INTERNATIONAL RELOCATION: A MODERN AUSTRALIAN PERSPECTIVE ON THE TYRANNY OF DISTANCE

FEDERAL MAGISTRATE PAUL HOWARD
FEDERAL MAGISTRATES COURT OF AUSTRALIA
BRISBANE, AUSTRALIA

1. When marriage breakdown occurs children and their parents must adapt to new circumstances. Sometimes the resident parent thinks that it would be a good idea for them, personally, to start life anew in another city – or even in another country.

2. When a parent wants to move overseas and take the children to live there with them – what approach should a court take? The difficult question of international relocation is considered by courts in many countries every week.

3. The purpose of this paper is to give an overview of the current Australian position and to make some comments generally pertaining to the international relocation of children.

Modern Australia

4. Because of the vastness of Australia – including the substantial distances between the capital cities of the various states – the question of relocation has been a vexing one for courts over a long period of time.

5. The High Court of Australia has made it clear that a court cannot require an Applicant for the child's relocation to demonstrate "compelling reasons" for the relocation of a child's residence.[1]

6. The most recent international relocation case decided by the High Court of Australia involved two Australians of Indian heritage. The case is reported (in order to protect the identity of the parties) as *U v U*[2]. In that case:

   (a) both parents were born in Mumbai, India;

   (b) the parties married in Mumbai in August 1989. At the time of the marriage the father was an Australian citizen who was also resident in Australia;

   (c) the father returned to Australia shortly after the marriage and the mother travelled to Australia a few months later. The mother did not become an Australian citizen but obtained permanent resident status;

[1] *AMS v. AIF: AIF v. AMS* (1999) FLC 92-852.
[2] (2002) 211 CLR 238. This summary of the facts is adapted from the judgment of Gaudron J.

(d) the parties separated in July 1995 when the mother took their only child (a daughter) to Mumbai without prior notice to the father. The mother did leave a note for the father informing him of her actions and she made contact with him after her arrival in India;

(e) the father travelled to India and commenced proceedings for custody in the Family Court at Bandra, Mumbai;

(f) between August 1995 and January 1998 the father visited Mumbai on five occasions and had unrestricted access visits with the daughter. On some of those occasions he even stayed at the home of the maternal grandmother where his former wife and the child were then living;

(g) the mother remained with the child in Mumbai until January 1998 when they returned to Australia. The parties attempted a reconciliation;

(h) unfortunately, the attempted reconciliation did not succeed. On 31 August 1998 the mother again tried to leave Australia and take the child to Mumbai without informing the father;

(i) unbeknown to the mother the father had (in June 1998) obtained an order from the Court restraining the mother from removing the child from Australia and he organised to have the child's name placed on the airport "watch list". Because the child's name was on that list the mother and the child were unable to leave Australia;

(j) the mother applied to the Court seeking an order allowing her to leave Australia permanently and live with the child in India. The mother was unhappy in Australia and missed her family and friends in India. The mother had no family in Australia and apart from three or four friends she had not other support in Australia;

(k) the mother was an educated woman who, before marriage, had worked in the shipping industry in London. In Australia she had only been able to find casual employment performing clerical duties and data entry type work;

(l) the father was a qualified accountant and had resided in Australia since 1973;

(m) the evidence confirmed that the child had a good relationship with both parents.

7. The trial Judge decided that the mother could not return to India with the child – but must remain living in the Sydney/Wollongong area. The mother appealed to the intermediate appellate court (the Full Court of the Family Court of Australia, also referred to herein as the Full Court). The mother's appeal was dismissed.

The Heart of the Matter – Parents Have Obligations

8. By a majority, the High Court of Australia dismissed the mother's final appeal[3]. In doing so the majority got to the heart of the modern Australian perspective on international relocation. At page 236 it was stated:

> *"The reality is that maternity and paternity always have an impact upon the wishes and mobility of parents: obligations both legal and moral, the latter sometimes lasting a lifetime, restrictive of personal choice and movement have been incurred."*[4]

9. Hence, once a person becomes a parent – obligations are imposed upon them. These obligations will restrict the person's freedom of movement.

