

JURISDICTION : FAMILY COURT OF WESTERN AUSTRALIA
ACT : FAMILY LAW ACT 1975
LOCATION : PERTH
CITATION : U and H [2009] FCWA 128
CORAM : CRISFORD J
HEARD : 8 & 9 SEPTEMBER 2009
DELIVERED : 2 OCTOBER 2009
FILE NO/S : PTW 5629 of 2008
BETWEEN : U
Applicant/Mother

AND

H
Respondent/Father

Catchwords:

Children's issues - International relocation - principles now applicable - importance of "meaningful relationship"

Legislation:

Family Law Act 1975

Category: Not Reportable

Representation:

Counsel:

Applicant : Mr R Hooper
Respondent : Mr P Dowding SC

Solicitors:

Applicant : Dwyer Durack
Respondent : Gillian Coote Family Law

Case(s) referred to in judgment(s):

A v A: Relocation Approach (2000) FLC 93-035
AMS v AIF; AIF v AMS (1999) FLC 92-852
B & B [2006] FamCA 1207
B and B; Family Law Reform Act 1995 (1997) FLC 92-755
Godfrey & Saunders [2007] FamCA 102
McCall & Clark [2009] FamCAFC 92

1 [Ms U] and [Mr H] were married [in] January 1986. They enjoyed living and
working overseas in different countries. Their son, [Martin], was born [in] July 1998
when the parties lived in [the Eastern states].

2 They separated on 12 May 2001 and shortly afterwards [the mother] and
[Martin] moved to Perth. At the time [Martin] was almost 3 years of age.

3 [The mother] now wishes to move to [the UK] to live. She wants [Martin] to go
with her to share in her love of both [the UK] and her present partner, [Mr T]. [The
father] opposes this move and wants [Martin] to remain living in Perth. He currently
lives and works in [China].

4 In these circumstances the Court is asked to decide what is commonly identified
as a relocation case. In the case of *B & B* [2006] FamCA 1207, the Honourable
Justice Warnick identified some of the difficulties in cases of this nature:

- “1. In most cases about parenting orders under the *Family Law Act* there is no conceptual difficulty in the court applying the principle that the best interests of the child are the paramount consideration. However, that is not so when deciding upon orders in what have become known as “relocation cases”. That is because, when in relocation cases regard is also had to another consideration, namely the right to freedom of movement of a parent, a delicate interplay of concepts arises. That is on the most favourable view of it. On another view, that to which I incline, the result is an imbroglio of principles.
2. However described, the nature of the judicial exercise required is such that even well crafted reasons for the orders (which more often than not permit relocation, at least within Australia) often seem unconvincing, formulaic, at times even as if there is a subtext. Unsurprisingly, in this context, many a losing litigant is perplexed. Many appeals are generated.”

5 In this case there is merit in the propositions advanced by both parties.

Approach to be adopted

6 These child-related proceedings were conducted pursuant to Division 12A,
Part VII of the *Family Law Act* 1975 as amended by the *Family Law Amendment*
(*Shared Parental Responsibility*) Act 2006.

7 The new legislation is strongly in favour of both parents having substantial
involvement in their children’s lives.

8 S 60B(1)(a) of the *Act* provides that the objects of the legislation are to ensure
that the best interests of children are met by the children having both their parents
involved in their lives in a meaningful way.

9 In *A v A: Relocation Approach* (2000) FLC 93-035, the Full Court of the Family
Court undertook an analysis of the considerations that might properly affect the

outcome of a case where relocation is proposed. Guidelines for decision making were set down. The Court followed binding principles of law that were established by a majority of the High Court in *AMS v AIF; AIF v AMS* (1999) FLC 92-852:

- In determining a parenting case that involves a proposal to relocate the residence of a child, the welfare or best interests of the child as the case may be under the relevant legislation, remains the paramount consideration but it is not the sole consideration.
- In determining a parenting case that involves a proposal to relocate the residence of a child, a court cannot require the applicant for the child's relocation to demonstrate "compelling reasons" for the relocation of a child's residence "contrary to the proposition that the welfare of the child would be better promoted by" maintenance of the existing circumstances: (per Gleeson CJ, McHugh and Gummow JJ at paragraph 47; Gaudron J at paragraph 92; Kirby J at paragraph 195; Hayne J at paragraph 209).

10 I am of the view that despite the substantial amendments to the *Family Law Act 1975* by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* there is nothing to suggest that these binding principles no longer apply to relocation cases.

11 However, the general approach to be adopted in making a parenting order since the introduction of the Amendment Act has changed. This was recently canvassed by the Full Court in *McCall & Clark* [2009] FamCAFC 92. The Court (Bryant CJ, Faulks DCJ and Boland J) referred to the current legislation and noted:

"... The court must, if it proposes to make or makes a parenting order, apply (unless it is not applicable or is rebutted) the presumption of equal shared parental responsibility (Section 61DA) (see *Goode* at paragraph 65). The making or proposing to make an order for equal shared parental responsibility then necessitates the requirement to consider the matters set out in s 65DAA."

12 The Court said:

"61. No doubt frequently, as in the instant case, the non relocating parent's proposal will be for an equal shared care arrangement, facilitating the consideration of matters under s 65DAA as one of the proposals, and not as an abstract exercise.

