

# FAMILY LAW MATTERS

## DECISIONS ON RELOCATION



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### **Reservation/Disclaimer**

**The Case Law set out below is current as at February 2009. We stress that every case is different and if you have a relocation issue it is most important that you consult us before taking the steps which may ultimately impact on the success of any application.**

### **SUBSTANTIVE DECISIONS**

TAYLOR & BARKER [2007] FamCA 1246

The Full Court (Bryant CJ, and Finn J, Faulks DCJ dissenting on the appeal but concurring with the below matters) delivered a decision concerning an appeal from a decision of a FM which permitted the Mother to relocate from Canberra to the Northern Territory to be with her fiancé and father of her second child. It should probably be your “Go To” case for the tie being when dealing with relocation matters as the Court has set out the pathway to follow under the new Family Law Shared Parental Responsibility Amendments.

Per Bryant CJ and Faulks DC;

(para 60) *“... a relocation proposal should continue to be considered and evaluated, so far as possible, in the context of the making of the necessary findings in relation to the relevant s 60CC matters; however, as we will shortly explain, such a proposal now also needs to be considered in the context of s 65DAA.”*

61. *It is also apposite to say in connection with Ground 5, that there was considerable discussion before us as to the appropriate order in which the presently relevant provisions of Part VII of the Act (notably s 60CC and s 65DAA) should be considered by a Court in determining a case such as the present.*

62. *The legislation gives no express direction or guidance on this issue. However given that the concept of the child’s best interests is the determinative factor in the application of so many of the provisions of Part VII, and given that s 60CC(1) provides that in determining what is the child’s best interests, the Court must consider the matters set out in subsection (2) (“primary consideration”) and subsection (3) (“additional considerations”) of that section, it would seem only logical that the Court make findings regarding the matters contained in those subsections (so far as they are relevant in a particular case) before attempting to apply any other provision in Part VII in which the determinative factor is the subject child’s best interests.*

Their Honours continued;

73. *Having concluded that it would not be in the child’s best interests to spend “equal time” with each parent, it was, in our view, unnecessary that his Honour consider whether such an option was “reasonably practicable”.*

74. *In our view, the common sense construction of s 65DAA(1)(c), and also of s 65DAA(2)(d), must be that it is only necessary for a Court to consider whether it would be “reasonably practicable” for the child to spend “equal time” with each parent, or “substantial and significant time” as the case may be, if the Court has already concluded that it would be in the child’s best interests to*

spend “equal time” with each parent, or “substantial and significant time” (as the case may be).

75. With regard to the possibility of the child spending “substantial and significant time” with the father, it is true that in the first sentence of paragraph 48 his Honour acknowledged that the advantages of maintaining the “status quo” of “substantial and significant time” as opposed to accepting the mother’s relocation proposal, were “obvious and very significant”. However his Honour had before him her application to be permitted to relocate, and he was obliged to consider it. Such consideration would clearly require a weighing up of the advantages and disadvantages of her proposal to relocate against the advantages and disadvantages of the maintenance of the status quo of substantial and significant time. This is what his Honour then proceeded to do.

76. Again it should be implicit in what we have said regarding this ground (Ground 6), that not only do we find no merit in it, but that we also endorse his Honour’s approach to the application of s 65DAA in a case which involved a relocation proposal.

77. His Honour, correctly in our view, endeavoured first to consider without regard to the relocation proposal, whether it was in the child’s best interests to spend “equal time” with each parent. When he concluded that it was not, he did not need to consider whether “equal time” was “reasonably practicable”.

78. But he did have to move to consider, the option of “substantial and significant time” which he regarded as having “obvious and very significant” advantages. The legislation gives no guidance as to the stage at which a court should commence a consideration of the relocation proposal, but if having found advantages in “substantial and significant time” (or for that matter in “equal time”), his Honour had then turned to consider the “reasonable practicability” of such an arrangement, some assistance would have been gained from s 65DAA (5).

After setting out that section, the decision continued;

79. A consideration of these matters would have required his Honour to evaluate the differing proposals of the mother and father and to consider whether “substantial and significant time” would be “reasonably practicable” if the mother were to relocate to Queensland. This would seem to be a logical path to follow but as the legislation does not prescribe an order in which the relocation proposals are to be considered, we are not prepared to find that his Honour’s decision was incorrectly reached.

80. His Honour did not specifically find that the mother’s proposal for the child to spend time with the father did not come within the definition of “substantial and significant time” as arguably it might have. However, he clearly recognised that the mother’s proposal was very different from the existing arrangements which he had found to have advantages for the child, so nothing ultimately turns on whether the time which the child was to spend with the father under his Honour’s orders did amount to “substantial and significant time”. Ultimately the advantages of the mother’s proposal outweighed, in his Honour’s opinion, the advantages of the existing arrangements, which would have been “reasonably practicable” if the mother remained in Canberra, but was not if she moved to Queensland.