The paramount consideration

10. The paramount consideration in all international relocation cases (indeed in all parenting cases) decided in Australia is – where do the best interests of the children lie?[5].

11. An order will only be made allowing one parent to move permanently overseas with a child if the order is considered to be, "in the best interests of the child".

[3] The judicial power of the Commonwealth of Australia is, by s.71 of the Constitution vested in, "*A Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates …".* The High Court of Australia is the ultimate appellate court for the Commonwealth of Australia. The intermediate appellate court dealing with family law matters is the Full Court of the Family Court of Australia (also referred to herein in this paper as the Full Court). The Full Court hears appeals from the two Family Law Courts of first instance – the Family Court of Australia and the Federal Magistrates Court of Australia. The majority of first instance decisions in family law matters in Australia are heard in trials conducted in the Federal Magistrates Court of Australia. This includes international relocation cases.

[4] Per Gummow and Callinan JJ at page 263 (with whom Gleeson CJ, McHugh and Hayne JJ agreed).

[5] Section 60CA of the *Family Law Act 1975*.

The Wishes and Interests of a parent applying for International Relocation

12. A parent's wishes will always be taken into account. It is desirable that the primary caregiver is living in a stress free environment – and in a country of their choosing.

13. A parent's wishes are still only one consideration to be taken into account in deciding a relocation case.

14. This principle was stated succinctly in the High Court of Australia by Kirby J in *AMS v AIF; AIF v AMS*[6]. At paragraph 145 of the decision His Honour stated:

> *"Courts recognise that unwarranted interference in the life of a custodial parent may itself occasion bitterness towards the former spouse or partner which may be transmitted to the child or otherwise impinge on the happiness of the custodial (or residence) parent in a way likely to affect the welfare or best interests of the child. This said, the touchstone for the ultimate decision must remain the welfare or best interests of the child and not, as such, the wishes and interests of the parents. To the extent that earlier authority may have suggested the contrary, it has now, properly, been rejected."*

15. The Full Court of the Family Court has also acknowledged this principle in *A v A Relocation Approach*[7]. The Court noted:

> *"The ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges upon those interests then it must give way."*

The Wishes of the Child

16. Another important consideration to be take into account in deciding an international relocation case will be the stated wishes of the children. Much will depend upon the age and maturity of the child – but the wishes of the child cannot be ignored[8].

---

[6] (1999) FLC 92-852 at paragraph 145 (underlining added).
[7] (2000) FLC 93-035 at 87,552 per Nicholson CJ, Ellis and Coleman JJ.
[8] Note section 60CC(3) of the *Family Law Act (1975)*. Also note Article 12 of the *United Nations Convention on the Rights of the Child* – by which a child is entitled to have his or her views given due weight in accordance with the child's age and maturity.

What orders can be made?

17. In Australia, the *Family Law Act* gives to the courts the power to prevent or to order the relocation of a child. In addition, the courts have the power to prevent a parent from relocating and furthermore, the courts have the power to force a parent to relocate – provided that such an order is "no more than is necessary to secure the best interests of a child"[9].

Recent changes in Australian law

18. In July 2006 the Australian Federal Parliament amended the *Family Law Act (1975)* (also referred to herein to as "the Act") and, essentially, has sought to influence the relocation debate.

19. Whilst there are no specific references to "relocation" in the Act note the following objects stated in the Act –

    (a) the best interests of children are met by ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child;[10]

    (b) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;[11]

    (c) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care – such as grandparents and other relatives.[12]

Equal Shared Parental Responsibility

20. There is now a presumption of "equal shared parental responsibility" when a court makes a parenting order[13]. This does not mean there is a presumption that the children will spend equal time with each parent. It does mean that a court must consider making an order:

    (a) that the children spend equal time with each parent; or

[9] *Sampson v Hartnett (No. 10)* (2007) 215 FLR 155 and [2007] FamCA 1365 at paragraph 58 – note section 114(3) of the *Family Law Act (1975).*
[10] Section 60B(1)(a) of the Act (underlining added).
[11] Section 60B(2)(a) of the Act (underlining added).
[12] Section 60B(2)(b) of the Act (underlining added).
[13] Section 61DA of the Act. Note, such a presumption may be rebutted by evidence.