62. In our view, it is inevitable, given the provisions of the legislation, that the exercise to be undertaken will, on its face, involve dual consideration of some matters. For example, consideration of matters under s 60CC(3)(d) (the likely effect of any change in the child's circumstances) and matters in s 65DAA(5)(a) and (b) and s 60CC(3)(e) (practical difficulty and expense of a child spending time with a parent) and s 65DAA(5)(a), (b) and (c) involve examination of similar criteria."

Relevantly here the Court went on:

“69. However, it appears to us that dealing with a parenting application involving a relocation where the presumption applies and an order is made for equal shared parental responsibility a court must consider:

- (a) whether equal time (or substantial and significant time) with both parents would be in the child’s best interests;
- (b) consider and weigh up an equal time (or substantial and significant time) regime against all the factors having advantages for the child in the relocation proposal, including considering the matters in s 65DAA(5); and then
- (c) consider whether an order should be made for equal time (or substantial or significant time) in one location, or for the child to reside with one parent in a distant location, with such other orders as will maintain the benefit of a meaningful relationship for the child if appropriate to do so;

In this context the use of the word “consider” in s 65DAA(1)(c) appears to us to have relevance.”

Court orders

- Orders sought at trial

13 [The mother] seeks to take [Martin] to live with her in the United Kingdom. Her proposals very much mirror what is presently taking place in Perth. This involves [The father] flying from [China] and spending a one week period with [Martin] in every four weeks during the school term.

14 She also proposes for a sharing of school holiday periods. There is also reasonable provision for communication by telephone, internet and mail.

15 She proposes that if she is not able to relocate with [Martin] then [the father] continues to have the same time he presently has, which is for a period of up to one week in every four during the school term and half the school holiday periods.

16 She proposes that if [the father] relocates to Perth, then he should see [Martin] each alternate weekend from the conclusion of school on Friday to the commencement of school on Monday and for Wednesday night of each week. Again there would be a sharing of the school holiday periods. She then proposes for communication and time on special days.

17 [The father] seeks there be a fortnightly or week about equal shared care arrangement in Perth. This proposal is contained in his Papers for the Judge and, at the request of the Court, he also provided a further Minute of Proposed Orders to cover the position if [the mother]’s proposal to relocate is successful.

18 In this regard he seeks weekly periods in Europe upon him giving written notice
to [the mother]. He also seeks six weeks in the summer school vacation with
[the mother] paying [Martin]'s return airfare to [China]. He also seeks each alternate
Christmas period and any further time the parties can agree.

- Existing orders

19 Prior to [the mother] and [Martin] moving to Perth from [the Eastern states] in
2001 the parties agreed a number of orders relating to [Martin].

20 Quite appropriately, there was an agreement that the parties have joint parental
responsibility for his long term care, welfare and development. Given the changed
wording to the applicable legislation this now translates as each party having equal
shared parental responsibility for [Martin].

21 Although I have no doubt that both parties are generally aware of what their
responsibilities are as a result of these orders it is worthwhile setting out with precision
where their obligations lie.

22 The parties need to be aware that an order for shared parental responsibility
imposes on them an obligation to consult on major long-term issues. These long-term
issues are specifically defined in the *Family Law Act 1975*:

“*Major long-term issues*, in relation to a child, means issues about the
care, welfare and development of the child of a long-term nature and
includes (but is not limited to) issues of that nature about:

- (a) the child's education (both current and future); and
- (b) the child's religious and cultural upbringing; and
- (c) the child's health; and
- (d) the child's name; and
- (e) changes to the child's living arrangements that make it significantly
more difficult for the child to spend time with a parent.”

23 The parties are to consult about these issues and make a genuine effort to come
to a joint decision about them. Neither party can ignore this obligation.

24 This obligation to consult arises from an order for equal shared parental
responsibility irrespective of the amount of time that either party spends with the child
and irrespective of where each lives.

25 Given the existing order and how that is now dealt with, the provisions of
s 65DAA of the Act come into play. In any event, [the father] has sought an equal
sharing of time if [Martin] remains in Perth. I am, thus, obliged to consider whether or
not [Martin] spending equal time with each parent would be in his best interests and
also be reasonable and practicable. If I decide not to make an order for him to spend
equal time with each parent, I must consider whether or not it would be in his best

interests to spend substantial and significant time with each of them, and if so, whether such an order would be reasonable and practicable.

26 The fundamental question I need to address is what form of orders is most likely to promote the best interests of [Martin].

27 At around the same time these parenting orders were made the parties also entered into a Child Support Agreement. This made provision for periodic child support and also for [the father] to pay for [Martin]'s education, including payment of fees at any secondary private school to be agreed between the parties. It included all education and education related expenses inclusive of all school tuition fees, uniforms, books, excursions and reasonable extracurricular and sporting expenses.

Applying the facts to the law

28 The competing proposals of the parties will now be discussed in the context of s 60CC of the Act in order to arrive at what is best for [Martin].

- **The benefit to the child of having a meaningful relationship with both of the child's parents;**

29 There is no dispute in this case that it is to [Martin]'s benefit to have a meaningful relationship with both of his parents. It is also not in dispute that he currently has such a meaningful relationship with both his father and his mother.

