

Submission No: 6

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Secretary:

Inquiry Into Child Custody Arrangements In the Event of Family Separation

Topic of Submission: The Law Concerning Relocation by the Custodial Parent

This submission relates to one very specific and critical aspect of child custody arrangements, namely the circumstances in which a custodial parent can re-locate. It is critical because, if the parents of a child do not live in close geographical proximity, none of the principles concerning the care of children of separated parents can be translated into reality. If the Committee does not address this issue, its report will be empty rhetoric.

Recommendation: Family law legislation should provide for a presumption that parents should reside in reasonably close geographical proximity until the child is 18 years of age and that a custodial parent must establish compelling reasons to justify any relocation. The present case law on re-location is highly unsatisfactory and permits relocation far too easily.

Background.

The Report¹ sets out the following principles that are presently incorporated into the Family Law Act.

“Except where it would be contrary to the best interests of the child:²

- children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;
- children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development;
- parents share duties and responsibilities concerning the care, welfare and development of their children;”

All of these principles are dependent on parents remaining in close geographical proximity. How could a non-custodial parent who lives in another city or even an hour's drive from where their child lives, maintain their employment (in order to meet their financial obligations to provide child support and pay for contact), know and care for their child and share the duties and responsibilities concerning the care, welfare and development of their child? Let me translate those abstract principles into questions concerning day to day reality. How does that parent attend events such as parent/teacher interviews, school plays, concert recitals, weekend sporting events, organise sleepovers with school friends, know how their child is going in school, know what their reading level is like, who their best friends are, what they like to eat, pick their child up after school once or twice a week and take them home, cook dinner for them, spend time with them on their birthday or otherwise be involved in their day to day life?

¹ Out of the Maze: Pathways to the future for families experiencing separation Report of the Family Law Pathways Advisory Group July 2001

² Family Law Act 1975, s. 60B(2).

The present law

The present law, as laid down by the High Court of Australia, concerning the relocation of a custodial parent requires consideration of a large range of issues and is quite complex. However, among other statements, the High Court has categorically **rejected** the proposition that a custodial parent must establish compelling reasons to justify their relocation and that a custodial parent have the onus of proving why the relocation would be preferable to the existing position.³

I have personally spoken to family law practitioners who know how to coach their clients on what to say in order to justify a re-location order. Some clients are 'encouraged' to consider how depressed they will be if they can not move on to a new life in another location. The argument is then made that if the custodial parent is deeply unhappy, then this will have an undesirable impact on the child. Other advice is given to strengthen the case. I have received advice from Senior Counsel that despite the fact that my daughter resides with me for five days a fortnight during school term and half of all school holidays, my prospects of preventing relocation are low.

The Impact on Children of Re-Location

The empirical evidence suggests that re-location by custodial parents is common⁴ and that the impact on children is negative. A recent detailed study of the effects of relocation on children by psychologists at the Arizona State University reveals that the children of separated parents who relocate are worse off both mentally and physically as a result of the relocation. It states that the proposition that a move by a custodial parent will improve their life is simply not demonstrated by the empirical evidence.⁵

The Right to Re-Locate

Inherent in some of the discussion of this issue, is the proposition that custodial parents have a right to relocate.⁶ While the rights of parents are relevant considerations in custody matters, the parenting of children also brings with it non-negotiable obligations and responsibilities. One of those obligations should be to remain geographically close to a non-custodial parent who is involved in the care and responsibility for his or her child. Non-custodial parents have non-negotiable obligations imposed on them – specifically the requirement to provide financial support. How is it that custodial parents may have the freedom to relocate with relative ease but non-custodial parents are locked into financial obligations?

³ See *AIF v AMS* (1999) FLC 92-852.

⁴ "Within four years after separation or divorce, three out of four custodial mothers move at least once" W Farrell "Father and Child Reunion" (Finch Publishing, 2001, New York) at 51.

⁵ *Journal of Family Psychology*, June 2003. In addition, see S McLanahan and G Sandefur "Growing Up with a Single Parent" (Cambridge, MA; Harvard University Press, 1994) at 41 "Residential mobility is the single most important factor determining a step-child's likelihood to succeed, accounting for as much as 60 percent of the overall negative difference between children in step-families and children in two-parent families."

⁶ See eg the judgment of Gaudron J in *AMS v AIF; AIF v AMS* (1999) FLC 92-852.