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National Legal Aid

The Director of Research
Family Law Council
Robert Garran Offices
National Circuit
Barton, ACT, 2600

4045 A-1106

Dear Professor Parkinson,

Re: Response to the Relocation discussion paper – National Legal Aid

Thank you for the opportunity to provide our comments on the Family Law Council's Discussion Paper on Relocation, February 2006. Our comments follow and are written in response to specific questions in the Discussion Paper.

NLA notes however, that since the Council's paper was released for comment the Family Law Amendment (Shared Parental Responsibility) Bill 2006 is about to become law in Australia. NLA has concerns that the new legislation, and the way it may be interpreted, could have a significant effect on the law relating to relocation.

It is our submission that on one view the new legislation could almost create a presumption against relocation. We refer in particular to the wording of S60B and S60CC in relation to the determination of a child's best interests, and the primary considerations set out in (2) (a) and (b).

The concept of shared parental responsibility may favour the preservation of the status quo over proposed relocation. It may also affect the ability of the 'contact' parent to relocate. If the new legislation places restrictions on parents seeking to relocate with children away from one parent, it follows that consideration must be given to the contact parent on the one hand to relocate as well; or on the other hand being restricted from relocating to enable a contact order to remain meaningfully in place. And thus any person with existing court orders for contact who wished to relocate, would need to go to court to seek permission to do so in order not to be in contempt of an existing court order for contact. See also our comment below in para 5.

Our view in relation to the changes and challenges presented by the new legislation is that the issue of relocation should be revisited when a body of case law has begun to develop under the new legislation. Whilst our view at

present, and as detailed below, is that the law should not be codified, it may be that this will ultimately be necessary.

NLA foreshadowed in the response to the Paramountcy discussion paper, that relocation cases are among the most difficult cases that the court has to deal with. As Carmody J said in W and R "people feel passionately about this vexed question. There are usually no easy answers and both sides of the argument often have compelling claims".

The example given in the paper, of the variations in approach across the United States further indicate that this is a vexed question.

The statistics presented in the discussion paper indicate that moving house and changing environments are becoming an increasingly common feature of family life in Australia, and also that 84% of resident parents are mothers. There is a disproportionate percentage of applicants in relocation matters who are women. It would be unlikely if any of the male respondents in those cases would react favourably to orders prohibiting their movement away from the child i.e. an enforcement of a contact order.

We note that Kirby J in AMS and AIF noted that one of the objects of the Family Law Act was to enable parties to a broken relationship to start a new life for themselves, to control their own future destinies and where desired to form new relationships free from unnecessary interference from a former spouse or partner or from a court.

We respond as follows in relation to the specific questions posed in the discussion paper.

1. Definition of relocation

Paragraph 2.1, Page 4: If the Family Law Act was to refer to 'relocation', it is likely to be necessary to define this term. The question then arises as to how would relocation be defined for this purpose?

NLA does not consider that the Act needs to refer to 'relocation'. We support the approach of the Full court in A v. A¹ (ie. that relocation cases are not a special category of cases but rather parenting cases where the proposal of one of the parties involves relocation). Therefore, the term does not need to be defined.

2. Definition of best interests of the child

Paragraph 3.9, Page 8: Please consider formulating a definition of the 'best interests of the child'.

¹ A v. A: Relocation approach (2000) FLC 93-035

NLA does not consider that the Act needs to define '*best interests of the child*'. We agree with the discussion paper that this is a complex concept that necessarily varies from child to child and may change over time or when circumstances change. We are satisfied with the current approach (ie. where the court determines best interests after considering the matters set out in section 60CC of the Act).

3. Criteria for relocation decisions

Paragraph 3.36-37, Page 15: Please consider whether the Family Law Act should be amended to provide specific criteria for making relocation decisions. In considering this broad question, please also consider commenting on the consequential questions [see below]:

We are not in favour of relocation cases being a special category. NLA agrees with the criteria for making relocation decisions laid down in the line of cases surveyed in the discussion paper, culminating with *U v. U*.² We support the case-by-case approach, which does not rely on presumptions in favour of either parent. Even though this may result in less certainty for our clients, we believe it delivers the most appropriate outcomes. We do not consider that the Act should be amended to enshrine these criteria. We note that the *Re K* guidelines were not written into legislation to allow the court some flexibility, and we support similar flexibility here.

We believe that the common law is the most appropriate mechanism for providing judicial guidance in making relocation decisions. Unlike legislation, the common law is flexible enough to deal with the infinite variety of family circumstances and to keep pace with changes to community mores and advances in expert knowledge. The development of relocation case law over the past decade clearly demonstrates this. We believe that attempting to adapt the Act in the same way will be like trying to 'pin jelly to a wall.'

The need for the flexibility of the common law will become even more important in the near future, as we adapt to the recent changes to the Act. We expect that the new provisions about children spending equal or substantial and significant time with both parents will make relocation decisions even more complex.

3.1 Whether relocation cases should become a special category of cases that require separate treatment (contrary to the approach that has been adopted by the High Court and the Full Court of the Family Court), and if so, why?

