A TALE OF SEVERAL CITIES – DIFFERENCES IN APPROACH IN RELOCATION CASES

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1.0 Introduction

1.1 The spur for me to write this paper arose from a confluence of events towards the latter part of 2012:

[a] I took annual leave in September/October 2012 and whilst I was away FM Purdon-Sully (as she then was) [1] conducted a circuit in Townville. It was subsequently reported by several practitioners that Her Honour had been very "liberal" in her approach to interim relocation cases and made several decisions permitting an interim relocation to occur;

[b] That contrasted with the common experience of practitioners in the conduct of such cases before their Honours Coker and Willis.

[c] Subsequently in several interim relocation cases in the lead-up to Christmas I experienced differences in approach between FM Coker and FM Willis.

1.2 It is not my intention to embark upon a criticism of individual judicial officers though it will be inevitable that some of my remarks may be interpreted that way.

1.3 More importantly, as I will shortly discuss, there is a lack of objective information concerning the decisions of our judicial officers. No decision of Coker, Purdon-Sully, or Willis JJ concerning interim relocation cases for the period to which I have just referred has been published on any of the available services.

2.0 Knowledge is of 2 kinds; we know a subject ourselves or we know where we can find information about it. [2]

2.1 The family courts, for the most part, make decisions based upon an exercise of discretion. Those decisions are informed, obviously enough, by the legislative pathway but the possibility of individual beliefs,

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[1] For the purposes of this paper I will refer to the present judges of the Federal Circuit Court as "FM" for any decision or activity by them prior to the legislative change from 12/4/13 and as "Judge" for any other circumstance.

[2] Samuel Johnson reported in Boswell "Life of Samuel Johnson"

preferences or even prejudices playing a part in the exercise of discretion cannot be denied. [3]

2.2 A careful approach to case preparation and advocacy requires some assessment of your opponent; and of the judicial officer. But how do we know how Judge X or Judge Y will approach a property trial; a child sexual abuse case; a relocation case? [4] Even within a trial, knowledge of judicial practices is necessary. For example, in my experience there is a considerable divergence of approach concerning the application of *Family Law Act* s. 69ZT? [5]

2.3 We have some advantage in North Queensland – our numbers are small – and so I know something of all those who regularly appear in the family courts; and something of the judicial officers. But is that good enough?

2.4 As an experiment I conducted a survey of the reported decisions of their Honours Baumann, Coker, Reithmuller, Spelleken, Purdon-Sully, Demack and Willis [6] concerning applications for interim relocation or, where a parent has unilaterally moved the children away, applications for the recovery of children. The numerical results [7] are as follows:

Baumann	none reported
Coker	1 reported [8]
Reithmuller	none reported
Spelleken	none reported
Purdon-Sully	none reported
Demack	2 reported [9]
Willis	none reported

2.5 Each of those judges listed will have conducted at least several if not numerous cases involving questions of interim relocation. A contrast can be made with FM Neville. His Honour's practice appears to be that most, if not all of his decisions are published on *Austlii* – numerous decisions appear.

2.6 So when I said earlier that FM Purdon-Sully was "liberal"; or if I were to venture that FM Coker was "strict", perhaps even "overly strict" this is nothing more than subjective opinion; and in the case of her Honour, the

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[3] See for example Kirby: "Judging: Reflections on the Moment of Decision" (1998) Aust Bar Rev 4

[4] for a comprehensive discussion see Lee Aitken "Analysing a judgment; or how to develop a practice" (2008) 30 Aust Bar Rev 114

[5] the discretionary exclusion of certain rules of evidence in child-related proceedings

[6] all of the Federal Circuit Court

[7] from Austlii

[8] *Walker & Winwood* [2011] FMCAfam 865

[9] *Pace v Wilson* [2009] FMCAfam 367; *Shirley & Shirley* [2010] FMCAfam 213

hearsay opinion of others. It is not possible to more scientifically explore such characterizations – the decisions which generate such "impressions" are not published.

2.7 Perhaps more importantly, in an era of not insignificant delays in some of our courts; of the increasing costs of litigation; of budgetary restraints upon the availability of court counsellors and legal aid – success or failure at the interim hearing can be crucial. Yet our sources of knowledge as to judicial attitudes and performance concerning the topic of this paper (or many other topics) are not much more sophisticated than anecdote or gossip.