30 After [the mother] and [Martin] moved to Perth in mid-2001 [the father] saw [Martin], on average, about three times a year. Initially this was in [the Eastern states] and occasionally when [the father] would travel to Perth.

31 In February 2006 [the father] moved to [China]. From mid-2006 [Martin] travelled unaccompanied to [China] to spend time with [the father]. After that [Martin] saw [the father] either in [the Eastern states] or Perth when [the father] returned to spend time with his family, or in [China].

32 In August 2008 [the mother] advised [the father] of her plans to relocate to [the UK] with [Martin]. After that, starting in November 2008, [the father] spent a week in every month working from Perth and having [Martin] live with him here. This arrangement continued up until trial.

33 [The father] says that he and his son have always been very close and their relationship has thrived despite the geographical distance between them since [Martin] was around 3 years of age. [The father] does not see the greater amount of time he has spent with [Martin] since late 2008 as necessarily improving the quality of his relationship with [Martin]. He is firm in his evidence that the closeness has always been present.

34 I respectfully agree with Boland J when in exercising appellate jurisdiction of the Court in *Morgan & Miles* (2007) FLC 93-343, her Honour said in the course of discussing the distance involved in a proposed relocation:

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

35 Although [the father] and [Martin] living in close proximity may be ideal, I am not satisfied it is necessary to maintain their presently strong attachment.

- **The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;**

36 This is not a matter that features in any way in this case.

37 I now turn to the additional considerations I must address. These are not secondary considerations, but are matters to be read in conjunction with the first matter I have dealt with.

- **any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views**

38 A Family Report was prepared by a Family Consultant. This report was published on 1 September 2009. The Family Consultant was not required for cross-examination.

39 [Martin] stated that the option of moving to [the UK] with his mother to live with her current boyfriend or to remain in Perth and have [the father] relocate to Perth both appealed to him. He reported he did not want to make the decision of where he would live as he considered his relationship with both his parents to be “equal” and he would be happy to live in “England or Perth”.

40 [Martin] reported he wanted to see [the father] more, but he was unsure of how much more. He said this in the context of stating that both his parents’ options appealed to him.

41 According to the Family Consultant, [Martin] enjoys visiting [China]. He has flown there unaccompanied since the middle of 2006.

- **the nature of the relationship of the child with:**
 - (i) **each of the child’s parents**

(ii) **other persons (including any grandparent or other relative of the child)**

42 [Martin] has an excellent relationship with both of his parents. [Martin] articulated this very clearly in the Family Report. The objective evidence supports this.

43 [Martin] commented that he got along with [Mr T] and enjoys his company.

44 [Martin] also has good relations with both the maternal and paternal families who live variously in Perth, [the Eastern states] and [Europe].

• **the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent**

45 The Family Consultant reports that each of [the mother] and [the father] present as being child focussed. He went on to say that each parent recognises the importance of the other in [Martin]'s life and is committed to promoting the relationship between him and the other parent. History supports this. Although the parties had some minor complaints about the other, it is clear that [the mother] has facilitated and been positive about [the father] spending the time he has wanted to with [Martin].

46 She ensures he has appropriate clothing and other much needed requirements for his week long stay with [the father] in Perth. She has been willing to allow him to fly to [China] or [the Eastern states] to suit [the father].

47 Unfortunately, there have been one or two recent occasions about which I form the view [the mother] had been a little mean spirited. One example was of her curtailing the time [the father]'s parents were able to spend with [Martin] when they had come to Perth from [the Eastern states] to visit. [The mother] said there was a pre-arranged dinner with a friend who resides in Perth and she wanted [Martin] to go. She also saw [Martin]'s attendance at a birthday party as more important than time with [the father]'s parents. Despite my criticism of her in this regard, I accept she has generally done all possible to accommodate [the father] and his family having time with [Martin]. [The father] accepted [the mother] had done nothing to damage or diminish his relationship with [Martin].

• **the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:**

(i) **either his or her parents**

(ii) **any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;**

48 Since [the mother] and [Martin] have lived in Perth, [the father]'s time with [Martin] has largely centred around holiday periods and to fit in with his work. [Martin] has not been accustomed to having [the father] living in the same city. On all

the proposals before the Court [Martin] will be exposed to at least some change. It is necessary to address the effect of this.

49 A move to [the UK] is likely to see some reduction in the time [Martin] currently spends with [the father]. However, he has only seen him for one week in each month since November 2008. Prior to that it was significantly less.

50 The relationship between [the father] and [Martin] is cemented and [Martin] is used to his father coming and going for holiday periods only. It has not affected the quality of their relationship.

51 I am satisfied there would be little diminution in the time he spends with other family members. In the Family Report [Martin] said he seldom visited his extended family in Perth given they are older than him and busy with their own lives. In fact, he is likely to spend more time with [the mother]'s brother and his wife who live in [Europe] and with whom [the mother] is very close.

52 A significant aspect of any move to [the UK] would involve a change of school. This is raised as a significant issue by [the father]. His hopes are that [Martin] will attend [a private school] in Perth. He sees the quality of education and care provided by the school to be of an extremely high standard. He had always been prepared to pay the education expenses of [Martin] in such a private school. He is concerned that the cost of a private school in [the UK] is far more expensive and out of his reach in a financial sense. On the other hand, he has concerns about the quality of education in a public school in [the UK]. He says that with his Australian accent [Martin] is likely to stand out and he may be the subject of some bullying.

