

CUSTODY AND MOBILITY : THE LAW

John Caldwell

Senior Lecturer in Family Law, University of Canterbury

A well-known axiom of Family Law is that following parental separation the children of the relationship generally need a continuing, close contact with both parents in order to ensure their good psychological health.¹ Accordingly, when one parent has sole custody of the child, good and frequent access to the other parent is normally seen as being of vital importance. However in an era of increased mobility, attributable in part to the quest for employment opportunities, it is not uncommon for the custodial parent to seek to move towns or countries. In such situations a Court is confronted with the difficult task of determining whether the benefits of access are so compelling in the particular case that the wish of the custodial parent to move must be denied.

In New Zealand, as in Australia, Canada, and England, issues on custody and access are controlled by the paramountcy principle, albeit in slightly differing forms, and any decision is inevitably particularised and dependent on its own facts. Nonetheless, a study of the cases from the various jurisdictions does reveal the emergence of some general trends and principles, and this article aims to isolate and analyse those trends.

The position in New Zealand

The freedom of the custodial parent to move residence within New Zealand has been discussed on two occasions by the Court of Appeal. In the first case, *Wright v Wright*,² the essential question for the Court was whether a condition placed on a custody order in favour of the mother (as to continued residence in Wellington) had been made pursuant to s. 13 of the Guardianship Act 1968. That section deals with disputes between guardians, and does not allow for any right of appeal from the Family Court. In this particular case, the Family Court had ruled that if the mother were to move to Auckland, as she desired, then custody should revert to the father. On these facts, the Court of Appeal held that the question of residence was very closely linked to the question of custody and access, and that the matter of residence could not therefore have been dealt with under s. 13 alone. In the course of their joint judgment in the Court of Appeal Cooke and Richardson JJ declared:

... since custody is defined as the 'right to possession and care of a child' an order for sole custody, without qualification, carries with it the prima facie right to determine the child's place of residence. The same must follow from an unqualified agreement that one party is to have custody. ... [U]nless restricted by statutory provision or Court order or agreement the person entitled to custody must have reasonable freedom to select the child's place of residence.³

1 For instance, in their longitudinal study of children who had experienced separation, Wallerstein and Blakeslee concluded that "[a]s in the intact family, the child's continued relationship with parents who co-operate with each other remains vital to his or her proper development": *Second Chances* (Bantam Press, 1989), 316. The psychological benefits for the child of good, frequent access have also been recently highlighted by Lee, Shaughnessy and Banks, "Impact of Expedited Visitation Services: A Court programme that enforces access through the eyes of children" (1995) 33 Family and Conciliation Courts Review 495.

2 [1984] 1 NZLR 366.

3 *Ibid.*, at 371.

The Court of Appeal proceeded to note, however, that restrictions on residence were common, and drew attention to the possible infringement of access rights, either ordered or agreed, if there were “significant changes” of the child’s residence without consent of the access parent or a Court order.

In the more recent second case, *Stadniczenko v Stadniczenko*,⁴ the custodial mother was applying for leave to appeal to the Court of Appeal against a condition placed on a custody order by the High Court, following an appeal by the father from a Family Court decision allowing the mother to move with the children from Wellington to Auckland. On appeal, the High Court imposed the condition that the children were not to be removed from Wellington without the consent of the father or of the Court. As, pursuant to s. 31(4) of the Guardianship Act 1968, an appeal to the Court of Appeal from the High Court was only possible, with leave, on questions of law, the mother sought to argue that the High Court Judge had erroneously added the condition as to residence in order to assure the father of access, when there had been no disagreement as to the father’s entitlement to access.

The Court of Appeal was satisfied that Doogue J in the High Court had reached his decision on the basis of the welfare of the children, as required by the paramountcy principle of s. 23 of the Guardianship Act 1968. On Doogue J’s view of the facts of the case, the children’s needs included their need for a continuing relationship with the father; and the Court of Appeal held that an error of law had not been made. However, in an obiter dicta pronouncement, however, McKay J, delivering the judgment of the Court, stated:

[i]f the Judge had imposed the condition as to residence solely in order to give recognition to Mr Stadniczenko’s rights of access, and had failed to give proper weight to the rights of Mrs Stadniczenko as custodial parent to pursue her own life as seemed best to her, then the Judge could be said to have made an error of law (at 500).

It is interesting that in both Court of Appeal judgments there is such emphasis on so-called “rights”, because the paramountcy principle, which McKay J acknowledged in *Stadniczenko v Stadniczenko* overrode any parental “rights”, would seem to deprive the right of any core or substance; and it is quite exceptional for the Courts to concede the existence of any parental rights in the context of custody or access disputes. On the other hand, it will be shortly be seen that the paramountcy principle provides only illusory assistance in this context, as often the alternative options presented to the Court by the parents are likely to diminish rather than enhance the child’s welfare. Further, it will soon become apparent that the Courts usually accede to the custodial parent’s desire to move, to such an extent that the custodial parent has a freedom to relocate which must come close to approximating a “right”. Conversely, it has been held in *Wright v Wright* that the non-custodial parent’s claim to access, whether court-ordered or agreed between the parties, does constitute an obstacle to the custodial parent being at liberty to move without Court order or mutual consent. If correct, then, to that limited extent, the non-custodial parent’s claim might also be loosely described as a “right”.

4 [1995] NZFLR 493.

Where the access is Court-ordered, then the constraints on the custodial parent's freedom to move are, as observed by the Court of Appeal in *Wright v Wright*, reinforced by statutory provisions contained in ss. 20A and 20(3) of the Guardianship Act 1968. Section 20A creates an offence where any person "without reasonable excuse" and "with intent to prevent an order for access to a child being complied with hinders or prevents access to a child by a person who is entitled under the order to access to the child". In order to circumvent the section, a custodial parent might seek to argue that a move to another city or country was reasonably justifiable, having been motivated, for example, not by any intent to hinder access but by reason of economic opportunity. A move so motivated would arguably not require any prior application to the Court. Nevertheless, 20A is a statutory reminder of the constraints placed on a custodial parent once an access order is made, though the section has no application where access is agreed rather than ordered.

Additionally, where an access order has been made, and is in force, then s. 20(3) of the Guardianship Act 1968 also has effect. This section creates an offence, punishable by imprisonment up to 3 months, where any person, without leave of the Court, takes or attempts to take any child out of New Zealand, knowing that an access order in favour of any other person is in force, or that proceedings are pending. The Court of Appeal observed that the wide terms of the section had "understandably" led commentators to point out the desirability of seeking leave of the Court.⁵ Further, if a proposed move is outside New Zealand, then there could be a possible breach of the other party's own "rights of custody" under Article 5 of the Hague Convention on the Civil Aspects of Child Abduction (defined, interestingly, to include the right to determine a child's place of residence), and the provisions of the Convention become highly relevant.

Once proceedings seeking leave to move are in train, then the paramountcy principle of s. 23(1) of the Guardianship Act 1968 is operational; and by s. 23(2) of the Act the Court is also thereupon required to ascertain the wishes of the child, and to take account of those wishes as it thinks fit, having regard to the child's age and maturity. Those requirements, of course, are basic to any custody or access issue. In this context, however, they can be peculiarly difficult to apply.

The child's welfare

It will be seen that the Courts frequently determine the custodial parent's application on the basis of its "reasonableness". The reasonableness or otherwise of the application could, of course, be measured against the child's welfare, and thereby be neatly fitted within the paramountcy principle.⁶ In practice, though, reasonableness is most often examined in terms of the custodial parent's emotional or employment needs. If the move is adjudged reasonable in terms of those needs, it is then, but often only then, that the Court comes to weigh the child's welfare by asking whether the otherwise reasonable move might have deleterious effects for the child. In other words, the test for the Court is usually not whether the move will

⁵ Note 2, at 372.