81. We acknowledge that his Honour's approach to the application of s 65DAA, which we have endorsed, does require that the matters which the court has to consider under that section (being "equal time" or "substantial and significant time"), must initially be considered without regard to any relocation proposal which might also be before the court. However any relocation proposal will then have to be balanced against the option of "equal time" or of "substantial and significant time" if either of those options has been found to be in the child's best interests, with the outcome normally emerging from a consideration of whether such an arrangement was "reasonably practicable".

82. We also acknowledge that this approach involves, at least initially, treating the relocation proposal as a separate and discrete matter, and that at least prior to the 2006 legislative amendments, the preferred approach was not to consider a relocation proposal separately from other proposals in relation to the child's living arrangements.

83. However consistently with what the Full Court said in *Goode*, **the options of the child spending "equal time" or "substantial and significant time" with each parent must now be given separate and real consideration, notwithstanding that a relocation proposal may also have to be given subsequent consideration, with the advantages and disadvantages of that proposal then being balanced against the advantages and disadvantages of an "equal time" or "substantial and significant time" arrangement.** Not to approach a case involving a relocation proposal in this way, would 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" or "substantial and significant time" with each parent." (BWT emphasis).

*LINDSAY & BAKER [2007] FamCA 1273*

The Full Court restated and affirmed the principles that a Court should apply when determining risk of abuse to a child in the unsupervised care of a parent. (See *M and M* (1988) FLC 91-979; (1988) 166 CLR 69, *N and S and the Separate Representative* (1996) FLC 92-655, *Re W (Sex Abuse: Standard of Proof)* (2004) FLC 93-192, *S v R* (1999) FLC 92-834).

*EDDINGTON & EDDINGTON (NO. 2) [2007] FamCA 1299*

This was an appeal from a parenting decision where, notwithstanding that the trial judge had concluded that the children should spend substantial and significant time with the appellant, what was ultimately ordered was held not to be substantial and significant time.

The facts of the case involved two children of the marriage, aged 13 and 11 years of age at the date of the trial. The two children lived in the former matrimonial home with the wife in the post-separation period (approximately 2 years). During that period the respondent was the children's primary carer.

Although the appeal was successful, the Full Court was quick to point out that it only interfered with the trial Judge's discretion mostly due to the particular circumstance of the case – the court had to work "spend time with arrangements" into the father's 56 day roster. The Full Court had this to say about s 65DAA;

54. *It is evident that, although orders for time to be spent with a parent fall literally within the provisions of section 65DAA(3)(a)(b) and (c), that does not*

*mean that the orders thereby provide for substantial and significant time within the terms of the legislation. It is equally evident that orders made for time spent cannot satisfy the requirements of substantial and significant time unless they literally meet all of the requirements of those provisions. What constitutes substantial and significant time will vary from case to case. What is substantial and significant time in one factual context may well not be in another. Whatever their terms, orders for substantial and significant time will have in common that they literally comply with each of the requirements created by s 65DAA(3). There is no issue that the orders under consideration did so comply.*

And also para 66;

*.... Clearly, the amount of time which children spend with a parent potentially impacts upon the quality or significance of that time. In our view, the time which the children would spend with the appellant pursuant to the trial Judge's orders, the duration of such periods and the frequency at which they would occur are likely to impact adversely upon the significance of the time which the children would spend with the appellant. There is thus a nexus between the substance and the significance of the time which the children would spend with the appellant. Beyond noting that the legislative requirements are conjunctive, we need say no more, other than to stress that the case turns on its own particular facts and circumstances, and the reality that the roster of the appellant in this case has particular impacts upon what may constitute substantial and significant time spent with the appellant.*

(BWT note – refer also Mazorski v Albright (2007) 37 Fam LR 518, where Justice Brown considered what constitutes a “meaningful relationship” within the meaning of the 2006 amendments to the Family Law Act 1975 but in particular, s. 65DAA. At page 526, Her Honour commented:

*“What these definitions convey is that ‘meaningful’, when used in the context of ‘meaningful relationship’, is synonymous with ‘significant’ which, in turn, is generally used as a synonym for ‘important’ or ‘of consequence’. I proceed on the basis that when considering the primary considerations and the application of the object and principles, a meaningful relationship or a meaningful involvement is one which is important, significant and valuable to the child. It is a qualitative adjective, not a strictly quantitative one. Quantitative concepts may be addressed as part of the process of considering the consequences of the application of the presumption of equally shared parental responsibility and the requirement for time with children to be, where possible and in their best interests, substantial and significant.”)*

