

DISPUTED CHILD RELOCATION: WHY THE COURTS FIND IT SO DIFFICULT TO DECIDE

WHAT IS A RELOCATION DISPUTE?

The Principal Family Court Judge of New Zealand, Boshier P has described relocation cases as *“cases that involve two competent and committed parents, one with sound reasons for wishing to relocate, the other with valid reasons for resisting the application”*.¹

Relocation matters reflect the tension between the freedom of adults to beginning fresh chapters in their lives and start new relationships versus the fact that even though romantic relationships may be temporary and fleeting, parenthood is life long and enduring.²

A problem that our courts are confronted with more frequently than ever in the past is the contested relocation of children to another jurisdiction (city) or another country, to a degree due to the phenomena of internet dating, (which now allows people that are geographically far apart to commence relationships) and the exponential increase in cohabiting (“co-habitation”) relationships, which are more fragile and transient than marriage.

¹ Principal Family Court Judge of New Zealand, Boshier P “Have Judges been Missing the Point and allowing relocation Too Readily?” 2010 *Journal of Family Law Practice* 10.

² Parkinson P, Cashmore J & Single J at 1.

Post-divorce, or post a co-habitation relationship, parties need to adjust and reorganise their lives. The custodial parent may wish to move to another city, province or country, taking along the children in his care³. Domingo at 159 states some of the common reasons given for relocation are:

1. Availability of attractive employment opportunity for resident parent or their new spouse;
2. A loss of confidence in the country's economy;
3. The escalating crime rate;
4. Better education opportunities for the children;
5. Lack of family support at the current location.

The move affects the care and contact arrangement and the relationship between the non-relocating parent and the child and would require a change to the existing arrangement. The non-relocating parent objects to this, a dispute ensues and the courts have to adjudicate on this issue and give a decision.⁴

³ Domingo W "For the sake of the Children: South African Family Relocation Disputes" 2011 14 *PER/PELJ* 159 (hereafter "Domingo") at 159.

⁴ Stahl PM "Emerging Issues in Relocation Cases" 2013 25 *Journal of the American Academy of Matrimonial Lawyers* 425 (hereafter "Stahl") at 425, Andrews PD *Links Between International Abduction and Relocation: Moving Towards Like-mindedness in Relocation Disputes Internationally – Is it Time for a Protocol Regulating International Relocation Disputes?* LLM thesis University of the Western Cape 2012 (hereafter "Andrews thesis") at (iii) and 27.

It is accepted that relocation disputes are some of the most difficult cases that courts have to deal with in the area of family law.⁵ Relocation litigation is also expensive, unpredictable, increasing conflict and discouraging settlement.⁶

Even though relocation disputes are unpredictable, 4 common outcomes are identified:⁷

1. The relocation of parent and child are allowed;
2. The relocation is disallowed, the parent and child remain and the status quo is preserved;
3. The relocation is disallowed and the parent relocates without the child, the primary care and contact is transferred to the non – relocating parent;
4. The relocation is allowed and the non-relocating parent chooses to follow and themselves relocate.

Relocation matters have a low settlement possibility as little or no middle ground exists between the respective parents to reach a compromise. The outcome, whatever the court decides, is that one of the parents will be devastated as either the resident parent relocates or not.⁸ Non-custodial parents, usually fathers, are less willing to accept electronic communication such as webcams as an adequate substitute, as one father quoted, “I cannot hug a webcam”.⁹

⁵ Domingo at 148; Stahl at 440 with reference to Freeman M & Taylor N “the Reign of Payne 2” 2011 20 *Journal of Family Law & Practice*, Andrews thesis at (iii) and 27.

⁶ Thompson R “Presumptions, Burdens and Best Interest in Relocation Law” 2015 53 *Family Court Review* 40. Thompson argues that the pure “best interest” approach in relocation is a failure and proposes presumptions and burdens to guide best interest.

⁷ Andrews thesis at 54 with reference to Elrod LD “Moving on: The “Best interest of Children in Relocation Cases’ 2010 1 *Journal of Family Law and Practice* 51.

⁸ Parkinson, Cashmore & Single at 3

⁹ Parkinson, Cashmore & Single at 18, Stahl at 425.

The comparison between children whom are relocated and abducted are obvious, the child loses important relationships (with friends) and family (father, grandparents, aunts uncles nieces and nephews), only 1 parent is involved in the child's day to day life, the child needs to adapt to a whole new environment and set of circumstances and all of this post a period of high conflict in his family life. All of this will affect the child and the affects may not all be as positive as they are made out to be by the relocating parent.

HISTORY THROUGH CASE LAW:

In the older cases such as *Van Rooyen* and *Godbeer*¹⁰ the attitude of the court was pro-relocation ("custody approach") in that the resident parent could decide where the child lives unless the non-resident parent could prove that the relocation would be detrimental to the child. The view point was aligned to the traditional view of custody in that the rights and wishes of the resident parent (usually the mother) were seen as the most important in the settling of relocation disputes.¹¹ Traditionally, one parent had sole parental authority, to the exclusion of the other parent.¹² The father, whom was usually the parent that was left behind when the mother relocated with the children, would retract and only play a marginal role in the life of his children.¹³

¹⁰ *Van Rooyen v Van Rooyen* 1999 (4) Sa 435 (C); *Godbeer v Godbeer* 2000 (3) SA 976 (W).

¹¹ Albertus L "Relocation Disputes: Has the Long and Winding Road Come to an End? A South African Perspective" 2009 2 *Speculum Juris* 70 (hereafter "Albertus") at 71.

¹² Domingo at 156 with reference to Parkinson at 259.

¹³ Stahl at 426.

In time the traditional “custody approach” was replaced with the common law¹⁴ and Constitutional principle of the “best interest of the child”. The common law and Constitutional principle both prescribe that the best interest of the minor child must be the determinant factor in the adjudication of any matter concerning a child.¹⁵ Sec 7 of the Children’s Act has a lengthy lists of factors which needs to be considered when determining a child’s best interest.¹⁶

What exactly the “best interest” test is, is still elusive. In **Jackson** the test was stated in the negative, in that it was held that it would not be in the best interest of the children that the custodial parent be thwarted in their endeavour to emigrate, if the decision to do so was “reasonably and genuinely taken”.¹⁷

After the promulgation of the Children Act 38 of 2005, in **RC v CS**¹⁸ a contested relocation was dealt with in terms of an application in terms of section 18 of the Children’s Act. The applicant requested permission to permanently relocate with the minor child to France and the respondent had repeatedly refused. The court considered sections 7(1)(d), (e) and (f) of the Act.

¹⁴ **Shawzin v Laufer** 1968 (4) SA 657 (A) as discussed in Andrews thesis at 32, where the best interest principle was first raised.

¹⁵ **Jackson v Jackson** 2002 (2) SA 303 (SCA) at par 2.

¹⁶ Domingo at 151: These include the nature of the relationship between the child and parents (sec 7(1)(a)); the attitude of the parents towards the child and to the exercise of parental responsibilities and rights in respect of that child (sec 7(1)(b)); the likely effect on the child of changes circumstances such as separation from either or both parents, (sec 7(1)(d)); the need for the child to remain in the care of his or her parent, family or extended family and to maintain a connection with his or her culture or tradition (sec 7(1)(f)); the child’s age, maturity, stage of development, backgrounds, physical and emotional security and intellectual, emotional, social and cultural development (sec 7(1)(g) – (h)); and the need of the child to be brought up within a stable environment (sec 7(1)(k)).

¹⁷ See also **Godbeer v Godbeer** 2000 (3) SA 976 (W) and **F v F** 2006 (3) SA 42 (SCA) at 34.

¹⁸ **RC v CS** [2011] JOL 28064 (GSJ) as referred to in Andrews thesis at 34.

In **B v M**¹⁹ it was held that the best interest of the child principle is the paramount consideration within a hierarchy of factors, but not the only factor worthy of consideration. This can be interpreted as leaning more towards the “neutral position” where no presumptive right exists to either relocate or to block relocation. However, the mother was allowed to relocate and it will be argued that the application of the best interest of the child standard “test” leads to a maternal preference.

In **Cunningham v Pretorius**²⁰ Murphy J held that taking into account the new family law framework brought in by the Children’s Act, that when dealing with relocation disputes, the court requires an overall impression regarding the facts presented by the parties. Relevant facts and circumstances must be assessed in a balanced fashion, the court unilaterally delivering a finding of mixed fact and opinion. Finally, the court makes a structured value judgement about what it considers in the child’s best interest. The courts dealing with this matter as such would be considered to be in line with the neutral approach as advocated by the author.

The “reasonable person” test has also been used in an attempt to determine the best interest of the child in a relocation dispute, as per **AC v KC**²¹. It was held that the court *a quo* had adequately taken the section 7 factors to determine the best interest of the child into account. The court then went further and stated that upon the adequate application of the section 7 factors one final question then needed to be answered, “*Objectively viewed, was the decision taken by the mother to relocate a decision which a reasonable person would have taken?*”²². This view has been

¹⁹ **B v M** 2006 (3) All SA 109 (W) par 146.

²⁰ **Cunningham v Pretorius** 31187/08 2008 ZAGPHC 358 21 August 2008 (unreported).

²¹ **AC v KCA** 389/08 2008 ZAGPHC 369 16 June 2008 (unreported).

²² Par 15.

critiqued as it allows the best interest of the mother to usurp the best interest of the child.

Chetty J in the 2010 case of **HG v CG**,²³ is guided by the Constitution and the Children's Act, does not refer to any previous case on the relocation and heavily relies on the wishes of the children.

Following on from **B v S** the Natural Fathers of Children Born out of Wedlock Act was passed.²⁴ A father seeking to acquire rights in terms of this act had to, apply to court in terms of section 2 of the act. The court then, after considering a number of factors had to determine if it was in the child's best interest to permit the father to exercise such rights.²⁵ In terms of section 3 of the Act, after lodgement, the court or any party could request the Family Advocate to conduct an enquiry into the child's best interest. The Act was eventually repealed as being unconstitutional because it unfairly discriminated against fathers on the basis of sex and marital status and thus contra section 9, (the equality clause) of the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996.²⁶

²³ **HG v CG** 2010 (3) SA 352 (ECP)

²⁴ Natural Fathers of Children Born out of Wedlock Act 86 of 1997 (repealed).

²⁵ Section 2(1) read with sections 2(2) and 2(5). Paleker M "Mediation in South Africa's New Children's Act: A Pyrrhic Victory" Paper presented at Asia – Pacific Mediation Forum Conference, 2008 accessed at <http://asiapacificmediationforum.org/resources/2008/7> - on August 08 2018, (hereinafter referred to as "Paleker") at 5.

²⁶ Davel CJ and Skelton Am (eds) **Commentary on the Children's Act** Juta 2007 at 3 – 10.

CONCLUSION

Contested relocation disputes, due to the mobility of parents and internet dating will become more and prevalent and specific legislation needed.

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