⁶ See, for instance, the discussion of the Full Court of the Family Court of Australia in the leading decision *Holmes v Holmes* (1988) FLC 91-918.

positively benefit the child's welfare, but rather whether it can be demonstrated that a move which is reasonable for the custodial parent to make might be harmful to the child's interests. For instance Nourse LJ summed up the English authorities on this issue by concluding that "... if the proposal of the custodial parent to move with the children ... is a reasonable one, leave should only be refused if it is clearly shown that the move would be against the interests of the child."⁷ This reflects a much more parent-focused approach than that normally pertaining in custody and access disputes.

There are dicta from the New Zealand Family Court which suggest that a decision will be unreasonable where "the benefits of a new residence are not demonstrable";⁸ but those benefits usually can be demonstrated where the custodial parent is likely to be become embittered and resentful if he or she is refused permission to move. In such cases, the stress and tension generated by an adverse judicial decision could well impact adversely on the child. The risk is particularly apparent if the custodial parent should suffer from a depressive illness,⁹ but this so-called "distress factor" applies more generally.¹⁰ Noting what he described as "the almost inevitable bitterness" which would follow the Court's interference with what was, from the custodial parent's point of view, a "reasonable" decision, Ormrod LJ declared that the Court should not do something which in ordinary human terms was prima facie "unreasonable" "... unless there is some compelling reason to the contrary".¹¹

Paradoxically, custodial parents who feel able to adopt a selfless attitude, and announce themselves ready to sacrifice their own goals and plans for the children's sake, are to some extent penalised — they might be perceived to be more immune to the bitterness and resentment normally ensuing from a judicial decision disallowing the planned move. For instance, in *Stadniczenko v Stadniczenko* the mother's genuine concern for the children's welfare, reflected in her stated preference, if need be, to stay in Wellington with the children rather than to move to Auckland to her family and male friend, was a factor in the High Court Judge's decision to refuse permission to move. Similarly, the English Court of Appeal upheld a decision declining the custodial mother's application to emigrate with the children to Australia, having noted the views of the first instance Judge that the mother put her children first. It was felt by the Judge that although an adverse decision would result in disappointment and frustration for the mother, she would not allow it to destroy the children's relationship with either herself or the father. Judge Hutchinson, quoting the mother's own evidence that she would 'survive', was satisfied that she could cope with the decision

7 *M v M* [1992] 2 FLR 303, at 308.

8 *C v C* [1995] NZFLR 360, at 368.

9 As in *C v C*, *ibid*.

10 See, eg *McDowall v McDowall* [1995] NZFLR 163, 165 per Judge O'Donovan, and *Reeves v Reeves* (District Court, Dunedin, FP 012/190/92, 18 June 1993, Judge Kean) 39; in Australia see *Fragomeli v Fragomeli* (1993) FLC 92-393, 80,023, and more recently *In the marriage of I and I* (1995) FLC 92-603, 82,029; in England see the decisions of the Court of Appeal in *Chamberlain v de la Mare* (1983) 4 FLR 434, 443, *Lonslow v Hennig* [1986] 2 FLR 378, and *Re F (a Ward)* [1988] 2 FLR 116. There is support for this view in Wallerstein and Blakeslee's celebrated study *Second Chances*, note 1, at 317: the authors contend that where children live with their mother after divorce "the single most protective factor in a child's psychological development and well-being over the years is the mother's mental health and the quality of her parenting."

11 *Chamberlain v de la Mare*, *ibid*.

refusing her permission to move.¹² On the other hand, such expressions of unselfishness on the part of the custodial parent are not invariably harmful to the parent's application: they may be regarded as symptomatic of the positive parenting attributes of the custodial parent, thereby bolstering the strength of the application.¹³

Certainly the Courts normally incline to the view that if the desire to move is reasonably motivated from the custodial parent's point of view, then any distress caused to that parent by the frustration of that move is correspondingly reasonable. Where there is a new family unit, and it is perhaps the new partner who seeks to move, then the Courts are concerned that any stress and resentment, particularly emanating from the new partner, could lead to a fracture of that new family unit. There are consequently a number of decisions in which the Courts have stressed the importance of promoting the stability and happiness of the new family.¹⁴ The Manitoba Court of Appeal, for instance, reasoned that as society permits and even encourages remarriage, a new family unit must be allowed to live a normal family life once a second stable union had been formed.¹⁵

Where there is no new family unit and it is the custodial parent alone who seeks to move, then it is often simply assumed that what is good for the custodial parent is good for the child.¹⁶ This is the philosophy which led Judge Frater to conclude in *Bachler v Parker*¹⁷ that "generally the child's interests are served by allowing their custodial parent to get on with the ordinary business of living even if that involves a move overseas."¹⁸

In a recent judgment, the Ontario Court of Appeal held that not only are the best interests of the child and custodial parent "inextricably tied to those of the child",¹⁹ but that in any event the Court should be "overwhelmingly respectful of the decision-making capacity" of the person in whom custody has been vested.²⁰ In a judgment which evidences considerable sympathy for the exacting nature of day-to-day parenting demands, the Court of Appeal asserted that the Court should be reluctant to interpose itself between the child and the parent, given that the consequences of one-off judgment of the Court delivered on a particular day must be endured on a continuing basis by the parent responsible for physical care for the child, whereas the access parent, as the Court observed, normally bears far fewer of the responsibilities.

The human sensitivity and the recognition of parenting burdens displayed in that judgment may well prove persuasive to other Courts. Yet,

¹² *Tyler v Tyler* [1989] 2 FLR 158.

¹³ See eg *P (LM) v P (GE)*, [1970] 3 All ER 659, at 600 per Winn LJ, and at 663 per Sachs LJ; see also *Fasan v Fasan* (1991) 32 RFL (3d) 121 at 132. This is redolent of Solomonic wisdom: see 1 Kings 4:16-28.

¹⁴ See eg *Belton v Belton* [1987] 2 FLR 343, at 346 per Purchas LJ; *Chamberlain v de la Mare* note 10, at 445 per Griffiths LJ; and *Lonslow v Hennig*, note 10.

¹⁵ *Korpesho v Korpesho* (1982) 31 RFL (2d) 449, at 451 per Monnin JA. See also the comment by the Family Court of Australia in *Fragomeli v Fragomeli* (1993) FLC 92-393 that one of the main objects of the Family Law Act 1975 was to enable the parties to a broken marriage to make a new life for themselves. The tolerance towards a planned move may be lessened if there is not perceived to be a firm commitment to the new relationship: *Brigante v Brigante* (1991) 32 RFL (3d) 299.

¹⁶ *Re F (a Ward)*, note 10, at 121-122 per Kerr LJ.

¹⁷ (Family Court, FP 432/92, 23 December 1993).

¹⁸ *Ibid*, at 17.

¹⁹ *MacGiver v Richards*, (1995 Ont. C.A. Lexis 106, March 23 1995), at 21.

²⁰ *Ibid*, at 20.

the judgment is a particularly striking indicator of the extent to which decision-making in this area of custody law has become adult-oriented rather than child-centred. After all, it is generally acknowledged that children, on the whole, thrive under conditions of stability, continuity, and routine; and it is known that change for children, particularly the very young, can be quite traumatic. Only rarely, though, is that trauma acknowledged,²¹ and only rarely is the welfare of the child held to be better served by retaining the known for what is inevitably unknown.²² More typical is the robustness shown by Treyvaud J in the Family Court of Australia when he pronounced that life must be accepted as “an ever changing prospect”,²³ and that changes of environment were inevitable in life. That may be adult realism, but it is not seeing the world through the eyes of a child.

It is difficult to gainsay the force of the argument in favour of custodial parent’s freedom to move, but it does need to be clearly recognised that the paramountcy principle is being severely qualified, if not entirely subsumed, by that freedom. Put simply, the welfare of many children often requires a good, frequent relationship with the access parent,²⁴ and a move away from that parent is a move that does not enhance their welfare. Sometimes Judges do concede this. For instance, in one Canadian decision Blair J expressly acknowledged that in mobility cases there was often no way to avoid likely adverse effects for the children, and that it was therefore “anomalous” in these cases to speak of the best interests of those children.²⁵ Having made that acknowledgment, Blair J allowed the custodial mother to move overseas.