As discussed at paragraph 1, we do not support treating relocation cases as a special category of cases that require separate legal criteria. However, we

² *U v. U* (2002) 1919 ALR 289

suggest that procedural practices should be improved for these cases. They must be identified as *'urgent major long-term issue cases'* as early as possible so that they receive listing priority. This is particularly important if the residence parent has already moved (without consent) or if the residence parent needs to move immediately (eg. for employment). In either of these scenarios, a delay in obtaining interim orders may effectively determine the final outcome, irrespective of the best interests of the child at the outset.

3.2 *Which of the criteria should be mandatory and which should be relevant considerations? Are there any factors that should not be taken into account?*

Not applicable (see answer at paragraph 3).

3.3 *If some guidelines were to be inserted in the Family Law Act, should they be based on the principles from case law outlined above?*

Not applicable (see answer at paragraph 3).

4. Recommendation by the Committee on Legal and Constitutional Affairs

Paragraph 4.4, Page 16: Do you have any comments on the Committee's recommendation?

NLA does not support the committee's recommendation because:

- it is unnecessary. Section 64B(2)(a) of the Act provides that a parenting order includes an order about the person with whom a child is to live and the time the child is to spend with other persons. Section 60CA already provides that in deciding whether to make a particular parenting order, the court must regard the best interests of the child as the paramount consideration.
- it substitutes a new criterion for the court's decision. The recommendation specifies that the court must be satisfied on *'reasonable grounds'* that relocation is in the best interests of child. We believe that the current requirement (to consider all the factors in s.60CC) provides a stronger and clearer definition of the relevant grounds.

5. Relocation by contact parent

Paragraph 5.22, Page 25: Do you think that the Family Law Act should be amended to provide that it is necessary for a contact parent to apply to a court to amend the contact orders if the residence parent opposes the contact parent's relocation?

NLA supports this proposal in principle. Section 60B(2) of the Act states that the provisions relating to children are founded on the following principles.

- parents jointly share the duties and responsibilities concerning the care, welfare and development of their children
- children have a right to spend time on a regular basis with both their parents.

Consistent with this philosophy, we believe that a contact parent who intends to relocate bears the same responsibility as a residence parent to seek agreement or (failing that) orders to vary the arrangements for spending time with the child. It is a contradiction that the law effectively determines whether residence parents can relocate but assumes contact parents are free to determine this for themselves. The obiter dicta comments of Hayne J in *U v. U*³ (ie. that future cases should not make such assumptions about contact parents) may herald a change in attitude.

Contact orders create a parental obligation to spend time with the child because the court has determined that this would be in the best interest of the child. We believe that the court can and should enforce contact orders against the contact parent, in the same way it enforces them against residence parents.

We acknowledge that it may not be in the best interests of the child to force a genuinely unwilling parent to have contact, but this is an issue that the court must consider on a case-by-case basis when making the enforcement decision.

6. Other people affected by relocation

Paragraph 5.42, Page 29: Please address how you think the law should take account of the interests of other people affected by relocation decisions.

NLA considers that the current law deals appropriately with the interests of other people affected by relocation decisions. The Act provides the best interests of the child are the paramount consideration (i.e. the child's needs must take priority over the needs of other people).

However, the child's right to have regular contact with other people significant to the child's care, welfare and development is protected by s. 60B(2)(b). Section 60CC(3) requires the court to consider:

- the nature of the child's relationship with other persons

³ *U v. U* (2002) 1919 ALR 289 at paragraphs 175-176.

- the likely effect on the child of any separation from any other child or person with whom the child has been living.

NLA considers that the weight that the court gives to these factors should continue to depend on the specific circumstances of each case and the guidance provided by relevant caselaw.

7. Social science research

Paragraph 6.45, Page 42: Are you aware of any Australian social science research that should be taken into account in the development of the law in Australia?

The Council will be aware of recent AIFS research.

8. Presumptions

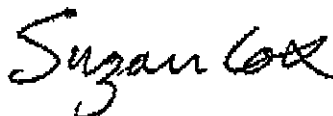
Paragraph 6.50, Page 42: Do you think that the Family Law Act should provide presumptions either for or against relocation of children with a residence parent, creating a legal onus on the other party to displace the presumption?

As discussed at paragraph 3, NLA does not support presumptions in favour of either parent, or indeed, after further consideration, a presumption in favour of relocation. Whilst greater certainty in these cases would be attractive we believe a case-by-case approach delivers the most appropriate outcomes because it allows the court to properly assess the unique circumstances of each family. We believe that the case law from the past decade demonstrates that relocation cases are too complex for a 'one size fits all' approach.

Should you wish to speak with us further in relation to the Discussion Paper please can you contact Mr George Turnbull, Director of the Legal Aid Commission of Western Australia, and the Director for NLA's Family Law Working Group.

Thankyou for the opportunity to make these comments.

Yours sincerely,



Ms Suzan Cox QC
Chairperson
National Legal Aid