(b) that the children spend substantial and significant time with each parent[14].

21. There are two decisions of the Full Court of the Family Court of Australia which stress the importance of this new "equal time" legislation –

(a) in *Goode & Goode*[15] the Court said that where the Parliament has stated that the Court of first instance must "consider" making an equal time order – this "suggests a consideration tending to a result, or the need to consider positively the making of an order …"[16];

(b) in *Taylor & Barker*[17] the Full Court of the Family Court of Australia spoke of the importance of the "equal time legislation" and the need for trial Judges to adopt an approach that does not "… devalue the imperative imposed by the Act to consider whether it is in the best interests of a child in a case to spend equal time (with each parent)".

Conclusion in relation to the modern Australian approach

22. Even before the introduction of the "equal time" legislation in Australia the High Court had made it clear that parents have obligations which may restrict their personal choices and their freedom of movement.

23. The introduction of the "equal time" provisions into the *Family Law Act* means that courts of first instance must now consider making orders for a child to spend equal time with each parent. If an order for equal time is made this will necessarily prevent the international relocation of a child.

24. A parent needs to come to Court with clear evidence and cogent arguments to establish that an international relocation will be in the best interests of the child. In those circumstances the Court will take into account (as one of the many considerations) the parent's wish to move overseas, as well as economic considerations and the important aspect of family support for the primary caregiver.

25. Applicants for such orders in Australia can be confident that the Courts of first instance will consider each case on its merits. All relevant matters will be taken into account.

26. If, at the end of the day, the Court concludes that it will be in a child's best interests to live permanently overseas with one of the parents – then the Courts in Australia will not hesitate to make such an order – "the touchstone" remains – the best interests of the children.

[14] Section 65DAA of the Act.
[15] [2006] FamCA 1346
[16] *Goode & Goode* (supra) paragraph 64.
[17] [2007] FamCA 1246

Contrast with United Kingdom

27. In 1886 the British Parliament enacted the *Guardianship of Infants Act*. Mothers were given equal rights with fathers and "the welfare of the infant is for the first time enshrined in statute and given a preferential position" (per Lord Guest in *J v C*[18]).

28. The *Custody of Children Act 1891* reiterated that the Court could intervene in cases where the "welfare of the child" demanded intervention.

29. The *Guardianship of Infants Act (1925)* confirmed the paramountcy of the concept known as, "the welfare of the child".

30. Throughout the course of the twentieth century the concepts of the "best interests of the child" and the "welfare of the child" took hold in the United Kingdom and Australia.[19]

31. The English Court of Appeal in *Payne v Payne*[20] in considering an application for international relocation reviewed the recent history in England and noted that the modern English law regulating applications for international relocation of children began with a decision of the Court of Appeal in *Poel v Poel*[21]. In *Poel's* case Sachs LJ stated at page 1473:

> *"When a marriage breaks up, a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must, of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well,* ***this Court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as my Lord has pointed out, produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child****. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."*

[18] [1969] UKHL 4 (19 February 1969).
[19] This and the preceding three paragraphs appeared originally in a paper by Mr Paul Howard entitled, "*Religious Upbringing of Children*" delivered at the twentieth LAWASIA conference in Hong Kong in June 2007.
[20] [2001] 1 FLR 1052. The approach in *Payne* was confirmed as correct in 2004 (*Re B*) and 2005 (*Re G*) by the Court of Appeal.
[21] [1970] 1 WLR 1469 (emphasis added).

32. Thorpe LJ concluded in *Payne's* case at page 1060 that relocation cases had been consistently decided over a 30 year period on the application of the two following propositions:

(a) "the welfare of the child is the paramount consideration; and

(b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the Court concludes that it is incompatible with the welfare of the children."

The Gender Issue in the United Kingdom – Or is it a Bias in Favour of the Applicant Primary Caregiver?