In many cases, then, it needs to be openly conceded that judicial authorisation for the move is hardly in the child’s *best* interests, but is nevertheless the least detrimental alternative for the children. As Judge Green observed extra-judicially, “... the Judge with the best will in the world, is more often than not faced with what is for the child a ‘lose-lose’ situation.”²⁶ In New Zealand, judicial genuflection to the paramountcy principle is dictated by s. 23 of the Guardianship Act 1968; but the real task of the Court in mobility cases, as McGechan J once opined, is more “a matter of choosing the course least damaging to the children”.²⁷

The wishes of the child

The general difficulties involved in first ascertaining and then determining what weight should be given to a child’s views in custody disputes are well-known.²⁸ For instance, apart from the statutory requirement to pay

21 For example, the trauma of change for young children aged seven and five was influential in the decision of the High Court Judge to require the custodial parent not to move in *Stadniczenko v Stadniczenko*, note 4, at 501.

22 But see eg *Hedley v Hedley* FLN [34] per Judge Maxwell.

23 *Lourie and Peristein* (1993) FLC 92-405, at 80, 155.

24 The Court of Appeal confirmed that the High Court Judge in *Stadniczenko v Stadniczenko*, note 4, had made no error of law because his decision was reached on the basis of the welfare of the children “... looking at all relevant factors including the need of the particular children for a continuing relationship with their father” (at 500).

25 *Oldfield v Oldfield* (1991) 33 RFL (3d) 235, at 237.

26 “Custody and Access — Parents at a distance: Intractable access”, in *Family Law Conference Papers vol 1* (New Zealand Law Society, 1995), 138.

27 *Burke v Rahim* (High Court, Wellington, AP 302 and 330/92, 25 May 1993) at 31. In *Bachler v Parker*, note 17, Judge Frater allowed the move to Australia on the basis that there was no “significant risk of danger” to the child (emphasis added, at 17).

28 See the discussion in *Family Law in New Zealand* (6th ed, Butterworths, 1993) at 352-354.

heed to the children's age and maturity there is always the underlying concern, when evaluating the significance of a child's wishes, that the expressed wishes may differ from his or her true, underlying wishes. On the issue of residence, conscious or unconscious indoctrination from a parent is not uncommon,²⁹ and sometimes children are simply in emotional turmoil following the aftermath of their parents' separation, and are in no state to formulate rationally-based views. In *Parmenter v Batt*³⁰ Thorp J concluded that the strongly expressed opposition of the two sons, aged nine and eleven, to the proposed move, which had proved influential in the Family Court's decision to refuse the custodial parent's application, was "... in considerable measure a reflection of their being increasingly involved in their parents' conflict rather than a considered choice".³¹ Similarly, in *Wright v Wright*, Cooke J and Richardson J noted that Counsel for the Child had explained that the seven-year-old boy tended to accept the view of the parent he was with at the time: he wished both to go to Auckland with his mother, and to remain with his father in Wellington. The Court of Appeal found that any further exploration of the wishes of this boy was unlikely to be helpful.

The difficulty in ascertaining the wishes of the child can be compounded if there is an overt difference of opinion between professional psychologists. For instance, in *Greer v Greer*³² the psychologist, appointed by the Court pursuant to s. 29A of the Guardianship Act 1968, contended that there was a divergence between a ten-year-old's strongly expressed wish to emigrate to Israel with his mother, and his deep wish to have a developed relationship with both parents. The boy's expressed wish, so the s. 29A reporter held, was essentially the absorption of his mother's view. The mother sought an opinion from a different psychologist. This latter psychologist suggested that the boy's desire to return to Israel was based primarily on his own experience and love of Israel, and only secondarily on the influence of his mother. This difference of professional opinion was eventually resolved by an interview of the boy by the Family Court Judge, who, detecting some uncertainty on the part of the boy as to the timing of the move, ultimately declined the mother's application to leave.

Even where the wishes of the child are unambiguous, rational, and uninfluenced by others, it is apparent that they usually prove to have little impact in dictating or altering the residential plans of a parent who has been selected by the Court to be the custodial parent. Once custody has been allocated it seems the Courts are reluctant to intervene in the parent-child disagreement by favouring the wishes of the child over the wishes of the responsible parent — though a child's wish not to move might prove influential in the Court's initial decision to grant custody to the other parent.³³

²⁹ See the English Court of Appeal decision in *M v M*, note 7.

³⁰ (1994) 13 FRNZ 51.

³¹ *Ibid.*, at 55. His Honour also concluded that in any event their ages pointed against their wishes being determinative.

³² [1995] NZFLR 176.

³³ See the discussion of the Full Court of the Family Court of Australia in *In the marriage of Ryan and Ryan* (1976) FLC 90-144, 75,704 — 75,705.

The “rights” or freedom of the custodial parent

There are clearly some differences in judicial approach between the cases where there are competing proposals for custody and cases where a long term or unchallenged custodial parent seeks the particular authorisation to move.³⁴ In cases where there are competing claims for custody, then the impact on a child of the new environment proposed by one of the parents can be relevant in the Court’s determination as to which of the two parenting proposals would best promote the child’s welfare. Most particularly, if both parents would seem to present as suitable custodial parents, then a proposal on the part of one of them to move from the established environment, may persuade the Court that the other parent would be the more desirable custodian.³⁵ In such circumstances, a condition as to residence imposed on a parent seeking to move is less draconian in its effects: the parent is only required to stay in a particular place if he or she is prepared in the future to accept the task of caring for the child.

In many cases on residence, however, the question of responsibility for primary custody is not in dispute,³⁶ and where one parent has long been the custodial parent, and the custody arrangements have been working satisfactorily, then different considerations must come into play. Here, the Courts tend to assert that the custodial parent, once chosen, should be free to decide where she or he lives. This is seen, for instance, in the Court of Appeal judgment of *Wright v Wright* where Cooke and Richardson JJ stated that:

since custody is defined as “the right to possession and care of a child” an order for sole custody, without qualification, carries with it the prima facie right to determine the child’s place of residence. The same must follow from an unqualified agreement that that one party is to have custody ... unless restricted by statutory provision or Court order or agreement the person entitled to custody must have reasonable freedom to select the child’s place of residence.³⁷

The characterisation of this parental freedom as a general “right”, though unexpected in a Family Law context, has been affirmed by other more recent decisions of the High Court and Court of Appeal, and has as well been echoed in cases overseas.³⁸ The assertion of this freedom or “right” can, as discussed earlier, be linked with the child’s welfare, and the Full Court of the Family Court of Australia once expressly observed that the cases affirming the freedom of the custodial parent are only explicable on the basis that freedom of movement and the welfare of the child often overlap.³⁹ Such a linkage means that a non-custodial parent seeking to

³⁴ The point made by the Full Court of the Family Court of Australia in *In the marriage of Holmes and Holmes* note 6 at 76,664. See also, for example, *Dunshea v Dunshea* (1987) 11 Fam LR 563, at 569 and *Fasan v Fasan*, note 13, at 132.

³⁵ See also the decision of the Supreme Court of New South Wales in *Dunshea v Dunshea*, *ibid.* But cf *Wright v Wright*, note 2: the mother and father both applied for custody, with the mother proposing to move from Wellington to Auckland. The Family Court awarded custody to the mother on condition she resided in Wellington; in the event that she wished to move, the Court decreed that custody should be awarded to the father; the High Court, however, allowed the appeal by the mother and removed the condition.

³⁶ For example see *Burke v Rahim*, note 27, and *P (LM) v P (GE)*, note 13.

³⁷ Note 2, at 371.