2.8 Experienced counsel might add some veritas by recounting their experiences but this simply leads to what Peter McManus has characterised as "Lawyers as a source of informal rules" [10] or what Professor Wade has termed "local law"; that is the legal culture which pertains in various places. [11]

2.9 Professor Wade also speaks of "trial judge law" – that is the series of impressions among lawyers about what certain judges 'do' or 'dislike' – the 'predilections and personalities of registrars and trial judges.' [12]

2.10 So part of my thesis is that reliance upon gossip, anecdote or even the experience of Fellows or Betts and Mayes [13] as the basis for making informed decisions as to the attitudes and approaches of judicial officers is not sufficient.

3. Interim Relocations – the law

3.1 A lesson to be drawn from the 2 more celebrated recent decisions of the High Court concerning family law – namely *MRR v GR* [14] and *Stanford v Stanford* [15] is that family lawyers do not pay enough attention to the legislation and its actual meaning. So after many years of applying a 4-step process to property cases we now know that we really paid not enough attention to those important words in s. 79(2) that say

> *The Court shall not make an order under this section <u>unless</u> it is satisfied that in all the circumstances it is just and equitable to make the order.* [16]

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[10] McManus, P "Informal Rules in Family Law" (2004) 18 AJFL Law 257
[11] Wade "Forever bargaining in the shadow of the law – who sells solid shadows?" (1998) 12 AJFL 256
[12] Wade, above at note 10, page 264
[13] my family law colleagues in Sir George Kneipp Chambers
[14] (2010) 42 Fam LR 531
[15] (2012) 47 Fam LR 481
[16] any underlining of text in this paper is my emphasis

3.2 We tend to forget that the *Family Law Act* contains no specific legislative guidance concerning relocation cases, whether those conducted on an interim or final basis. The word "relocation" or any similar concept does not appear at all in the legislation

3.3 Rather the legislation provides that, in these cases, as in any case concerning children:

[a] the best interests of the child are the paramount consideration; [17]

[b] various "objects" concerning the best interests of children and the "principles" which underlay those objects are stated; [18]

[c] there is a presumption that the best interests of children are met by an order for equal shared parental responsibility; [19]

[d] where the presumption continues to apply or is not rebutted [20] the court must consider whether a regime of equal time, alternatively "substantial and significant time" is in a child's best interests subject to a separate legal test concerning "reasonable practicability;" [21]

[e] in determining best interests the court must take into account both primary and additional considerations. [22]

3.5 The word "interim" has several references in the property sections of the Act but so far as children are concerned appears only:

[a] in the context of allegations of family violence, a Court is obliged to consider what interim or procedural orders are required to "protect the child or any of the parties ..." ; [23] and

[b] in the context of parental responsibility an interim order concerning such must be "disregarded" at the time of a final order so that the issue is considered afresh. [24]

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[17] iFLA *s. 60CA*
[18] *FLA* s. 60B
[19] *FLA* s. 61DA
[20] *FLA* s. 61DA(2)- (4)
[21] *FLA s.* 61DAA(1) – (5)
[22] *FLA* s. 60CC
[23] *FLA* s. 67ZBB(3)
[24] *FLA* s. 61DB

3.6 It is important to bear in mind that decisions of the Courts concerning the legislation fall into 3 categories:

[a] Most often a decision consists of nothing more than the application of the legislation to the facts of the case before the trial judge;

[b] On occasion (and rarely) there will be a decision, either by a trial judge or appellate court, which specifically interprets a word or phrase in the legislation;

[c] Sometimes the decisions of appellate judges give "guidance" as to the manner of applying the legislation when exercising discretion.

3.7 So far as the legislation is concerned:

[a] If there is already in place an order for equal shared parental responsibility *FLA* s. 65DAC precludes a unilateral move by one parent without notice and consultation with the other parent; [25]

[c] *FLA* s. 60I requires parents, if no exclusionary factors apply, to make a genuine effort to resolve the dispute before proceedings are implemented. [26]

3.8 The "guidance" that might be drawn from appellate decisions is not "law." The following passage from *B and B: Family Law Reform Act* [27] is important:

> *Ultimately it is a question of applying in a common sense way the individual sections so as to achieve the best interests of the children in the particular case. Although the Attorney-General submitted that the interrelationship between the three sections was as much about procedure as it was about substantive law, we think it would be a mistake for this essential exercise to be clouded by procedural or semantic issues.*
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> *The court now, as previously, is required to determine what is in the best interests of the particular children .... the weight to be attached to individual components of those sections may vary significantly from case to case.*
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> *This approach, which emphasises the essential importance of the exercise of the discretion in each case, accords with the approach otherwise adopted by courts to the discretionary provisions in the Family Law Act: see for example the decision of the High Court in Mallett v Mallet (1984) 156 CLR 605 ; 52 ALR 193 ; 9 Fam LR 449 ; FLC*

