Relocation

It is common for victims of domestic violence to seek to move away from the geographical location where the abusive partner resides in an attempt to ensure their safety and their childrens' safety and escape the coercive controlling behaviours of their abuser. In addition, a perpetrator of family violence may seek to, or threaten to, relocate the residence of the children to exert control over or "punish" the abused partner. Such relocation may be proposed or unilaterally undertaken, and may involve relocation to intrastate, interstate or international locations.

Where parents are unable to reach agreement as to whether one party may change the place of residence of their child or children to another town, state or country, they may apply under the *Family Law Act 1975* (Cth) (*FLA*) or the *Family Court Act 1997* (WA) (*FCA*) to have the matter determined by the Federal Circuit and Family Court of Australia or the Family Court of Western Australia (collectively called here "the family courts"). In many cases where relocation is allowed the presumption of shared parental responsibility is rebutted.

Orders enjoining a parent, as opposed to a child, from relocating or to relocate are rare and should only be made to the extent "necessary to secure the best interests of the child" (*Sampson & Hartnett (No. 10)* [2007] FamCA 1365 (22 November 2007) per Bryant CJ and Warnick J at 58). (See also *AMS v AIF* [1999] HCA 26; 199 CLR 160; 163 ALR 501; 73 ALJR 927 (17 June 1999) at [145], [191], [47] and *U v U* [2002] HCA 36; 211 CLR 238; 191 ALR 289; 76 ALJR 1416 (5 September 2002) at [144]-[145]). If parties cannot agree, they can ask the Court to make parenting orders, including:

- an order which allows the party to relocate with the child/ren or
- an order prohibiting the other party from relocating the child's residence outside of a certain area (for example, that the child's residence is not to be further than 30 kilometres from the child's current school, or that the child's residence is to be within a specific metropolitan area).

The Court may also make a recovery order where a party has unilaterally changed the place of residence of a child or children, requiring the return of the child.

Where allegations of domestic or family violence or child abuse are made, applications for orders allowing or prohibiting relocation are decided in the same manner as other parenting applications where there are allegations of family violence or child abuse; there is not a specific subcategory of application related to relocation (see *Cowley & Mendoza* [2010] FamCA 597 (16 July 2010)). The best interests of the child are always the paramount consideration (section 60CA FLA; section 66A FCA), a primary consideration in determining a child's best interests is the need to protect the child from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence (which is given greater weight than the benefit to the child of a meaningful relationship with both parents) section 60CC FLA; section 66C FCA and the Family Courts are required to consider the risk of family violence section 60CG FLA, section 66G FCA. The considerations are the same whether the application is to relocate intrastate, interstate or internationally.

Relocation cases can be 'amongst the most difficult decisions for family court judges' [George & Gallwe 2016] due to their highly sensitive nature [ALRC 2010]. There is a high incidence of family violence in relocation applications. A 2012 study of litigated relocation disputes characterised 80% of relationships as 'high conflict or abusive' [Kaspier et al 2011].

In some cases, family violence is a driving factor behind relocation. For example, in *Stringer & Nissen (No 2)* [2019] FamCAFC 185, the mother unilaterally relocated to another town to escape family violence by the father without consent to remove the child from the risk of exposure to family violence. The Full Court of the Family Court of Australia overturned interim orders that the parties have equal shared parental responsibility and that if the mother did not return to their prior town and live with the child, the child live with the father). The Full Court found that the interim hearing judge did not appropriately weigh the mother's allegations of family violence, concerns for the father's alcohol abuse and an existing protection order when determining the child's best interests. Furthermore, if family violence was appropriately found, the presumption for equal shared parental responsibility would not have applied, resulting in an alternative parenting outcome in favour of the relocated mother. Ainslie-Wallace J noted that the conclusion that the child's best interests were to live in the first town was effectively a coercive order which required the mother to return to the father's place of residence.

In Russell & Russell [2012] FamCA 99 (7 March 2012) Young J allowed a mother who alleged a history of violence perpetrated by the father to return with the child to India, despite the father's stated intention to remain in Australia regardless of the Court's decision. The mother had limited English skills, poor work prospects and no family support in Australia and there was a high level of conflict between the parties exacerbated by cultural issues. Both parties' extended families remained in India. Young J found the presumption of shared parental responsibility was rebutted due to the conflict between the parties, their lack of communication and cultural issues.

A 2016 English study reported that unsuccessful applicants to relocation disputes often felt like courts had “put [their] abuser right back in control” when deciding to increase other-parent contact, rather than allow relocation [George & Gallwe 2016]. In its 2010 report, the Australian Law Reform Commission also noted that victims may not feel safe from violence if they remain proximate to their abuser [ALRC 2010], or isolated from support systems located elsewhere.