



Legitimate guidelines, parenting disputes and the case of ‘coercive’ relocation orders

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This article considers the law concerning ‘coercive’ relocation orders and in particular whether there can be said to be a ‘legitimate guideline’ operating in this area. To answer this question, the article addresses the jurisprudence on the nature of a ‘coercive’ relocation order, as an identifiable category of case is required for there to be a legitimate guideline. In light of judicial statements on interim relocation orders, the article also outlines whether any guideline operates in that context also. The article goes on to consider the justification for any guidelines in relation to relocation and highlights how traditional gendered notions of parenting have played out in a number of interesting coercive relocation cases.

Introduction

It is trite to say family law relocation cases¹ are just another brand of parenting dispute and there are no special rules.² Or are there? The High Court has been clear that the Full Family Court of Australia can, and should, develop ‘legitimate guidelines’ to aid with consistency in the exercise of its broad discretion in both parenting and property matters.³ The Full Court has described a legitimate guideline as requiring:

axiomatically, a principle which can be identified with clarity and, in addition, the identification of a ‘particular class of case’ to which it applies ... a legitimate guideline should either apply to *all* cases or, at least, *all* instances within an identifiable category of case.⁴

A legitimate guideline will affect how an aspect of discretion is exercised,⁵ and must be applied unless the decision-maker justifies why it should not be; it does not determine the overall exercise of discretion in a family law matter. Legitimate guidelines exist in other areas of discretionary decision-making, most notably sentencing.⁶

The Full Court has been slow to identify legitimate guidelines, only

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1 A ‘relocation’ case has typically been seen to involve a situation where a parent wishes to move away from the other parent with a child. As this article shows, the ambit is now much wider.

2 *Sayer v Radcliffe* (2012) 48 Fam LR 298, 311 [47].

3 *Norbis v Norbis* (1986) CLR 513. Note that the discretionary powers to make both parenting and property orders under the *Family Law Act 1975* (Cth) (‘FLA’) are extremely wide, limited only by lists of relevant considerations.

4 *Hoffman v Hoffman* (2014) 51 Fam LR 568, 576 [41] (‘Hoffman’).

5 Ie, a legitimate guideline does not simply clarify matters of statutory interpretation, eg, what considerations may be relevant to the exercise of the discretion taking account of the words of the relevant section.

6 See, eg, *Wong v The Queen* (2001) 207 CLR 584.

occasionally mentioning them and rarely being clear about whether they are purporting to create a guideline.⁷ Only very recently has the Full Court paid more attention to the significance of guidelines.⁸ This historical inattention to the jurisprudential status of statements of principle has led to some confusion and this is particularly apparent in a number of areas relating to family property law; though guidelines are still much more commonly discussed in that context than in relation to parenting disputes.⁹ However, it is not surprising guidelines are less commonly considered in the development of parenting law.¹⁰ The question of how to deal with the deliberate or reckless wasting of assets¹¹ in a property dispute, for example, might be more amenable to a guideline than, say, the question of whether siblings should reside together. Recent case law on 'relocation',¹² however, raises questions about whether legitimate guidelines are developing in parenting matters, or perhaps are erroneously perceived to exist.

The first, and primary part, of this article focuses on the area of what are now commonly called 'coercive' relocation orders. What is a coercive relocation order, is there a legitimate guideline that limits the exercise of discretion in making such orders, and if there is, is this justifiable? The first two questions are inextricably linked, as if there is no identifiable category of 'coercive relocation order', then technically there can be no legitimate guideline.

The second part of the article considers briefly the making of interim parenting orders where there has been a so-called 'unilateral' relocation with the child/ren by one of the parents. Does the fact of a 'unilateral' relocation limit the court's exercise of interim discretion, such that there could be said to be a legitimate guideline operating?

The article concludes by discussing the continuing gendered impact of the law relating to relocation cases in Australian family law.

Coercive orders: What are they, is there a legitimate guideline and should there be?

In *Oswald v Karrington*,¹³ the Full Court considered the process adopted by a trial judge in ordering a primary carer mother to relocate closer to the father to facilitate the children's contact with him and said:

7 This is clearly reflected in *Hoffman* (2014) 51 Fam LR 568, where the Full Court found that, despite many years of the appearance of there being a guideline about special contributions or skill, the Court ruled, in fact, there was not: Lisa Young and Jo Goodie, 'Is there a need for more certainty in discretionary decision-making in Australian family property law?' (2018) 32 *Australian Journal of Family Law* 162.

8 See generally Young and Goodie, above n 7.

9 Lisa Young et al, *Family Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 852ff [14.4]ff.

10 Though note the comment about the rule in *Rice v Asplund* [1978] FamCA 84 (22 November 1978) in *ibid* 504–5 [8.106].

11 The Full Court has clearly developed a legitimate guideline in relation to this matter: see *Re Kowaliw* (1981) FLC 91-092; *Re Browne v Green* (1999) 25 Fam LR 482.

12 Historically, relocation disputes involved the question of whether a parent should be permitted to relocate, with the child/ren, away from the other parent. In recent times, as we shall see, many more complex scenarios are now encompassed in this category.

13 (2016) 55 Fam LR 344 ('*Oswald*').

It may be accepted, as it was in this case, that the Court has power to make a coercive order. Importantly though, *it is well established* that the proper exercise of that power is ‘at the extreme end of the discretionary range’ and there should exist ‘rare’ or ‘extreme’ factors that warrant the Court exercising its discretion to make a coercive order requiring a parent to relocate so as to continue to perform the role of primary caregiver of children.¹⁴

*Sampson v Hartnett [No 10]*¹⁵ and *Adamson v Adamson*¹⁶ (and *Ember v Assadi*¹⁷ referred to in *Adamson*) were cited in support of this ‘well established’ approach.

The Full Court considered it had the power to make a ‘coercive’ order, and was referring to existing superior case law that purportedly limits the exercise of the court’s discretionary power to make such an order; namely ‘rare’ or ‘extreme’ circumstances are required. On its face, this appears to be a legitimate guideline, as it would apply to all cases that fell within this category (that is, where a coercive relocation order was being considered) and it shapes the exercise of discretion: in the absence of ‘rare’ or ‘extreme’ circumstances, a court should *not* exercise its discretion to make that coercive order without some particular justification (though this guideline would not determine what order *should* be made in either circumstance, thus it does not determine the overall outcome of the case).

In *Needham v Cassidy*,¹⁸ decided shortly before *Oswald*, Judge Brewster challenged both the question of the court’s power to make such an order and whether any authoritative statement on this point had, at that time, been laid down by the Full Court. On the point of precedent, His Honour considered he was not bound by Full Court statements in either *Sampson* or *Adamson*,¹⁹ saying they were obiter because ‘in each case the court set aside orders requiring a parent to relocate’.²⁰ His Honour did not elaborate further on this point.

Were the statements in *Sampson* and *Adamson* obiter? If they were, then the suggestion in *Oswald* that this approach is well established would be open to question. The outcome of an issue under consideration in a case does not determine the status of statements of legal principle leading to that outcome: the question is whether the statement in question formed part of the reasoning necessary to reach the decision. The Full Court first discussed the question of coercive orders in *Sampson*. In overturning Moore J’s order which effectively required the mother to move to a new location, the Full Court discussed, as part of its rationale, the failure of Moore J to explain how making an order at the ‘extreme end of the discretionary range’²¹ was justified — having previously opined that it would only be in rare circumstances that a coercive

14 Ibid 348 [16] (emphasis added).

15 (2007) 38 Fam LR 315 (*Sampson*).

16 (2014) 51 Fam LR 626 (*Adamson*).