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[25] *Morgan v Miles* (2007) 38 Fam LR 275 at paragraph [77]
[26] *Morgan v Miles* at [78]
[27] (1997) 21 Fam LR 676 commencing at [9.55]

91–507 and ZP v PS (1994) 181 CLR 639 ; 122 ALR 1 ; 17 Fam LR 600 ; FLC 92–480. For many years in child related cases the legislature and the courts have consistently emphasised that the welfare or best interests of the particular child in the particular circumstances of that case is the determinant, and have eschewed the application of fixed or general rules as the solution. That continues to be the case; the Reform Act should not be understood as suggesting otherwise.

As a matter of proper practice and to ensure that this essential task is performed, a judge in the adjudication of such a case would be expected in the judgment to clearly identify s 65E as the paramount consideration, and then identify and go through each of the paragraphs in s 68F(2) which appear to be relevant and discuss their significance and weight, and perform the same task in relation to the matters in s 60B which appear relevant or which may guide that exercise. The trial judge will then evaluate all the relevant issues in order to reach a conclusion which is in that child's best interests.

In this approach no question of a presumption or onus arises. The analysis by McLachlin J in Gordon v G oertz (1996) 134 DLR (4th) 321 is compelling. The Act contemplates individual justice. Any question of presumption or onus has the potential to impair the inquiry as to what is in the best interests of the particular children. It may render the case more technical and adversarial, and may divert the inquiry from the facts relating to the children's best interests to legal issues relating to burdens of proof. The task is not "to be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary". See the judgment of Brennan J (as he then was) in In the Marriage of Brown and Pedersen (1991) 15 Fam LR 173 ; (1992) FLC 92–271.

3.8 So before turning to various pieces of "guidance" from the Full Court or to the results of individual cases could I stress those concluding words:

The task is not "to be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary".

4. Interim decisions – guidance as to the exercise of the discretion

4.1 For many years we followed a "rule" in interim cases concerning children that almost sanctified the status quo. It derived from *Cilento* [28] and a sequence of cases up to *Cowling.* [29]

4.2 At the heart of those decisions is the proposition that "interim proceedings do not determine the long-term rights and obligations of the

[28] (1980) 6 Fam LR 35
[29] (1998) 22 Fam LR 776

parties and their children." [30] The proposition may be defensible in a strictly technical sense but hardly accords with the reality that confronts so many litigants – lack of legal resources or funding; the variable quality of legal representation; the delays experienced in some registries; and the pace and changeability of modern life. Even in those cases where parties are well-funded and well-lawyered, practitioners have always taken the view that "winning" at the interim stage substantially influences if not governs the final result.

4.3 Subsequently the "rule" was modified by the decision of the Full Court in *Goode v Goode*, [31] which followed upon the 2006 amendments to the *Family Law Act*. The Full Court first referred with approval to the following passage from *Cowling:*

> *The Family Law Act does not draw any distinction between the principles to be applied in determining residence in interim and final proceedings. The essential difference between them is one of procedure. Interlocutory proceedings do not determine the long-term rights and obligations of the parties and their children ..... the court needs to exercise considerable caution against being drawn into matters properly dealt with in the trial process. Ordinarily, at interim hearings the Court should not be drawn into issues of fact or matters relating to the merits of the substantive cases of each of the parties ... the Court traditionally looks to the less contentious matters, such as the agreed facts, the care arrangements prior to separation, the current circumstances of the parties and their children and the parties respective proposals for the future. In some cases it may also be necessary to consider child protection issues.* [32]

But the Full Court in *Goode* went on to say:

> *The reasoning in Cowling ... must now be reconsidered in light of the changes to the Act, particularly changes to the objects (s 60B), the inclusion of the presumption of equal shared parental responsibility (s 61DA), and the necessity if the presumption is not rebutted to consider the outcomes of equal time and substantial and significant time.*
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> *In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable. This means where there is a status quo or well settled environment, instead of simply preserving it, unless there are*

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[30] *Cowling* at [18]
[31] (2006) 36 Fam LR 422
[32] the passage in *Cowling* commences at [18]

protective or other significant best interests concerns for the child, the court must follow the structure of the Act and consider accepting, where applicable, equal or significant involvement by both parents in the care arrangements for the child.

