**ADR Bulletin**
**ADR Bulletin**

Volume 12 | Number 4 Article 2

1-1-2011

# Relocation and the best interests of the child - can it be determined?

Mieke Brandon

Tom Stodulka

ADR Bulletin of Bond University DRC

Challenging dimensions in FDR

# Relocation and the best interests of the child — can it be determined?

**Mieke Brandon** and **Tom Stodulka**

Mediation in post-separation relocation cases presents the practitioner with many challenges, particularly when the parent wanting to relocate with their children believe they are right and the other parent is wrong to dispute it.

In this article we discuss some of the typical themes of relocation issues for separated and divorced parents from court outcomes and family dispute resolution (FDR).

From a mediator's perspective, facilitating discussions about relocation issues between separated or divorced parents is one of the most complex and emotionally charged conversations with which we deal. All too often it is the cause of a serious wedge between the parents, who previously may have been quite cooperative and now tend to argue their interests by positional bargaining, rather than the all-important factor of how to achieve a considered outcome based on what is in the child's best interests.

All too often, the obligations of all the key factors outlined in the *Family Law Act 1975* (Cth) (the Act)[1] are put aside to fulfil one parent's own needs.

As more and more Australians embark on intercultural marriages, re-partner after relationship breakdown or divorce, travel or seek family support and work intrastate, interstate and overseas, more parents will seek to relocate. A court cannot prevent a parent from relocating, but it can prevent parents with whom the children predominantly live from automatically taking the children with them.[2] Furthermore, it is thought that these days many parents of children have never been married or lived together; they may have had a one-night stand; they may have lived together on and off; or they may have met overseas and become cross-continent parents.[3]

Disputes often occur when parents with whom the children live want to move, with their children, a considerable distance away from the other parent, who will predominantly object because the children's opportunity to spend time with them will be significantly hampered by distance. These disputes become particularly problematic when it is perceived that the relocation is motivated by aims of interfering with the practical, physical and emotional parent–child relationship of the other parent and their extended family and community.

> ... facilitating discussions about relocation issues between separated or divorced parents is one of the most complex and emotionally charged conversations with which [mediators] deal. All too often it is the cause of a serious wedge between the parents, who previously may have been quite cooperative and now tend to argue their interests by positional bargaining ...

Parkinson describes the courts' decision-making about how to work out the relocation dilemma as 'the tension between the children's right to maintain a relationship with both parents, and the freedom of movement of the children's primary carer'.[4]

The Honourable Justice Faulks suggests that 'relocation decisions are often described as among the most difficult decisions judges of family law courts must make'.[5]

Since there is no agreed definition of a 'relocation dispute', Behrens, Smyth and Kaspiew refer to a 'relocation case' as a case in which separated parents (this may include a step-parent or member of the extended family who has care of a child) are in conflict over the 'geographical place' where the child or children live, which could include a dispute over 'which parent' they will live with.[6]

In 2006, the Shared Parenting Council wrote to the Family Law Council, stating in the introduction to its submissions on Family Law Relocation:

> ... we say and most humbly acknowledge that the relocation cases are the hardest cases and most difficult for the Family and other Courts that have jurisdiction in such matters.[7]

This was borne out in the recent High Court case of *MRR v GR*.[8] That case dealt with an appeal from the Full Court of the Family Court of Australia, which had upheld a decision from a Federal Magistrate in 2007 requiring the mother of a five-year-old child to

return to Mt Isa where the parents and child had lived for some months. They had moved up from Sydney for work opportunities for the father, who was keen to continue living in Mt Isa and wished to have a shared care arrangement with the child. After separation in 2007 the mother and child went back to Sydney, but returned to Mt Isa pursuant to interim orders.

In 2009 the High Court[9] considered the provisions of the Act which state that:

> ... the best interests of the child are paramount,[10] that there is a presumption that equal shared parental responsibility is in the best interest of the child[11] ... but also that a court is required to consider whether a child spending equal or substantial or significant time with each parent is reasonably practicable.[12]

Many cases, whether brought through the courts or through dispute resolution processes, have hinged on people's interpretation of what is actually in a child's best interests. The Act sets out many factors to be taken into consideration. These include the primary considerations of:

- the benefit to the child of having a meaningful relationship with both of its parents; and
- the need to protect the child from physical or psychological harm and from being subjected to or exposed to abuse, neglect or family violence.