33. In *Payne v Payne*[22]:

(a) the mother was a citizen of New Zealand and she applied for leave to remove the child permanently from the United Kingdom. The mother wanted to take the child to live with her in New Zealand;

(b) the mother had earlier taken the child to New Zealand but had been ordered to return to the United Kingdom from New Zealand pursuant to an order made under the Hague Convention on the Civil Aspects of International Child Abduction 1980;

(c) after the child's return to the United Kingdom the father and the paternal grandmother had enjoyed regular "staying" contact with the child. This contact was acknowledged as "exceptionally good";

(d) the father sought a residence order. The father also opposed the mother's application for leave to take the child to live permanently in New Zealand;

(e) the trial Judge rejected the father's residence application. The trial Judge also gave to the mother leave to remove the child permanently to New Zealand;

(f) the trial Judge in applying the relevant case law found that the move to New Zealand would be in the child's best interests because it would make her mother happy;

(g) the father's appeal was dismissed by the English Court of Appeal.

[22] (Supra). Summary of facts taken from the headnote.

34. The English Courts have been criticised for displaying what has been described as "bias towards the mother"[23].

35. As time goes by more and more fathers are assuming significant – and often – primary caring roles[24]. It will be an interesting observation as to which direction the English Court of Appeal takes. Will the perception of a bias towards mothers continue?

36. What will surely occur, in my view, is that the perception of a bias towards mothers will be dispelled. A more accurate view of the English approach will eventually emerge. I predict that it will reveal that the English courts give significant weight to the wishes of a primary caregiver – regardless of whether that is a mother or a father or both.

37. It is imperative that issues of gender should not cloud the debate concerning international relocation.

Conclusion in relation to the contrast between Australia and the United Kingdom concerning international relocation

38. The English courts continue to maintain that the welfare of the child is the paramount consideration.

39. To an outside observer, however, it does appear to be the case that the applicant parent's wishes (in the case of an international relocation application by a primary caregiver) seem to have at least equal standing with the welfare of the child.

40. The net result of the English approach is that the "desirability of a stress free environment" for the primary caregiver seems to achieve substantially more prominence than is the case in Australia.

41. In Australia – neither mothers nor fathers are given preferential treatment. Neither primary caregivers nor secondary caregivers are given preferential treatment. Neither applicants nor respondents are given preferential treatment. In Australia there is only room for one dose of preferential treatment in such a case – that is – in favour of the best interests of children.

[23] Emeritus Professor Mary Hayes, "*Leaving the Loved: Children of a Shrinking World – a Twenty First Century Dilemma"* Australian Family Lawyer, Volume 20, No. 1. Also note Anna Worwood, *"International Relocation – the Debate*", August [2005] FamLaw and *"International Relocation of Children – Are Our Courts Too Mother-centred?"* The Review, September 2005.

[24] Orders for equal time mean two primary carers.

42. In my view, the High Court of Australia in *U v U*[25] drove a stake through the heart of the *Payne* decision noting – that a parent's wish (in particular the primary caregiver) to move overseas with a child is only one of a "multiplicity of considerations to be weighed in parenting cases".

International relocation in the future

43. With the worldwide use of the internet and associated technology – including the use of web cameras and so on – parents are increasingly able to maintain regular visual and audio contact with their children anywhere in the world.

44. In this ultra modern age children have become jetset international travellers, mobile telephone users and internet users par excellence.

45. The world is becoming a smaller place. The cost of airfares has reduced substantially over the course of the last 15 years. There are airlines flying between Australia and Malaysia for only a few hundred dollars per ticket.[26]

46. Passengers frequently fly from Australia to the west coast of the United States in approximately 12 hours.

47. Countless young Australians, Malaysians, English, Chinese, Indians, Americans, Japanese and Europeans (to name but a few) live, study, work and travel regularly in foreign countries. This current crop of young globetrotters will undoubtedly start to become parents during the course of the next 10–15 years. Being internationally mobile is second nature to this generation. It is easy to see then in the course of the next quarter of a century applications for international relocation will become more frequent.

48. In those circumstances – governments in the democratic nations of the world will have to revisit the question of international relocation. In the meantime, trial courts will undoubtedly continue to use their best endeavours to determine in each case what is best for the children.

Federal Magistrate Paul Howard

Federal Magistrates Court of Australia

[25] (Supra) at 263.
[26] Obviously the continuation of low cost airfares will be very much dependent upon the current global oil crisis.