53 [The mother] has made enquiries about schooling in [the UK] and has identified a few schools which she says would fit the bill for [Martin]. [Martin] has been involved in identifying appropriate schools and has had some orientation at the [two particular schools there]. [The mother] does not have the same concerns about bullying or the quality of education that [the father] has.

54 There is no objective evidence before the Court as to the differences in the quality of education or the likely incident of bullying due to an Australian accent. In the Papers for the Judge filed on behalf of [the father] there is an assertion "He will enter an education system different to that in which he has been educated to date and a school in which ~~the majority~~ many of the pupils do not speak English as a first language". Not only is there no evidence at all of this but, if it is correct, there is no evidence it is necessarily a bad state of affairs.

55 [The mother] has provided extremely well for [Martin] since his move to Perth. There is no criticism by [the father] of her parenting ability. I am satisfied that the enquiries she has made are thorough and sensitive to [Martin]'s needs. Any change in school, no matter in which country, is likely to be disruptive. [Martin] himself did not articulate any particular concerns to the Family Consultant.

56 Another aspect of concern for [the father] is that [Martin] is very well settled in Perth. He has an ideal lifestyle with a small coterie of close friends, neighbours and associates. [The father]'s counsel put forward that [the mother]'s notion of life in

[the UK] is unrealistic and idealised given she makes little effort to utilise much the same activities in Perth.

57 What needs to be borne in mind is that [the mother] has previously lived and worked in [the UK]. Not only is [Mr T] living there, but she has other contacts. [Martin] himself has been to [the UK] and his view is that if he went to [the UK] it would be “really good” as he has friends there. They would be able to visit family and travel to other parts of Europe. [The father] deposes to never having questioned [the mother]’s mothering ability. I am satisfied that [the mother] has the ability to ensure [Martin] is comfortable in his environment and is in a position to make suitable friends.

58 [Ms W], a neighbour and friend of [the mother], gave credible evidence about [the mother]’s demonstrated ability to fit into a community well. [Ms W] said that she, her partner and two children visited Europe every second year. They had visited three times since 2005 and she deposes to researching the possibilities of a teacher exchange in England for a six to 12 month stint in 2010/2011. The families will maintain contact.

59 If [Martin] is to remain in Perth then he will see more of [the father]. This is whether he has an equal shared relationship with him or whether he sees him on an alternate weekend basis as suggested by [the mother].

60 [The father]’s first proposal is that he have a fortnightly block of time with [Martin] each month. This is a considerable change for [Martin] given he has been cared for solely by [the mother] since at least before he was three years of age. [The father] suggests an alternate week arrangement as an alternative. Again, this would mean a substantial period of time away from his primary caregiver in order to live with a person he has historically shared holiday periods with. I am of the view that this would require considerable adjustment.

61 If he was to see [the father] each alternate weekend and for an overnight period during the week it is likely he would adapt to this change without many difficulties.

62 In the Family Report, although he said he wanted to see [the father] more, [Martin] did not specify what this meant in terms of any specific amount of time.

- **the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with both parents on a regular basis**

63 Since separation these parties have lived in different parts of, firstly Australia, and then the world. Extensive travel is something very familiar to them all. [The father] has been primarily responsible for the costs of travel given his higher income.

64 [The mother] proposes that if she is able to relocate she will assist in the costs of travel. Her brother deposes to be willing to assist her and he was not challenged on this. In evidence [the mother] said her father had made a similar offer to help.

65 [Martin] and [the father] have commuted between Perth and [China] since 2006. It is a seven and a half hour trip. Any relocation to [the UK] will involve about four hours more travelling time. There is also inconvenience to [the father] because the different time zones will affect his ability to work remotely. The latter is not something that will affect [Martin].

66 The parties both utilise email. They do not utilise more up-to-date methods of communication e.g. Skype. They are both in a position to and it may be something for future consideration.

67 Whatever order this Court makes I am not persuaded that [Martin]’s right to maintain personal relations and direct contact with [the father] will be affected in a qualitative sense. However, I will return to this aspect later.

- **the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child’s parents, and any other characteristics of the child that the court thinks are relevant**

68 [Martin], at over 11 years of age, has travelled unaccompanied internationally for three years. He travels with his mother, his father and on his own. [Martin] shares a love of science with [the mother]. The Family Consultant reports that [Martin] “enjoys the commonality between them” – referring to his relationship with his mother in relation to their shared interests.

- **the capacity of:**
 - (i) each of the child’s parents; and**
 - (ii) any other person (including any grandparent or other relative of the child)****to provide for the needs of the child, including emotional and intellectual needs**

69 I am satisfied that both parties are capable of providing for [Martin]’s needs. The Family Consultant confirms this in the report. Both parents are very child focussed.

70 [The mother] has almost single handedly raised [Martin] since separation. He is well settled and happy. I see this, primarily, as being a function of [the mother], the person, rather than of living in Perth. There is no real criticism of [the mother]’s ability to appropriately parent [Martin] and she has consistently provided for him in terms of housing, schooling and supervision. He has an active out of school life with sporting activities, tutoring and friends. She has maintained part-time work to ensure her availability for [Martin].