The additional considerations include, among others:

- views expressed by the child;
- the nature of the relationship of the child with each of their parents, grandparents and other persons;
- the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent; and
- the practical difficulty and expense of a child having contact with a parent.[13]

The Chief Justice of the Family Court of Australia has commented that the concept of best interests is 'deliberately open-ended'.[14] The Chief Justice refers to Justice Carmody's comments that best interests:

> ... are values, not facts, they are not amenable to scientific demonstrations or conclusive proof ... Most cases are finely balanced with the only option being a choice between two or more alternatives. Predictions, perceptions, assumptions and even intuition and guesswork can all play a part in search of the best interests solution.[15]

A few years earlier, in 1999, in the High Court case of *AMS v AIF*,[16] the Honourable Justice Kirby observed that the facts of every relocation case are 'unique' and have to be carefully analysed. Justice Kirby went on to state that previous judicial decisions are only of assistance to the extent that they promote a 'general consistency of approach' and that 'each case depends on the application of governing legislation which, in turn, is in a constant state of amendment and re-expression'.[17]

Decision-making about relocation is as difficult and challenging in the judicial setting as in an FDR forum. The courts may be able to determine a relocation application on the strengths of parental capacity, a history of violence or current abuse, drug addiction, mental illness, disinterest or one of the parents not being interested in facilitating the child spending time with the other parent, or factors of indigenous heritage.[18] These types of issues are similarly raised in FDR. In contrast to the decision made by a court, in FDR the parents themselves have to work out how best to care for their children post separation. This can become more complex when one or both parents intend to re-partner or have already re-partnered, or change their sexual preference with a new partner. When the parent with whom the children live becomes terminally ill or is deceased and the grandparent applies for shared care (which may mean relocation), the decision-making process can take another twist.

Parents will often present positionally in FDR, without the necessary capacity to weigh up the strengths and weaknesses of their respective claims (which they will see as an automatic right). If parents come ill-prepared, they can benefit greatly by seeking legal advice, be it privately or from within an agency. Counselling and participation in group information sessions conducted at a Family

Relationships Centre, for example, may be beneficial.

Pre-mediation or intake prior to mediation assists parents to become familiar with their obligations under the Act. However, it is important for practitioners to be vigilant about assessing the risk factors, as relocation may be used as an interference strategy.

Relocation can prevent the child from maintaining an active and ongoing relationship with the non-residential parent. The child may have difficulty establishing a long-distance relationship and the emotional and financial cost can fall to the non-residential parent.[19] Turkat suggests that all professionals dealing with relocation cases must consider 'the potential risk factors' for identifying the underlying reasons that may motivate the parent in whose care the children are to 'interfere in the relationship between the non-residential parent and his or her offspring'.[20]

Mediators need to understand the underlying psychological pain and loss a parent imagines they may experience or may acutely feel as a result of losing their parental role as co-parent or carer and having a say in their child's life. For some parents, it is hard enough not to be with their children 24/7 and to foresee less than shared time each week can push some over the edge. The parent's identity as a father or mother may well be closely linked to their role as a regular active participant and hands-on parent in their children's lives. The emotional and psychological consequences cannot be underestimated, even for the parent who agrees as a result of mediation that the children can move with the other parent.

The timing of the discussion about relocation in mediation can help or hinder the discussions and potential outcomes. A parent who perceives they have been 'left' as a result of separation may have additional problems with confusion, depression or anger in coming to terms with this new factor, in contrast to the 'leaver' of the relationship who is ready to move on.[21]

FDR practitioners providing mediation for relocation issues do well to have some knowledge of likely outcomes in court. Such understanding can assist parents throughout the mediation process, particularly during exploration, negotiation and private sessions. Being in possession of such information does not damage a mediator's role of remaining objective, independent and non-biased. Rather, it equips the mediator with the means to ask pertinent questions in an even-handed way. The mediator can appropriately reality test and assist parents to work through their differences, and facilitate possible options as well as evaluate these options against the children's developmental needs. This may well include the option of seeking involvement with a child consultant.[22]

In all discussions in mediation, the children are the predominant focus and are considered within a multi-generational extended family system,[23] as well as in the context of their community and cultural environment. Green suggests that 'living and growing in a community gives shape, context and meaning to their lives and development'.[24] Many parents already have adapted their lives when they became parents and made sacrifices. After separation, they have hopefully adjusted by providing two homes for their children while remaining joint decision-makers for their offspring. It is therefore most important that parents are not pitted against each other, but learn to cooperate even at a distance. Parents must be encouraged to form a 'business like' relationship with each other. Referral to parenting programs may assist in this as well.[25]

Unresolved separation issues may come to the surface in any mediation. FDR practitioners are specially trained to be vigilant in assessing suitability for mediation in the first place, as well as monitoring continuously parents' emotional and physical safety while clients of the service they provide. Such an approach does not guarantee the parties will be able to rationally work through all the positive and negative aspects of their proposals — especially when they are diametrically opposed. However, it does help both parents to get a fuller and more comprehensive perspective of what each household has to offer and how the children may or may not benefit from relocation. It may be that a child first needs to complete primary school, or a parent first needs to establish an environment in which they can manage assuming full responsibility of a household with young or pre-teen children.

