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DISPUTES**

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## "FOR THE SAKE OF THE CHILDREN": SOUTH AFRICAN FAMILY RELOCATION DISPUTES

W Domingo\*

Humpty dumpty sat on the wall, Humpty Dumpty had a great fall all the kings horses and all the kings men couldn't put Humpty Dumpty together again!\*\*

### 1 Introduction

"Like Humpty Dumpty a family once broken by divorce, cannot be put back together in precisely the same way."<sup>1</sup> A decision by a primary caregiving parent to relocate after a divorce, thereby disrupting the non-primary caregiver's right of contact with the children in the marriage or, where both parents have joint care, the denial of the other's parental rights to care, raise the possibility of litigation involving relocation disputes.

The reasons sometimes given for relocating include matters such as the availability of attractive employment opportunities for either the primary caregiver or his/her spouse in the new location, a loss of confidence in the country's economy, the escalating crime rate, the availability of better education for the children, and the lack of a family support system wherever the family was initially situated. The parent who is going to be left behind often refuses to agree to the move. The primary caregiver then approaches the court to dispense with that guardian's consent. Relocation disputes are amongst the most difficult cases that courts have to deal with in family law matters.<sup>2</sup>

This contribution deals with the development of South African family jurisprudence in this area. I provide a general introduction contextualising the change in terminology as well as the conceptual paradigm shifts entailed in the operation of the *Children's*

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\*\* Opie and Opie *Nursery Rhymes* 213-215.

<sup>1</sup> Quote from the New York Court of Appeals in *Tropea v Tropea* 665 NE 2d 145 (NY 1996) in Van Schalkwyk 2005 *De Jure* 344.

<sup>2</sup> Parkinson 2006 *FLQ* 255.

Act.<sup>3</sup> I begin by analysing the *Children's Act* in the context of family relocations. I then proceed to discuss the different jurisprudential approaches/trends taken by our courts. I pave the way forward by making the argument that we need a general consistency in approach by our courts when dealing with relocation disputes. Despite the existence of the *Children's Act*, we still need guidelines or perhaps a "Relocation Act" which works in tandem with the *Children's Act*.

In my contribution I will refer to the traditional custodial parent as the "primary caregiver" and the parent who has access (now contact) as the "non-primary caregiver." These labels of identification work well when one parent is awarded sole care. Labelling becomes unclear when we deal with parents who are awarded joint care. For convenience's sake and clarity, in the context of my discussion on relocation in this contribution, I will also refer to the parent wanting to relocate as the "relocating parent" and the parent who remains behind as the "non-relocating parent."<sup>4</sup>

## 2 The change in terminology and ideological paradigm shifts

In order to deal with the complexities of issues relating to relocation, I believe it is important to describe, very briefly, the new family law landscape introduced by the *Children's Act*. The *Children's Act* has not only introduced a change in terminology but has also introduced a shift in the way we think and conceptualise paradigms in family law. In the context of issues relating to relocation, the terms custody and access have been replaced with the terms care and contact respectively.

Care has a much wider ambit than custody. It means not only providing for the child's daily needs such as a safe home, food, education and love. It also includes promoting the well being of the child, maintaining a sound relationship with the child and, of paramount importance, attending to the best interests of the child. Both parents have these responsibilities and rights.<sup>5</sup>

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<sup>3</sup> *Children's Act* 38 of 2008.

<sup>4</sup> A full discussion on the philosophical underpinnings of the *Children's Act* is beyond the scope of this contribution.

<sup>5</sup> Look at the definition of care in s 1 of the *Children's Act*.

The current paradigm seems to favour the practical and theoretical thrust in the direction of shared parental responsibility and rights. It is now more readily accepted that children have two primary attachments, which seems to deny the assumption that men are not *prima facie* nurturers and caretakers of their children.<sup>6</sup> This flows into the idea that courts should grant joint care orders so that children maintain close bonds with both parents. Solomon's Wisdom, that children cannot be shared, is reinterpreted in the light of the conceptual framework of shared parenting in the following way:

[C]ommon references to the Biblical Solomon proposing to divide a baby across two women claiming to be the natural mother are used fallaciously to illustrate why shared parenting would not work. The dispute appears too intractable and the reader recoils at the connotations of a baby being cut in half to appease the two women. The message in this story has been distorted. In the story the true mother gives up her child rather than have it cut into two halves. This is analogous to the friendly parent concept. The point of Solomon's wisdom is the true mother's willingness to share and countenance the possibility of the other women being a potential parent.<sup>7</sup>