That is not to say that stability derived from a well-settled arrangement may not ultimately be what the court finds to be in the child's best interests, particularly where there is no ability to test controversial evidence, but that decision would be arrived at after a consideration of the matters contained in s 60CC, particularly s 60CC(3)(d) and 60CC(3)(m) and, if appropriate, s 60CC(4) and 60CC(4A). [33]

5. Interim relocation decisions – guidance as to the exercise of discretion

5.1 The case to which reference is often made is a single decision by Justice Boland (sitting as the Full Court on appeal from a Federal Magistrate) in *Morgan v Miles.* [34] Her Honour's guidance may be summarised as follows:

[a] There is neither a presumption for nor against interim relocation; rather the Act provides for the careful exercise of a structured decision to determine the appropriate order; [35]

[b] Because each case presents different facts and issues for determination no precise indicia can be categorically laid down as mandatory requirements requiring more or less weight in a relocation case but developing law should provide general guidance; [36]

[c] The "very difficult cases" involving a relocation "make it highly desirable that except in cases of emergency the arrangements which will be in the child's best interests should not be determined in an abridged interim hearing and these are the type of cases in which the child's present stability may be extremely relevant on an interim basis; " [37]

[d] Her Honour also adopted comments by Warnick J in *C and S* [38] as "apt and relevant" [39]

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[33] *Goode* commencing at [71]
[34] (2007) 38 Fam LR 276
[35] at paragraph [74]
[36] paragraph [79] at the last dot point
[37] paragraph [88]
[38] [1998] FamCA 66
[39] paragraph [88]

[e] The "distance" of a proposed interim relocation is not the determinative criteria – it is the consequence of the move or proposed move – so [40]

> *The issues to be determined may be quite different for example, for an infant or toddler developing attachments, to those of older children; or for economically impoverished families where fuel costs may be unaffordable thus impeding maintenance of a meaningful relationship. Conversely, there may be little impact on maintaining a meaningful relationship between a child and the non relocating parent particularly if the child has a history of living predominantly with the relocating parent, and spending time with the other parent where, with alternate arrangements, the child's relationship with the non relocating parent can be maintained and fostered.*

5.2 I have no difficulty with what Her Honour said as summarised at sub-paragraphs [a], [b] and [e] above. But let me explore [c] and [d] a little further.

5.3 What is the warrant for introducing the word "emergency"? And what does it mean? Having regard to s. 60CC(2)(b) and s. 60CC(2A) it could be argued that domestic violence is a far more important criteria than a mere "emergency". When a couple living in employer-supplied housing in Moranbah separate so that one of them must vacate the premises and cannot afford alternative accommodation in Moranbah is that an "emergency" or just a case for spousal maintenance? If one parent is to be transferred away by the Defence Forces in January 2014 does it become an emergency depending upon whether the Court can or cannot schedule a final trial between May 2013 and December 2013?

5.4 This latter point is well made by the Full Court in *Deiter & Deiter.* [41] In that case a mother unilaterally moved the child from Sydney to Perth. After a 6-month delay, the father bought proceedings for the child's return. Part of the mother's case involved allegations of domestic violence. The (Western Australian) magistrate ordered the mother's return relying upon the decisions in *Goode* and *Morgan v Miles.* The Full Court set that decision aside. The following points emerge from the reasons:

[a] A whole section of the reasons was headed

Making an interim order without regard to its likely duration

Under that heading the Full Court said that the magistrate "failed to properly weigh" the likely delay in setting the matter down for a

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[40] paragraph [91]
[41] [2011] FamCAFC 82

final hearing in either Perth or Sydney, including the prospects of an expedited final hearing.

[b] Particular emphasis was placed upon *Family Law Act* s. 60K and the obligation to resolve allegations of family violence expeditiously.

[c] The Full Court referred to the passage from *Cowling* that I cited at paragraph 4.3 above but added emphasis to the passage as follows:

> *The Family Law Act does not draw any distinction between the principles to be applied in determining residence in interim and final proceedings. The essential difference between them is one of procedure. Interlocutory proceedings do not determine the long-term rights and obligations of the parties and their children ..... the court needs to exercise considerable caution against being drawn into matters properly dealt with in the trial process.* ***Ordinarily****, at interim hearings the Court should not be drawn into issues of fact or matters relating to the merits of the substantive cases of each of the parties ... the Court traditionally looks to the less contentious matters, such as the agreed facts, the care arrangements prior to separation, the current circumstances of the parties and their children and the parties respective proposals for the future.* ***In some cases it may also be necessary to consider child protection issues.***