³⁸ See, for example, *Parmenter v Batt*, note 30, at 54 per Thorp J, and *Stadniczenko v Stadniczenko*, note 4, and, in Australia, *In the marriage of Armstrong* (1983) 9 FLR 402, at 407. In both *Stadniczenko* and *Armstrong*, however, conditions as to residence were imposed on the custodial parent.

³⁹ *In the marriage of Holmes and Holmes*, note 6, at 76,664.

resist the planned move must establish that the interests of the custodial parent and child are clearly incompatible, and must adduce specific reasons why the child's welfare would be adversely affected by the move and new environment.⁴⁰ Thus, Thorp J, delivering judgment in the Family Division, interpreted the paramountcy principle to mean that:

... leave should not be withheld unless the interests of the child and those of the custodial parent are clearly shown to be incompatible. So the approach of the Court is to sanction the realistic proposal of the custodial parent unless that proposal is inconsistent with the child's welfare.⁴¹

In similar vein, the Family Court of Australia recently characterised restrictions on the custodial movement as "serious",⁴² and in an earlier judgment held that orders restricting movement of the custodial parent would only be made in "exceptional circumstances".⁴³ The Ontario Court of Appeal also recently explained that the Courts need to recognise the "enormous undertaking ... and the overwhelmingly relentless nature of the custodial responsibility".⁴⁴ When such approaches are taken, it can be seen that a non-custodial parent, who does not seek custody, but seeks to prevent the custodial parent from moving, has, as the English Court of Appeal suggested, a "heavy burden to discharge".⁴⁵

Nevertheless, the custodial parent can also sometimes carry an evidential burden of sorts.⁴⁶ For instance, in a case where there had been an agreement covering questions of moving the child, the Manitoba Court of Appeal held that the custodial parent who sought to depart from the agreement would bear the onus of proving that his or her actions were being taken to advance the child's welfare.⁴⁷ The Supreme Court of New South Wales also once declared that the custodial parent's freedom or right to choose a location arose only where the Court was able to see that a child's lifestyle would not be upset by removal from the familiar geographical and social environment.⁴⁸ If that approach is taken, then the custodial parent would, of course, have the onus of establishing that absence of upset. Further, Judge Boshier has held in *C v C*⁴⁹ that a proposed move would be held unreasonable, and therefore not be countenanced, if "the benefits of new residence are not demonstrable".⁵⁰ Although the Judge did acknowledge that the weight of the case-law favoured the ability of the custodial parent to move, such dicta would seem to put some evidential onus on the custodial parent to establish those benefits.

Finally, the custodial parent may have a heavier onus where he or she plans to take the child overseas. There are a number of Australian decisions

40 The approach of the Family Court of Australia in *In the Marriage of Armstrong*, note 38. See also the decision of the English Court of Appeal in *Chamberlain v de la Mare*, note 10.

41 *Re K (A Minor) (Removal from Jurisdiction)* [1992] 2 FLR 98, at 106.

42 *In the marriage of I and I*, note 10, at 82,024.

43 *In the marriage of Ryan and Ryan*, note 33, at 75,704 (in this case though such a restriction was made).

44 *MacGiver v Richards*, note 19, at 18-19.

45 *Chamberlain v de la Mare*, note 10, at 440 per Ormrod LJ.

46 The point made in a leading decision of the Ontario Court of *Carter v Brooks* (1990) 30 RFL (3d) 53, at 63 per Morden ACJO.

47 *Sabagh v Sabagh* (1994) 2 RFL (4th) 44, at 47 per Helper JA and Scott CJM.

48 See the decision of the Supreme Court of New South Wales in *Rudolph v Dent* (1985) 10 FLR 669.

49 [1995] NZFLR 360.

50 *Ibid*, at 368.

drawing distinctions between applications to move interstate and applications to move overseas.⁵¹ In New Zealand, the distinction is apparent in s. 20(3) of the Guardianship Act 1968, which applies only to removals overseas. The reason for the differentiation is clear: once the child is overseas, the domestic Court lacks any formal power to protect the child's welfare, and access to the non-custodial parent becomes obviously more difficult to arrange and implement.

Additionally, a child moving overseas will often have to make cultural, social and educational adjustments over and above those demanded by a shift within his or her own country. It was thus contended by the Family Court of Australia that the broad homogeneity of society within that jurisdiction, coupled with a well-established pattern of substantial numbers of people moving between States, made it difficult to argue that the welfare of children would be detrimentally affected by the mere fact of the move within the country.⁵² The same is probably true of New Zealand. Where the move is abroad, however, the same assumption cannot be so readily made. Nevertheless, there is an abundance of cases within New Zealand and from overseas jurisdictions in which the custodial parent has been allowed to leave the jurisdiction. The factor of an overseas shift is certainly relevant, but has not proved overly powerful in militating against the custodial parent's proposal.

Whether the proposed move is within or outside the domestic jurisdiction, the Court is concerned most with the bona fides and reasonableness of the application, and these factors, often merging one into the other, warrant detailed examination.

Bona fides motive — economic enhancement

It is now well-established that, as a prerequisite for permission to move to be granted, the Court must be satisfied the application to move is genuine and made in good faith.⁵³ Recently, the Full Court of the Family Court of Australia identified three examples of a lack of bona fides. These were: where the dominant purpose of the application differed from that given by the applicant, where the real purpose of the removal was to cut off any meaningful contact between the children and the access parent, with the objective of destroying whatever relationship may have hitherto existed, and where the purpose was to impede or hinder access.⁵⁴ If any such motive for the application could be established, then that would be the end of the application; the Court would not proceed to consider any other aspects of the reasonableness of the application.

However, provided the predominant motive for the move is not the diminution of contact between the children and the non-custodial parent, then it would seem that a desire on the part of the custodial parent to put greater physical space between herself or himself and the non-custodial parent may, at least where there is a relationship of real difficulty, in certain circumstances be seen as "reasonable", and survive the good faith test. In

⁵¹ See eg *In the marriage of Holmes and Holmes*, note 6, at 76,664, *In the Marriage of Armstrong*, note 38, at 407, and *Craven v Craven* (1976) at 75,204.

⁵² *In the marriage of Armstrong*, *ibid*, at 407.

⁵³ See eg *Blois v Blois* (1988) 210 APR 328, at 332; *Reeves v Reeves*, note 10, at 40; *P (LM) v P (GE)*, note 13, at 661; *Tyler v Tyler*, note 12, at 162.

⁵⁴ *In the marriage of Skeates-Udy* (1995) FLC 92-626, at 82, 285 per Baker J.

Parmenter v Batt Thorp J accepted that the custodial mother's planned move from Auckland to Waiheke Island was largely motivated by a strong desire to increase the physical distance between herself and her former husband, whom the mother saw as determined to control her own life. Nevertheless, his Honour felt that it would be "unreasonable" to require her to live in close physical proximity; and a loss of midweek access for the father could, in his Honour's view, be offset by increasing holiday access.

The most commonly advanced motive for the application to move is the desire on the part of the custodial parent to enhance the educational, career, or economic prospects of either himself or herself, or his or her new partner. A number of Canadian decisions illustrate well the willingness of the Courts in that jurisdiction to facilitate the economic enhancement of the custodial parent. For instance, one custodial mother was granted permission to leave Windsor for Ontario in order to take up a law clerk's position,⁵⁵ and another mother was allowed to move away from Ontario, where the Court felt she would be caught up in an "endless cycle of conflict and poverty", to the province of British Columbia where she had been offered employment.⁵⁶ In a further case, where the new husband of the custodial mother needed to transfer from Winnipeg to Alberta in order to retain his job as a credit manager for a large company, the Manitoba Court of Appeal noted that Canadians often had to move in order to search for employment or to better their present employment, and that it was in the interests of the child for the new stepfather to have a secure income rather than being forced to seek new employment or receive social welfare assistance.⁵⁷ In such cases it can be seen that the Canadian Courts generally have ranked the economic well-being of the custodial parent, and, where relevant, the new family, as a higher priority than the needs of the child for continuation of the existing access regime.