I believe that these ideological changes concerning parenting will have a profound impact on relocation. The post-divorce family unit has been lauded as the "binuclear family" by Professor Robert Oliphant.<sup>8</sup> A binuclear family is defined as a large, interconnected family, with one household headed by the ex-wife and the other household headed by the ex-husband, with the child being a member of both.<sup>9</sup> In the context of relocation disputes, parents who have joint care are able to demonstrate more clearly to the child the benefits of their relationship, to prevent relocation.<sup>10</sup>

### 3 Relocation and the *Children's Act*

According to section 9 of the *Children's Act*, "in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied". Section 7 of the Act sets out a lengthy list of factors which courts need to take into account when determining the best interests of a child. These include the nature of the relationship between the child and

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<sup>6</sup> Shared Parenting Council of Australia 1998 *Journal of the AAML* 3.

<sup>7</sup> Shared Parenting Council of Australia 1998 *Journal of the AAML* 4.

<sup>8</sup> Glennon 2008 *Utrecht Law Review* 66.

<sup>9</sup> Glennon 2008 *Utrecht Law Review* 66.

<sup>10</sup> Glennon 2008 *Utrecht Law Review* 66.

parents;<sup>11</sup> the attitude of the parents toward the child and to the exercise of parental responsibilities and rights in respect of that child;<sup>12</sup> the likely effect on the child of changed circumstances such as separation from either or both parents;<sup>13</sup> the need for the child to remain in the care of his or her parent, family or extended family and to maintain a connection with his or her culture or tradition;<sup>14</sup> the child's age, maturity, stage of development, background, physical and emotional security and intellectual, emotional, social and cultural development;<sup>15</sup> and the need of the child to be brought up within a stable environment.<sup>16</sup>

The general principle is that both parents retain guardianship of a child after the dissolution of a marriage unless the courts orders otherwise.<sup>17</sup> Section 18 of the *Children's Act* sets out the responsibilities and rights that parents have in respect of their children. These include the responsibility and right to care for the child, to maintain contact with the child, to act as a guardian of the child; and to contribute to the maintenance of the child. Section 18(3)(c)(iii) and (iv) of the *Children's Act* states that the person acting as guardian must either grant or refuse consent to the child's departure or removal from the Republic and for the application of a passport.

An unmarried father can automatically acquire parental responsibilities and rights, which include the right to guardianship if he meets certain requirements set out in section 21(1)(a) and (b) of the *Children's Act*.<sup>18</sup> If the unmarried father does not meet the section 21 requirements, in terms of section 22 of the *Children's Act* the mother and unmarried father may conclude a parental responsibilities and rights agreement which confers guardianship on the unmarried father. If no agreement can be reached the unmarried father can approach the High Court for a guardianship order. It must be stressed that unless the unmarried father has guardianship over the child, his consent for removing a child from South Africa will not be necessary.

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<sup>11</sup> Section 7(1)(a).

<sup>12</sup> Section 7(1)(b).

<sup>13</sup> Section 7(1)(d).

<sup>14</sup> Section 7(1)(f).

<sup>15</sup> Section 7(1)(g)-(h).

<sup>16</sup> Section 7(1)(k).

<sup>17</sup> See ss 19 and 20 of the *Children's Act* 38 of 2008.

<sup>18</sup> The section includes parties in a permanent life partnership, which includes parties in a civil union partnership.

Unfortunately, the *Children's Act* does not make provision for consent procedures for relocation. It is clear from section 18 that if a parent wishes to relocate outside of South Africa the consent of both parents is needed. However, with relocation within the borders of South Africa, the situation may technically be different.

The *Children's Act*, section 18(4), stipulates that co-holders of guardianship over a child can exercise their parental responsibilities and rights independently and without the consent of the other guardian's rights. This *prima facie* means that a parent, with whom the child permanently resides, can independently and without the consent of the other parent, decide to relocate with child within the country. However, section 6(5) of the *Children's Act* states that-

a child, having regard to his or her his age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

Furthermore, section 31 of the Act stipulates that a co-holder of parental responsibilities and rights must consult and give consideration to the views of other co-holders of responsibilities and rights as well as the child when making decisions which are likely to change significantly or to have a significantly adverse effect on the co-holders exercise of parental responsibilities and rights in respect of the child. This would include decisions which affect contact between the child and parent, which would also include decisions to relocate to another city or province.