Having added that emphasis the Court described the last sentence in *Goode* as "most important." [42]

[d] The Full Court also said it was an error on the magistrate's part to fail to give proper consideration to the father's ability to relocate to Perth pending trial. [43]

[e] Finally, as to *Morgan v Miles* the Full Court [44] said the following:

> *Before concluding our discussion of this appeal, we wish to make mention of the use Kaeser AM made of the checklist which Boland J provided in Morgan and Miles as being useful in relocation disputes.*
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> *It will be recalled that the Acting Magistrate made reference to the first item in that checklist, which suggests that a court dealing with such disputes "must be satisfied the parties have, unless an exclusionary circumstance applies, genuinely attempted to resolve the issue". His Honour found that the*

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[42] see paragraphs [62] and [63] of the decision.
[43] At paragraphs [95] and [96]
[44] on this occasion Finn, Thackray and Strickland JJ

parties had not made such an attempt, but his reasons do not make clear what impact, if any, this may have had on his decision.

We accept that in preparing her checklist, Boland J was attempting to provide guidance for parties and practitioners involved in relocation disputes. However, one difficulty in creating a "checklist", is that a gloss will be added to a statute that is already overly complicated. A further concern is that judicial officers will begin to apply the checklist, rather than the legislation, thereby overlooking the nuances contained in the statute.

5.4 As an example of the way other judicial officers have (perhaps) misled themselves into regarding the *Morgan v Miles* checklist as "binding" upon them, cases can be found where attempts have been made to define the word "emergency".

5.5 In *Orbach & Schroder* [45] Neville FM said this:

In the light of these circumstances, there is no certainty, nor can there be, as to when (or if) the matter might proceed to a final hearing. Such an observation is in no way critical of any party, least of all the Father. However, from a procedural perspective alone, this matter must necessarily wait for further unknown factors to unfold over the coming months, and then, in all likelihood, possibly even wait for a further significant period of time ... In my view, such circumstances bring this matter within the general caveat articulated by Boland J in Morgan v Miles , when her Honour spoke, at [88], about the usual need for such cases to be determined at a final hearing "except in cases of emergency" (emphasis added).

In my view, it is not appropriate for any of the parties, nor for [Y] in particular, to remain in a state of legal and domiciliary limbo until some unknown, but likely a not insignificant, date well into the future as to when the matter might (or might not) come back to Court, and be heard at some still later time. On current best estimates, even if the matter were to be heard in the latter part of this year ... more likely than not it would still not be until perhaps sometime in 2014 before the matter was finally determined.

5.5 "Emergency", on the basis enunciated by Neville FM might mean nothing more than the fairly usual 12 months or so delay between interim hearing and final trial.

5.6 In *Collins v Lawrence* [46] the mother had made a unilateral move away based upon the need to take up new employment. In allowing that

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[45] [2012] FMCAfam 1324

situation to remain FM Brown accepted that a circumstance of "emergency" had arisen in these circumstances:

> *The mother was entitled to apply for the position. I accept that the turn around between advertising, offer and acceptance was short. This is not the mother's fault. She can perhaps be criticised for accepting the job, without prior reference to the father, particularly in terms of the implications of the job for how the parties cared for their two children.*
>
> *The mother has now rented new accommodation for herself in [B]. It is also her case, given she has accepted the [B] position, that the Education Department has now filled her previous position in [K] and she has no job to return to in the short term.*
>
> *Accordingly, the mother characterises the situation confronting her as being one of emergency, which justifies her current application to the court. No doubt, the father would say the emergency is of the mother's own creation and she should not have applied for the job in the first place.*

5.7 Am I being too harsh in referring to Lewis Caroll?

> *"When I use a word, Humpty Dumpty said in a rather scornful tone, it means just what I choose it to mean – neither more nor less"*

5.8 As to *C and S* that was a case where a parent had unilaterally relocated from Queensland to the Riverina in New South Wales. Justice Barry ordered the wife to return. On appeal Warnick J said:

> *... it is clear that the interests of any child ... are very much connected with any questions directly affecting those children such as a relocation being determined by a Court without the impediment of a situation of recent development which significantly alters the relationship of the child or circumstances of the child with regard to one of its parents from what it or they had been immediately beforehand.*

5.9 In circumstances where one parent had relocated the child upon flimsy grounds that "guidance" just quoted has merit. But it ought not become a rule. Who would apply it where there is significant family violence? Or where one party has consented to relocation but then withdrawn it?