The Supreme Court of Canada in a landmark judgment on spousal maintenance recognised the economic hardships often borne by women following separation as a result of their traditional child-care responsibilities, and accepted the reality of the phenomenon known as the "feminisation of poverty".⁵⁸ In an Australian case on custodial mobility, the Full Court of the Family Court of Australia included reference to the Supreme Court judgment, and endorsed the view that "economic factors and the unequal position of women" are relevant factors for the Courts to take into account in this area of law.⁵⁹ This recognition of economic realities, and the increase of emotional well-being that normally accompanies a higher standard of living for both the child and the custodial parent (who is usually female), can also be seen in a number of cases from both New Zealand and England.

⁵⁵ *Fasan v Fasan*, note 13.

⁵⁶ *Jarrett v Jarrett* (1995) 10 RFL (4th) 24. See also for instance *Oldfield v Oldfield*, note 25, where the Court granted permission for the custodial mother to return to France, noting, inter alia, that she was likely to find employment there which was more intellectually satisfying and financially rewarding than she was likely to find in Canada.

⁵⁷ *Korpesho v Korpesho* (1982) 31 RFL 449. (But cf the decision of the Ontario Court of Appeal in *Carter v Brooks*, note 46, where the mother unsuccessfully sought to move from Ontario to British Columbia in order to enable her husband to pursue a legitimate and advantageous job opportunity.)

⁵⁸ *Moge v Moge* [1992] 3 SCR 813.

⁵⁹ *In the marriage of I and I*, note 10, at 82,028.

In *Kennedy v Tyler*,⁶⁰ for example, Judge Blaikie provisionally granted leave for the custodial mother to leave New Zealand for Australia because of the claim of her new husband, who was on the unemployment benefit and unable to obtain suitable employment in Dunedin, that he would be able to set up a maintenance business in Townsville and possibly gain a sand-blasting job there. Stating that the difficulties arising out of unemployment could not be under-estimated, Judge Blaikie was largely persuaded to grant leave (on the condition, inter alia, that the husband had first obtained paid employment), because "... the desire to acquire full-time employment must itself improve the emotional feeling of self-worth on the part of the mother and Mr Kennedy, and must improve in a material way the lifestyle available to the children themselves."⁶¹ Similarly, one of the reasons which prompted Judge Boshier to allow the custodial mother to leave New Zealand to live in England in *C v C*⁶² was because her economic position in Auckland as a domestic purposes beneficiary, unlikely to find work, would be improved in the United Kingdom where she would have greatly enhanced financial resources open to her.

In one English case, the Court of Appeal considered the desire of the custodial mother and her new husband to leave England to live in New Zealand was a reasonable one, because, in part, the husband on his salary in New Zealand would acquire a higher standard of living.⁶³ In similar vein, the English Court of Appeal in two other cases allowed one custodial mother to leave England for South Africa because of the offer of a University teaching appointment, which she had been unable to obtain in the United Kingdom,⁶⁴ and another to leave for the United States of America because of an advantageous job offer in hotel management there.⁶⁵

Finally, though, it should be noted that the Full Court of the Family Court of Australia has held that where an application to leave the country was based on a proposal of the custodial parent to pursue an educational programme, the Court is entitled to be satisfied that the educational course proposed will have some "practical relevance to the current socio-economic circumstances" of the custodial parent.⁶⁶ Obiter dicta, Judge Boshier in *C v C* has also observed that where there is no apparent reason for a move from an established residence (and the non-custodial parent has an important part in the child's life) then the Court "may be slow to condone a move away".⁶⁷ These are judicial reminders that the motive of the applicant must not only be simply bona fides, but also be reasonably based.

⁶⁰ (1988) 4 NZFLR 708.

⁶¹ *Ibid*, at 714.

⁶² Note 49.

⁶³ *Lonslow v Hennig*, note 10, at 380 and 382 per Dillon LJ.

⁶⁴ *Nash v Nash* [1973] 2 All ER 704 (the salary offered was also double what she was then receiving).

⁶⁵ *Re F (a Ward)* [1988] 2 FLR 116.

⁶⁶ *In the marriage of Skeates-Udy*, note 54, at 82,296 (the Full Court of the Family Court of Australia held that the trial Judge was mistaken in holding the custodial mother's application was not bona fides, but that nevertheless he had made no error of law in finding her reason was not compelling enough to allow the move at the expense of the children's relationship with their father).

⁶⁷ Note 49, at 368. On the other hand, in *Wright v Wright*, note 2, it appeared there was no compelling reason for the custodial mother's wish to move from Wellington to Auckland other than "simply that she would prefer to live there" (at 367). The Family Court did make a custody order imposing a condition as to residence in Wellington, but this condition was removed by Grieg J in the High Court.

Reasonableness

Whilst the motive for the custodial parent's planned move is commonly economic in its origin, it need not be so confined. It might arise, for example, in substance or in part, out of a desire to re-establish links with family or a familiar culture, or out of a wish to develop a relationship with a partner who lives elsewhere. Whatever the motivation, assuming first its genuineness, the Court must come to consider the reasonableness of the plan. In the abstract, one would expect the question of the reasonableness or otherwise of the move to be assessed essentially from the child's perspective, but with the welfare of the child being so often integrally linked to the welfare of the custodial parent, the Courts sometimes have to step out of the child's shoes and adopt a more adult-focused approach. Obviously reasonableness is a question of fact, embracing a multitude of factors,⁶⁸ but a number of considerations are of particular importance and are discussed below.

(i) Duration of proposed move

In determining the reasonableness of the plan the proposed duration of residence in the new location can be of great importance.⁶⁹ There is, needless to say, a fundamental difference between a proposed overseas holiday and planned emigration, and normally one would expect the Court to be much more ready to countenance overseas vacation plans.⁷⁰ In *D v D*⁷¹ Judge Pethig declared his belief that the child would benefit from overseas holiday travel, and from meeting overseas family, and that the proposed trip would be a "positive, broadening experience in all sorts of ways".⁷² His Honour was not, however, prepared to entertain a proposal for the child to spend 12 months overseas, and the Judge, clearly concerned about the effect of a long absence on both the boy's schooling and relationship with the non-custodial father, indicated that a period of 6 months would be more appropriate. Similarly, in *Lake v Lake*⁷³ Judge Maxwell was not prepared to countenance a proposal whereby the custodial mother and her de facto partner would live in Melbourne for two years. It can be thus be said that if the proposed period away exceeds a period of a few months, then the move has really ceased to have the character of a vacation, and the risk of potential damage to the relationship between the child and non-custodial parent has clearly increased. Other factors of reasonableness must then come into play.

⁶⁸ Ten possible major factors were identified by Judge Greene in her paper delivered at Family Law Conference in October 1995: note 26, at 133-134.

⁶⁹ It was the first factor, in a non-exhaustive list of relevant factors, identified as relevant by the Full Court of the Family Court of Australia in *Kuebler v Kuebler* (1978) FLC 90-433, at 77,205.

⁷⁰ See eg *N v N* FLN-63(2d), note 90, where the custodial mother was authorised to take the child overseas for an eight week holiday with herself and her partner. See further *Buckle v Buckle* (Family Court, Palmerston North, FP 054/331/94, 28 June 1995) where Judge von Dadelszen authorised the grandparents to take their grandchildren on a 4 week trip to the United States of America, during which time the grandmother was to receive a rare University award. Nevertheless, even where the nature of the trip overseas is clearly of a holiday nature, being of very short duration, the proposal might be rejected as unreasonable if it breaches some previously made agreement by the parties: *Sabagh v Sabagh*, note 47.

⁷¹ (1984) 1 FRNZ 181.

⁷² *Ibid*, at 182.

⁷³ FLN-5(2d) N6.