In the case *Joubert v Joubert*<sup>19</sup> in the Cape High Court, Erasmus J considered some of the parental responsibilities and rights provisions in the *Children's Act*. With regard to the above sections the Court found that although the primary caregiver had to consult the other parent, who also has responsibilities and rights in respect of the child, this did not mean that the primary caregiver was bound to give effect to the views and wishes of the other parent. The court further held that a failure to give consideration to the views of the other parent and failure to inform the other parent did not render the decision by the primary caregiver void or invalid. However, failure to do this would render the decision subject to review.

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<sup>19</sup> *Joubert v Joubert* 2008 JOL 219229 (C) (unreported to date) para 35.

#### 4 The development of South African jurisprudence: approaches by our courts

Relocation is commonplace after divorce. Cases involving relocation are generally brought by women. However, there are more and more cases being brought by men. See for example the case of *Jackson v Jackson*<sup>20</sup> where the father (a care-giver) wanted to relocate to Australia with his two daughters aged nine and seven, and *MK v RK*,<sup>21</sup> where the father wished to relocate to Israel with his daughter. Most of the cases dealt with by our courts are relocations to another country. There is only one reported case to date which deals with a local relocation, from Johannesburg to Cape Town.<sup>22</sup>

Since the *Children's Act* does not set out any criteria for cases dealing with the issue of relocation, we still need to consider case law to determine the issues that need to be taken into account. Our courts have, over the years, not been in agreement with regard to the approach that should be taken when dealing with relocation applications. Different approaches seem to have been used, which could be thought of as amounting to two distinct approaches: the pro-relocation approach and the neutral approach.

##### 4.1 The pro-relocation approach

With the pro-relocation approach, there is a general acceptance or, in some instances, a presumption in favour of the primary caregiver. The children are allowed to go with the primary care-giving parent wherever he or she chooses to live, unless it is necessary to restrain a relocation to prevent harm to the children.<sup>23</sup> The non-relocating parent would have to illustrate that this would clearly be detrimental to the children, otherwise relocation would be authorised. This is illustrated by the *Van Rooyen v Van Rooyen*<sup>24</sup> case where King DJP held the following:

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<sup>20</sup> *Jackson v Jackson* 2002 2 SA 303 (SCA).

<sup>21</sup> *MK v RK* 17189/08 South Gauteng High Court (Johannesburg) 6 May 2009 (unreported to date).

<sup>22</sup> *B v M* 2006 3 All SA 109 (W).

<sup>23</sup> Parkinson 2006 FLQ 255.

<sup>24</sup> *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 439G-H.

It is trite that the interests of the children are – all else being equal – best served by the maintenance of a regular relationship with both parents. Sadly, however, children of divorced parents do not live in an ideal familial world and the circumstances necessitate that the best must be done in the children's interests to structure a situation whereby access by the (non–primary caregiver) is curtailed but contact between him and the children is effectively preserved.

In *Godbeer v Godbeer*<sup>25</sup> the court added something in greater accordance with the traditional approach. The court held that if the primary care-giving parent makes a decision to move and has given mature and rational thought to the matter, then the presumption is that the relocation is in the best interests of the child.<sup>26</sup>

In more recent judgments, as seen in *Jackson v Jackson*,<sup>27</sup> our courts have favoured the pro-relocation approach, providing that the primary caregiver's decision to move should be shown to be reasonable and *bona fide*. The following legal principles regarding relocation were set out in the *Jackson* case:

It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, *a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parents is shown to be bona fide and reasonable*. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, *it would not be in the interest of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken*. Indeed one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. *But what must be stressed is that each case be decided on its own particular facts*. No two cases are precisely the same and, while past decisions based on other facts may provide useful guidelines, they do no more than that. By the same token, care should be taken not to elevate to rules of law dicta of judges made in the context of the peculiar facts and circumstances with which they were concerned.<sup>28</sup>

The court's rationale for affording special consideration to the primary caregiver's desire to relocate is explained in the minority judgment of Cloete AJA in *Jackson*:

The fact that a decision has been made by the custodian parent does not give rise to some sort of rebuttable presumption that such decisions is correct. The reason

<sup>25</sup> *Godbeer v Godbeer* 2000 3 SA 976 (W).

<sup>26</sup> *Godbeer v Godbeer* 2000 3 SA 976 (W) 982C-983A.

