The matter was heard first in September 1996, several months after the Family Law Reform Act came into operation. Its principles, objectives and substantive provisions were therefore relevant to the decision. At the hearing the wife indicated

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that if she were prevented from moving to Victoria with the children she would remain in north Queensland, and the father indicated that if this occurred he would not apply for a residence order.

At first instance the trial judge found that there had been significant conflict between the parties since the separation but that both were, in their respective capacities, loving and involved parents. The Court counsellor's report (the children were not separately represented) had suggested that the children had a marginal preference to remain living with their mother if she moved to Victoria. The counsellor had also indicated that the conflicts between the parents would be 'ultimately destructive for the girls' emotional development' and would be avoided by the mother's movement away from the area.

The trial judge found that the mother was extremely distressed at the prospect of not being able to remarry and move away with the children. Although parents'

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interests are subservient to those of their children, where a resident parent's quality of lifestyle, capacity to cope and/or mental health are diminished or detrimentally affected by an inability to relocate, there may well be an adverse impact on the children's best interests. It was seen to be so in this case and the mother's application was granted.

The judge also found that principles underpinning pre-Reform Act decisions in determining whether to make orders facilitating a relocation by parents and their children required the following matters to be considered: Is the application made bona fide? If so, can the Court be reasonably satisfied that the resident parent will comply with contact orders and other orders to ensure the continuance of the relationship between the children and the contact parent? What is the general effect on the welfare of the children in granting or refusing the application?

Within the context of the children's best interests and the principles and objects of the legislation, the trial judge considered that the following may also be relevant in such cases: the wishes and interests of each parent, taking account of the notion

that parties should normally be free to pursue a new life after separation subject to their ongoing parental responsibilities; the fact that one parent has been the unchallenged primary caregiver for a considerable time; and the fact that the proposed move is interstate, not overseas.

The father's appeal and arguments of the parties and interveners

The father appealed against the decision to the Full Court (Nicholson CJ, Fogarty and Lindenmayer JJ). His objections focused the Court's attention on the right of children to have contact with both parents and the impact which a change of location by one parent would have on the children's enjoyment of that right.

Central to his argument were the objects and principles contained in the new section 60B, which reads as follows:

60B(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

60B(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

- (a) children have a right to know and be cared for by both their parents regardless of whether their parents are married, separated, have never been married or have never lived together; and
- (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development;
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children.

These, it was claimed, had introduced major and significant changes to the culture of family law in Australia by, for the first time, including the specific rights of children as a consideration. Together with

the terminology changes, these served to move the focus in re-location disputes away from balancing the advantages and disadvantages of moving between the rights of parents to making the rights of the children concerned predominate. This may only be altered where it could be shown that the current situation was contrary to the children's best interests.

On this basis, and remembering that children have a right under the amendments to have contact with *both* parents and that parents are exhorted to *share* parental duties and responsibilities, he said that a right of either the resident or contact parent to relocate exists only where the Court can be persuaded that the children's rights would not be adversely affected.

Counsel for the wife argued that the new legislation did little more than restate the previous position in cases of this nature, that it would not have been intended that in a mobile society such as Australia that parents who had, for example, been posted elsewhere as a result of their employment would have to satisfy the Court of the appropriateness of the move, and that the best interests of the child were still the central criterion. She also submitted that economic and social matters should be taken into account when relocation cases were being determined, and referred to Australian Institute of Family Studies research findings into the economic consequences of marriage breakdown as being relevant.

There were two interveners in the case – the Attorney-General, Daryl Williams QC, who appeared personally on behalf of the Commonwealth, and the Human Rights and Equal Opportunity Commission (HREOC).

The Commonwealth argument emphasised the importance of children's rights under the legislation but did not support the husband's argument that there was an onus on the parent applying to move to show that the relocation would be in the best interests of the child. However, there was now some doubt, it was argued, about the relevance of earlier decisions, given that a residence order is conceptually and in practice different from a custody order.

The Human Rights and Equal Opportunity Commission submitted that the right to freedom of movement is recognised in the Constitution, at common law, and by reason of the International Covenant on Civil and Political Rights which entered into

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force in Australia in August 1980. It was also relevant that the Reform Act was heavily influenced by the United Nations Convention on the Rights of the Child and that the wellbeing of all family members and the freedom of parents to exercise their human rights are factors in the determination of what is in the best interests of a child.