Relocation cases, by their very nature, can potentially create situations of high conflict between parents who previously may have successfully co-parented or parallel parented.[26] These, like any other cases, need to be managed carefully as mediation must not make the situation worse. Even if parents in principle agree on relocation for their children, the frequency of visits, costs of children's transport and how this is paid for often become sticking points. When one parent does not drive and the other does but has other younger children and does not

Mediators need to understand the underlying psychological pain and loss a parent ... may acutely feel as a result of losing their parental role as co-parent or carer and having a say in their child's life. For some parents, it is hard enough not to be with their children 24/7 and to foresee less than shared time each week can push some over the edge.

want to spend all his or her time in the car away from their 'new' family, the options are limited to how to progress the relocation issue. Similarly, when the children temporarily live with the other parent, e.g. due to illness, this parent may have a problem having the children returned to them. It may be that where the children live is perceived as a relocation issue for the parent living with them as well as for the parent who wants them returned to their care. If the parents cannot agree and the matter is proceeding to court, it is important for the practitioner to reality test how the children can communicate or spend time with the other parent, while waiting for the case to be determined. It is our experience that one session is often not enough for parents to make informed decisions in relocation cases.[27]

If the parents cannot agree and the matter is proceeding to court, it is important for the practitioner to reality test how the children can communicate or spend time with the other parent, while waiting for the case to be determined. It is our experience that one session is often not enough for parents to make informed decisions in relocation cases.

Due to the emotionally-charged complexity of these situations, parents considering relocation will benefit greatly from the input of a range of experts, including family lawyers, psychologists, social workers, child consultants and conflict coaches. The wishes of the child(ren), for instance, may be sought through child-informed mediation.[28]

To illustrate relevant issues in this area the following example is provided from a case that came to mediation subsequent to a court's decision that a pre-primary age child would be permitted to relocate with his mother to another state, 1700 kilometres away from the father.

The initial court decision was conditional on the parties coming to mediation when the child became of school age. What came out in the mediation session was that the father had a strong relationship with the child from birth and maintained regular contact through weekend visits, holidays and weekly phone contact. The mother stated in mediation that the child had formed close relationships around where she lived and explained that she wanted the child to remain in her care at that location. This demonstrated that the delay in final resolution added to the parents' angst, lack of certainty and idealistic expectations, causing further aggravation between them. The insecurity of what eventually was going to be decided impacted on the trust between them, while in the meantime they had made elaborate communication and travel arrangements for the child as well as the father.

As with other family disputes, the use of child-informed mediation conducted by a child consultant benefited both the parents and the child in coming to agreement.

In conclusion, it is always going to be very difficult for a court to determine a relocation outcome. Similarly in FDR parents in their exploration of relocation issues find it just as hard. However, many parents are able to demonstrate their love and care for the children. They often respect each other's skills as parents and maintain they have strong family support networks in their respective locations. There are times when parents are able to make equally strong arguments as to why they should win in the tug-of-war — albeit not seeing how their ongoing conflict causes damage to the child. Single-mindedness is difficult to change to open-mindedness and it is therefore most important for children to have a

voice via specialists who can do this safely by protecting the children from potential backlash from one or both parents.[29]

Both the judiciary and FDR practitioners may need more evaluative research about the best interests of the children in relation to how children fare post relocation. This may assist to get a clearer picture in determining how parents can deal with the choices they make about relocation. Whether parents use their own interpretation of the best interests of the child in FDR or prefer a court hearing to determine this:

> ... relocation law is not just used to resolve disputes which involve a judge determining the outcome: parties negotiating outcomes do, to some extent at least, use the 'shadow of the law' to resolve their disputes.[30] ●

*Mieke Brandon and Tom Stodulka are registered FDRPs and are accredited under the National Mediation Standards Scheme. Tom can be contacted at <mail@tomstodulka.com> and Mieke at <miekeb@powerup.com.au>.*

## Endnotes

1. See sections 63DA, 63C(2), 64D, 63C(2)(d), (g), (h).

2. See Heartly Healy, Family Law Specialist at <www.hhfamilylaw.com.au/relocation.php> on issues for the court to consider, viewed 10 January 2011. See also P Parkinson 'Family law and the indissolubility of parenthood' (2006) 40(2) *Family Law Quarterly* 237–280.

3. See P Parkinson, J Cashmore and J Single, 'The need for reality testing in relocation cases' (2010) 44(1) *Family Law Quarterly*, 1–34 at 3–4, <ssrn.com/abstract=1704703>, viewed 13 January 2011.