<sup>27</sup> *Jackson v Jackson* 2002 2 SA 303 (SCA).

<sup>28</sup> *Jackson v Jackson* 2002 2 SA 303 (SCA) para 2. Emphasis added.



why a Court is reluctant to interfere with the decisions of a custodian parent is not only because *the custodian parent may, as a matter of fact, be in a better position than the non-custodian parent in some cases to evaluate what is in the best interests of a child* but, more importantly, because the parent who bears the primary responsibility of bringing up the child should as far as possible be left to do just that. It is, however, a constitutional imperative that *the interests of children remain paramount. That is the "central and constant consideration"*.<sup>29</sup>

The court in *F v F*<sup>30</sup> echoed the same sentiments as in *Jackson*, that courts will not lightly interfere in the decisions of primary caregivers, but at the same time made the point that courts "must guard against too ready an assumption that the [primary caregivers] proposals are necessarily compatible with the child's welfare."<sup>31</sup> The 2008 case *MK v RK*<sup>32</sup> once again followed the *Jackson* decision. In order for the father to be successful in his application to immigrate to Israel, he had to show that his decision was both *bona fide* and reasonably and genuinely taken and that it was in the best interest of his daughter.

In *AC v KC*<sup>33</sup> the court maintains its overall pro-relocation approach. To determine whether the decision by the primary caregiver (the mother) to relocate to Abu Dhabi, where she had secured employment, was reasonable or not, the court relied on the "reasonable person test." The test is to "think oneself into the shoes of the proverbial *bonus paterfamilias* or the reasonable man."<sup>34</sup> The court held that the court *a quo* had adequately and holistically taken into account the section 7 factors determining the best interests of the child. Therefore the final question, objectively viewed, was whether or not the decision taken by the mother was one which a reasonable person would have taken.<sup>35</sup> This view of the appeal court is incorrect, for the balancing of competing factors is not used to determine whether the decision by the primary caregiver is reasonable or not, but to ascertain whether it is in the best interests of the child or not.<sup>36</sup> This case incorrectly allows the best interests of the mother to usurp the best interests of the child.

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<sup>29</sup> *Jackson v Jackson* 2002 2 SA 303 (SCA) para 34. Emphasis added.

<sup>30</sup> *F v F* 2006 3 SA 42 (SCA).

<sup>31</sup> *F v F* 2006 3 SA 42 (SCA) para 13.

<sup>32</sup> *MK v RK* 17189/08 South Gauteng High Court (Johannesburg) 6 May 2009 (unreported to date).

<sup>33</sup> *AC v KC* A389/08 2008 ZAGPHC 369 16 June 2008 (unreported to date).

<sup>34</sup> *AC v KC* A389/08 2008 ZAGPHC 369 16 June 2008 (unreported to date) para 13.

<sup>35</sup> *AC v KC* A389/08 2008 ZAGPHC 369 16 June 2008 (unreported to date) para 15.

<sup>36</sup> Albertus 2009 *Speculum Juris* 78.

In most of these cases the argument for relocation is supported by Goldstein, Freud and Solnit's idea that the most important consideration is to preserve the relationship between the child and his/her "psychological parent," and that a primary care-giving parent should have the authority to raise the child as he or she sees fit without interference with that authority by the state or the non-primary caregiver. It must be noted that this idea resonates with the traditional notion of custody, as involving the sole right to exercise all aspects of parental authority to the exclusion of the other parent.<sup>37</sup>

Wallerstein, Brunch and Bowermaster (who are social scientists) also support the idea that in the issue of relocation the bond between the primary caregiver and the child is of primary concern.<sup>38</sup> However, there are scientists who are critical of their assumptions, such as Brunch and Bowermaster. Warshak, for example, argue that children need to maintain a relationship with both parents, and that the law should encourage both parents to remain in proximity to their children. However, Warshak recognises that the impact of relocation on children is dependent on several factors, and argues that there needs to be an individualised determination in each case of whether or not relocation should be supported.<sup>39</sup>

Arguments which support a presumption in favour of relocation risk conflating the best interests of the child with the interests of the primary caregiver, while arguments against relocation, although cloaked in the rhetoric of children's interests, are often about a non-primary caregiver's interest in remaining close to the child. All of these are legitimate interests. This means that to avoid these pitfalls, perhaps a neutral position needs to be adopted, which balances the interests of the parents and the child equally.