The outcome

The Full Court dismissed the husband's appeal and held that the trial judge had neither misapplied the law nor exercised his discretion incorrectly: 'Given his Honour's findings about the background of this case and the impact upon the wife and the impact directly and indirectly upon the children of a refusal to make [the relocation order] his Honour was clearly correct in the conclusion at which he arrived.'

The Full Court characterised the Reform Act as 'representing a major re-statement of the law relating to children who come within the ambit of the Family Law Act and over time it may have a significant impact upon the approach to those matters'. It described section 60B as providing 'an optimum set of values for children of separated parents and [as] the goal to which the parents, society and the courts should aim'.

The essence of the judgment is that the best interests of children remain the paramount consideration and define the central issue, as section 65E spells out. The right to be cared for by both parents has to be seen in the context of parental separation, with a consequence being that each parent may henceforth contribute different degrees of care.

The Court must consider the various matters set out in section 68F(2) in determining what those best interests are, although the weight it gives to any one factor depends on the circumstances of each case. So also the specific principles contained in section 60B(2) provide considerable but not exhaustive guidance to the Court, and their importance will vary from case to case.

The Full Court held that no question of a presumption or onus arises in such cases – that is, the applicant is not required to prove that her or his move will not have

a detrimental effect on the children. Such an approach would, it considered, make the hearing more technical and adversarial, and possibly divert the inquiry from the facts relating to the children's best interests to legal issues relating to burdens of proof.

The Full Court further held that within the context of the best interests principle several particular considerations were likely to be relevant in relocation cases. These were: the degree and quality of the existing relationship between the children and each parent; the degree and quality of the existing contact between the children and the contact parent; the reason for the relocation; and the distance and permanency of the proposed change.

Other relevant factors may include the ages and wishes of the children, the feasibility and costs of travel, alternative forms of contact and the dislocation from other aspects of the child's former environment such as schools, friends and extended family members.

One additional factor which the Full Court made reference to was the impact on the contact parent of the provision emphasising that the child has a right to contact with *both* parents. In his argument, the father's counsel maintained that this resulted in the contact parent having as little right to move away as has the resident parent. The Court held that it would be within the Court's power to make an order which might have the indirect effect of restricting a contact parent's movement. However such an order would be most unlikely to be made, given the reality that it would rarely be beneficial to children to require contact parents to see or otherwise communicate with them against that parent's wishes. In so doing, the Full Court commented on the unrealistic and impractical interpretation of section 60B as suggested by the father, and opposed an approach which would involve either parent being what it described as 'captives of fortune' to their children.

The Full Court remarked: 'To freeze both parents at the location to which they went after separation so that the children may continue to have that contact with each of them is most unlikely to serve the long-term best interests of the children. It would inevitably mean that one or both parents may be forced to forego personal or economic opportunities which are advantageous to all members of that for-

mer family or to continue to live in circumstances which are no longer suitable or appropriate.'

Although for some, *B and B: Family Law Reform Act 1995* will be seen – as a 'victory' of mothers over fathers – in reality the judgment provides a useful analysis of the Reform Act provisions and objectives, an overview of relocation decisions in Australia and elsewhere, and an illustration of the delicate balancing which accompanies so many of these difficult disputes.

An illustration of this latter consideration is to be found in the Full Court's analysis of the reasons for either parent wishing to move to a new location. One such reason, as in this case, is the desire to remarry, which the father's counsel suggested might be a pursuit of the mother's own life at the expense of her children. However, the judgment emphasises the importance of personal relationships and their encouragement by society. It also refers to section 43 of the Family Law Act which requires the Court to 'preserve and protect the institution of marriage' and 'give the widest possible protection and assistance to the family as the fundamental group unit of society'. In so doing it makes the point that these principles need not apply only to first marriages.

Conclusion

While the Full Court in *B and B* emphasised that a relocation case is not a special category of parenting matter in itself, it provided in that instance an excellent opportunity to test the impacts of several central provisions of the Family Law Reform Act.

Undoubtedly other occasions will present themselves in time and in a variety of as yet unforeseen situations. The collaborative research project referred to elsewhere in these columns which is examining the impacts of the Family Law Reform Act will include reactions to relocation cases, but will also focus on the consequences of the amendments in a wide range of matters over the three year life of the inquiry.

Reference

Sandor, D. (1995), 'Moving stories', *Family Matters*, no. 42, Spring/Summer, pp. 42–44.

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