4. P Parkinson, 'Freedom of movement in an era of shared parenting: the differences in judicial approaches to relocation' (2008) *Federal Law Review*, <ssrn.com/abstract=1181442>, viewed 13 January 2011.

5. The Hon Justice Faulks, 'Relocation: a report to the Attorney General prepared by the Family Law Council, Commonwealth of Australia May 2006 <www.ag.gov.au/www/agd/agd.nsf/Page/FamilyLawCouncil_Publications_ReportstotheAttorney-General_RelocationReport>, viewed 17 January 2011. See also 'Challenges for the courts in relocation decision-making' in J Behrens, B Smyth and R Kaspiew (eds), *Relocation disputes in Australia: what do we know, and what are the implications for family law and policy?*, Symposium proceedings, April 2008, Canberra, <www.aifs.gov.au/institute/pubs/fle/appendixa.pdf> viewed 17 January 2011.

6. J Behrens, B Smyth & R Kaspiew, 'Australian family law court decisions on relocation: dynamics in parents' relationships across time' (2009) 23 *Australian Journal of Family Law* 222 at 224.

7. Shared Parenting Council of Australia, 'Family Law Relocation submission', 18 April 2006, p 1, <www.familylawwebguide.com.au/attachment.php?id=379&keep_session=2508211>, viewed 13 January 2011.

8. [2010] HCA 4.

9. In *Re MRR v GR* the High Court allowed the applicant's appeal, holding that the Full Court of the Family Court should have held that it was open to the Federal Magistrate, on the evidence before him, to find that it was reasonably practicable for the daughter of MRR and GR to spend equal time, or substantial and significant time, with each parent and therefore it was not open to the Federal Magistrate to consider making the order described in s 65DAA(1)(c) of the Family Law Act. The matter was remitted to the Federal Magistrates Court for a de novo hearing.

10. Section 60CA.

11. Section 61DA(1).

12. Section 65DAA(b).

13. Sections 60CC and 60B.

14. Faulks, above note 5 at 44.

15. *W & R* [2006] FamCA 25, unreported, 30 January 2006, at [54], quoted in Faulks, above note 5 at 44.

16. *AMS v AIF; AIF v AMS* [1999] 199 CLR 160 at 206–207; [1999] HCA 26 at [142].

17. Ibid at 206. Kirby J also observed in *AMS v AIF* at 208: 'One of the objects of modern family law statutes … is to enable parties to a broken relationship to start a new life for themselves, to control their own future destinies and, where desired, to form new relationships, free from unnecessary interference from a former spouse or partner or from a court.'

18. Section 4(1) of the Act refers to the child's heritage as their Aboriginal or Torres Strait Islander culture, their community or communities to which they belong, including the lifestyle and traditions of those environments. Any descendant child of Australian Aboriginal or Torres Strait Islander people being relocated from their heritage may have additional cultural needs that must be taken into account. See also P Parkinson, 'The realities of relocation: messages from judicial decisions', May 2008, Social Science Research Network Electronic Library, p 3.

19. ID Turkat, 'Relocation as a strategy to interfere with the child-parent relationship' (1996) 11 (39-41) *American Journal of Family Law* at 1–2, <www.familylawwebguide.com.au/library/spca/docs/Relocation%20Strategy%20to%20Interfere%20with%20Child%20Relationship.pdf>, viewed 10 January 2011.

20. Ibid at 2 for a list of risk factors identified.

21. L Fisher and M Brandon, *Mediating with Families*, 2nd edn, 2009, pp 70–71.

22. See Legal Aid ACT, <www.legalaidact.org.au/whatwedo/faq/fdr.php>, viewed 13 January 2011.

23. See Fisher and Brandon, above note 21 at 57–58.

24. M Green, 'U v U, You v Me, Us v Them', Paper presented at the 8th AIFS Conference, Melbourne, February 2003, 4, <www.aifs.gov.au/institute/afrc8/green.pdf>, viewed 14 February 2011.

25. See I Ricci, *Mum's House, Dad's House*, 1997, Chapter 8.

26. See BD Olsen, 'How it is', January 2011, <www.mediate.com/articles/olsenB3.cfm?nl=298>, viewed 17 January 2011.

27. FRCs offer three hours of free mediation. The Telephone Dispute Resolution Service offers two-hour telephone sessions and in some instances online FDR. Private practitioners make their own time schedules.

28. See Relationships Australia, 'Fab Abs', *Recent Research Abstracts*, Issue 53, October 2008.

29. See Fisher and Brandon, note 21 above at 82–91.

30. Behrens, B Smyth & R Kaspiew, above note 6 at 246.