#### **4.2 The neutral approach**

In the neutral approach, there is neither a presumption in favour of or against relocation and a court applies a fresh inquiry into each case as it arises. In other

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<sup>37</sup> Parkinson 2006 *FLQ* 259.

<sup>38</sup> Parkinson 2006 *FLQ* 260.

<sup>39</sup> Warshak 2003 *Family Relations* 381.

words, the approach is to accept no presumptive right of either parent to move or block a move.<sup>40</sup> On a case by case discretionary basis, a court needs to review a proposed move in terms of the child's welfare and interests.

In *Cunningham v Pretorius*,<sup>41</sup> taking into account the new family law framework set out in the *Children's Act* Murphy J held that in deciding relocation disputes:<sup>42</sup>

What is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed fact and opinion, in the final analysis a structured value-judgment, about what it considers will be in the best interest of the child.

From the above it appears that both parents are placed on an equal footing and their interests are balanced fairly against the child's best interests. This accords with the neutral approach.

In the 2010 case of *HG v CG*<sup>43</sup>, the parents had joint care of their fourteen-year-old son and a set of eleven-year-old triplets (two boys and one girl). They lived in separate homes but in the same housing complex, so that the children would maintain close contact with both parents. The mother wanted to relocate to Dubai, as she had been retrenched and was planning on marrying a wealthy businessman who worked in Dubai.<sup>44</sup>

Unlike all the early cases mentioned above, which start off with the guiding legal principles set out in the *Jackson* case, Chetty J's guiding principles are the *Constitution*<sup>45</sup> and the *Children's Act*.<sup>46</sup> Interestingly, Chetty J does not make reference to any previous cases on relocation. The court instead relies heavily on the wishes of the children, who in this case were of sufficient age and maturity to

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<sup>40</sup> Clark 2003 SALJ 87.

<sup>41</sup> *Cunningham v Pretorius* 31187/08 2008 ZAGPHC 258 21 August 2008 (unreported to date).

<sup>42</sup> *Cunningham v Pretorius* 31187/08 2008 ZAGPHC 258 21 August 2008 (unreported to date) para 9.

<sup>43</sup> *HG v CG* 2010 3 SA 352 (ECP).

<sup>44</sup> *HG v CG* 2010 3 SA 352 (ECP) paras 7-10.

<sup>45</sup> *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

<sup>46</sup> Sections 7, 10 and 31 referred to above.

express their views.<sup>47</sup> This case illustrates that the trend taken by our courts more and more may be the neutral approach.

I believe that the neutral approach is more in line with the *Children's Act*. With the paradigm shift to the idea of shared parenting, the question has changed from being which parent the child will live with to how the child's time will be shared between the parents. There should be no presumption in favour of either the relocating parent or the non-relocating parent.

## 5 Factors considered by the courts in relocation applications

Given the lack of legislative guidelines to assist courts in making their relocation decisions, which are largely value-based, it is important to consider the factors that courts usually take into account. The following is a list of such factors arising from a consideration of some past relocation decisions.

### 5.1 *The paramount consideration: "the best interest of the child"*

The best interest principle was applied in relocation cases even before the advent of the *Constitution* or the *Children's Act*.<sup>48</sup> The traditional position favoured by our courts has been that it is generally considered to be in the best interest of the child to remain with the custodial parent. The court in *Joubert v Joubert*<sup>49</sup> held that the primary caregiver generally has the right to have the child with him/her. However, in *F v F*<sup>50</sup> it was found that courts must not readily assume that the primary caregiver's proposals are necessarily compatible with the child's welfare. Different factors are considered in assessing what is in the best interests of the child, including the need to preserve a particular family unit of which that child is a part, and the advantages and disadvantages that the move will have for the child (whether or not he/she will suffer trauma if removed from one parent).

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<sup>47</sup> *HG v CG* 2010 3 SA 352 (ECP) para 23.

<sup>48</sup> Section 28(2) of the *Constitution*; s 7 *Children's Act* 38 of 2008.

<sup>49</sup> *Joubert v Joubert* 2008 JOL 219229 (C) (unreported to date) para 35.

<sup>50</sup> *F v F* 2006 3 SA 42 (SCA).

In *B v M*<sup>51</sup> the court held the following in regard to the best interest principle:

A child's best interest is the pre-eminent consideration amongst all other considerations. However, the legislature did not intend the best interests of the child to be the sole or exclusive aspect to be considered because it did not prescribe that the child's best interests are the only factor to be considered or the sole determinant of the exercise of the court's discretion. The best interest principle is the paramount consideration within a hierarchy or concatenation of factors but is not always the only factor receiving consideration in matters concerning children.