5.10 As an example of the way in which <u>facts</u> ought govern decision-making rather than "guidance" or "mind-sets" I refer to the decision of the Full

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[46] [2010] FMCA 893

Court in *Parks v Farmer.* [47] The parents lived in Darwin. The child was aged 11 at the date of hearing. The father relocated to Melbourne with the child without the consent of the mother. By the time of hearing the child had been in Melbourne for a month and by the time of delivery of the judgment, 2 months. The interim hearing was conducted on the papers without cross-examination. Upon an interim basis the Federal Magistrate at Darwin permitted the relocation to occur – and upon appeal the Full Court confirmed that.

5.11 Of particular note is that it appears to have been argued that the Federal Magistrate failed to have regard to the guidance appearing in *Morgan v Miles.* Precisely what that argument was does not appear in the reasons of the Full Court, merely this bare statement –

> *With respect to the single judge decision in Morgan v Miles the learned Federal Magistrate was not obliged to have regard to that case, or anything said in it. As is not in doubt, the decision pre-dated the decision of the High Court in MRR v GR ...* [48]

5.12 There are two possible interpretations of those comments:

[a] there was something about the case where it could be concluded that equal time or substantial and significant time was not reasonably practicable and this was very material to the interim outcome – that does not clearly emerge from so much of the facts as recounted by the Full Court; and/or

[b] it remains appropriate to make the old-fashioned but still vital analysis to show that there is a distinction between those parts of any prior decision which are merely *obiter dicta* rather than part of the *ratio decidendi.* The word "emergency" is just *obiter dicta* – it is not binding,

5.13 In a further portion of the decision the Full Court answered a submission by the mother's counsel as to the importance of stability as follows:

> *We are unable to accept that in an interim hearing such as this, on incomplete and untested evidence, determining the child's best interests in accordance with the provisions of Part VII would not, or should not be significantly influenced by questions of the comparative stability of the parties' proposed arrangements for the child. As the authorities, and the terms of Part VII of the Act make clear, whilst the Court does not condone "unilateral relocations", such actions are but one of the factors which, by reference to the provisions of Part VII, are relevant to determining the child's best interests on an interim basis after a circumscribed hearing (see Goode & Goode [2006] FamCA*

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[47] [2012] FamCAFC 12

[48] at paragraph [48] of the decision

1346; (2006) FLC 93-286).

Whilst, in the circumstances of this case, the father's unilateral relocation of the child's residence could not be condoned, the learned Federal Magistrate made findings, which remain undisturbed, in relation to both that and all other issues relevant to determining the child's best interests on an interim basis. It has not been established that the learned Federal Magistrate erred by not concluding that the father's unilateral relocation of the child's residence tipped the balance of the child's best interests in favour of the mother's proposal for his care on an interim basis.

5.14 The words underlined might be considered a subtle shift in the concept of "stability" - "comparative stability of the parties proposed arrangements" is much more than merely "the family has always lived in Townsville."

5.15 Consistent with my complaint about a lack of adequate reporting of decisions, *Morgan v Miles* is reported in Austlii, the Family Law Reports and the Family Law Cases. But though *Parks v Farmer* and *Deiter* significantly qualify that decision, neither of them feature in any service other than Austlii.

5.16 Some other interim decisions where the "emergency" rule in *Morgan v Miles* appears to have been ignored or broadly interpreted are:

Pace v Wilson [49]

Demack FM. Child 5 permitted to be moved from Mackay to northern NSW in circumstances where father had limited relationship with child.

Fitzpatrick v Power [50]

Neville FM. Child of 10 months permitted to be moved from northern NSW to Whitsundays where she had received an employment offer requiring immediate uptake. Evidence of excessive alcohol use by father.

Babbitt v Babbitt [51]

Neville FM. Mother's unilateral relocation allowed in circumstances of domestic violence.

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[49] [2009] FMCAfam 367
[50] [2009] FMCAfam 1007
[51] [2009] FMCAfam 1885

Walker v Winwood [52]

Coker FM. Mother made a unilateral move from Townsville to NSW. The father was, it appears working from time to time away from Townsville so that a step-mother would have a significant role in caring for the children if they remained in Townsville. The unilateral move was allowed.

6.0 Some examples from recent times

6.1 As I said at the outset it is not my intention to embark upon a criticism of our local judges; though I take the view that informed debate concerning their and our performance is a hallmark of our mutual professionalism.

Case Study A

Facts:

Family lived in Mackay. Separation December 2011. Child aged 8 at time of hearings but with some special needs. Father worked in coal mines on 4on/4off roster. May 2012, without notice, mother relocates to Bundaberg where other members of her family lived.