17 [2013] FamCAFC 107 (19 July 2013) (*Ember*).

18 [2016] FCCA 1477 (13 July 2016).

19 Neither *Zanda v Zanda* (2014) FLC 93-607 nor *Ember* [2013] FamCAFC 107 (19 July 2013).

20 *Needham v Cassidy* [2016] FCCA 1477 (13 July 2016) [36].

21 *Sampson* (2007) 38 Fam LR 315, 333 [83].

order of this type would be appropriate.²² In *Adamson*, the Full Court endorsed *Sampson* as requiring rare or exceptional circumstances for the making of a coercive relocation order,²³ finding that the necessary rare or exceptional circumstances did not exist in the case before it and so the trial judge was not justified in making a coercive relocation order. The question of the proper approach to making coercive relocation orders was therefore central to the reasoning leading to the Full Court setting aside the orders made at first instance in both cases; thus, the statements on these points were not obiter.

Judge Brewster then explained why, in his view, none of the sections²⁴ referred to in the various cases, provide the basis for the power to make coercive orders, concluding:

if the Parliament intended the Family Law Act to give to the court the power to make orders inconsistent with section 92 of the *Australian Constitution*, Article 13(1) of the [United Nations *Universal Declaration of Human Rights*] and Article 12 of the [United Nations *International Covenant on Civil and Political Rights*] in that it intended to give the court the power to restrict a person's freedom of movement from one State to another, or to deny to a person the right to live in the State of his or her choosing, it should have expressly said so or it must be necessarily and clearly implied in the Act. It did not expressly say so. In my view it is not necessarily or clearly implied.²⁵

It is not the intention of this article to engage in depth with the question of whether, as a matter of constitutional interpretation, the court has the power to make a 'coercive' order. Patently, there is nothing in the *Family Law Act 1975* (Cth) ('*FLA*') that expressly provides this power. Nonetheless, many members of the Full Court believe the answer to this question to be yes,²⁶ the High Court directly addressed the s 92 question in *AMS v AIF*,²⁷ and in both *AMS v AIF*²⁸ and *U v U*²⁹ High Court judges made statements supporting the Full Court's interpretation on this point.

However, Judge Brewster's challenge to the jurisprudence in this area does highlight some issues that have not been adequately addressed by the Full Court, which perhaps led to his Honour's concern about the precedential value of the existing case law:

- what precisely is a 'coercive' order (clarity on this point being a prerequisite to any legitimate guideline existing);
- has the Full Court in fact laid down any 'legitimate guideline' as to the exercise of discretion to make a coercive relocation order and what does it require; and

22 Ibid 328 [57].

23 (2014) 51 Fam LR 626, 634 [37].

24 *FLA* ss 65D, 64B, 114(3).

25 *Needham v Cassidy* [2016] FCCA 1477 (13 July 2016) [73].

26 *Sampson* (2007) 38 Fam LR 315, 323 [33]; *Adamson* (2014) 51 Fam LR 626, 633 [35]. Note however Judge Sexton's conclusion in *Hutchins v Gray* [2015] FCCA 1540 (5 June 2015) that the question of the power to make orders compelling or restraining relocation in relation to de facto couples is unclear: at [18]ff.

27 (1999) 199 CLR 160, 213–16 [157]–[162], 232–3 [221].

28 Ibid 179 [45], 232–3 [221].

29 (2002) 211 CLR 238, 262 [89].

- if the answer to the second question is yes, is that appropriate?

A What is a ‘coercive’ relocation order?

For many years the Family Court has restrained the movement of primary carer parents without troubling itself as to the jurisdictional basis of that power. It is only since the Court considered whether it could go further — to force either parent to relocate — that it has engaged with this question;³⁰ as we saw above, the Full Court is satisfied it has the requisite power. The question, though, is the power to do what? What, precisely, is a ‘coercive’ relocation order (bearing in mind that most orders are coercive in nature)?

The Full Court refers to ‘coercive’ relocation orders as if their categorisation is uncontroversial. As the cases referred to above show, the Court clearly considers a coercive order to include an order requiring a parent to relocate themselves to a new location (either with or without a child) to be closer to the other parent so they (the coerced parent) can assist with parenting their child. However, is there any distinction to be drawn between orders that directly order a parent to move and those that do so only implicitly;³¹ an order requiring a parent to take on day-to-day parental responsibility for a child who does not live near them implicitly requires that parent to relocate closer to the child to comply. Judge Brewster had no doubt as to the answer to this question: ‘[i]f it looks like a duck, swims like a duck and quacks like a duck then it is a duck. If the practical reality of the order is to require a parent to relocate it is a coercive order’.³² This was also the view of the Full Court in *Sampson v Hartnett [No 10]*.³³

A more difficult question is whether an order *restraining* a move is always, or can be considered in some circumstances, coercive. While, as noted in *Nada v Nettle*,³⁴ the starting point in considering the nature of a coercive order is the 2007 Full Court decision in *Sampson v Hartnett [No 10]*, *Sampson* is far from clear on this point. Bryant CJ and Warnick J had this to say:

there is power under s 114(3) of the Act to *enjoin a parent from relocating or to relocate*, provided that that injunction is no more than is necessary to secure the best interests of a child. The proper exercise of such a power is likely to be rare, because:

- (i) the location of the child will usually be the critical factor, leaving to the parents the choice about their roles; and
- (ii) in a parenting case, an order directed to a parent to relocate or not will likely only serve a useful purpose if that parent is to then discharge a particular role as a parent. *If the evidence supports a finding that the parent will play that role, if the child is relocated or not, the order directed to the parent will likely be superfluous.* If the evidence does not support such a finding, the order will be coercive in nature and be equivalent to forcing that parent to discharge a role in circumstances not of that parent’s choosing.

30 The discussion of this issue started with *ibid*, though there was no consideration in that case of jurisdiction (though there might well have been given the coercion being discussed was that of requiring a parent to relocate out of the country: at 285 [175] (Hayne J)).

31 Eg, where the parent is ordered to effect the relocation of the child, and parent the child in the new location, but is not expressly required him- or herself to move as, eg, in *Sampson* (2007) 38 Fam LR 315.

32 *Needham v Cassidy* [2016] FCCA 1477 (13 July 2016) [75].

33 (2007) 38 Fam LR 315, 334 [88].

34 [2014] FamCAFC 123 (16 July 2014) [145].

The prospect of ordering a parent to relocate and in effect ‘parent’ in a situation not of that parent’s choosing, legitimately gives rise to concerns, particularly in respect of enforcement.³⁵

The introductory part of this statement appears to say that *any* order — to relocate or prohibit relocation — is ‘likely to be rare’ and presumably therefore coercive.³⁶ And yet, family courts have for many decades routinely restrained parents (usually mothers) from moving away with child/ren with no requirement of rare or extreme circumstances.³⁷ However, read in full, it can be seen that the Court is saying this: if a parent seeking to relocate with a child concedes they will stay and parent the child if unsuccessful in obtaining the order they want, there is no point in making the order prohibiting the parent’s relocation. They will stay anyway. Thus, it is only when a parent says they *will leave without the child* if denied the order, that an order prohibiting relocation becomes coercive. In the Full Court’s view, parents who choose not to abandon their children in the face of the court’s refusal to permit relocation of the child are apparently not being coerced to stay (notwithstanding they have gone to court over the matter!). This is the case even where that parent is patently the primary carer of choice. As such, in the court’s words, a parent who is prepared (however reluctantly) to stay, is not being forced to discharge their role in ‘circumstances not of that parent’s choosing’ and so is not being coerced.

This approach in relation to restraining relocation resonates with comments made in the High Court case of *U v U*,³⁸ where the mother complained on appeal that when she answered in the affirmative a question in cross examination as to whether she would stay if relocation were not permitted, the Court erroneously elevated this to being one of her ‘proposals’. That case held the Court can consider *any* parenting arrangement, even those not proposed by the parents, so there was no error on the trial judge’s part. Thus, where there is no evidence before the Court on the point raised in *Sampson* — whether the primary carer parent is prepared to stay if unsuccessful — then counsel for the other parent (or indeed the Court itself) is at liberty to ask the question. As has been argued elsewhere,³⁹ this shifts the focus from the central question — where the child should live — to where the parent should live. If the parent concedes they will *not* move without the child, then *Sampson* says that parent is not being coerced to remain and so rare or extreme circumstances are not required to put an injunction to that effect in place.

However, other statements by Bryant CJ and Warnick J in *Sampson* muddy the waters, tending to the interpretation that a coercive order is *only* one that requires a parent to move to a ‘new’ location:

35 (2007) 38 Fam LR 315, 328–9 [58]–[59] (emphasis added).

36 See *Hutchins v Gray* [2015] FCCA 1540 (5 June 2015) where Judge Sexton (at [18]) clearly interprets *Sampson* (2007) 38 Fam LR 315 in this way.

37 See, eg, *Soulos v Sorbo* [2015] FamCA 196 (26 March 2015); *Ezekov v Chandra* [2015] FamCA 133 (5 March 2015); *Radley v Radley* [2013] FamCA 346 (21 May 2013); *Johar v Johar* [2012] FamCA 609 (1 August 2012).

38 (2002) 211 CLR 238.

39 See, eg, Lisa Young, ‘Australia: Revisiting relocation disputes’ in Bill Atkin (ed), *The International Survey of Family Law — 2016 Edition* (Jordan Publishing, 2016) 19, 25 and the citations referred to therein.

As indicated earlier, the purpose of a ‘coercive’ order is more to create a situation, rather than choose between situations that already exist ...⁴⁰

In *D and SV* ... the Full Court ... considered the degree to which, generally, alternatives to restricting freedom of movement ought be explored. Their comments apply equally or more so to an order requiring relocation, contrary to a party’s proposals ...⁴¹

If it is within power to order a person not to relocate, it would be surprising if it was not within power to order a person to relocate, although one would imagine the exercises of power to the latter effect would be *even more rare*, because the effect is more drastic. The person being ordered not to move at least has chosen that location at some stage and for reasons which one assumes at least once existed. This contrasts with a person who may not wish to go somewhere and therefore the order is much more of an imposition on that person’s freedom.⁴²

Each of these statements draws a distinction between an order that is about the maintenance of the status quo (that is, whether the primary carer parent is to be restrained from relocating *away* with the child) and cases where the Court is considering ordering a parent to move to a new location to parent.⁴³ The last of the extracts above suggests the former form of order is rare (which it is not) and the latter ‘even more rare’ (when in fact such orders are all but non-existent).

In the minority in *Sampson*, Kay J seemed to consider coercive orders to be limited to orders requiring a person to move to a new location. Having doubted the Court’s power to make such an order, his Honour went on to say that ‘if the power exists, it would not be exercised other than in the most exceptional circumstances’.⁴⁴

Most recently, in *Mareet v Colbrooke*,⁴⁵ in an *ex tempore* decision dealing with an interim order, the Full Court cited *Sampson* as standing for the proposition that, while the Court clearly has ‘the power to enjoin a party to relocate (*or not*), such an injunction should rarely be made’.

It is difficult to discern the ambit of a coercive relocation order from these statements. Does the principle in its application provide any clearer answer? In the 2013 decision of *Ember v Assadi*,⁴⁶ the parents were living in Newcastle at separation (October 2010) having previously lived in both Sydney and Melbourne. The father moved to Sydney and in January 2011 the mother

40 *Sampson v Hartnett [No 10]* (2007) 38 Fam LR 315, 326 [47].

41 *Ibid* 327 [53].

42 *Ibid* 328 [57] (emphasis added).

43 While the case law does not actually emphasise the word ‘new’, this is clearly what is meant. See, eg, *ibid* 328–9 [58], where the Court talks of injunctions to ‘enjoin a parent from relocating or to relocate’; one stops a move to a new location, the other requires a move to a new location.

44 *Ibid* 342 [121]. In fact, Kay J takes an approach that treats the parents as being free to live where they wish and the dispute being about with whom the child should live: at 345 [136].

45 [2019] FamCAFC 15 (7 February 2019) [14] (emphasis added). The Full Court went on to make some confusing comments about the trial judge having wrongly characterised the case as a ‘relocation case’ which led to errors of law. It appears the Full Court was distinguishing this from an interim return order-type case, on the basis that the child had never lived in the location to which the mother was being asked to move, having been born in the new location.

46 [2013] FamCAFC 107 (19 July 2013).

moved with the children to Melbourne. The father later refused to return the children after contact, and at an interim hearing in August 2011 the children were returned to the mother in Melbourne. The final decision in late 2011 required the mother to return herself and the children to either Sydney or Newcastle. The mother's second ground of appeal was the alleged failure of the federal magistrate 'to provide adequate reasons identifying the exceptional circumstances which require the mother to live with the children in Sydney or Newcastle'.⁴⁷

The Full Court (Finn, Strickland and Ainslie-Wallace JJ) found no merit in this ground, saying:

This is a challenge that is misconceived. Contrary to the assertion contained in this Ground, there is no requirement in the legislation or that can be gleaned from the authorities that to succeed in an application which entails relocation, and in particular to require a party to move with the children, 'exceptional circumstances' need to be established.

... there is an onus on the applicant ... to demonstrate in the context of the orders being made [sic] is in the best interests of the children and reasonably practicable, but that is the extent of it.⁴⁸

It seems counsel did not refer the Court to *Sampson v Hartnett [No 10]* on this point,⁴⁹ though their Honours later referred to *Sampson* in the context of the question of the power to make such an order, including the paragraphs which talked about the rare nature of coercive orders. Presumably, the Full Court in *Ember* considered the Full Court in *Sampson* to have only been expressing how discretion is likely to be exercised, rather than creating any legitimate guideline, though no direct consideration was given to this point. Also, it may be that the Court in *Ember* saw this more as a case of returning a parent who had moved away, rather than requiring a parent to move somewhere new. This raises the further difficult question — discussed below — of when a parent who has moved away to a new location has established enough permanency in that place to argue that ordering them to return would be requiring them to move to a 'new' location — as opposed to being brought back (which the Court routinely does as we see in the second part of this article). If a parent and child are returned on an interim basis, then one might see this more as a restraint of movement from the original location, rather than requiring a parent to move to a new location to parent. This distinction is significant if different principles apply to those situations. *Ember* neither addressed this issue, nor recognised the existing jurisprudence and so does not assist in understanding the scope of coercive relocation orders.

In the 2014 decision of *Adamson* the parents were living in Sydney on separation, whereupon the mother moved with the child to 'Town S'. Prior to trial the father moved to Town C (140 km from Town S) and sought — and was granted — an order requiring the mother to relocate with the child closer to Town C. As this clearly involved an order requiring a parent to move to a new location, not surprisingly the Full Court highlighted the relevant quotes

47 Ibid [26].

48 Ibid [50]–[51].

49 Ibid [52].

from *Sampson* extracted above.⁵⁰ Thus, *Adamson* throws no further light on the question of whether an order restraining a move is coercive.

In *Preiss v Preiss*⁵¹ Cronin J had no doubt the order the father sought (to force the mother to relocate with him and the child to Israel, both parents having left there in 2008) amounted to a coercive order requiring rare or extreme factors. While that particular case did not present any compelling arguments in favour of such an order, Cronin J had this to say about the scope of coercive orders:

In *Sampson* (supra) the Full Court made a number of important observations about coercive orders. The first was that *the purpose of a coercive order* is to ‘create’ a situation rather than choose between situations that already exist and as such, orders need to be connected to the evidence in the case ...⁵² As the Full Court said in *Sampson* at [57], the exercise of the power as contemplated, would be rare because the effect is drastic. To force the wife to move to Israel without knowing to what she was going, would not only be drastic but unjust.⁵³

This tends to suggest an order requiring a parent to remain in a location is not coercive.⁵⁴

In *Kuan v Toh*⁵⁵ the father, who was living in Malaysia, sought leave to appeal a decision refusing to order the mother and children to relocate to Malaysia.⁵⁶ The Full Court concurred with the federal magistrate, saying ‘[o]nly “rare” or “extreme” factors warrant the court exercising its discretion to make “coercive” orders requiring a parent to relocate so as to continue to be the primary carer of their child/children.’⁵⁷ However, in this case, the mother had been living in Malaysia since separation in October 2013; she left in late July 2015 when the father relocated from Australia to Malaysia and instituted parenting proceedings in that jurisdiction. The matter concerning the father’s request for the return of the mother and children was heard in Australia in April 2016. It was understood that if the children were ordered to return, the mother would accompany them, as there was no dispute the children should live primarily with her. Given those facts, and based on the discussion in *Sampson*, one might think the order sought by the father was not necessarily coercive; the mother had left the jurisdiction without the father’s consent in circumstances where he was seeking parenting orders in that jurisdiction, and she conceded she would go with the children if they were ordered to return. In refusing to grant leave, the Full Court said:

50 *Adamson* (2014) 51 Fam LR 626, 634 [37].

51 [2017] FamCA 12 (18 January 2017) (*Preiss*).

52 *Ibid* [37].

53 *Ibid* [41] (emphasis added).

54 See also *Nada v Nettle* [2014] FamCAFC 123 (16 July 2014) [145] where the Full Court described a coercive order as ‘being one in which a parent is required to change the location of residence of a child to a nominated place’.

55 (2016) FLC ¶93-717.

56 In fact, the father sought the ‘speedy return’ of the mother and children to Malaysia, as she had left there to go to Australia, where they had previously lived. Malaysia is not a signatory to the *Hague Convention on the Civil Aspects of International Child Abduction*, signed 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983), and so that did not apply and so the matter was determined by the primary decision-maker on the basis of the children’s best interests.

57 (2016) FLC ¶93-717, 81,543 [32].

The mother has a right ‘to live and work wherever she desire[s]’, as of course does the father. Historically, *each* of them had individually exercised that right including when, relevantly, the father returned to Malaysia and filed proceedings there and when, relevantly, the mother travelled to Australia and filed proceedings here. The question is not whether the best interests of the children point to Malaysia hearing the parenting proceedings if the children return there *with the mother* — the question is whether those best interests point to that conclusion if the father exercises his right to live in Malaysia and the mother exercises her right to live in Australia.⁵⁸

A focus on a parent’s right to live where they wish might of course throw a different light on the question of making relocation orders, coercive or not. The above quote is footnoted as being based on a paragraph from *U v U*.⁵⁹ However, this does not reflect what the High Court in *U v U* ultimately held on this point:

whatever weight should be accorded to a right of freedom of mobility of a parent, it must defer to the expressed paramount consideration, the welfare of the child if that were to be adversely affected by a movement of a parent.⁶⁰

The facts of *Kuan v Toh* are somewhat unusual in that the parents moved back and forth from Malaysia to Australia. Further, it is difficult to assess whether the international aspect of the case had any impact on the way the decision was framed; it is one thing to order a parent to relocate within Australia, it might be considered an entirely different matter to effectively deport them in the name of the child’s best interests. *Preiss*,⁶¹ mentioned above, also involved a father seeking an order to coerce the mother to move to a foreign jurisdiction; it was also agreed the child would live primarily with the mother. While no rare factors warranting such an order were found to exist in that case either, the ‘drastic’ nature of such an order was seen to arise from the overall circumstances for the wife of having to move back to Israel, rather than the mere fact that it was an international move being sought.⁶² In other words, there was no attention paid to the general question of ordering parents to leave the country.

Leaving aside the anomalous decision of *Ember v Assadi* and the question of forced international relocations, the foregoing shows that an order requiring a parent to move to a ‘new’ location to parent is coercive,⁶³ and so *may* be an order requiring a parent to remain in a location to parent when they have

58 Ibid 81,543 [33] (emphasis in original).

59 (2002) 211 CLR 238, 262 [88].

60 Ibid 262 [89].

61 *Preiss v Preiss* [2017] FamCA 12 (18 January 2017).

62 See also *Mosel v Frost* [2015] FamCA 484 (18 June 2015).

63 *Kuan v Toh* (2016) FLC 93-717; *Ember* [2013] FamCAFC 107 (19 July 2013) [59]. For other examples see *Petty v Crowley* [2016] FCCA 3169 (16 December 2016) (mother not ordered to move); *Maddock v Barkin* [2016] FCCA 41 (29 January 2016) (where the judge eschewed any consideration of an order coercing the mother to move location to facilitate shared care saying it was entirely a matter for her where she lived); *Beeney v Jenner* [2013] FCCA 1937 (20 November 2013) (mother not ordered to move closer to father to facilitate his contact with child); *Astarita v Cotton* [2017] FamCA 87 (10 February 2017) (where the Independent Children’s Lawyer (‘ICL’) contemplated recommending the mother be compelled on an interim basis to move closer to the father but abandoned that in the face of a judicial indication that such an order was unlikely); *Mosel v Frost* [2015] FamCA 484 (18 June 2015) (mother not ordered to relocate with the children to another country as sought by the father); *Franklin v Kendall* [2014] FamCA 691 (27 August 2014) (where the

identified that absent an order they would leave without the child. The jurisprudence is not clear, however, as to whether an order restraining a move, when the parent concedes they will not go without the child, is coercive;⁶⁴ though if the history of relocation decision-making in Australia is considered one would conclude it is not, as restraint of primary carer parents (who would not abandon their children) is not unusual.⁶⁵ *Kuan v Toh* also raises further difficult questions: what is the impact of the move being international, when is a location ‘new’ and what weight should be given to parental rights of freedom of movement? We return to the last of those questions later in the article.

The question of when a location is ‘new’ is significant if the ambit of coercive relocation orders is limited to orders requiring someone to move somewhere ‘new’ to parent. There is no definitive answer as to when a location is ‘new’ and it will be a matter of fact to be determined in each case. In *Healey v Osbourne*⁶⁶ an interim application to return a mother and child who had been living in a new location for a year was treated by the court as concerning a coercive order and the case references suggest it was considered the mother was being asked to move to a new location rather than merely being ordered to return.⁶⁷ The father in this case was not seeking care of the child but rather that the mother return and continue her role as primary carer. The Full Court agreed as to the characterisation of the order sought, and that, as the father had the means and ability to travel for contact, there were no rare or extreme circumstances warranting a coercive relocation order. In *Tokely v Tokely*⁶⁸ the mother moved states with the children about 4 months before the interim hearing and the father’s order seeking their return was treated as being coercive, though issues as to the unilateral nature of her actions were also raised.

Thus, relatively short periods in an alternate location might give rise to the conclusion that requiring that parent to return, is requiring them to move somewhere ‘new’. Conversely, however, it is not difficult to find cases dealing with interim relocation where the return of a carer parent is sought and there is no discussion of whether such orders are coercive as they are simply

mother was not ordered to return, after 3 years, from South Australia to Queensland, which order was sought by the ICL); *Mikono v Perez* [2012] FamCA 761 (31 August 2012) (where the mother had been living in Melbourne for 2 years since separating from the father, who was found to be intimidating, overbearing and made the mother fearful; the father’s application to have her return to Sydney so as to facilitate his contact was unsuccessful). There are some cases where an order is sought that is clearly coercive but is not identified as such: see, eg, *Seaward v MacDuff* [2013] FamCA 485 (19 June 2013) (the mother remarries and moves state while the father in jail for 15 months — on release the father is unsuccessful in obtaining order that the mother return).

64 Not surprisingly, it is not difficult to find vague statements about the nature of a coercive order. See, eg, *Tokely v Tokely* [2017] FCCA 638 (2 March 2017) [24]; *Hutchins v Gray* [2015] FCCA 1540 (5 June 2015) [18].

65 There is a myriad of cases of this kind, but for recent examples see: *Renwick v Renwick* [2018] FCCA 154 (24 January 2018) (mother permitted to relocate but only after a year — no suggestion order was coercive).

66 [2017] FamCAFC 185 (7 September 2017).

67 *Ibid* [16]. See also *Nicholson v Durham* [2015] FCCA 2026 (28 July 2015); *Lenahan v Lenahan* [2017] FCCA 3307 (4 December 2017) [20].

68 [2017] FCCA 638 (2 March 2017).

characterised as being ‘return’ orders.⁶⁹ Again, this points to a lack of clarity about the precise ambit of coercive relocation orders because, whatever their ambit, current case law indicates the scope of coercive orders will *always* include orders requiring someone to move to a ‘new’ location to parent: application of this principle thus requires some way of understanding of what is meant by ‘new’.

On the question of orders being sought in relation to a proposed international relocation, we would say this (accepting that a much more detailed argument could be made on this point, but that this is beyond the scope of this article). While not part of Australian domestic law, Australia is a signatory to the *International Covenant on Civil and Political Rights* (‘*ICCPR*’), art 12 of which provides:

- 1 Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- 2 Everyone shall be free to leave any country, including his own.
- 3 The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
- 4 No one shall be arbitrarily deprived of the right to enter his own country.⁷⁰

The High Court and the Full Court have adopted the position that the family courts can, under the *FLA*, restrain and require movement within Australia, and restrain movement out of Australia. One might argue this is consistent with art 12(3), on the basis of the rights of the child concerned. While art 12 does not refer to the right to remain in one’s country, this is implied from the terms of art 12(4).⁷¹ Indeed, one might imagine this is not directly referred to in the *ICCPR* because it is considered to be a self-evident right of citizenship. While there are a range of factors that might affect one’s ability to leave Australia,⁷² forcing someone who is legally entitled to be here to leave the country is treated very differently under Australian law. The *Migration Act 1958* (Cth), which gives the federal government the power to deport certain people, does not define the word deportation. A dictionary definition of deportation is ‘to force someone to leave a country’.⁷³ A coercive order that a parent move to another country to parent a child would effectively force that person to leave the country; is it not then deportation? The general position is that an Australian citizen cannot be deported (there is no general mechanism

⁶⁹ See, eg, *Larsson v Blake* [2017] FCCA 1361 (28 June 2017) (3 months); *Keith v Browne* [2015] FCCA 1496 (27 March 2015) (5 months); *Marcus v Ellis* [2014] FCCA 582 (25 March 2014) (5.5 months).

⁷⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’).

⁷¹ Human Rights Committee, *General Comment No 27: Freedom of movement (article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11>.

⁷² Eg, the requirement to hold a valid passport, being incarcerated, being prohibited from departing due to a child support debt, etc.

⁷³ *Deport*, Cambridge Dictionary <<http://dictionary.cambridge.org/dictionary/english/deport>>. It is notable that definition goes on to say ‘especially someone who has no legal right to be there’; the law does not even have a particular nomenclature for the expulsion of a citizen from their own country, as it is generally not possible.

to do this, absent extradition like situations) and even extreme and limited circumstances are required to deport a permanent resident.⁷⁴ Equally, deportation of persons validly in Australia who are not citizens or permanent residents is severely constrained by the *Migration Act*. The Full Court has not grappled with this issue in the cases to date, despite it being directly raised on the facts of a number of cases, as shown above. We would argue that, at best, a court could refuse to restrain a parent's international relocation with a child on the basis that the parent staying behind could follow the parent with care if they wished; however, the court should not — and arguably cannot — order one parent to follow the other parent overseas.

In summary, having reviewed the authorities it seems the courts are behaving as if there is a legitimate guideline, though the Full Court has not entirely resolved the question of precisely which orders are coercive. As noted at the outset, the Full Court's recent statement in *Oswald* highlights its view as to the existence of some factor limiting discretion:

it is well established that the proper exercise of that power is 'at the extreme end of the discretionary range' and there should exist 'rare' or 'extreme' factors that warrant the Court exercising its discretion to make a coercive order ...⁷⁵

This indicates very clearly that the Full Court considers the discretion to make a coercive order is not at large; for this very reason, that is the absence of rare or exceptional factors, the appeals in *Sampson*, *Adamson* and *Oswald* were successful.

As to the scope of coercive relocation orders, it includes orders compelling a move to a 'new' location, or restraining a move where a parent would not otherwise stay and parent. Restraint of movement where a parent concedes they will stay to parent is probably not coercive. It is not clear when a location is new, and doubt has been cast on whether courts can order parents to relocate overseas. According to *Hoffman v Hoffman*, a court must justify the making of the coercive relocation order in the absence of rare or compelling circumstances. *Hoffman* confirms that a legitimate guideline does not absolutely bind a court as to the exercise of discretion (it cannot otherwise it would be an impermissible binding rule), but that failing to apply the guideline will result in more scrutiny being applied to the exercise of discretion. Notably, this legitimate guideline, like others, does not determine the ultimate exercise of discretion, namely with whom the child should live; rather it constrains the court's discretion to facilitate any parenting order with an order as to where a parent shall live.

B Which circumstances must be 'rare' or 'extreme'?

Assuming there is a legitimate guideline, what factors has the court considered to be 'rare' or 'extreme', such as to warrant the making of a coercive relocation order? In *Franklin v Kendall*⁷⁶ Cronin J noted that 'no authoritative discussion seems to have taken place' as to what is rare or extreme.⁷⁷ An

⁷⁴ *Migration Act 1958* (Cth).

⁷⁵ *Oswald v Karrington* (2016) 55 Fam LR 344, 348 [16].

⁷⁶ [2014] FamCA 691 (27 August 2014).

⁷⁷ *Ibid* [8].

argument that a longstanding shared care arrangement amounted to a rare circumstance was rejected by Judge Middleton.⁷⁸ The father in that case also argued that the child's primary attachment to both parents made for a rare circumstance; the Judge found the child was primarily attached to the mother and said (unhelpfully) '[having] so found, I am not satisfied that a rare factor exists in this case'.⁷⁹

In *Nada v Nettle* the mother had moved with the child from regional New South Wales to Hobart in July 2012. The hearing was in October 2013 and the mother was ordered to return. It is not clear from the decision whether this order was considered coercive or rather, given the mother left in stealth and hid the fact of her move until April 2013, it was considered a 'return' order as it were.⁸⁰ The Court referred to *Sampson* and statements therein concerning coercive orders before finding that the consequences for the mother of returning to rural New South Wales, where her family lived, were not such that an order requiring her to relocate there was inappropriate. Reflecting a similar approach, as we have seen above, it was said in *Preiss*, relying on *Sampson*, that coercive orders would be rare *because* the consequences of such an order would be drastic. This approach derives from the problematic statement in *Sampson* which assumes that

the person being ordered not to move at least has chosen that location [at] some stage and for reasons which one assumes at [least] once existed. This contrasts with a person who may not wish to go somewhere and therefore the order is much more of an imposition on that person's freedom.⁸¹

In other words, it is assumed that a coercive order is going to be rare because you are asking the person to move to a place they have never lived before and that is a drastic thing to do. However, as the case law reviewed here has shown, cases are not that easily categorised, with orders to return to previous residential locations at times being considered coercive.

Moreover, the above approach reveals a confusion between rare or extreme circumstances that warrant a coercive order, and the consequences of a coercive order being drastic and thus such orders being rarely made. This is a very important distinction. Much of the discussion of this topic in the case law rests, as a matter of principle, on the premise that parents should be able to live where they wish,⁸² and only be forced to move to somewhere not of their choosing, if rare or exceptional circumstances exist. As was said in *Sampson v Hartnett [No 10]*, an order forcing someone to relocate somewhere new is drastic because it is such an imposition on their freedom to choose

⁷⁸ *Olsen v Goodman* [2017] FCCA 2337 (11 October 2007).

⁷⁹ *Ibid* [47]. The father in this case had sought an order that the mother relocate to a different state to facilitate shared care around his fly-in fly-out work arrangement.

⁸⁰ For a case that highlights the uncertainty as to what approach is to be applied where the matter involves both a recent unilateral relocation and a coercive order, see *Nicholson v Durham* [2015] FCCA 2026 (28 July 2015) [26]: where the father's application that the mother be required to return with the child after a unilateral relocation in the face of his opposition was accepted by the judge to concern a coercive order, despite Boland J's statements in *Morgan v Miles* (2007) 38 Fam LR 275 being cited as to the need for an emergency.

⁸¹ *Sampson v Hartnett [No 10]* (2007) 38 Fam LR 315, 328 [57].

⁸² *Ibid*; *Adamson* (2014) 51 Fam LR 626, 639 [68].

where to live.⁸³ It is an entirely different proposition to say that a coercive order can be made *unless* the consequences of the proposed move are ‘drastic’ for that parent. The latter approach would ride roughshod over parental rights to freedom of movement involving as it does the assumption that it is acceptable to order parents to move anywhere, as long as the consequences of such a move are not considered by a judge to be ‘drastic’ for them. So, to take an example, a wealthy parent, with no other children and no partner, who can easily work in other locations, can be ordered to move somewhere they have never lived, nor ever wished to live, so they can be available to parent a child who is with the other parent in that location. For this particular parent, it might be argued the consequences are not drastic; it is nonetheless a considerable imposition on their right to live where they choose.

We would argue that, if the correct approach is that only in rare circumstances should one order a parent to move somewhere against their will to parent a child, then that decision must be *based on the child’s best interests*. In other words, there will need to be something exceptional about the child’s situation that warrants an order that so drastically impinges on a parent’s right to choose where they live. For example, imagine the child in question is profoundly disabled, and the parent with care (who has limited finances) moves closer to his or her parents for assistance, and seeks an order that the other parent move there also, to assist with the care of their child. Then it might be said that rare or exceptional circumstances exist, and a coercive order *could* be made. However, the court must still consider whether a shared care arrangement in that new location is practicable,⁸⁴ and the consequences of such a move on the parent who is being asked to move against their will, and decide the matter on that information. When one (a) compares the two examples above, (b) considers the terms of the legislation which premises the making of parenting orders on the child’s best interests, and (c) considers that parental rights to freedom of movement should only be constrained to the extent necessary to advance a child’s best interests, then it becomes evident that any test for rare or extreme circumstances *must* turn on factors relating to the child.

In support of this interpretation, consider *Shan v Prasad*,⁸⁵ where the Full Court had occasion to consider whether an injunction effectively restraining a husband from leaving the country until he had paid moneys due under an ordered property settlement was wrongly made for failing to take into account relevant matters. The injunction was ordered as the husband was considered a flight risk given his previous behaviour and it was, in effect, the only form of security available. The Full Court upheld the appeal on this point, setting aside the injunction:

the primary judge acknowledged that the orders sought involved ‘a drastic restriction’ on the husband’s freedom of movement ... Because the order was so drastic it was necessary that the findings which justified an order of this type were clear.

83 (2007) 38 Fam LR 315, 328 [57].

84 As required under *FLA* s 65DAA.

85 [2018] FamCAFC 12 (1 February 2018).

We have discussed the inconsistencies concerning the treatment of the proceeds of sale of Property D and land in India. We accept the submission by senior counsel for the husband that in deciding where the balance of convenience lay, it was necessary to give close attention to the capacity of the husband to make the payment. An order as draconian as this could not proceed on the fiction inherent in 'notional property' being available to make the payment. Indeed, whatever financial capacity the primary judge considered the husband may have was eroded by the spousal maintenance order he would go on to make. Unless this balancing exercise was properly undertaken, his Honour could not, as the provision requires, be satisfied that it would be 'just or convenient' for the orders to be made.

The injunctions made by his Honour had a significant and serious impact on the husband, operating to prevent him from leaving Australia for an indefinite period. In coming to that determination, the primary judge was obliged to balance the utility of the order against the possible detriment to the husband. As we said, this exercise required careful consideration by reference to clear findings of fact, in relation to those matters.

The drastic impact on the husband's freedom of movement thus had to be considered *in the context of* the facilitation of the property order. Orders restricting a person's freedom of movement are draconian, and so they can only be justified (if at all) when the facts particular to the matter at hand (be that enforcement of a property order, or the best interests of the child) are so unusual as to demand such an imposition.

So, in the end, while it appears there is a legitimate guideline being applied, we have confusion as to what amounts to a coercive order, in particular in regard to orders restraining moves (and arguably international relocations), and confusion as to what is required in the way of rare or exceptional circumstances. Let us turn now to the principles involved and consider whether the court *should* have a legitimate guideline in this area, and if so, what it should be.

C Should there be a legitimate guideline for relocation orders requiring 'rare' or 'extreme' factors?

The current discussion about legitimate guidelines arising from *Hoffman* presents an opportunity to reframe the thinking to date about relocation; that is, the court could consider explicitly crafting a relocation guideline and thus providing a more coherent, and principled, framework for relocation cases. There has been considerable critique over the years of decision-making in relocation cases, both in Australia and elsewhere,⁸⁶ with the extensive literature encompassing suggested approaches at every point on the spectrum

86 Lisa Young, 'Are Primary Resident Parents as free to move as Custodial Parents Were?' (1996) 11 *Australian Family Lawyer* 31; Juliet Behrens, 'A Feminist Perspective on B and B (The Family Court and Mobility)' (1997) 2 *Sister in Law* 65; Lisa Young, 'Resolving Relocation Disputes: The interventionist approach in Australia' (2011) 23 *Child and Family Law Quarterly* 203; Rae Kaspiew, 'Equal Parenting or the Effacement of Mothers: *B and B* and the Family Law Reform Act 1995 (Cth)' (1998) 12 *Australian Journal of Family Law* 69; Lisa Young, 'B and B: *Family Law Reform Act 1995* (Cth) — Relocating the Rights Debate' (1997) 21 *Melbourne University Law Review* 722; Carol S Bruch, 'The Use of Unpublished Opinions on Relocation Law by the California Courts of Appeal: Hiding the Evidence?' in J Erauw, V Tomljenovi and P Volken (eds), *Liber Memorialis Petar Šarčević: Universalism, Tradition and the Individual* (Sellier European Law Publishers, 2006) 225;

(from complete freedom of movement to near absolute restraint of movement). Presuming the court has the power to make such orders, we conclude there should be a guideline for relocation orders requiring rare or extreme circumstances. However, this guideline should operate in *all* 'relocation' cases. Any decision which impedes the freedom of movement of a parent — be it by restraining a desired move or forcing a move and whether on an interim or permanent basis — is coercive as to where that parent lives. In line with the approach in *Oswald*,⁸⁷ we suggest the court should normally adopt the position that parents are free to live where they wish, and decide the issue before the court, which is where the child should live.⁸⁸ But we accept there may be rare or exceptional circumstances — such as the example given above relating to a disabled child — where the child's best interests demand the court should consider making an order that is coercive as to where a parent lives.

Such an approach, applying to all relocation cases, would be a significant departure from the history of relocation decision-making in Australia, which has routinely seen orders requiring carer parents to stay where they are so that they can parent and facilitate parenting with the other parent. Such an approach would not amount to a presumption in favour of relocation. Any parent with care seeking an order to relocate with the child would have their case decided on the basis of the competing proposals in the different locations, which may result in a change of care. However, if the parent seeking a stay order was not a candidate for primary care, then such an approach would favour the freedom of movement of the primary carer parent. Similarly, the freedom of movement of 'left-behind' parents would be favoured also, as it would be extremely difficult to obtain an order requiring them to follow the moving parent.

As we have indicated above, the rare or exceptional circumstances should relate to the circumstances of the child. This is consistent with a principle that recognises restraint in making such injunctions such that they are no more than is required to meet the child's best interests; 'the justice or convenience of ... [a parenting] injunction is likely to be closely connected with the parenting orders made and the findings that underpin those orders'.⁸⁹

By way of example as to how this approach would work, take for example the recent case of *Wendland v Wendland*.⁹⁰ The mother in this case was in the Australian Defence Force ('ADF') and while on a posting near the home town of the father they formed a relationship in mid-2012. It was known the mother was to be posted to another town in late 2012 but before that occurred the

Richard Chisholm, '[934] To what extent can the court make orders that inhibit a parent's right to relocate?' (2008) 22 *Australian Journal of Family Law* 154; Merle H Weiner, 'Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation' (2007) 40 *University of California Davis Law Review* 1747; Carol Smart, 'Law's Truth: Women's Experience' in Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (Allen and Unwin, 1990) 7; Mark Heneghan, 'Relocation Cases — The Rhetoric and the Reality of a Child's Best Interests — A View from the Bottom of the World' (2011) 23 *Child and Family Law Quarterly* 226.

⁸⁷ *Oswald v Karrington* (2016) 55 Fam LR 344.

⁸⁸ See also Young, 'Resolving Relocation Disputes', above n 86.

⁸⁹ *Oakley v Millar* [2018] FamCAFC 47 (9 March 2018) [45]–[46].

⁹⁰ [2017] FCCA 2295 (8 September 2017).

mother discovered she was pregnant, and they then began cohabiting. The mother took maternity leave, then returned to work part-time and her reposting was at that time cancelled. It was understood while the parties were together that when the mother was finally posted somewhere else, they would move as a family. The couple married in late 2014 though by late 2015 they were 'emotionally' separated and physically separated in 2016 when the child was 3, the child living primarily with the mother. By mid-2016 it was known that the mother would be posted to another town in early 2017. The mother's proposal was that the child live with her and she be permitted to take the child wherever she was posted from time to time. The father proposed the child not be allowed to relocate and if the mother relocated the child live primarily with him. It appears, though was not directly stated in the decision, that if the mother was not permitted to take the child, she might consider leaving the ADF (which had been her life for many years) and remain. The mother in this case was the sole financial provider for the child. The expert evidence was that the father following the mother, or the mother giving up the ADF, would both compromise the respective parents' ability to parent.

In deciding what was clearly a difficult case, Judge Vasta said:

It does seem to me that if I accepted all of the submissions made of the father, it would be very hard to ever justify any child relocating from where the child grew up, especially if there is no risk to the child and especially if the presumption had not been displaced.

But Courts order relocations all the time, as long as such a relocation is in the best interests of the child.⁹¹

While Judge Vasta adopted a scrupulously child centred approach and paid real attention to the impact on the child of the mother being restrained and effectively forced to leave the ADF, given the father sought an order restraining the mother's relocation, Judge Vasta might, instead, have framed the question by first asking if there were any exceptional circumstances *relating to the child* which meant he should consider an order that was coercive as to where either parent lived. For example, there could be some particular reason (such as a medical condition) which meant movement associated with postings was harmful to the child. If the answer to that question were no, then the matter to be determined is simplified, being solely whether the child's interests were better served by a) living with the mother wherever she might happen to be and knowing she would move with new postings, or b) remaining with the father. The facts of this case then strongly favoured a decision in favour of the mother as primary carer; and indeed this was what Judge Vasta ordered.

We also accept that an argument might be made for a position which prefers a guideline that no parenting order should ever restrain a parent's freedom of movement, as the issue in dispute is where the child will live (thus fully respecting parental freedom of movement). One might think this amounts to an (impermissible) binding rule, in that it leaves no room at all for the exercise of judicial discretion on this point. We would argue this is not the case, because it is an approach that addresses the scope of the dispute. While

91 Ibid [80]–[81].

parenting orders can clearly constrain a range of parental activities that relate to parenting, the simple issue of a parent deciding where to live is not, strictly speaking, a matter relating to parental responsibility. Thus, it might be argued to be more a matter of statutory interpretation as to the scope of a parenting order, than an attempt to constrain discretion. If a parent chooses to live in a location that does not promote the child's best interests, then the court can take that into account when deciding where the child shall live. We accept this is an argument that can be further developed; we raise it because it is the other obvious guideline that respects parental rights to freedom of movement. Of course, there is a range of possible guidelines that might be much more restrictive of parental movement.

Whatever approach one considers appropriate, we can see no argument in favour of the current position, which treats only some orders as coercive. Our view stems in part from the impossibility of drawing that distinction with any clarity as shown by the confusion in the case law discussed above. The backdrop as to why parents are in a particular location, or wish to move, are so diverse that they are not susceptible of the simple classification that was suggested in *Sampson*.⁹² Further, the classic relocation case of old proves the point that the distinction drawn to date is arbitrary: it cannot be said that a preferred primary carer parent who concedes under pressure that they will not abandon their child has not been 'coerced' to stay in a location not of their choosing.⁹³

If, in the end, the court wishes to develop principles that impact on decision-making then it needs much greater clarity than has been achieved in relation to so-called 'coercive orders'.

Interim cases involving 'unilateral relocation'

As the phrase suggests, a unilateral relocation involves a parent taking the child/ren and moving away from the other parent without their consent. Is a judge's discretion in the case of a 'unilateral' interim relocation somehow constrained? That is, does a legitimate guideline operate in this situation? Some judges seem to think so.

The question of how interim relocation applications should be dealt with post the 2006 shared parenting reforms was considered by Boland J in *Morgan v Miles*:

It appears to me that the very difficult issues in cases involving a relocation, which difficulties are highlighted in the cases and referred to by the Family Law Council in its 2006 report *Relocation: a report to the Attorney-General prepared by the Family Law Council*, (Family Law Council of Australia, Barton, 2006) make it highly desirable that, *except in cases of emergency*, the arrangements which will be in the child's best interests should not be determined in an abridged interim hearing, and these are the type of cases in which the child's present stability may be

⁹² *Sampson v Hartnett [No 10]* (2007) 38 Fam LR 315, 328 [57].

⁹³ Of course, the dangers of a longstanding preferred primary carer standing their ground and not conceding they will stay if they lose the case are well illustrated by the decision in *Paget v Nicholson* [2016] FCCA 1059 (3 May 2016).

extremely relevant on an interim basis. It further appears to me the comments of Warnick J in *C and S* remain apt and relevant to determination of these cases.⁹⁴

However, the Full Court confirmed in 2012 in *Parks v Farmer*⁹⁵ that while ‘the comparative stability of the parties’ proposed arrangements for the child’ may be very significant, and courts do not condone unilateral relocations, such actions are but one of the factors which, by reference to the provisions of Part VII, are relevant to determining the child’s best interests on an interim basis. In other words, there is no legitimate guideline.

Despite the Full Court’s clarity in *Parks*, some first instance judges continued to refer to Boland J’s statement and decide the matter on the basis of whether or not an emergency exists. For example, the Full Court in 2015 in *Browne v Keith*⁹⁶ dealt with an appeal where the trial judge had said ‘the court should not readily grant interim relocations where there has been a unilateral relocation except in cases of emergency’. Upholding the appeal, the Full Court was clear (again) that nothing in the case law supported this statement.⁹⁷ And yet, some lower courts continue to cite *Morgan v Miles* with approval on this point, and impose a requirement of an emergency to avoid an interim return order for the parent having unilaterally relocated.⁹⁸

So, clearly there is no legitimate guideline here, though some judicial officers continue to refer, incorrectly, to Boland J’s statement and apply the law as if there is.

A final note: The gender factor

Parkinson has sought to argue that it is not necessarily, as many assert, mothers who are most adversely affected by relocation decision-making (that is, in having their freedom of movement restrained).⁹⁹ Parkinson’s claim has in turn been challenged.¹⁰⁰ For obvious reasons this is a significant point, as we must be vigilant about laws which appear neutral on their face but which have a discriminatory impact. This issue has been addressed in much relocation literature to date.

In this context, the review of the cases for this article identified a very interesting pattern. The first mention of coercive orders (though not named as such then) was in *U v U*;¹⁰¹ the point raised by a High Court judge there was whether a father might have been ordered to follow a mother who sought to relocate with the child. This issue was also raised in another High Court case,

94 (2007) 38 Fam LR 275, 292 [88] (emphasis added).

95 [2012] FamCAFC 12 (3 February 2012) [87]–[88] (*‘Parks’*).

96 (2015) 55 Fam LR 208, 213 [28].

97 *Ibid* 213 [29].

98 See, eg, *Veitch v Leslie* [2016] FCCA 844 (10 February 2016) [6] (Judge Brown); *Whitley v Mowle* [2015] FCCA 2326 (25 August 2015) [23]–[24] (Judge Harland); *Nicholson v Durham* [2015] FCCA 2026 (28 July 2015) (Judge Coker) (though the actual decision turned on whether there were rare circumstances warranting a coercive order to return); *Marcus v Ellis* [2014] FCCA 582 (25 March 2014) [134] (Judge Brown); *Ricks v Andre* [2017] FCCA 3159 (15 December 2017) (Judge Brown); *Pyne v Pyne* [2017] FCCA 3335 (2 November 2017) [9] (Judge Middleton).

99 Patrick Parkinson, ‘Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation’ (2008) 36 *Federal Law Review* 145, 165–7.

100 Young, ‘Australia: Revisiting relocation disputes’, above n 39, 27–33.

101 (2002) 211 CLR 238.

MRR v GR,¹⁰² where the mother argued the father could be ordered to return with her and the child to Sydney, rather than staying in Mount Isa where they had moved for his work. In neither case was the father ordered to move (indeed, in *U v U* no such order was sought). Later, it was established in *Sampson* that orders requiring parents to move in such circumstances could be made, and should be considered. At that time, the general thinking seemed to be that this might be utilised by mothers seeking to relocate and asking for the 'left-behind' fathers to come with them. While we did not search every relocation case (as our focus was on coercive relocation orders), it is notable that we did not identify any cases where a father was ordered to move to follow a relocating mother. What we did find, however, were cases where fathers sought orders that mothers be forced to relocate in quite surprising circumstances:

- *Seaward v MacDuff*,¹⁰³ where the father, having been released from prison, sought orders that the mother move back from Queensland where she had moved on remarrying while the father was in prison;
- *Petty v Crowley*,¹⁰⁴ where the father wanted the mother to follow him to another city where he was to be posted and was going to study. The father did not propose that the children live primarily with him;
- *Beeney v Jenner*,¹⁰⁵ where the father moved away from Queensland to Sydney and when the mother then moved to Melbourne he sought an order she be forced to move to Sydney. The father did not propose that the children live with him; and
- *Mosel v Frost*,¹⁰⁶ *Kuan v Toh*¹⁰⁷ and *Preiss v Preiss*,¹⁰⁸ all cases involving fathers seeking that mothers move with them overseas so the mother could continue parenting. In all of these cases, the father's ultimate proposal was not that the children live primarily with them.

Now, while the fathers in these cases were (unsurprisingly) not successful, the fact of these applications says something about the consequences of expanding relocation orders to include forcing parents to move to new destinations. Here we have a group of fathers who consider it appropriate that the child's mother be forced to move to suit their parenting needs, many of whom are not themselves intending to be a primary carer parent. Perhaps the high rate of self-represented litigants increases the chances of such cases reaching trial, but it is also possible the impact of the 2006 shared parenting reforms is somehow at work here. While the reforms were purportedly aimed at children's interests, any increase in a sense of paternal right to see children that may have followed might well lead to a conviction that there is merit in an order that compels a mother to relocate to a new place so that a father can participate in parenting a child. There is a wealth of literature on the way women's presumed roles as carer parents are constructed, and play out to their disadvantage, in law. It is striking to note that the development of the notion

102 (2010) 240 CLR 461.

103 [2013] FamCA 485 (19 June 2013).

104 [2016] FCCA 3169 (16 December 2016).

105 [2013] FCCA 1937 (20 November 2013).

106 [2015] FamCA 484 (18 June 2015).

107 (2016) FLC ¶93-717.

108 [2017] FamCA 12 (18 January 2017).

of ‘coercive’ orders has seen applications that seek to place even greater constraints on the lives of women, in the name of children’s best interests.

If the Full Court reconsiders its decision-making in this area, from a policy perspective this is a factor that needs to be considered, as however neutral a legal approach may appear, in application its consequences may be very gendered indeed. Some might argue the rise of applications such as those mentioned above, favours a conclusion that the correct approach is that the court should not make orders as to where parents live, but rather confine itself to deciding where, and with whom, children live and spend time. Otherwise, the result may always be that, ultimately, it is mothers who find themselves disproportionately disadvantaged, simply by virtue of their greater role in caring for children. Judge Harman, in refusing a very typical ‘relocation’ injunction — where the father sought to restrain the primary carer mother from moving about 2.5–3 hours drive away to be near her parents and new partner — had this to say:

The Court would fall into ... error ... by proceeding on the basis of determining the ‘*ideal*’ arrangement and then artificially and through use of the Court’s coercive powers creating circumstances (through restraint or injunction) to bring such ideal arrangements to bear.¹⁰⁹

A judge’s view of what might be ‘ideal’ for a child may well be influenced by normative understandings of family, that prioritise men as breadwinners and women as child carers. Rather, we should be asking of our judges that they fulfil their role as *dispute resolvers*, and in any relocation matter the real dispute is, in fact, with whom the child should live.

109 *Meredith v Meredith* [2015] FCCA 2152 (13 August 2015) [163].