In *Cunningham v Pretorius*<sup>52</sup> the court held that it must be guided principally by the best interest of the child. Courts must carefully weigh and balance the reasonableness of the primary caregiver's decision to relocate, the practical and other considerations on which such a decision is based, the competing advantages and disadvantages of relocation, and finally how relocation will affect the child's relationship with the non-primary caregiver.<sup>53</sup>

## **5.2 The purpose of relocating**

The motive for relocation must be genuine, reasonable and *bona fide*, and should not serve merely to frustrate the access rights of the other parent (or holder of parental rights and responsibilities). For example, in *F v F*<sup>54</sup> the court found that the mother's plan to relocate to England was ill researched and unstructured. As a result her application was dismissed.

## **5.3 The interest of the relocating parent**

In *B v M* the court found that South African judgments have explicitly accepted that married persons are and should be free to create their own lives, post divorce, unfettered by the needs or demands of their former spouses. The applicant's right to freedom of movement and family life is thus always a factor taken into account by the court. Satchwell J made the point that the message should not be sent out that

<sup>51</sup> *B v M* 2006 3 All SA 109 (W) para 146.

<sup>52</sup> *Cunningham v Pretorius* 31187/08 2008 ZAGPHC 258 21 August 2008 (unreported to date).

<sup>53</sup> *Cunningham v Pretorius* 31187/08 2008 ZAGPHC 258 21 August 2008 (unreported to date) para 5.

<sup>54</sup> *F v F* 2006 3 SA 42 (SCA) para 158.

primary caregivers are shackled to the other parent and that they lose their independent right to freedom of movement.<sup>55</sup>

#### **5.4 The interests of the non-relocating parent**

The court will consider if the applicant has taken into account the non-relocating parent's right of contact with the child and if a plan has been put in place to preserve the relationship of the child and the non-relocating parent. Social science studies reveal that "quality" and not "quantity" (the frequency of contact) impacts on the parent-child relationship.<sup>56</sup>

#### **5.5 The relationship between the child(ren) and parents**

The amount of time the child spends with each parent is also a fact considered by the court. Where parties share approximately the same amount of time with the children, relocation could have a more detrimental effect on the child and his/her relationship with the non-relocating parent.<sup>57</sup>

#### **5.6 The gendered nature of the roles within the post-divorce family**

In *B v M* the court took into account the gendered nature of the roles within the post-divorce family. It was noted that primary caregivers or custodial parents are most frequently mothers. A restriction on the freedom of movement of a primary caregiver would therefore impact more significantly upon women than men. Satchwell J stated that "careful consideration needs to be given to applying the best interest principle in a manner which does not create adverse effects on a discriminatory basis – in this case gender discrimination."<sup>58</sup> In *F v F* the court was also sensitive to the issue of indirect gender discrimination. It held that "despite constitutional commitments to equality, the division of parenting roles in SA remains largely gender based. Because

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<sup>55</sup> *B v M* 2006 3 All SA 109 (W) para 158.

<sup>56</sup> Scott 1992 CLR 638.

<sup>57</sup> See for example *HG v CG* 2010 3 SA 352 (ECP), where the parties had joint care and lived in the same complex. The children shared an equal amount of time with both parents.

<sup>58</sup> *B v M* 2006 3 All SA 109 (W) para 162.

women are in many instances the custodial parent, the refusal of relocation applications impacts disproportionately upon them."<sup>59</sup>

I agree that the issue of relocation is inevitably and inescapably gendered. However, arguing about children's issues using the rhetoric of gender equality and discrimination leads quickly into dangerous waters. Maintenance is, after all, predominately a male obligation. Patterns of custody orders could also be regarded as discriminatory, as fathers are disproportionately the non-primary caregivers, but the issue is not whether outcomes disproportionately favour mothers or fathers. The issue should be whether courts are optimally promoting the well being of children.<sup>60</sup> The child within a relocation dispute is to remain the focus, as gendered impacts exist everywhere in family law.

### **5.7 The views of the child**

In appropriate circumstances, depending on the age and maturity of the child, the court will have regard to the views of the child regarding the proposed relocation. This is in line with the child's right to participate in decisions affecting the child (sections 10 and 31 of the *Children's Act*). When she wrote on relocation in her early works Wallerstein said that:<sup>61</sup>

Especially at the time of a contemplated move, the court should be responsive to the child's voice, amplifying it above the din of competing parents. Only in this way can it ascertain and respect "the best interests of the child."

In the *HG v CG*<sup>62</sup> case the court stated that the *Children's Act* brought about a fundamental shift in the parent/child relationship and not only vested a child with certain rights but also gave the child the opportunity to participate in any decision affecting him or her. The court was enjoined by the Act to give due consideration to the views of the children in a case. In the present case the minor children were of an age and level of maturity (14 and 11 years of age) to make an informed decision,

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<sup>59</sup> *F v F* 2006 3 SA 42 (SCA) para 12.

<sup>60</sup> Parkinson 2006 FLQ 255.

<sup>61</sup> Wallerstein and Tanke 1996 FLQ 323.

<sup>62</sup> *HG v CG* 2010 3 SA 352 (ECP) para 6.

namely to preserve the status quo of joint care by both parents and to reject relocation to Dubai.

I believe that the views of children are important but courts need to be sensitive to the dangers of listening to children. Courts should be wary and not delude themselves into thinking that they are hearing a child's voice when in fact they may be receiving "a distorted broadcast laced with the static of a charged emotional atmosphere; or the voice may be delivering a script written by another; or it may reflect the desire to placate, take care of, or pledge loyalty to a parent."<sup>63</sup>

In the case of *MK v RK*<sup>64</sup>, the court dismissed the wishes of the child as being naïve and unrealistic. The young girl believed that relocation to Israel would take away all her "hurtful memories and solve all her problems."<sup>65</sup> Roos AJ held that her wishes therefore could not be decisive.<sup>66</sup>

## 6 The way forward: legislative guidelines or a Relocation Act

We live in a global village and the world is becoming a smaller place. "In this ultra modern age children have become jet set international travelers, mobile telephone users and internet users par excellence."<sup>67</sup> Countless young people, including young South Africans, live, study, work and travel regularly in foreign countries. This current crop of young globetrotters will undoubtedly start to become parents during the course of the next 10-15 years. Being internationally and locally mobile is second nature to this generation. It is easy to see then in the course of the next quarter of a century that applications for local and international family relocations will become more frequent.<sup>68</sup>

Relocation is not provided for in the *Children's Act*. There is an apparent gap in the law which needs to be filled in order to provide certainty and consistency in the way

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<sup>63</sup> Warshak 2003 *Family Relations* 382.

<sup>64</sup> *MK v RK* 17189/08 South Gauteng High Court (Johannesburg) 6 May 2009 (unreported to date) para 18.

<sup>65</sup> *MK v RK* 17189/08 South Gauteng High Court (Johannesburg) 6 May 2009 (unreported to date).

<sup>66</sup> *MK v RK* 17189/08 South Gauteng High Court (Johannesburg) 6 May 2009 (unreported to date).

<sup>67</sup> Howard 2008 <http://www.austlii.edu.au>.

<sup>68</sup> Howard 2008 <http://www.austlii.edu.au>.



in which our courts deal with relocation disputes. It is for this reason that I believe that legislative guidelines governing relocation need to be added to the *Children's Act* or alternatively a Relocation Act needs to be introduced by Parliament.

### **6.1 Legislative guidelines**

The relocation case law discussed above indicates that South African courts do not have a uniform approach to relocation disputes. Since we have entered a new phase in family law with the *Children's Act*, I believe it is the ideal time to recommend that legislative guidelines be implemented to assist courts in deciding relocation disputes. These guidelines will operate in tandem with the *Children's Act*.

On 23-25 March 2010, more than 50 judges and experts in family law from all over the world met in Washington, DC to discuss international family relocation. This meeting culminated in the release of the "Washington Declaration on International Family Relocation."<sup>69</sup> South Africa can draw on their recommendations.

The declaration states that relocation determinations should be made without any presumptions for or against relocation. This accords with the neutral approach discussed earlier. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach, they recommend that the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors, which are listed in no order of priority. The weight to be given to any one factor will vary from case to case, for example:<sup>70</sup>

- a) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;

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<sup>69</sup> This took place at the Hague Conference on Private International Law, hosted by the International Centre for Missing and Exploited Children, with the support of the United States Department of State (hereafter the Hague Conference on Private International Law).