71 [The father] is critical of the absences [Martin] is noted as having from his school. It is clear that this was explained in correspondence to [the father]’s solicitor before trial. The bulk of the absences relate to time [Martin] has had from school when accompanying both parents overseas. I accept, as [the father] also appears to accept, that [the mother] made appropriate arrangements and took or provided homework for [Martin] to complete.

72 Both parties are able to cater for [Martin]’s intellectual needs.

73 Both parties, I am satisfied, can cater for [Martin] in a financial sense. [The father] earns a considerable income with little present tax impost. He is a [professional] employed by [an international firm]. He has savings although he has paid an extraordinary amount on his legal fees compared to [the mother].

74 [The mother] works part-time as a laboratory assistant and is confident of obtaining some work in [the UK] with the [museum]. I do not see her confidence as being misplaced given she has previously worked there and has some helpful contacts.

75 [Mr T] has offered his assistance. Having seen and heard him in court I do not doubt that he is genuine. [The mother] has an unencumbered home in Perth, the proceeds of which will be used to ameliorate costs in [the UK]. She has identified with some precision in her affidavit material how she will manage financially in [the UK]. She has the support of her family.

• **the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents**

76 [The father] made it clear that the Court should have genuine concerns over [the other]'s general attitude. His concerns crystallised as follows:

- [The mother] has put her own interests above those of [Martin] in her desire to relocate ostensibly for nothing more weighty than her "love of [the UK]".
- The manner in which she rekindled her relationship with [Mr T] is opportunistic and the Court could not be confident that this relationship is likely to last.
- She is uprooting [Martin] from all that is known, familiar and good in Perth.

77 I will deal with these concerns.

78 During their relationship the parties spent a total of some six years living and working in [the UK]. They lived there for about 2½ years in 1991. They returned to live in [the UK] in 1994. [The father] deposes that [the mother] had expressed a desire to live in [the UK] again and he accepted a job there. She said in her evidence that her present desire to return to [the UK] has been long held. She explains that there is not one single reason for wanting to relocate but rather a "whole package". She views the move to [the UK] as being best for "us" referring to herself and [Martin]. She says she would not do it if it was not good for [Martin].

79 She made no bones about the fact that it would also provide more career opportunities for her and enable her to pursue her relationship with [Mr T]. However, she deposes:

"72 ... Indeed, my thinking was that even if things didn't work out with [Mr T], I could see lots of advantages for [Martin] and I to live in [the UK] or Europe and that I wanted to move anyway."

80 At least, at present, [the mother] views her relationship with [Mr T] as permanent. She met him in the mid-1990s in [the UK]. He was a friend that visited her and [the father]. She kept in touch with him and had an intimate relationship with

him spanning one year in 2002. This attempt at a long distance relationship was unsuccessful. She resumed her relationship with him almost on a whim in June 2008. I am satisfied, however, having heard the evidence of both [the mother] and [Mr T] that they are now very committed to making the relationship work. In any event, as noted above, it is not the main reason for [the mother]'s move to [the UK].

81 [Martin] is now a young man. He has been used to moving in different environments. I am satisfied [Martin] is adaptable and flexible and, with his mother's assistance, would be able to adapt in a new country if the court allows the relocation.

82 [The mother]'s has some concerns about [the father]'s priorities:

- His apparent sudden interest in spending time with [Martin] after she signalled her intention to relocate.
- His focus on his work.

83 Again, I will address these assertions.

84 [The mother] adopts a somewhat cynical view in that [the father]'s interest in spending more time with [Martin] only arose in the context of her intention to live in [the UK]. Not only did he express considerable interest in spending much more time with [Martin], but he said he had always intended relocating to Perth but had just not told [the mother] yet.

85 He has previously been able to pursue his own career without the need to consider significant others, given [the mother] has been, by agreement, the person responsible for [Martin]'s day to day care in Perth.

86 [The mother] has worked part-time and done little to advance her own employment position during the important formative years of [Martin]'s life. She now would like the opportunity to pursue her own career and relationship in another country. She does not see this as compromising [Martin]'s care given his more advanced years.

87 In no way can [the father] be criticised for wanting to spend time with [Martin]. This can only be in [Martin]'s best interests. However, as [the mother] pointed out, [The father]'s presence would have been just as valuable when [Martin] was young.

88 [The father] signed a two year contract with the [company] in October, 2006. At the time of signing this contract it was agreed between him and his employer that he could work from Perth for one week in each school term. He deposes that his intention had been to fly to Perth, rent a serviced apartment near to [Martin]'s school and during the school day, he would work from [the company]'s Perth headquarters. Despite the bank's agreement [the father] failed to take advantage of the opportunity. He says he now regrets this. However, at the time it appears his desire to attend to work demands outstripped the desire to spend time in Perth. It was after [the mother]'s notification of her intention to relocate that he actually put into place what had been agreed to some two years earlier.

89 [The father] now says that he will come to live in Perth if [the mother] is unable to relocate to [the UK]. He will do so within a three month period.

90 One of his concerns about the move to [the UK] is that he will not be able to come to [the UK] to visit [Martin] and also marry it with his work commitments given the different time zones. He also says he only gets four weeks annual leave.