*SAMPSON AND HARNETT (No 10) [2007] FamCA 1365*

In, *Sampson* the Full Court was compelled to consider whether the Family Court had the power to order a parent to relocate, i.e. make an order which effectively coerced a parent into an interstate relocation where the Mother was living in Geelong and the Father in Melbourne. The background of the dispute involved a Mother whose attitude toward facilitating the children's relationship was less than ideal and “*if her demonstrable lack of support in this area were to continue into the future there is the spectre of the children becoming alienated from their father.*” The pivotal part of the order was;

- The parents are to have equal shared parental responsibility for their children

- The children's residence is to be established in Sydney no later than 1 May 2007.
- The children are to spend time with each parent as follows (and then a detailed schedule of time was set out)

There was no specific order for the Mother to move from Geelong to Sydney but essentially the second order above had the effect of "coercing" her to move. The Mother opposed such a move however the trial judge, Her Honour Moore J said;

*"... It is acknowledged such an obligation impinges Ms Sampson right to live where she chooses, but that has to give way to the children's best interests ..."*

Essentially, that was the issue agitated on appeal.

Bryant CJ and Warnick J (in a joint judgment) discussed the necessity to consider and make findings about the impact, including the practical and financial impact, on a mother who was the children's primary caregiver of being effectively compelled, as the result of parenting orders providing a regime for young children to spend substantial and significant time with the father, ultimately leading to equal time with both parents, to move with the children contrary to her proposals.

The Full Court held that the trial Judge fell into appealable error by not considering the practicability of the orders, including the financial capacity of the mother to move to Sydney.

The majority held that the Court did have power, which power could, in an extreme case, be exercised to compel a parent to move in order to facilitate a shared parenting regime, but found in the particular case the orders "were in effect at the extreme end of the discretionary range" and that "[s]trong and well-defined support for them was necessary".

This is a considerably detailed and useful case for anyone involved in "relocation" type cases because it reviews many of the caselaw up to and subsequent to the Family Law Shared Parental Responsibility Amendment Act as well as making views as to different types of orders that can be used for differing situations (not just the instance under appeal).

Interesting their Honours noted that s64B did not give the Court power to make the order as to where a parent should live.

*"35. In our view, notwithstanding the breadth of the language in the section, particular the terms of paragraph (i), an order requiring a parent to live in a particular place is not a parenting order as there defined."*

Nonetheless after consideration of many authorities on relocation (e.g. *AMS, A v A (Relocation approach)*, *D v SV*) their Honours had the following to say;]

*57. If it is within power to order a person not to relocate, it would be surprising if it was not within power to order a person to relocate, although one would imagine the exercises of power to the latter effect would be even more rare, because the effect is more drastic. The person being ordered not to move at least has chosen that location as some stage and for reasons which one assumes at least once existed. This contrasts with a person who may not wish to go somewhere and therefore the order is much more of an imposition on that person's freedom.*

58. However, we conclude there is power under s 114(3) of the Act to enjoin a parent from relocating or to relocate, provided that that injunction is no more than is necessary to secure the best interests of a child. The proper exercise of such a power is likely to be rare, because:

(i) the location of the children will usually be the critical factor, leaving to the parents the choice about their roles; and  
(ii) in a parenting case, an order directed to a parent to relocate or not will likely only serve a useful purpose if that parent is to then discharge a particular role as a parent. If the evidence supports a finding that the parent will play that role, if the child is relocated or not, the order directed to the parent will likely be superfluous. If the evidence does not support such a finding, the order will be coercive in nature and be equivalent to forcing that parent to discharge a role in circumstances not of that parent's choosing.

59. The prospect of ordering a parent to relocate and in effect "parent" in a situation not of that parent's choosing, legitimately gives rise to concerns, particularly in respect of enforcement. What if the parent, in response to such an order, simply hands the child to the other parent, perhaps in circumstances such as in the instant case, where for whatever reason, there is not a well-established relationship between the child and the other parent? Will the primary parent be punished? The fact that such vexing questions arise does not mean that the power does not exist and may be rightly exercised at times. Enforcement is discretionary and may be rare in the situation exemplified. On the other hand, enforcement may be appropriate if a primary parent ordered to relocate, simply did not do so.

Before examining the trial judges exercise of her discretion Bryant CJ and Warnick J had this to say;

75. To order someone to relocate to another place will require the court to be satisfied that the practicalities of life equally or sufficiently exist in the place to which the party is required to move. One would therefore reasonably expect a close analysis of the moving party's capacity and/or the other parties' capacity to provide for such practicalities having regard to the orders proposed by the court. It is probably only in the circumstance of significant wealth of both parties that it might reasonably be inferred that the practicalities of life could be met without detailed inquiry."

His Honour Kay J probably was stronger in his view about the efficacy of an order which coerced a parent to move;

"121. Whilst we have not been directly asked to determine the issue of the power of the court to make an order requiring a parent to move from a well established place of residence to a different location so as to place the children in closer proximity to the other parent, I have severe doubts that there is power to make such an order or, if the power exists, it would not be exercised other than in the most exceptional circumstances."

.../...

136. In my view the dilemma in this case is to sculpt orders to meet the realities of the case. Those realities are that the father wants to live in Sydney and the mother wants to live in Geelong and each is free to do so. What needs

*to be achieved, is an order that in the circumstances maximises the opportunities for the children to develop a relationship with both of their parents. It requires a choice of which parent is to be the primary caregiver, that is, with which parent the children are to live, and then a choice of what opportunities should be provided to the other parent to have the children spend time with them.”*

*PENDER & HAYWARD* [2007] FamCA 1526

This was an appeal from the decision of a Federal Magistrate making interim orders for a 2½ year child to live with the Father in Sydney when Mother had moved to Queensland on an urgent basis in the face of an undertaking not to do so. The focus of the appeal before Her Honour Justice Boland was s61DA dealing with the presumption of equal shared parental responsibility. Her Honour referred to Goode as follows:

*In Goode the Full Court discussed the circumstances in which a judicial officer hearing an interim application may find it appropriate to rely on s 61DA (3) and not make an offer for equal shared parental responsibility. At paragraph 78 the Full Court said:*

*The combination of the Revised Explanatory Memorandum and the comments of the House of Representatives Standing Committee on Legal and Constitutional Affairs suggests that s 61DA(3) provides a discretion not to be exercised in a broad exclusionary manner, but only in circumstances where limited evidence may make the application of the presumption, or its rebuttal, difficult. In this case for example, we respectfully agree with his Honour’s decision that this consideration meant it was inappropriate to apply the presumption.”*

Her Honour confirmed that irrespective of whether an Application seeks “equal shared parental responsibility” or not (or is silent as to that issue), a Court is mandated to apply the presumption in s61DA;

*“55. What his Honour was required to determine was whether the unconverted evidence was sufficient to satisfy him in the exercise of his discretion the presumption applied and that these parents should share equally all “the duties, powers, responsibilities and authority which, by law, parents have in relation to children”, and take into account, as he did, that if he made an order under s 61DA, that such an order would be disregarded at a final hearing.*

*56. Thus his Honour had to consider, if the evidence before him was adequate, making an order for equal shared parental responsibility. If the evidence was inadequate he could rely on s 61DA(3) and make no order. If the evidence demonstrated that it was not in the best interests of these children that their parents should have equal shared responsibility for major long term decisions about them he could find the presumption was rebutted. The effect of such order, if made, would require the parents to consult one other and make a genuine effort to reach agreement about major long term issues in relation to the children.”*

(BWT note – see also *KEACH & KEACH* [2007] FamCA 1496 at para 28).



Although probably not agreeing with the course adopted in the FM's decision, Her Honour did not find an error in law on behalf of the FM (on this point). Her Honour did provide some useful obiter at paragraph 66 in that if there was contested evidence about equal shared parental responsibility, that may make it appropriate for an FM to avail themselves of s61DA(3).

Ultimately, the appeal was upheld;

*"90. There is no doubt that courts dealing with parenting applications involving a unilateral move by one parent for good reason very often order a return of a child until a proper determination of a proposed relocation can be made on a final basis (see C & S [1998] FamCA 66). However, as his Honour recognised this was an unusual case. He noted that the mother had "chosen to remain in [the small town] for a number of, to her, very valid reasons".*

*Further, it was not the mother's position that she would remain in the small town other than on a short term basis ...*

*97. As I have already noted, the case before his Honour was unusual, and his Honour's task was a difficult one. The proceedings were truncated with short, and at times, conflicting or ambiguous oral submissions. It was not, prima facie, a case where one party sought to relocate interstate on a permanent basis bringing into play the principles applicable to those parenting cases known as "relocation cases", but that was, in the short term, the practical effect of the orders sought by the mother and thus, in my view, it required a very careful assessment of the competing proposals to structure a regime in the best interests of these very small children. This was particularly so where the matter was dealt with "on the papers" with no testing of the evidence, and no expert evidence such as would normally be given in a relocation case by a Family Consultant as to the children's attachments, and developmental needs."*