<sup>70</sup> Hague Conference on Private International Law. It is a global inter-governmental organisation that develops and services multilateral legal instruments, which respond to global needs. The official website of the Hague Conference on Private International Law is accessible at <http://www.hcch.net>.

- b) the views of the child having regard to the child's age and maturity;
- c) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
- d) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
- e) any history of family violence or abuse, whether physical or psychological;
- f) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
- g) pre-existing (care) and (contact) determinations;
- h) the impact of the refusal on the child, in the context of his or her extended family, education and social life, on the parties;
- i) the nature of the inter-personal relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
- j) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;
- k) issues of mobility for family members; and
- l) any other circumstances deemed to be relevant by the judge.

In addition to the above guidelines, I also recommend that when our courts consider different proposals set forth by the parties, they need also to consider:

- a) possible alternatives to the proposed relocation;
- b) whether or not it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted;<sup>71</sup> and
- c) whether or not the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.<sup>72</sup>

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<sup>71</sup> For example, in *MK v RK* Case (*MK v RK* 17189/08 South Gauteng High Court (Johannesburg) 6 May 2009 (unreported to date)) the non-relocating parent (father) was willing to relocate if the relocation was within South Africa.

<sup>72</sup> Foley 2006 <http://www.family-justice-council.org.uk>.

The above factors reflect research findings concerning children's needs and developments in the context of relocation.<sup>73</sup> They provide an ideal starting point to begin drafting South Africa's own guidelines when dealing with relocation disputes.

## 6.2 A Relocation Act

As society becomes increasingly mobile, our legislature will be confronted with the issue of introducing an Act dealing with the issue of relocation. Legislation dealing with relocation should deal, amongst other things, with the definition of relocation; objections to relocations (can parties other than primary care-givers object to the relocation?); factors to be considered;<sup>74</sup> and the burden of proof (which party should bear the burden of proof with regard to these factors?).

The American Academy of Matrimonial Lawyers has developed a Model Relocation Act, which could provide South Africa with some guidance.<sup>75</sup> The Model Relocation Act requires a sixty-day notice of change in the principal residence of a child, and permits the non-primary caregiver to object to the relocation. Relocation is defined as "a change in principal residence of the child for a period of sixty days or more, but does not include a temporary absence from the principal residence."<sup>76</sup> A definition would be useful in South Africa in view of the fact that the *Children's Act* does not draw a distinction between "departure" and "removal."<sup>77</sup>

In addition, the legislation "should also govern the mediation process to be followed in respect of relocation disputes and provide guidelines as to how a parenting plan can best deal with such disputes should they arise."<sup>78</sup>

## 7 Conclusion

There was a time when the question of divorce was debated in terms of whether or not it might be better to stay in an unhappy relationship for the sake of the children.

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<sup>73</sup> Hague Conference on Private International Law.

<sup>74</sup> See the factors listed above.

<sup>75</sup> AAML 1998 <http://www..aaml.org>.

<sup>76</sup> AAML 1998 <http://www..aaml.org>.

<sup>77</sup> See s 18(c)(iii) *Children's Act* 38 of 2008.

<sup>78</sup> Albertus 2009 *Speculum Juris* 85.

Now the question raised by the relocation problem is if divorce means staying in close proximity to each other for the sake of the children.<sup>79</sup> Having examined the jurisprudence of our courts in regard to relocation disputes, I believe that early case law reveals that our courts previously favoured the pro-relocation approach. If primary caregivers gave mature, rational thought and *bona fide* reasons for relocating then the presumption was that relocation was in the best interest of the child. Recent case law in the context of the *Children's Act* seems to be leaning towards a more neutral position, where neither parent should have a presumptive right to relocate or block relocation.

My recommendation is that either legislative guidelines or a Relocation Act that will provide greater certainty and consistency in relocation cases and which will work in tandem with the *Children's Act* should be introduced. This will aid not only courts when making decisions, but also parents in arguing their cases.

Like Humpty Dumpty a family, once broken by divorce, cannot be put back together in precisely the same way. That is the reality of divorce and post-divorce relocation cases. For the sake of the affected children, it is time that greater attention is paid to children themselves, by protecting the continuity of the child's relationship with both parents.

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<sup>79</sup> See Parkinson 2006 *FLQ* 265.

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### List of abbreviations

AAML	American Academy of Matrimonial Lawyers
CLR	Californian Law Review
FLQ	Family Law Quarterly
SALJ	South African Law Journal