91 [The father] said he has considered a potential move to live in [the UK]. He has previously worked and lived in [the UK]. He deposes to being approached by a [UK] firm in 1994 and returning there to work. He also deposes to having received an unsolicited offer to join the [company in the Eastern states in a similar position]. Further, he deposes to being approached by [a firm] in Perth in February 2001. They were looking to recruit a banking and finance partner. [The father], on his own evidence, has considerable experience and has been much sought after.

92 I am not satisfied that [the father] has made all possible enquiries to rigorously assess his employment opportunities in [the UK]. He does not detail with any precision what his enquiries have been in [the UK] and he simply relies upon a [particular economic forecast] for the United Kingdom as at 16 April 2009. It is also noted that [his company] has an office in [the UK].

93 I find little to criticise in [the mother]'s attitude to [Martin] and parenthood. [The father]'s circumstances have been very different. He has generally had a very good attitude. He has not always availed himself of opportunities to spend time with [Martin], perceiving work to be of a higher priority. To his credit he now wants to spend more time with [Martin].

- **whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child**

94 I did not form the view that these parents enjoyed the court process or gained very much from it. It is hoped that any order that is made will see the end of any court involvement.

- **any other fact or circumstance that the court thinks is relevant.**

95 A considerable amount of time at trial was spent on cross-examining [the mother] about her relationship with [Mr T]. It warrants some attention.

96 [Mr T] swore a detailed affidavit for the purpose of the proceedings. He flew from the United Kingdom to give evidence at the trial.

97 Although he and [the mother] met in the mid-1990s it was only when he came to Australia to visit a relative in early 2002 that he commenced a relationship with her. For a period of one year they saw each other sporadically. He met [Martin]. They decided against continuing their relationship due both to the difficulty [the mother] was having adjusting to the breakdown of her marriage to [the father] and the fact of the geographical distance between them.

98 [The mother] and [Mr T] had no contact for some five years. She travelled to Europe in the middle of 2008 with a relocation to Europe very much in mind. She contacted [Mr T] and they spent a weekend in Vienna. This involved [Mr T], [the mother] and [Martin] spending time together. I formed no adverse view at all of

[the mother] in relation to the manner she handled the reintroduction of [Mr T] to [Martin]. There is absolutely no evidence to suggest [Martin] felt uncomfortable, compromised or ill at ease. He had no personal recall of [Mr T] from 2002 but accepted him as his mother's friend.

99 [Mr T] has worked at [a computer company] in [the UK] as a senior technical account manager since February 2008. He works closely with large organisations across Europe, providing engineering and business supports. He says that [the UK] is a world leader for media production and engineering services and because his career is so specialised there are only a handful of locations worldwide which can provide him with an upward career path. Perth is not one of those places although Sydney might be. He presently earns a comfortable wage and is settled in [the UK]. His family lives in the United Kingdom and he is close to them.

100 He was cross-examined about a possible move to Australia. He had made some enquiries about migrating and about job opportunities. He made it clear that if [the mother] was not able to relocate to [the UK] he would move to Perth, despite the enormous difficulty that would cause for him personally and professionally. I did not doubt his credibility. He made it clear that living with [Martin] and [the mother] is a priority above that of his career. He said he intended to remain an integral part of [the mother] and [Martin]'s life despite the possibility his career and standard of living may suffer.

Section 60CC(4) and (5)

101 These provisions of the *Act* are lengthy. In essence, they require the Court to consider the extent to which each parent has fulfilled or failed to fulfil the responsibilities of a parent. Where relevant, these matters have already been dealt with.

Conclusions

102 Given the existing order for joint parental responsibility for the long term care, welfare and development of [Martin] and what this presently means – both [the mother] and [the father] have equal shared parental responsibility - I will firstly turn to consider whether an equal shared living arrangement is in [Martin]'s best interests. Perth is the only place where this was put forward as being a viable option.

103 Both parties see the benefits of having the other actively involved in [Martin]'s life. Both have worked towards this. [The father] wants an equal sharing of time in Perth. Ideally he wants this in two week blocks, although he would consider a week about arrangement. [The mother] opposes this.

104 It is common ground that [the father] has primarily spent holiday periods with [Martin]. He already has an excellent relationship with him. This has developed through the quality of the time he spends with [Martin] rather than the amount of time he spends.

105 [The father]'s case demonstrates what a good living environment [Martin] has in
Perth with his mother. She has been a constant in his life and has provided him the
stability and influence he needs.

106 Although I have considered an equal sharing arrangement, I am not satisfied it
would be in [Martin]'s best interests. I find it best he continues to have the one
predominant and settled household from which he goes about his various activities.
To be away from the person who has traditionally been his primary caregiver for
periods of two weeks is, in my view, too long, even taking into account his age.
Again, even with a week about arrangement I am not satisfied it is in his best interests.

107 Although [Martin] wants to spend more time with his father he does not say he
wants an equal shared living arrangement, he simply considers his relationship with
both parents to be equal.