(ii) *Cultural and social considerations*

Where the proposal for overseas residence does involve a more permanent shift, then cultural considerations often become relevant. Those considerations are of reduced significance if the cultural milieu in the new country is not too dissimilar from the old (as where, for example, a European New Zealand family moves to Australia), but where there are pronounced cultural or racial differences in the new country then, as pointed out by the Australian Family Court, these can be of some significance.⁷⁴ For instance, in *Greer v Greer*,⁷⁵ the New Zealand Family Court, declining an application of the custodial mother to leave New Zealand for Israel, commented on the benefits of continuity of language, lifestyle and culture for a ten-year-old boy. In *P v P*⁷⁶ the Family Court, declining an application for the child to return to Western Samoa, emphasised that where there was a choice of two cultures, the decision must ultimately be one that is "best designed to permit each culture to develop in tandem".⁷⁷ On the other hand, if the child is a member of a minority racial group in his or her present country then, as in *Burke v Rahim*,⁷⁸ it may be positively advantageous for a child to move to a new country where the racial differences are not so significant.

Sometimes a custodial parent who is not presently residing in the country regarded as "home" may have a particularly strong yearning to return to his or her homeland and familiar culture. An application to return home has a particularly high likelihood of being assessed as a reasonable one, especially if, as in *McDowall v McDowall*,⁷⁹ the custodial parent has been living in the present country for only a short period of time. In one Canadian case, for instance, the custodial mother, a native of France, was said to have an attachment to France that was "an essential part of her character", and her return was permitted.⁸⁰ Similarly, in an Australian case, the desire of the custodial father to live in Israel was accepted as "long-standing, fervently held, and genuine", and the Court granted leave to return.⁸¹ However, it must be said that in both the aforementioned cases the cultural adjustments required of the children were not great: in the Canadian decision, the children, though enjoying their English heritage, were bilingual and also enjoyed France; and in the Australian decision the boy's upbringing in an Orthodox Jewish home and at a Jewish school in Australia was stated to be not markedly different from life in Israel. As well, in both cases, the custodial parents were returning to families, with the children thereby benefiting from the presence of an extended family.

In considering the reasonableness of any proposed move to an overseas country the social and legal characteristics of the new country can be influential. Delivering his judgment in *Burke v Rahim*, McGechan J argued

⁷⁴ *In the marriage of R and R* (1984) FLC 91-571 at 79,617 (an application to live in France was refused).

⁷⁵ [1995] NZFLR 176, at 181 per Judge Strettell.

⁷⁶ (Family Court, Palmerston North FP 85/14/89), as quoted by Judge Strettell in *Greer v Greer*, note 32, at 183. In *Greer's* case the application by the custodial mother to return to Israel to live was refused.

⁷⁷ *Ibid.*

⁷⁸ (High Court, Wellington, AP 302 and 330/92, 25 May 1993) at 24-25 per McGechan J.

⁷⁹ [1995] NZFLR 163 (the parties were South African and had lived in New Zealand for only 8 months — the mother was permitted to return to South Africa).

⁸⁰ *Oldfield v Oldfield* (1991) 33 RFL (3d) 235, at 251 per Blair J.

⁸¹ *In the marriage of Lourie and Perlstein*, note 23.

that sometimes the Court must attempt to evaluate the suitability or otherwise of a foreign society for the up-bringing of children in accordance with “some basic norms and requirements of civilised behaviour”.⁸² On the facts of this case, his Honour said that whilst there would be reluctance to release a child into some primitive society, or a society which shows “abhorrent features” the Court did not regard Singapore, with its arguably less liberal structure, as being an unsuitable place for the children to grow up, and the mother was allowed to take the children there.

On this matter of the social conditions and structures in the proposed new country, an English Court, granting leave for the custodial mother and stepfather to leave England gratifyingly described life in New Zealand as a “reasonable way of life”;⁸³ and in another case Winn LJ, delivering judgment in 1970, described New Zealand as a “highly civilised country”, stating that “one need not worry too much about the protection of the child if trouble arose”.⁸⁴ Perhaps more surprisingly, though, the English Court of Appeal, allowing the custodial mother to move to South Africa, described South Africa in 1973 as being, apart from the apartheid objection, “an ordinary civilised place”.⁸⁵

In assessing whether or not the country can be deemed “civilised” the procedures and principles upon which the legal system deals with issues of guardianship, custody and access are important.⁸⁶ For example, the Family Court of Australia, in granting leave for a custodial father to emigrate to Israel, emphasised that Israel was a “civilised country”, with the Courts operating upon the paramountcy principle.⁸⁷ Judicial concern over the nature of the Family Law system in the intended new State emanates from the lack of enforceability of a domestic Court order in overseas jurisdictions. In *Burke v Rahim*, the High Court explicitly recognised that conditions made by the Family Court as to access to the children in Singapore could well prove idle, unenforceable, and empty in that country, and McGechan J warned that in the eventuality that the access arrangements did not work as contemplated the High Court would probably be required to delete provision as to access.

On the other hand, the New Zealand Family Court, referring to the comity between the Family Courts in Australia and New Zealand, has suggested that if the New Zealand Family Court were to make an order of access in favour of the non-custodial parent then that order, whilst not actually enforceable in Australia, might, if not complied with by the custodial parent, be seen as the appropriate basis for a similar order to be made by the Australian Family Court.⁸⁸ However, any suggestion that a domestic Court could make an order allowing relocation on the condition that the appropriate overseas Court had first made an access order in favour of the non-custodial parent could rightly be dismissed as fanciful and “a total unreality”.⁸⁹ Generally, the domestic courts simply accept that if the

82 Note 78, at 24.

83 *Lonslow v Hennig*, note 10, at 382 per Dillon J, citing the unchallenged findings of the High Court Judge.

84 *P (LM) v P (GE)*, note 13, at 662.

85 *Nash v Nash*, note 64, at 708 per Davies LJ.

86 See the comment by the Family Court of Australia in *In the marriage of R and R*, note 73, at 79, 617.

87 *In the marriage of Lourie and Perlstein*, note 23.

88 *Reeves v Reeves*, note 10, at 43 per Judge Kean.

89 *Tyler v Tyler*, note 12, at 165 per Kerr LJ.

custodial parent's application to leave for an overseas destination is to be granted then the welfare of the children will lie exclusively in the hands of that country's legal system. Consequently, judicial assessments of whether or not a new country's legal and social systems are based on "civilised" norms and the paramountcy principle, although implicitly paternalistic, are frequently to be found.

As an aspect of the social structure of the proposed new country, the available medical and educational facilities available for the children must affect the children's welfare, and thereby the reasonableness of the application. Thus, Ormrod LJ, though embracing the general principle of custodial parent freedom, gave as an example of incompatibility between the interests of the children and the custodial parent the case of where a child was well-settled in a boarding school, so that it would be very disadvantageous to "upset the situation and move the child into a very different educational system".⁹⁰ Sometimes, of course, the educational or medical facilities available in the new country might prove to be superior to those in the child's present home, and in that type of case the proposal to move more will more obviously appear reasonable.⁹¹

(iii) Relationship with extended family and non-custodial parent

Often the motive for the planned move to a new location is the custodial parent's need to receive the support and love of family and friends based at that place. For instance in *Bachler v Parker*⁹² the specialist reporter highlighted the need for the custodial mother, who had only recently been reunited with her birth father in Australia, to care for her four-year-old child within the context of a caring extended family. Judge Frater felt that the mother, who had experienced a troubled past, needed to develop relationships with her father and other members of her Australian family, and the Judge therefore allowed her to leave.

Sometimes, though, a proposed shift overseas is determined to be detrimental to the child's welfare, because, from the child's perspective, the inevitable loss of regular contact with the non-custodial parent is compounded by the loss of contact with the extended family or friends of the home environment. In cases from both New Zealand and Australia such a loss has been influential in disallowing the proposed overseas move.⁹³ In some Canadian cases the loss of relatives and friends has even been influential in the Court's refusal to allow the custodial parent to move between provinces. For instance, the Prince Edward Supreme Court refused to allow the custodial mother to take her three-year-old girl to Ottawa, declaring that the relationships of a little girl with her grandparents and friends were, together with her relationship with the non-custodial parent, important to her and should not be lost.⁹⁴ Likewise, in a case where

⁹⁰ This passage from the unreported judgment of *Moodey v Field* (decided 13 February 1981) was quoted by Dillon LJ in *Lonslow v Hennig*, supra, note 10, at 382.

⁹¹ See eg *McDowall v McDowall*, note 79 (the child suffered from the serious condition of neutropenia; the medical resources for treatment in New Zealand, whilst adequate, were found by Judge O'Donovan to be in some ways inferior to those available in South Africa). In *In the marriage of Lourie and Peristein*, note 23, Trevaud J noted the suggestion that the Jewish school system in Israel was preferable to the Jewish school system in Australia (at 80,154).

⁹² Note 17.

⁹³ See eg *Greer v Greer*, note 32, and *Dunshea v Dunshea*, note 34, at 567 (SC NSW) per Bryson J.

⁹⁴ *Crawford v Crawford* (1985) 46 RFL (2d) 331, at 336 per Mullally J.

a four-year-old son had the benefit of very extensive and warm extended family in Ontario, the Ontario Family Court refused the custodial parent's application to move to Ottawa: it was held that maintenance of these relationships, and the associated Italian cultural traditions, were important for the boy.⁹⁵

On occasion, there is no such loss to take into account. Most particularly, where the extended family, or in greater likelihood the non-custodial parent, has a negative influence on the child, then a proposed move will inevitably appear more reasonable. For instance, if there has been inter-parental conflict, then a greater geographical distance may allow the animosity to subside.⁹⁶ In *Thomson v Thomson*⁹⁷ the crucial factor in Fraser J's decision to allow the custodial mother to move from Dunedin to Australia was the continuing hostility and distrust shown by the father towards the mother. In the Judge's view, this antagonism was having a corrosive influence on the five-year-old child's welfare, and his Honour considered that the boy's best interests would be served by permitting the mother to reside in Australia, with adequate access to be reserved for the father. The Australian Family Court similarly held that in a case where a father, because of his obsessive attitude to the custodial mother, seemed unable to cater for his children's emotional needs, and the trial judge had been unable to dismiss the possibility of the father behaving in a sexually inappropriate behaviour towards the children, it would be unreasonable to require the mother to stay in Australia.⁹⁸

(iv) *Finances*

The reasonableness of the custodial parent's move can be affected by the financial means of the non-custodial parent. For instance, in *C v C* Judge Boshier, approving the custodial mother's plan to live in England, noted that the father, with the mother's assistance, had the financial means to visit the United Kingdom at reasonably regular intervals in the future.⁹⁹ In Canadian cases, the availability of financial resources for access visits has also been persuasive in allowing the proposed move;¹⁰⁰ and equally it has been suggested that the Canadian courts are more likely to restrict mobility if the access parent does not have enough money to maintain regular and frequent contact.¹⁰¹

It will shortly be seen that the custodial applicant is often required to contribute to the costs of access where the move involves a change of location within the domestic jurisdiction, and is also frequently required to lodge a bond to help defray the access costs where the move is overseas. Where, however, the applicant's finances would essentially be exhausted in order to pay for the travel to an overseas destination this might well

⁹⁵ *Brigante v Brigante*, note 15, at 310 per Beckett UFCJ.

⁹⁶ See *Fasan v Fasan*, note 13, at 133.

⁹⁷ (High Court, Dunedin, AP 3/92, 21 September 1992).

⁹⁸ *In the marriage of I and I*, note 10.

⁹⁹ Note 49. The mother, however, was required to contribute to his accommodation and travel in the UK by posting \$20,000 in a separate New Zealand bank account which was to be drawn from for access costs.

¹⁰⁰ *Fasan v Fasan*, note 13.

¹⁰¹ In *In the marriage of I and I*, note 10, the Full Court quoted Canadian comment to this effect, and which had cited *Brigante v Brigante*, note 15. See further *Carter v Brooks*, note 46.

influence a Court against allowing the move:¹⁰² the depletion of limited finances might be seen as adverse to the child's welfare.

The position of the access parent

From the child's point of view, regular access is often said to be essential for the child's optimum emotional development. Moreover, from the parents' perspective, it is clear law in New Zealand that both married couples and de facto couples living together at the time of birth, retain guardianship upon separation.¹⁰³ Accordingly, both the custodial parent and access parent remain, at least in theory, jointly responsible for the child's upbringing. A non-custodial parent could then proceed to argue that this responsibility or obligation is very difficult to discharge without freely available access, and that a change of the child's residence, inevitably rendering access less full and frequent, would militate against the proper discharge of guardianship rights or responsibilities.

At first sight, it does seem unfair that both the access parent and the child are deprived of a beneficial relationship, and the Courts do frequently express sympathy for the predicament of the non-custodial parent when the children move to a new home.¹⁰⁴ Nevertheless, McGechan J has observed that any decision based on the paramountcy principle may necessarily be "cruel to a parent".¹⁰⁵ Usually that parent will be the non-custodial one. In balancing losses to the child, the Ontario Court of Appeal has forcefully contended that the benefits to the child offered by the custodial parent, providing day by day care, far outweigh the benefits of weekend access. As a result, the Ontario Court of Appeal declared that the right of access, whilst important and beneficial, should not receive the same protection as custody rights. Moreover, when the specific issue of fairness between the parents is examined, there is strength in the Ontario Court's further argument that access parents enjoy the freedom to live as they wish, at least when the children are not present on visits, whereas the custodial parents are likely to find most of their decisions and choices tightly restricted by their custodial role. Consistent with this line of thought, it has been suggested by a New Zealand psychologist, that it is more usual for the non-custodial parent to shift after a dissolution of marriage — but that such moves by non-custodial parents are rarely, if ever, debated in the Family Court.¹⁰⁶ Clearly, then, the access parent does enjoy lifestyle benefits not available to the custodial parent, and unfairness to the custodial parent would ensue if the access parent were able to tie the custodial parent to a particular locality, when, at the same time, the custodial parent remained entirely powerless to prevent the access parent moving at whim from one location to another.

For these sorts of reasons, the Courts lack any enthusiasm to control the custodial parent's freedom, and prefer instead to restructure access arrangements. As an indication of a general judicial approach, the Family Court of Australia once declared that a custodial parent's freedom of

¹⁰² See, for example, *Lake v Lake* FLN-5(2d) N6-7.

¹⁰³ Section 6(1) of the Guardianship Act 1968.

¹⁰⁴ See eg the English Court of Appeal decisions of *P (LM) v P (GE)*, note 13, and *Lonslow v Hennig*, note 10.

¹⁰⁵ *Burke v Rahim*, note 27, at 16.

¹⁰⁶ Adamiak, "Wait Until Your Father Gets Home" — Reflections of a s 29A Reporter" in *Family Law Conference Papers Vol 1*, note 26, at 119.

mobility should only be restricted if "... the welfare of the children clearly indicates that the other parent should have regular weekly access rather than less frequent but longer periods of access."¹⁰⁷

When deciding on restructured access, though, the Court needs to concern itself with such practicalities as the ability of the non-custodial parent to visit during the child's scheduled school holidays. On occasions, practical difficulties of this nature may tell against the viability of the move proposed by the custodial parent.¹⁰⁸ The Supreme Court of New South Wales in one case found that a proposed annual visit of several weeks from two sons aged 8 and 12 to their non-custodial father would result in the paternal relationship becoming fairly nominal during the rest of the year, with an ensuing injury to that relationship resulting in a "large injury" to the boys' welfare: the mother's application to move to Tasmania was accordingly declined.¹⁰⁹

In considering restructured access in the aftermath of a move, and the consequent effect on the child's relationship with the non-custodial parent, the child's age can be a pertinent consideration; and, as Judge Greene asserted in her recent conference paper, the Court must determine such matters as whether written or telephone communication would be a realistic prospect for the children and parent.¹¹⁰ Commenting on *Bachler v Parker*¹¹¹ the Judge also noted how the Court could take "an intermediate step" of requiring the custodial parent to stay in New Zealand "for sufficient time for the child to be prepared for a planned and properly ordered departure" and until the child was of an age "where he was able to hold his father in his memory during his absence overseas".¹¹²

As in *Bachler's* case, the Court might also authorise counselling for the parties in order to help both parents come to terms with their future responsibilities for the child's welfare. By whatever method, the Court will invariably seek to avoid a complete termination and loss of relationship with the non-custodial parent. Conventional wisdom does prescribe that, other than in rare circumstances, some of the most vital factors for the psychological well-being of children during their childhood, and indeed during adulthood, are the opportunity to have a relationship with both parents and the knowledge that they are loved by both.¹¹³ The Courts will therefore do their utmost to ensure that some access is continued.

Ensuring continuation of access

As earlier discussed, an order of a domestic Court is generally unenforceable in an overseas jurisdiction, and where there is a proposal to move overseas, much therefore depends on the willingness of the custodial parent to facilitate any access that is either suggested or ordered by the domestic Court. Accordingly, if the Court cannot be satisfied that the custodial

¹⁰⁷ *Craven v Craven*, note 51, at 75,205.

¹⁰⁸ See, for example, *Rudolph v Dent*, note 48, at 678.

¹⁰⁹ *Dunshea v Dunshea*, note 34, at 568 per Bryson J.

¹¹⁰ Note 26, at 134. In *Lonslow v Hennig*, note 10, Dillon LJ contemplated that between the envisaged visits every two years, contact between the father and the two daughters aged 10 and 12 would be kept alive by letters, photographs, and telephone calls and by the father's receipt of school reports.

¹¹¹ Note 17.

¹¹² Note 26, at 136.

¹¹³ Judge Eberhard described this as his "considered and passionate belief" in *Jarrett v Jarrett* (1995) 10 RFL (4th) 24, at 29. See also the much cited work of Wallerstein and her co-authors in *Surviving the Breakup* (Basic Books, 1980), and *Second Chances*, note 1.

parent would comply with any orders for restructured access, this can prove to be “a weighty, although not decisive matter” against the success of the application.¹¹⁴ Similarly, if an application is made to move overseas for a period of limited duration, and then return, the Court may need to be satisfied that an undertaking to return will be satisfied.¹¹⁵

In order to reinforce access orders or undertakings the custodial parent may be required to pay a bond, or, as McGechan J preferred to describe it, an “indemnity or guarantee”.¹¹⁶ For instance in *D v D* where Judge Pethig authorised the custodial mother to take her son to Australia for six months, the mother was required to post a bond of \$10,000; and in *Burke v Rahim* McGechan J made his approval for the custodial mother to leave for Singapore conditional on her father posting a bond, or indemnity, of \$50,000.

In *Burke's case* the sum also served as a fund to help defray access costs of the non-custodial parent, and there are a number of New Zealand case examples where the successful custodial parent has been required to lodge a sum in a bank or trust account in order to assist with future access costs.¹¹⁷ Furthermore, the costs normally incumbent on an access parent can be lessened if the custodial parent agrees either not to apply for a child support formula assessment, or that any sums previously paid for child support be instead paid into an account for the purpose of funding access.¹¹⁸ With such arrangements, though, it is important for the access parent to appreciate that the custodial parent could withdraw from that agreement at any time,¹¹⁹ and the non-custodial parent does remain potentially liable for Child Support payments, irrespective of the place or country of the child's residence.¹²⁰

Conclusion

The case-law shows it is rare for a custodial parent to be refused permission to move, assuming that his or her motive for the move is a bona fides one; and the child's welfare, which is by no means invariably the pivot of the various judgments, is usually assumed to be best promoted by promotion of the custodial parent's economic and psychological welfare.

¹¹⁴ *Holmes v Holmes*, note 6, at 76,663.

¹¹⁵ See eg *In the marriage of Kuebler and Kuebler* (1978) FLC 90-434, 77,206 per Asche SJ. On the other hand, the English Court of Appeal allowed the custodial mother to move in *Lonslow v Hennig*, note 10, where the access proposal was for an eight week visit every two years.

¹¹⁶ *Burke v Rahim*, note 78, at 35.

¹¹⁷ See, for instance, *C v C*, note 49 (the custodial parent was to deposit \$20,000 in a separate New Zealand bank account, to be managed jointly, from which \$3,000 was to be withdrawn for access visits to England); *Kennedy and Tyler*, note 60 (\$5,000 was to be lodged in a trust account of Counsel for the Child, who was permitted to invest in an authorised trustee investment, and annual interest was to be used for the costs of return air fares for both children between Australia and New Zealand in accordance with the ordered access arrangements); and in *Bachler v Parker*, note 17, it was ordered that, if the non-custodial parent did not himself move to Australia prior to the custodial parent and child, then the custodial parent was not to leave New Zealand until, inter alia, funds were lodged in the trust account of Counsel for the Child to cover the costs of the first access visit.

¹¹⁸ Judge Greene notes in her paper that the parties may agree to contract out of the Child Support Act regime in order that child support be instead put towards travel costs: note 26, at 137. In *Kennedy v Tyler*, note 60, the sum of \$18.00 per week previously paid for child maintenance was ordered to be paid into the trust account of Counsel for the Child in order to help fund air fares and access costs. (For similar arrangements see the leading English case *P (LM) v P (GE)*, note 13.)

¹¹⁹ See s. 65 of the Child Support Act 1991.

¹²⁰ See the failure of the non-custodial parent to obtain a departure order in *Lyon v Wilcox* [1994] NZFLR 653 (CA).

Normally, though, the move will in fact have some detrimental consequences for the child, and is likely to result in a more distant relationship with the non-custodial parent. However, that diminished relationship with the access parent is perceived to pose less of a risk to the child's welfare than the diminished and impaired parenting from a custodial parent who feels thwarted, frustrated and embittered by an adverse judicial decision.

Essentially, then, the case-law seems to establish that custody carries with it not only the rights and responsibility of possession and care of the child, but also the right to determine the geographical location in which those rights and responsibilities will be carried out. The access parent might well feel that his or her parenting role is effectively being disregarded when a move is approved by the Court, but, as the Ontario Court of Appeal contended, it can be "manifestly unfair" to treat the interests of the access parent and custodial parent as being on an equal footing.¹²¹

Nevertheless, in exceptional cases the Courts will rule against the custodial parent and constrict his or her freedom to move. Examples of such rulings include cases where custody is being disputed and both parties would be suitable custodial parents,¹²² where the custodial parent's new relationship seems unstable,¹²³ where the custodial parent's plan is simply impractical and ill-conceived,¹²⁴ where the custodial parent could cope with a decision refusing permission to move,¹²⁵ where the child is of a young age that would make loss of grandparents, friends, and access parent particularly difficult,¹²⁶ and where the child has special needs.¹²⁷

Generally, though, in this area of law the custodial parent's freedom to move is accorded primary importance and weight by the Courts, and generally, it must be said, the wish of the custodial parent has become the first and paramount consideration

¹²¹ *MacGiver v Richards*, note 19, at 24.

¹²² *Dunshea v Dunshea*, note 34. To some extent, this was also the case in *Stadniczenko v Stadniczenko*, note 4.

¹²³ *Brigante v Brigante*, note 15 (the child also enjoyed a close relationship with the access parent and his extended family).

¹²⁴ *Re K*, note 41.

¹²⁵ *Re Tyler*, note 12.

¹²⁶ See *Greer v Greer*, note 32, and *Crawford v Crawford*, note 93. In *Stadniczenko v Stadniczenko*, note 4, the trauma of change for children aged 7 and 5 was influential in the High Court's decision to refuse permission (at 501).

¹²⁷ *In the Marriage of Armstrong*, note 38, (the child was "mentally retarded").