Proceedings seeking return of child filed August 2012; first return date 23/10/12. On that date FM Willis orders a child inclusive conference and adjourns interim hearing to 23/11/12.

Report from CIC suggests child needs "to live in one household and spend generous holiday time with the other parent". Mother's position is that she will not return even if child ordered to return.

At subsequent interim hearing FM Willis urges parents to focus on long-term rather than interim arrangements. Results in Consent Interim Order with child's (and mother's) temporary residence in Bundaberg being undisturbed. Father to spend block periods of 4 days each three weeks.

The Order contains this notation:

... the parties have taken the courts advice and concentrating their energy into resolving their issues on a final basis rather than engaging in litigation on an interim basis. It is for this reason that a family report has been ordered.

[52] [2011] FMCAfam 865

Family Report issues 3 months later. Records that mother has now fallen out with family in Bundaberg and for that and several other reasons recommends that the child (and mother) return to live Mackay. She has not done so.

A final trial is now required before Coker FM. I will say nothing further concerning my view of the merits of the case.

Discussion:

The complicated working lives of those in the mining industry adds a layer of difficulty to a relocation case. It can mean that the Court does not have an alternative "full-time" parent. For that reason the approach of Her Honour in refraining from conducting an interim hearing and encouraging the parties to consider long-term matters is defensible.

But as illustrated by this case such an approach has risks. The case may now have a result different from that which the parties and their lawyers (and Her Honour?) contemplated.

However I commend Her Honour for the notation appended to the Order. When I first read it I was taken out of my usual comfort zone. But I commenced this paper by speaking of the need for transparency. We have all experienced settlements occurring because a judge has said something – has given "advice". Why shouldn't it be recorded on the order in the form of a Notation? It gives context for the consent that occurred.

Case Study B

Facts:

Case conducted in the same time frame as Case Study A.

Family lived in Mackay. Child aged 6 ½ at time of hearings. Father worked in coalmines. Practical effect of his roster was that mother was full-time carer of child and he had contact for 3 days/2 nights in a moving 8-day cycle. Consent order as to these arrangements February 2012. Restraint upon either party moving child from "Mackay district." Order also provided a dispute resolution mechanism for disputes concerning major issues.

August 2012 – consent property settlement requires mother (and child) to leave former matrimonial home and for father to resume living there. Exchange of correspondence begins. Mother's case is that she cannot afford to pay rental in or about same suburb. Proposes to move to Cannonvale (near Airlie Beach). She activates dispute resolution clause – father refuses to participate. She offers to pay a reduced rent so as to stay in former matrimonial home and seeks extension of time to vacate

the home. Father insists upon a commercial rent. She then relocates to Cannonvale in early October.

Father brings proceedings. First return date 19/11/12. On that date Willis FM critical of mother's unilateral action – but also critical of father's refusal to engage in dispute resolution. As with Case Study A Her Honour also speaks of the long-term rather than an interim resolution.

Order made that parties attend mediation. That occurs but no resolution achieved.

On subsequent hearing parties subsequently argue the interim relocation issue – final submissions made prior to Christmas. Decision reserved.

Decision given late March 2013 – mother ordered to return child by commencement of second school term – father ordered to pay $70 week spousal maintenance to assist mother with rental.

Discussion:

It would be fair to say that Betts (for the father) and I (for the mother) both assumed from the way in which the hearing occurred that Her Honour was more likely to allow the mother's move to Cannonvale to remain undisturbed.

It was one of those cases where on a final basis you would ordinarily predict that the mother's prospects of success were very high. She was the unchallenged primary carer; the father's work roster allowed him only 2 nights in 8 for his time with the child – and more importantly because the cycle continually shifted the mother's ability to secure effective employment was inherently constrained. Her "relocation" was less than 100 km and so was not unlike the decision in *D v SV.* [53]

Both case studies illustrate the usual (and I am not being critical by using that word) delays we experience. In the first, 10 months elapsed between the unilateral relocation and the family report being issued. In the second 5 months elapsed between the interim relocation and the Order for return – by which time the child had attended a full term at a new school. As lawyers we understand the delay – but in both cases some distress was caused to the clients.

[53] (2003) 30 Fam LR 91

Case Study C

Facts

Mother a member of ADF. 2009 – orders provide for shared care in Townsville. Late 2009 father moves to Tasmania – mother becomes full-time care. December 2010 father returns and mother acquiesces in request for reinstatement of shared care. June 2011 – mother posted to Afghanistan. Father secretly relocates the child to Brisbane. Mother discovers this in October 2011 and upon return from Afghanistan brings proceedings in January 2012.

February 2012 – Coker FM orders return of the child. Child returns but father remains in Brisbane – seeks a final order for relocation of the child to Brisbane.

October 2012 – mother advises of a posting to Victoria – she informs father and only then does he return to live in Townsville.

Mother brings application seeking interim relocation. Coker FM refuses application. Child ends up in full-time care of father once mother's posting takes effect.

Discussion

His Honour, with respect, placed too much emphasis upon the status quo of a place rather than the stability or status quo of the carer. The "comparative stability" referred to by the Full Court in *Parks v Farmer* was I suggest an important consideration; alternatively His Honour might have taken a more liberal approach to the word "emergency" in *Morgan v Miles.*

Postscript

After a couple of months of being the full-time carer the father has now entered into a Consent Order providing for the child to live with the mother in Victoria.

Case Study D

Facts

Mother aged 20 when child born in 2010. Father aged 26. Separation ends after significant act of domestic violence occurs. Domestic Violence order made. Father employed as chef in restaurant and not able to exercise extensive time with child.

Mother now living with her mother. Relocation arises because maternal grandmother's employer is closing Townsville premises and relocating all employees to Brisbane office in January 2013. Mother wishes to move as well because of absence of other family support in Townsville.

February 2012. Father, by email, consents to relocation. Subsequently withdraws consent. July 2012 proceedings commence and mother seeks order for interim relocation. Part of her case relies upon a barrage of abusive and threatening text messages and numerous telephone calls made in the late evening. Coker FM orders attendance at child dispute conference and "warns" father as to his behaviour and says "throw the phone in the bin." Father does not attend CDC and by September 2012 the barrage of text message resumes. For example - 50 messages from him to her in 15-hour period on one day.

Further interim argument November 2012. Decision given 21/12/12 - interim relocation refused.

Discussion

Both these case studies example what, in my respectful view, is a "strict" approach by His Honour. If facts such as these do not allow for an interim relocation it is legitimate to ask what facts might ever do so?

7.0 Is it better to be an Applicant or Respondent?

7.1 I have surveyed many interim relocation cases (and not merely those in the Case Studies above) by many different judges and justices.

7.2 I have formed the impression that the parent who makes a unilateral relocation is more likely to succeed as a Respondent to a recovery application than if that person "does the right thing" by becoming an Applicant and seeking "permission" to relocate.

7.3 Consistent with the observations I advance at section 2 of this paper I am not able to establish the correctness of my impression, one way or the other: as many decisions of our judges are not reported.

7.4 However the parent who makes a unilateral move gains several advantages:

[a] the move creates new factual circumstances which must be taken into account by the court - and though not condoning the unilateral decision it is but one factor in all the factors requiring consideration by a court. [54]

[54] as discussed in *Parks v Farmer* op cit

[b] any delay by the other parent or her/his lawyer in commencing an application; and/or delay by the court in setting the matter down for hearing means that the new status quo begins to gain significance;

[c] the delay leading to a final trial is a relevant consideration;

[d] the ability of the Applicant to relocate is a consideration;

[e] tactically it can be better to respond than to apply – that is any lack of or errors in the applicant's evidence are the source of potential advantage;

[f] if the decision goes against the Respondent and a recovery order made, he/she has the ability to Appeal and seek a stay of the Order pending appeal. The Applicant who applies for "permission" to relocate and fails can appeal but cannot seek a stay – because the usual form of order is simply "application dismissed."

8.0 Conclusion

8.1 It is clear enough that there is no true commonality of approach amongst the judiciary, either "locally" or elsewhere concerning the vexed question of interim relocations.

8.2 The profession has difficulty discerning the approach of individual judicial officers because of a variable reporting of their decisions.

8.3 A "check-list" approach to these cases is a useful discipline; but ought not be so invariably followed either by practitioners or judicial officers as to create "rules". There is no proposition of law that says that "interim relocations" are impermissible or "generally" impermissible. Cases such as those discussed in this paper illustrate that there is more opportunity and flexibility to achieve interim relocation than our mind-set envisages.

8.4 Individual cases require the exercise of individual discretion. The *Family Law Act* contemplates individual justice and our submissions to judicial officers ought emphasize that proposition.

8.5 From a practitioners point of view the key to success, as always, remains proper preparation of the factual material and the submissions that will be made.

Michael Fellows
Sir George Kneipp Chambers
May 2013