108 Further, a matter of some minor concern is the fact [the father]'s arrangements
appear to be a little uncertain. He deposes he needs a three month lead in period in
order to move to Perth. Initially his evidence was that his employment could only
sustain a one week period of him working remotely. He then said he could
accommodate such work on a full-time basis given he would have a window of
opportunity to either travel for business or work longer hours when [Martin] is with
[the mother]. He had some proposals about accommodation and the practical day to
day involvement he would have in [Martin]'s life. I accept he has been involved for
one week periods since November 2008, but it is clear that [the mother] is responsible
for a lot of [Martin]'s activities and the provision of suitable clothing and items for
general daily use.

109 I now move on to consider whether a substantial and significant time regime
would be appropriate. I am satisfied that this would be in [Martin]'s best interests.
This would fit in with [Martin] wanting to see more of his father. It would also
address [the father]'s argument that as [Martin] moves into puberty his father's
physical presence is extremely valuable to his development. However, it gives
[Martin] the benefit of a home base.

110 This issue of substantial and significant time needs to be considered in the
context of any relocation.

111 The regime currently in place since November 2008 encompasses a substantial
and significant time arrangement. The proposals of both parties, if there is a relocation
to [the UK], also contemplate such an arrangement.

112 [The father] did not specifically address what would happen if he was
unsuccessful in an equal shared care arrangement, and [the mother] was to remain in
Perth. He deposes that if the Court orders [Martin] should remain living in Perth he
will relocate within three months. He was not clear whether that is only on the basis
of an equal shared care arrangement or whether he will relocate to Perth no matter
what the time spent arrangement is.

113 In any event, [the mother]'s proposal of each alternate weekend from Friday
until Monday and every Wednesday night gives him a greater amount of time with

[Martin] than the current arrangement. I consider this to be an appropriate arrangement. However, it may not suit [the father]'s work commitments. He was silent on this proposal.

114 In summary, both parties accept a substantial and significant time regime is appropriate and each proposes it for both Perth and [the UK].

115 I am satisfied that it is reasonably practicable for [Martin] to spend substantial and significant time with [the father] if he does remain in Perth. It has worked to date and [the father] has said he has an ongoing commitment to spend more time with [Martin]. He may relocate to Perth.

116 It is necessary to consider whether the same can be said if [Martin] relocates to [the UK].

117 [The father] says it would not be reasonably practicable for the following:

- Whilst he can work remotely from Perth, he is unable to do that in [the UK] given the different time zone.
- He is constrained in the non-work time he can spend in [the UK] due to having only four weeks annual leave. He presently has five days owing to him.
- Even if he is able to work or spend time in [the UK] there will be practical difficulties not experienced in Perth relating to transportation, and likely distance between school and accommodation.
- The cost of almost everything is higher.
- If he moves to [the UK] he is unlikely to get work due, at least in part, to the global economic downturn.

118 I have already addressed the fact of [the father] getting work in [the UK]. In essence, it is something he does not want to have to contemplate and thus I find he has not explored all options. He is not prepared to sacrifice his career or standard of living. I accept this is not unreasonable in all the circumstances.

119 He deposes to having saved substantial money with a view to buying a property in Perth for himself and [Martin]. He may need to utilise these funds in a different way if [Martin] goes to [the UK]. He could ameliorate some of his costs of accommodation in [the UK] by exploring possibilities of purchasing a modest property there.

120 Although transportation and the practicalities of [the UK] life may be more inconvenient than in Perth, I am not satisfied that this equates to a lack of reasonable practicability. It may not be ideal, but it is something that can be worked around with a little bit of forethought. It is far from insurmountable.

121 [The father] may well be restricted in the annual leave he can utilise in [the UK]. He has six weeks owing to him when he returns to Australia. However, he was clear that his present work situation has been freed up considerably given there are more personnel working in his section. He has more resources available to him. Given this he has been able to secure a commitment to work remotely in Perth. His evidence

suggests there have been family friendly work practices available to him with [the company] from as early as 2006. He has simply not availed himself of them.

122 I am not satisfied he has explored all such family friendly options such as the possible offsetting of salary against more annual leave or further leave without pay. Not surprisingly, [the father] has not been willing to address the fact of an unpleasant outcome in the proceedings.

123 I am also satisfied that there may be occasions in which he could work remotely either in Perth, [China] or [the Eastern states] when [Martin] is with him and where [Martin] can be cared for by either [the father] or family. He is no longer a young child. Alternate care arrangements can be made, as [the mother] has done in Perth when required.

124 Overall I am satisfied it is reasonably practicable for [the father] to spend substantial and significant time with [Martin] if [Martin] lives in [the UK]. It might not be the best option for [the father], but it certainly allows [Martin] to have his father involved in his day to day activities from time to time, especially in relation to his schooling. It may not be as easy or practicable as Perth, but I find it to be viable. It is a matter of degree only. [The father] said in evidence that if [the mother] was able to relocate to the United Kingdom he would do as much as possible to spend time with [Martin]. I accept that.

125 I now turn to the competing proposals for the relocation itself.

126 The existing law makes it clear that neither party bears any onus to prove his or her case is the better option. It is also important to consider that both parties have a right to live their lives where they choose, bearing in mind the paramount consideration is the best interests of their child.

127 The Honourable Justice Kay recently dealt with the issue of relocation, albeit interstate, in the context of the amended legislation (*Godfrey & Saunders* [2007] FamCA 102). His Honour there said:

“The Act sets out in s 60CC several matters for the Court to consider in determining what is in the child’s best interests but does not seek to mandate that any one or other matter becomes determinative in any particular case. For the purposes of this case the legislation requires that there be a primary consideration given to the benefit of the child of having a meaningful relationship with both of the child’s parents but it does not purport to prescribe how that meaningful relationship is best promoted in the circumstances of any one case.”

He further commented:

“Even if the move results in a diminution of quality of the relationship, what the legislation aspires to promote is a meaningful relationship, not an optimal relationship.”

128 I consider it of some importance in this case that [the father] and [Martin] have always had a meaningful relationship and this will not be fractured by any of the

proposals put forward. There is no evidence that a relocation will result in a diminution of [the father] and [Martin]'s relationship. It has evolved to date with little commonality in their living environment.

129 I have determined [Martin] should remain living with [the mother] and she should be able to relocate with him to [the UK]. I have arrived at this conclusion for the following reasons:

- Although [Martin] will be changing his living environment with all that this encompasses, including friends, family, schooling and community life, I am satisfied that the arrangements proposed by [the mother] are not ill thought out or capricious. She has more than adequately made such arrangements in the past for [Martin]'s benefit. [Martin] has stated that he would be happy to live in England or Perth. He said both options appealed to him. The Family Consultant reported that [Martin], in his view, would have the capacity to adjust to a move to [the UK].
- [The mother] has enjoyed living in [the UK]. She has not made the decision to go there without some experience of living there. She has dedicated herself to [Martin] since separation. She now wishes to go with him, as a team, to experience the lifestyle, expand her career and give her relationship the best chance of success.
- I have already canvassed the issue of the continuation of a meaningful relationship between [Martin] and [the father] and see no reason for this to change.

130 It is settled that the best interests of the child are the paramount consideration in any determination for relocation. However, it is not the sole consideration. In this case it is appropriate to take into account [the mother]'s wishes and plans, as long as in doing so, [Martin]'s best interests are not compromised. Since separation [the mother] has been assiduous in taking care of [Martin]'s needs. She has done everything to ensure [Martin] has had the opportunity to develop well. I do not doubt this will continue. Now at 11 years of age, [Martin] has good relations with both his parents and he appears to be well balanced and flexible. He has expressed satisfaction with a possible move to [the UK].

131 [The father] has had the opportunity of earning a substantial amount of money and advancing his chosen career. He has been able to accommodate his relationship with [Martin] around his career. A relocation may not make this as easy as it has been in the past. However, given I am satisfied it will not cause any ruction in his relationship with [Martin], I see no reason why [the mother]'s wishes cannot now be accommodated albeit to some extent at the expense of [the father]'s wishes.

132 I find [Martin]'s best interests are served by remaining living with his mother where she has chosen to live, [the UK].

133 I am also mindful of what the Full Court of the Family Court held in *B and B; Family Law Reform Act 1995* (1997) FLC 92-755:

“A very important aspect of a child’s best interests is to live in a happy family environment ... Ordinary common experience indicates that

long-term unhappiness by a residence parent is likely to impinge in a negative way upon the happiness and therefore the best interests of children who are part of that household.”

134 [The mother] has been steadfast in her desire to relocate. She would remain in Perth and try to develop her relationship with [Mr T] in Perth. There was no attempt by her to overstate any “long term unhappiness”. However, it is likely to be difficult for her to take advantage of career opportunities and lifestyle opportunities she says are present in [the UK]. [Mr T] is prepared to sacrifice lifestyle and career to be in Perth, but I am not satisfied that there is a need.

135 Subject to submissions from counsel, in particular in relation to paragraphs 4(d) and (e), the orders I intend to make are:

Orders

- 1 Except as set out in these orders all previous orders be discharged.
- 2 The father and mother have equal shared parental responsibility for the child [MARTIN] born [in] July 1998.
- 3 [Martin] reside with the mother and she have leave to live in the United Kingdom with him commencing January 2010.
- 4 [Martin] live with the father as follows:
 - (a) in accordance with paragraph 1(f) of the orders of 13 February 2009;
 - (b) from 18 December 2009 until 2 January 2010;
 - (c) For a period up to one week in every four during the school term from 9.00 am Saturday until 7.00 pm the following Sunday, provided written notice has been given to the mother of which weeks/weekends during each school term the father wishes to spend time with [Martin] at least 21 days prior thereto, but not to include Mother’s Day or the mother’s birthday nor the first or last week of each school term;
 - (d) subject to submissions, the United Kingdom summer school holidays with the mother to meet the return airfare of [Martin] to [China];
 - (e) part of the United Kingdom term holidays;
 - (f) each alternate United Kingdom Christmas school holiday period to commence in 2011 and each alternate year thereafter; and
 - (g) at such further or other times as the parties may agree.
- 5 The father have reasonable weekly communication with [Martin] by telephone, email and Skype.
- 6 Each party to give the other party prior written notice of the places that [Martin] will be visiting in respect of any travel during school holidays away from the city in which [Martin] resides.
- 7 Each party have liberty to holiday overseas with [Martin] during the period that [Martin] would normally spend time with them pursuant to these orders,

and prior to departure are to provide to the other party their contact details and destinations of travel.

I certify that the preceding [135] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate