South African Law Reform Commission

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Project 100D

RELOCATION OF FAMILIES WITH REFERENCE TO MINOR CHILDREN

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INTRODUCTION

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act, 1973 (Act No. 19 of 1973).

The members of the South African Law Reform Commission are as follows:

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The Secretary is Mr Nelson Tshisamphiri Matibe. The Commission's offices are situated at- 2007 Lenchen Avenue South, Centurion, Pretoria.

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Code of Alabama (2015)

Constitution of the Republic of South Africa, 1996

Family Law Act, 1975 (Act No.53 of 1975) (Australia)

Family Law Act, 1986 (Act No. 55 of 1986) (United Kingdom)

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PREFACE

The aim of this discussion paper is to elicit comments on the SALRC's preliminary findings and proposals as contained in the discussion paper. The discussion paper was developed to serve as a basis for the SALRC's further deliberations in the development of a report, which is the final document in this investigation. The views, conclusions and recommendations that are contained in this discussion paper should not be regarded as the SALRC's final views. The discussion paper, which includes the draft Children's Amendment Bill, 2021 ("the draft Bill") is published in full in order to provide persons and bodies wishing to make representations or comments with sufficient background information that would enable them to submit well-informed comments or representations to the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments or representations and attributing such comments or representations to respondents, unless the comments or representations are marked "confidential". However, even then, respondents should be aware that the SALRC may, in terms of the Promotion of Access to information Act, 2000 (Act No. 2 of 2000), be required to release information contained in representations or comments submitted to the SALRC. Respondents are requested to submit their written comments or representations to the SALRC by no later than **31 January 2022** at the address appearing on page ii of the discussion paper either by e-mail or ordinary mail.

The discussion paper is also available on the internet at-
http://salawreform.justice.gov.za/dpapers.htm

Enquiries should be addressed to Ms Aura Mngqibisa, who is the researcher allocated this investigation. The researcher's contact details appear on page ii of the discussion paper.

EXECUTIVE SUMMARY

Project 100D involves the development of an integrated approach to the resolution of family law disputes. Specific reference is made to disputes relating to the care of and contact with children after the relationship breakdown of the parents. The need has been identified to assist families with procedural issues arising out of separation, divorce and child welfare. This discussion paper forms part of the broader Project 100D and its scope is limited to relocation of families with reference to minor children.

There is a significant increase in the number of parents relocating or wishing to relocate with minor children to other parts of the world for different reasons. Some parents may wish to start a new life somewhere else after divorce or may wish to move back to their place of birth to live nearer to family members who may provide them with emotional, financial or any other form of support they may require after a process of separation or divorce. There are also those parents who relocate to join a new partner who is living outside the country or who is relocating to a new place outside the country. These are just few of the reasons why there is continuous increase in the number of parents relocating or wishing to relocate with minor children.

Relocation disputes normally arise where the parent (relocating parent) with whom the child resides wishes to move to another country and the other parent (non-relocating parent) with whom the child does not reside refuses consent for the removal of the child from the Republic in terms of section 18(3)(c)(iii) of the Children's Act 38 of 2005. The relocating parent may decide to approach the court to obtain an order to relocate with the child despite the refusal of consent of the non-relocating parent. The non-relocating parent may also approach the court for an order prohibiting the relocation. In the absence of legislative guidelines on relocation the courts, while making use of its discretion to decide such a dispute, are required to take cognisance of section 28(2) of the Constitution (principle of the best interest of the child) and also apply the factors outlined in section 7 of the Children's Act 38 of 2005.

Chapter 4 of the discussion paper discusses the different approaches that the courts adopt in settling relocation disputes in the absence of legislative relocation guidelines. Chapter 6 of the discussion paper contains a comparative study that looks at the different approaches that have been adopted by courts in other jurisdictions in settling relocation disputes. The three approaches that have been identified as having been commonly adopted by courts in settling relocation

disputes are – (a) Pro-relocation approach, (b) Neutral approach and (c) Anti-relocation approach. There is, however, no consistency in terms of application of these approaches by the courts. Safe to say the approaches are not watertight compartments and development is somewhat fluid. The SARLC is of the view that adopting legislative guidelines to guide relocation in South Africa will bring more certainty in this area of the law. Parents in a relocation process will know what to expect or do when involved in a relocation process. This will further reduce the number of relocation disputes that are taken to court for a decision. The proposals of the SALRC include the following:

- Co-parents must, prior to relocation, attend mediation in terms of the Family Dispute Resolution Bill, 2020. Issues affecting the children may be discussed and agreed upon in mediation, before the relocation;
- The term “relocation” must be defined so as to bring clarity as to what kind of move is considered a relocation in terms of the proposed legislation;
- Relocation must be categorised as follows: (a) national relocation with or without the child; (b) international relocation without the child; and (c) international relocation with the child;
- A notice of relocation must be served by all persons with responsibilities and rights of care of and / or contact with a child; and
- An additional list of relevant factors which parties and courts need to consider together with the factors set out in section 7 of the Children’s Act in order to determine if a proposed relocation is in the best interests of a child.

To give effect to all the proposals contained in this discussion paper, the draft Children’s Amendment Bill, 2021 has been prepared and it is attached to this discussion paper, as Annexure “A”.

CHAPTER 1: BACKGROUND

1.1 Customarily, relocation disputes arise where the parent with whom the child resides wishes to move to another country and the parent with whom the child does not reside refuses consent for the removal of the child from the Republic in terms of section 18(3)(c)(iii) of the Children's Act 38 of 2005.[1] However, for the purpose of this discussion paper, a relocation occurs where any person who is entitled to care for or contact with a child decides to leave the municipal area, province or country to live somewhere else with or without the child.[2]

1.2 Relocation disputes have been described as cases, which often involve two competent and committed parents, one with valid reasons for wishing to relocate and the other with equally valid reasons for resisting the relocation.[3]

1.3 Divorced parents need to adjust and rearrange their lives after a divorce.[4] A situation can therefore arise where one parent wishes to relocate to another city, province or country with the child in his or her care.[5] In similar vein, the parent with whom the child does not reside may wish to relocate to another city, province or country. Such relocation could affect the relationship between the child and his or her parents and would require a change in the parenting arrangements. Where a parent with whom the child resides wishes to relocate within the country or outside the country and the non-relocating parent with whom the child does not reside refuse to consent to the relocation, this would normally result in a dispute in which the High Court has to step in and give a decision.[6] Similarly, where a parent with whom a child does not reside wishes to move within the country or outside the country and the parent with

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1 Subject to subsection (4) and (5), a parent or another person who acts as a guardian of a child must-(iii) consent to the child's departure or removal from the Republic.

2 Skelton A (ed) "*Family Law in South Africa"* (2010) at 264.

3 Boshier P "Have Judges been missing the Point and Allowing Relocation Too Readily?" 2010 1 *Journal of Family Law Practice* 10.

4 Domingo W "For the Sake of the Children: South African Family Relocation Disputes" 2011 14 *PER/PELJ* 159 (hereafter "Domingo") at 159 refers to the following reasons sometimes given for relocating- (a) availability of attractive job opportunities in the country relocated to; (b) escalating crime rate in the country being relocated from; (c) availability of better education for the children in the country relocated to; and (d) lack of a family support system in the country relocated from.

5 Domingo at 148.

6 Stahl PM "Emerging Issues in Relocation Cases" 2013 25 *Journal of the American Academy, of Matrimonial Lawyers* (hereafter "Stahl") at 425; Andrews PD *Links between International Abduction and Relocation: Moving Towards Like*- LLM Thesis University of Western Cape 2012 (hereafter "Andrews's thesis") at (iii) and 27.

whom the child resides objects to the relocation, this could also lead to disputes where the child is affected.

1.4 Relocation disputes are among the most difficult cases that courts have to deal with in family matters.[7] The law relating to relocation has been described as unpredictable and expensive, increasing conflict and discouraging settlement.[8]

1.5 It stands to reason that, whether the courts allow or deny the relocation, one parent might be emotionally devastated. Despite this emotional devastation, and provided that both parents remain child-focused and support the child's relationship with the other parent, relocation may not be harmful to the child and in some instances may even be a positive experience for the child. However, relocation cases reflect the tension between the freedom of adults to leave a relationship and begin a new life for themselves, versus the harsh reality that while relationships may be dissoluble, parenthood is not.[9]

1.6 The reasons given for relocating often include matters such as the availability of attractive employment opportunities for either the relocating parent or his or her spouse in a new place of location. Other reasons for relocating may include a loss of confidence in the country's economy, escalating crime rate, lack of a family support system in the current place of residence[10] and the availability of better education and health care for the children in the place being relocated to.

1.7 Although it is hard to predict the outcome of a specific relocation dispute, the following four common outcomes have been identified in most relocation disputes:[11]

(a) the court allows the parent to relocate with the child;

(b) the court disallows the relocation request and the status quo is preserved because the parent decides not to move without the child;

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7 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.

8 Thompson R "Presumptions, Burdens and Best Interests in Relocation Law" 2015 53 *Family Court Review* 40. Thompson argues that the pure "best interests" approach to relocation is a failure and proposes presumptions and burdens to guide best interests.

9 Parkinson P, Cashmore J & Single J "The Need for Reality Testing in Relocation Cases" 2010 44 *Family Law Quarterly* 1 (hereafter "Parkinson, Cashmore & Single") at 1.

10 Domingo at 148.

11 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.

c) the court disallows the relocation request and the parent moves without the child, resulting in primary residency/care being transferred to the non-relocating parent; or

d) the relocation request is allowed and the other parent chooses to follow to the new place of relocation.

1.8 It has been argued that polarised views are not helpful in making relocation decisions in a given case. Relocation needs to be thought of within a risk context and within each case certain familial, residential and mobility factors may decrease or increase risk for resilience of a particular child. It is suggested that courts and care evaluators need to be open to the particular facts within each family that will help to determine the risk and protective factors that exist, rather than rely on rigid rules in solving these cases.[12]

1.9 Relocation disputes are seen as a growing problem with an increase in the number of parents living far apart from each other. This trend is attributed to, firstly, the relative fragility of cohabitation relationships, which have increased at an exponential rate compared with marriages. Secondly, there has been an increase in international mobility. Thirdly, due to internet dating, there has been a change in dating patterns and distance has become less of an obstacle to the development of new relationships.[13]

1.10 The reason for the low settlement rate in relocation disputes is attributed to the fact that little middle ground exists between the positions of the two parents on which to base a compromise. Either the relocating parent will move or not.[14] Nonetheless, there are some possibilities to improve the situation, such as sharing travelling costs to ensure future contact of the children with the non-relocating parent and accepting longer holiday contact periods for the non-relocating parent or delaying the relocation for a few years. However, not all these have been regarded as adequate substitutes for the experience of family life or regular visits in person. For example, a parent cannot hug a child via a webcam.[15]

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12 Stahl at 441.

13 Parkinson, Cashmore & Single at 3.

14 Parkinson, Cashmore & Single at 18; Stahl at 425.

15 Parkinson, Cashmore & Single at 19; Stahl at 441.

CHAPTER 2: BROAD HISTORICAL OVERVIEW

2.1 In older cases and prior to the promulgation of the Constitution of the Republic of South Africa, 1996[16] and the Children's Act,[17] the approach of our courts was seen as one favouring the parent with whom the child resides (usually the mother) above the parent with whom the child does not reside (usually the father). This approach was considered sympathetic towards the mother and traditional in the sense that it was in line with the tradition of granting custody (guardianship) (now termed "care") only to one parent (usually the mother) to the exclusion of the other parent.[18] Typically, the courts would allow the parent with whom the child resides to relocate to another country unless the other parent could prove that the relocation was motivated by a desire to defeat his or her right of contact with the child or that the relocation would be detrimental to the child's best interests.[19] The views and wishes of the parent with whom the child resides were considered paramount over those of the other parent with whom the child does not reside.[20] In determining the best interests of a child, much weight was attached to the wishes and feelings of the parent with whom the child resides, rather than engaging the best interests of the child as central to the enquiry.[21]

2.2 This traditional approach was not promoted in the case of ***Shawzin v Laufer***.[22] In this case, the court took the view that the best interests of the child should be the primary consideration in matters involving the child. Amongst the arguments that were advanced in support of the relocation by the applicant in this case was the point that the standard of living that the children will be exposed to in the country of relocation (Canada) was higher than the standard of living that was currently enjoyed by the children in South Africa. In determining the best interests of the children, *Rumpff, JA* rejected the applicant's argument on the possibility of an improved standard of living of the children on relocation and stated as follows:[23]

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16 Act 108 of 1996.

17 Act No. 38 of 205.

18 Domingo at 156 with reference to Parkinson at 259.

19 Boyd TM "The Determinants of the Child's Best Interests in Relocation Disputes" LLM mini-thesis, University of the Western Cape, 2015, at 39.

20 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.

21 Bonthuys E "Clean Breaks, Custody and Parents Right to Relocate" 2000 26 *SAJHR* 489.

22 1968 (4) SA 657 (A).

23 At 669 A-B.

> I do not think that to be able to live in affluence is of educative value to boys of that age; their education and happiness in these formative years depend, or should depend, on other things in life.

2.3 The appellant advanced the argument that if the relocation was allowed the children would not be raised according to their religious beliefs. The religious factor was not taken into consideration by the court in making its decision nor was it found to be material in the context of the best interests of the child test, which was applied to grant the relocation application.[24]

2.4 As far back as 1969, the principle of the child's best interests was described by our courts as a golden thread, which runs throughout the whole fabric of our law relating to children.[25] While there is no doubt about the importance of the "best interests of a child" as a guiding principle to be applied in matters involving children in relocation disputes, what remains a challenge is the fact that this principle is not defined in any legal instrument and for now its interpretation is left to the discretion of the courts.

2.5 Prior to the promulgation of the Constitution[26] and the Children's Act[27] a checklist of factors set out in the case of ***McCall v McCall***[28] was used to determine the best interests of a child in cases involving a child. In this case of **McCall**, the court pointed out that in determining what was in the best interests of a child the court must decide which of the parents is better able to promote and ensure the child's physical, moral, emotional and spiritual welfare; and that, this could be assessed by the application of certain factors or criteria such as the following:[29]

(a) the love, affection and other emotional ties which exist between the parent and child and the parent's compatibility with the child;
(b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
(c) the ability of the parent to communicate with the child and the parent's insight into understanding of sensitivity to the child's feelings;

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24 Albertus L and Sloth-Nielsen J "Relocation Decisions: Do Culture, Language and Religion Matter in the Rainbow Nation?" (2010) 1.2 *Journal of Family Law and Practice* 89.

25 Ferreira S "The best interests of the child: From complete indeterminacy to guidance by the Children's Act" (2010) 73 *THRHR* 202.

26 *Supra* at 2.1.

27 *Supra* at 2.1.

28 1994 (3) SA (3) SA 201 (C).

29 1994 (3) SA (3) SA 201 (C) p202.

(d) the capacity and disposition of the parent to give the child guidance, which he or she requires;
(e) the ability of the parent to provide for the basic physical needs of the child, the so-called “creature comforts” such as food, clothing, housing and other material needs;
(f) the ability of the parent to provide for the educational well-being, security and spiritual needs of the child, both religious and secular;
(g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development needs;
(h) the mental and physical health and moral fitness of the parent;
(i) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the status quo;
(j) the desirability or otherwise of keeping siblings together;
(k) the child’s preference, if the court was satisfied that in the particular circumstances the child’s preference should be taken into consideration;
(l) the desirability or otherwise of applying the doctrine of same-sex matching; and
(m) any other factor, which is relevant to the particular case with which the court is concerned.

2.6 With reference to the child’s preference ((k) above), if the court was satisfied that the child had the necessary intellectual and emotional maturity to give his / her expression of a preference and a genuine and accurate reflection of his / her feelings towards a relationship with each of his parents, the child’s preference would be taken into consideration.

2.7 With the coming into effect of the Constitution and the Children’s Act, the best interests of the child principle has been entrenched as the central enquiry in the adjudication of relocation disputes involving children.

CHAPTER 3: SOUTH AFRICAN LEGISLATIVE FRAMEWORK AND OTHER INTERNATIONAL INSTRUMENTS

A The Constitution of the Republic of South Africa, 1996

3.1 The Constitution entrenches the principle of the best interests of a child. Section 28(2) of the Constitution provides that -[30]

> A child's best interests are of paramount importance in every matter concerning the child.

3.2 The entrenchment of the principle of best interests of a child in the Constitution was largely welcomed by our courts, even though it is true that the principle remains vague in interpretation and application. In line with section 28(2) of the Constitution, it is now mandatory for courts to consider what is in the best interests of a child when taking decisions that involve children.

3.3 It is true that considering the wording used in section 28(2) of the Constitution, at face value, it appears as if the paramountcy of the child's best interest's principle can act as a "trump card", that outweigh all other competing rights in a particular case.[31]

3.4 The use of the term "paramount" in section 28(2) would seem to suggest that the best interests of a child supersedes other competing constitutional rights in a given case. *J Zermatten* suggests that such is not the case. He states as follows:[32]

> Indeed, this nuance means that in situations where a decision-maker (judiciary, administration, and legislator) is required to render a decision, particular importance must be attached to the best interests of the child. Consideration must also be given to all possible impacts of the decision on the child or group of children in question. That said, this interest will not necessarily usurp all the other interests in a case (for instance interests of the parents, other children, adults, public services or the State). This terminology implies that the best interests of the child will not always be the single,

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30 Section 28 of the Constitution, 1996 (Act No. 108 of 1996).

31 Skelton A (ed) *Family Law in South Africa* (2010) 241.

32 Zermatten J "The Best Interests of the child: Literal analysis, Function and Implementation" (2010) 18 *The International Journal of Children's Rights Volume* 18.

> overriding interest and that there may be other competing interests at stake. The child's best interests must be the subject of active consideration in such a way that there is a demonstration that the child's best interests have been explored and taken into account as a primary consideration.

3.5 Couzens summarises his view on the paramountcy of the best interests of the child principle, within the context of other competing rights, as follows:[33]

> Giving 'appropriate weight' to the best interests of the child does not mean that such interests trump all other legitimate interests. The Court has been clear that section 28(2) can be limited according to section 36 of the Constitution.

3.6 Section 28(2) requires that individual interests be safeguarded, including by enabling the delivery of child-centred remedies.[34] The Court pointed out in ***S v M (Centre for Child Law as Amicus Curiae)***[35] that –[36]

> … A more difficult problem is to establish an appropriate operational thrust for the paramountcy principle. The word 'paramount' is emphatic. Coupled with the far-reaching phrase 'in every matter concerning the child', and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children. This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of s 28(2). The problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests.

3.7 Literature on children's rights indicate that the best interests of the child principle fulfils three functions in the jurisprudence of the Constitutional Court: (a) as an interpretation tool for section 28(1) of the Constitution; (b) as a tool to establish the scope and potential limitations of other constitutional rights; and (c) as a right in itself.[37]

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33 Couzens M "The best interests of the child and the Constitutional Court: A critical appraisal" Constitutional Court Review Program, 2018 available at: http://www.wits.ac.za.

34 Couzens *supra* at 7.

35 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007).

36 *S v M supra* at par 19.

37 Couzens *supra* at 28.

3.8 It is clear that the rights of the child are not superior to other rights and they should not be, since that would represent reverse discrimination, which would be in conflict with other constitutional principles.[38] In relocation disputes, the courts are therefore expected to weigh the best interests of the child against the rights of the parents.[39] On the paramountcy of the principle of the best interests of a child *Van Der Schyff AJ* stated as follows:[40]

> The best interests of the child is to be pursued, not only because children constitute a vulnerable group which is entitled to special care and assistance, but because the 'protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities' and because children must be afforded the necessary protection and assistance to enable them to assume their responsibilities within the community. Children must thus be protected and assisted to facilitate the 'full and harmonious development' of their personalities and to grow up in a family environment and in an atmosphere of 'happiness, love and understanding'. The constitutional right of a child that his or her best interests are of paramount importance in every matter concerning the child, will thus be applied in the context of the specific matter at hand. The determination of the best interests of a pregnant minor who is considering the termination of the pregnancy will be substantially different from determining the best interests of a child whose parents are getting divorced when the issues to be determined revolve around care and contact and relocation.

3.9 The debate on what exactly is the meaning of the best interests of a child principle continues and in this regard in ***LW v DB*** [41] *Satchwell J* stated as follows:[42]

> However, some writers suggests that the principle (best interests of a child) has yet to acquire much specific content or to be a subject of any sustained analysis designed to shed light on its precise meaning. The result is that diverse interpretation may be given to the principle in different settings …

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38 Heaton J *South African Family law* 3ed (2010) 165.

39 Heaton J "An individualized, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" (2009) *Juridical Science Journal* Vol. 34 No.2 (2009) 34.

40 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC); 2007 (2) SACR 539M (CC) para 25.

41 2015 JR 2617 (GJ).

42 *LW v DB* 2015 JDR 2617 par 10.

B The Children's Act 38 of 2005

1 Part A

3.10 The Children's Act of 2005 introduced, amongst other things, a change in terminology in the area of child law. For example, the terms "custody" and "access" are now referred to as "care" and "contact", respectively. The meaning of the term "care" is broader than a mere capacity to have the child with, to control and supervise the child's daily activities as embodied in the term "custody". The term "care"[43] includes, *inter alia,* providing for the child; protecting the child; safeguarding and promoting the well-being of the child; maintaining a sound relationship with the child; and ensuring that the best interests of the child is the paramount concern in all matters affecting the child. The term "contact"[44] is defined as meaning, *inter alia,*

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[43] Section 1 **"care",** in relation to a child, includes, where appropriate -

(a) within available means, providing the child with -

(i) a suitable place to live;

(ii) living conditions that are conducive to the child's health, well-being and development; and

(iii) the necessary financial support;

(b) safeguarding and promoting the well-being of the child;

(c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;

(d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;

(e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;

(f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;

(g) guiding the behaviour of the child in a humane manner;

(h) maintaining a sound relationship with the child;

(i) accommodating any special needs that the child may have; and

(j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

[44] Section 1 **"contact"**, in relation to a child, means-

(a) maintaining a personal relationship with the child; and

(b) if the child lives with someone else -

(i) communication on a regular basis with the child in person, including -

(aa) visiting the child; or

(bb) being visited by the child; or

the maintaining of a personal relationship with a child, and on a regular basis if the child lives with someone else.

3.11 The careful introduction of certain new terms in the Children's Act indicates a preference for shared parenting and joint decision-making by the legislature to ensure the involvement of both parents in the life of a child. Furthermore, to decrease the disruption that comes with the alienation of one parent from the life of a child and the consequent emotional and behavioural tendencies that follow that. There is an apparent effort aimed at ensuring that a child is given a chance to live as much of a "normal life" as possible despite not being able to reside with both parents.

3.12 Section 9 of the Children's Act provides that in all matters concerning the care, protection and well-being of a child, the standard that the child's best interests is of paramount importance, must be applied.[45]

3.13 Section 7(1) of the Children's Act provides that whenever a provision of the Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration, where relevant:

(a) The nature of the personal relationship between -
    (i) the child and the parents, or any specific parent; and
    (ii) the child and any other care-giver or person relevant in those circumstances;
(b) The attitude of the parents, or any specific parent, towards -
    (i) the child; and
    (ii) the exercise of parental responsibilities and rights in respect of the child;
(c) The capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) The likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from -
    (i) both or either of the parents; or
    (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(ii) communication on a regular basis with the child in any other manner, including -

(aa) through the post; or;

(bb) by telephone or any other form of electronic communication

[45] Section (9) In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

(e) The practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) The need for the child –

  (i) to remain in the care of his or her parent, family and extended family; and

  (ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) The child's -

  (i) age, maturity and stage of development;

  (ii) gender;

  (iii) background; and

  (iv) any other relevant characteristics of the child;

(h) The child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) Any disability that a child may have;

(j) Any chronic illness from which a child may suffer;

(k) The need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) The need to protect the child from any physical or psychological harm that may be caused by -

  (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

  (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) Any family violence involving the child or a family member of the child; and

(n) Which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

3.14 In ***M v M***[46] the court pointed out that since each child's best interests are of paramount importance when the issue of primary residence, in the context of relocation, is decided, it is necessary to consider all factors set out in section 7 of the Children's Act[47] in such a case. The fact that a specific factor is not addressed in the relevant judgement should not mean that such a factor has not been considered.[48]

3.15 Section 18(1) and (2) makes provision for parental responsibilities and rights which a person may have either in full or specific to a matter, with respect to a child. Section 18(4) of the Children's Act stipulates that co-holders of guardianship over a child can exercise their parental responsibilities and rights independently and without the consent of the other guardian.

3.16 Nonetheless, for certain matters listed in section 18(3)(c) every guardian's consent must be obtained. Section 18(3)(c) (iii) and (iv) of the Children's Act provides that a parent or other person acting as guardian of a child must either grant or refuse consent to the child's departure or removal from the Republic and for the child's application for a passport.

3.17 However, in terms of section 18(5), a competent court may order otherwise if the consent of every guardian of a child has not been obtained for matters, which require every guardian's consent.

3.18 In the unreported case of ***KM v JW***[49] the applicant (mother) sought an order in terms of section 18(5) of the Children's Act, dispensing with the respondent's consent as envisaged in section 18(3)(c)(iii) and (iv). The applicant sought to relocate with the child to the Democratic Republic of Congo (DRC). The respondent (father) refused to grant the required consent for the removal of the child to the DRC. The court pointed out that the issue to be decided was whether the applicant had made out a proper case for the court to consent to the removal of the child to the DRC or show that the removal of the child to the DRC was reasonable and *bona fide.* The court found that the applicant had failed to provide sufficient details to the court to enable the court to decide whether the proposed relocation of the child to the DRC was reasonable and *bona fide.*[50]

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46 *M v M* (15986)/2015) [2018] ZAGPJHC 4 (22 January 2018).

47 Par 38.

48 Par 44.

49 Case No. 95071/2015 (Gauteng Division, Pretoria).

50 Par 24.

3.19 Furthermore, the court pointed out that it is important to consider whether the relocation will serve the best interests of the child.[51] The court considered the report of the Family Advocate which highlighted, *inter alia,* the fact that no proper consideration had been made by the applicant as to the circumstances in which the child was to live in the DRC. Furthermore, that the educational and safety and security needs of the child had not been taken into account in planning for the removal of the child to the DRC by the applicant.[52] The court took note of the fact that the Family Advocate's report revealed that there was no bond between the child and the applicant (as the child had for two years lived with the respondent).[53] The court further took note of the fact that no wrongdoing such as neglect or abuse of the child by the respondent had been brought to the attention of the court.[54] The court denied the application to dispense with consent in terms of section 18(3(c)(iii) and (iv) of the Children's Act.[55]

3.20 Furthermore, section 31(1) and (2) of the Children's Act, provides that a co-holder of parental responsibilities and rights must consult and give consideration to the views of other co-holders of parental responsibilities and rights as well as the views and wishes of a child, of a certain age, maturity and development stage before making any decision, which is likely to change significantly or to have a significantly adverse effect on the co-holders exercise of parental responsibilities and rights in respect of the child.

3.21 In the case of ***Joubert v Joubert***[56] the appellant contended that in terms of section 31(2) of the Children's Act, the respondent (mother) with whom the child resided was supposed to consult and give due considerations to his views and wishes before taking a decision to enrol the child in another school. The reason being that this decision was likely to change significantly, or to have a significant adverse effect, on the exercise of his parental rights and responsibilities towards the child. The court found that although the parent with whom the child resided had to, in terms of section 31 of the Children's Act, consult the parent who does not reside with the child concerning such a decision, this does not mean that the parent with whom the child resides, is bound to give effect to the views and wishes of the parent not residing with the child[57] after the required consultation.

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51 Par 28.

52 Par 31.

53 Par 28.

54 Par 33.

55 Par 35(1).

56 *Joubert v Joubert* 2008 JOL 219229 (C).

57 Par 35.

3.22 The court held that failure to inform or consult and give consideration to the views and wishes of the parent not residing with the child does not render void or invalid the decision of the parent with whom the child resides.[58] Additionally, the court held that failure to consult the parent not residing with the child as envisaged in section 31(2) of the Children's Act may subject the decision to relocate with the child to review, the determining factor being whether the decision is in the best interests of the child.[59] It is important to note that the *Joubert* case did not deal precisely with the issue of relocation, instead it dealt with a decision to enrol a child in a certain school without the consent of the parent not residing with the child.

3.23 Although relocation disputes have typically involved the situation where the parent with whom the child resides wishes to move to another country, it is clear that section 31 of the Children's Act also covers the situation where a parent wishes to move to another municipal area or province within South Africa.

3.24 Section 31(1) provides that before a person holding parental responsibilities and rights takes a decision (which affects contact between the child and a co-holder of parental responsibilities and rights or which is likely to significantly change, or to have an adverse effect on the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being) that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

3.25 Responses to the SARLC Issue Paper 31 indicate that the regulation of relocation should not only deal with international relocation but also with national (internal) relocation.

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58 Par 35.

59 Par 35.

Response to SALRC Issue Paper 31

Women's Legal Centre

Section 2.3.59 of the Issue Paper rightly acknowledges that relocation and abduction of a child are two sides of the same coin. For this reason, there must be consistent application of the law for both internal relocation and relocation abroad. Relocation within the Republic without the consent of a co-parent has the same impact on the child as relocation outside of the Republic but without the protections afforded by national and international legislation regarding child abduction. It is recommended that, save in situations where there is a domestic violence interdict in place, a parent must obtain the consent of the co-parent if they wish to relocate, whether it be within the Republic or abroad.

3.26 A case of relocation within the borders of the Republic was considered in ***LW v DB.***[60] The applicant (mother) sought for an order to move the child from the Vaal Triangle (Gauteng Province) to Cape Town (Western Cape Province). The court pointed out that relocation of parents, whether within or outside the borders of the Republic, necessarily involves continuing fragmentation of the original family unit with the associated distress of parents and children separated from each other and from familiar environments.[61]

3.27 The court noted that this case differs from the many relocation cases that have been decided by the courts in South Africa in that it deals with a relocation matter that involves a move within the borders of South Africa. Furthermore, that in this case the parents have joint care and contact in respect of the child, while many decided cases on relocation had involved a situation where one parent has the care of the child and the other a right of contact with the child.[62] Having said that, the court pointed that it would not be difficult to extract guidance from earlier decisions as such decisions are flexible and capable of adaptation to various circumstances.[63] The court identified the following guidelines as applicable to relocations:

(a) the interests of the children are the first and paramount;

(b) each case is to be decided on its own facts;

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60 2015 JR 2617 (GJ).

61 Par 13.

62 Par 16.

63 Par 17.

(c) both parents have a joint primary responsibility for raising the child where the parents are separated; the child has the right and the parents the responsibility to ensure that contact is maintained;

(d) where a parent with residence of child wishes to relocate, the court will not lightly refuse leave for the child to be taken out of the country if the decision of the parent with residence of child is reasonable and *bona fide*; and

(e) the courts have always been sensitive to the parent who is left behind. The degree of such sensitivity and the role it plays in determining the best interests of the child remain a vexed question.

3.28 The court found that there were no grounds proffered on which the court could conclude that the relocation is neither *bona fide* nor reasonable.[64] The court pointed out that it will not concern itself about the places, which are subject of the relocation. For example, whether the relocation is from England to South Africa or Canada to South Africa (international relocations) or Vaal Triangle to Cape Town (Internal relocation).[65] The court held that the proposed move to Cape Town was genuine and reasonable.[66] The relocation order was granted.[67]

3.29 A consideration of the case of ***LW v DB*** *supra* reveals that courts apply the same principles in both international and internal relocations. *Satchwell J* pointed out as follows:[68]

> Where a custodial parent wishes to emigrate, a court will not likely refuse leave for the children to be taken out of the country if the decision of the custodial parent is shown to be *bona fide* and reasonable.

3.30 Applying the same principles (*bona fide* and reasonable) which are considered by courts in deciding disputes in international relocations *Satchwell J* went on to consider whether the decision of the applicant to relocate to Cape Town from Vanderbijlpark was *bona fide* and reasonable.[69]

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64 Par 23.

65 Par 33.

66 Par 101.

67 Par 109 (1).

68 Par 20.

69 Par 23.

2 Part B: The Hague Convention on Civil Aspects of International Child Abduction

(a) Introduction

3.31 The Hague Convention on Civil Aspects of International Child Abduction ("the Hague Convention") is an international treaty aimed at preventing the removal of a child from the jurisdiction in which he or she normally resides by a parent or caregiver without the consent of the other parent or caregiver and to facilitate the return of the child wrongfully removed. South Africa ratified the Convention in 1996 and it came into operation on 1 October 1997. The Hague Convention is in force in the Republic and its provisions are law in the Republic, subject to the provisions of the Children's Act.[70] The provisions of the Hague Convention are contained in Schedule 2 of the Children's Act. The Hague Convection provides that the objects of the Convention are to-[71]

> (a) secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
> (b) ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contacting State.

3.32 The Hague Convention binds Contracting States to assist the parent or person left behind by providing a simplified procedure and additional remedies to those seeking the return of a child who has been wrongfully removed or retained.[72] The removal or the retention of a child is to be considered wrongful where -[73]

> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph (a*)* above, may arise by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

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70 Section 275 of the Children's Act.

71 Article 1.

72 Article 2.

73 Article 3.

3.33 In terms of Article 4, the Hague Convention applies to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights and shall cease to apply when the child attains the age of 16 years.

3.34 Article 12 provides that where a child has been wrongfully removed or retained in terms of article 3 of the Hague Convention and a period of less than a year has lapsed since the unlawful removal or retention, the authority concerned shall order the return of the child forth with, except-[74]

> (a) where there is a possibility of the minor child being fully integrated into the environment in the new country; and
> (b) where there is evidence that a period of more than one (1) year has elapsed since his / her removal from the previous country of residence.

3.35 Once the requirements with regard to the wrongfulness of the abduction as contemplated in Article 3 read with Article 4[75] are met, the child must be returned from the country from which she or he was removed, unless a defence provided in Article 13 and 20 is proven.

3.36 If the parent with whom a child resides decides to relocate with the child to another country without the consent of the other parent or in the absence of a court order granting leave to relocate with the child outside the borders of South Africa, the removal of the child is considered unlawful and amounts to abduction (kidnapping). If the wrongful removal of the child meets the elements of Article 3 read with Article 4 of the Hague Convention, the parent with whom the child does not reside may apply to the Central Authority of the Contracting State to which the child is retained, for the return of the child.

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[74] Article 12 of the Hague Convention "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is [demonstrated that the child is now settled in its new environment] [own emphasis]…".

[75] The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

3.37 The Office of the Family Advocate is the Central Authority for South Africa as contemplated in Article 6 of the Hague Convention.[76] The Central Authority of South Africa will liaise with the Central Authority of the country in which the abducted child is thought to be retained, to facilitate the return of the child.

3.38 If the abducted child is retained in a State, which is not a signatory to the Hague Convention, the parent remaining behind must seek private legal representation in the country where the child is retained to facilitate the return of the child.

(b) Defence on return or removal of child

3.39 A Contracting State may refuse to return a child where it is established that –[77]

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody (care) rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that the child's return will expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation.

3.40 An order for the return of a child may be refused if the child objects to being returned back to the requesting State and in such circumstances, the child ought to have attained an age and degree of maturity at which it is appropriate to take account of his or her views.[78]

3.41 Article 20 of the Hague Convention provides that a Contracting State may refuse the return of a child under the provisions of Article 12 if such an act shall result in violation of fundamental principles of the requested State with regard to the protection of human rights and fundamental freedoms (human rights).

(c) Relevant case law on the Hague Convention

3.42 In ***Sonderup v Tondelli and Another***[79] the mother of a child was granted an order by the court to remove the child for one month from British Colombia to South Africa. In

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76 Article (1) For the purposes of the Hague Convention on International Child Abduction, "Central Authority" - (a) in relation to the Republic, means the Chief Family Advocate appointed by the Minister for Justice and Constitutional Development in terms of the Mediation in Certain Divorce Matters Act; or Article 6- A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

77 Article 13.

78 Article 13.

79 2001 (1) SA 1171 (CC) para 12.

accordance to the court order the father of the child was to have custody of the child in the event that the child was not returned to British Colombia within the agreed upon time frames (one month). The mother did not return the child after the one month and the Supreme Court of British Columbia awarded the father sole custody of the child.[80] The father then petitioned for the return of the child under the Hague Convention and subsequent to that, the Central Authority of British Colombia sent a request to the Family Advocate in South Africa for the return of the child.[81]

3.43 The mother opposed the application of the Family Advocate for the return of the child to British Colombia. She argued that an order authorising the return of the child to British Colombia under the Hague Convention would amount to making an order in conflict with section 28(2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child. She argued that such a return would be against the child‘s best interests of the child. The court held that there is no conflict between the Hague Convention and section 28(2) of the Constitution, since under both instruments, the interests of children are of paramount importance in determining custody and access (care and contact) issues. Further, the court held that the Hague Convention is reconcilable with section 28(2) of the Constitution.[82]

3.44 Furthermore, the court decided that, given the evidence before it, it was not inconsistent with the child’s best interests that issues relating to the father‘s custody and access (care and contact) with the child be considered by the Supreme Court of British Columbia. The court granted an order for the return of the child to British Colombia.[83] The mother appealed to the Constitutional Court. The mother contended that the father did not possess any rights of custody (care and contact) with respect to the child, as contemplated in Article 3 of the Hague Convention and thus the removal of the child from British Columbia and her retention in South Africa was not wrongful. Furthermore, that there was a grave risk that the return of the child to British Colombia would expose her to physical and psychological harm. The court pointed out that the court has to decide on the following issues to arrive to a decision:[84]

(1) Whether the provisions of the Hague Convention apply in the present case;

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80 Par 8.

81 Par 9.

82 Par 17.

83 Par 18.

84 Par 19.

(2) If so, whether, as incorporated by the Children's Act, they are consistent with the Constitution; and

(3) Whether these provisions require the return of the child to British Colombia.

3.45 The court found that the applicant had not satisfied the grave risk requirement and further that it was in the best interests of the child to have the Supreme Court of Colombia determine questions relating to the child's future custody and guardianship.[85] The court ordered that the child be forthwith returned to British Colombia.[86]

3.46 In ***Pennello v Pennello and Another,***[87] a matter involving the wrongful removal of a child by the respondent (mother) as contemplated in Article 3 of the Hague Convention from New Jersey (United States of America), the place where the child was habitually residing together with the appellant (father) and the respondent before being wrongfully removed to South Africa, was heard by the Durban and Coast Local Division. On application of the father of the child, the Durban and Coast Local Division *(Pillay J)* ordered the return of the child to New Jersey (USA). With the leave of *Pillay J*, the respondent (mother) appealed against this order to the Full Court of the Natal Provincial Division and the appeal was upheld. The father then appealed against the judgment and order of the Full Court. The respondent entered a defence in terms of Article 13(b).[88]

3.47 The respondent described to the court in detail, *inter alia,* the volatile and aggressive nature of the applicant. On the respondent's version, the child had clearly been traumatised by the appellant's behaviour and as a result she displays this trauma in her interaction with other men. The respondent pleaded that, were the court to order the child's return to New Jersey and should she stay with her father, there would allegedly be a grave risk to her health, both physically and psychologically. Furthermore, that even if the respondent were to return with the child to New Jersey, the volatile relationship between the appellant and the respondent would still expose the child to serious psychological harm and place the child in an intolerable situation.

3.48 Relying on the judgment of the Constitutional Court in ***Sonderup v Tondelli and Another*** *supra*, the Court held that, once the appellant had established that the removal of

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85 Par 48.

86 Par 49.

87 (238/2003) [2003] ZASCA 147; [2004] 1 All SA 32 (SCA).

88 Article 13(b) states that requested State not bound to order return of child if existence of grave risk of physical or psychological harm, or that child would otherwise be placed in an intolerable situation.

the child was wrongful within the meaning of article 3 of the Hague Convention, which was done on the papers before the Court, the onus was then on the respondent to establish the defence on which she was relying in terms of article 13(b). *Pillay J* stated as follows:[89]

> The physical and verbal abuse, even on the respondent's version, appears to me to arise over apparently trivial disagreements and conduct which one or the other party finds offensive or unacceptable ... there are insufficient facts before this Court to justify a finding that the child would be placed in the intolerable situation or exposed to the grave risk of physical or psychological harm as the Respondent would have the Court find on the probabilities ... The reasons advanced by Respondent that she and the child would be exposed to physical and mental trauma if ordered to return to America, appear to arise out of her own reasons rather than out of fear of harm to the child.

3.49 Accordingly, the court ordered the summary return of the child to New Jersey, subject to relatively detailed conditions designed to protect the interests of the child pending the final adjudication and determination, by the New Jersey courts, of the issues of care of and contact with her.[90] The respondent filed an application in which she sought to have the matter remitted to the court *a quo* for the purpose of adducing further evidence.

3.50 On 10 October 2003, the respondent delivered another application for leave to adduce further evidence before the court, both by way of affidavit and documentary material (including all the documents, which she had previously sought to place before the Full Court). The respondent sought to cast doubt on the adequacy of the appellant's undertakings, as incorporated in the order made by the court of first instance, and on the appellant's ability and willingness to comply with such undertakings. Further, the respondent submitted that, in all probability, she would not be able to obtain employment should she return to New Jersey and would hence be unable to support herself financially.[91]

3.51 The court noted that a return order made under article 12 of the Hague Convention is an order for the return of the child in question to the Contracting State from which he or she was abducted, and not to the "left-behind" parent. The child is not, by virtue of a return order, removed from the care of one parent, or remanded to the care of the other parent.[92] The court found that the respondent has not established the defence envisaged by Article 13(b).[93] The

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89 Par 11.

90 Par 12

91 Par 23.

92 Par 53.

93 Par 57.

court ordered that the minor child be returned to New Jersey, United State of America forthwith.[94]

3.52 The article 20 defence is hardly raised in child abduction litigation cases because of the difficulty in proving it. In the Colombian case of ***Hazbun v Escaf*** [95] article 20 was raised as a defence in a child abduction case. The parents of the child married, lived and eventually divorced in Colombia. The First Family Court of Barranquilla, Colombia approved a custody (care) agreement providing that the child would reside with the mother and spend every other weekend with the father. Pursuant to the custody (care) agreement, the summer holidays were to be divided evenly with the child spending equal time with each parent. The father subsequently relocated to the United States of America (his country of birth) and the child on two occasions visited him there successfully. On the third visit and when the child was due to return to Colombia, the mother received an email from the father informing her that the child would not be returning to Colombia and a letter written by the child informing the mother that he wished to remain in the United States of America, to live with his father.

3.53 The mother immediately filed a Hague Convention Return Application with the Colombian Central Authority seeking for the return of the child to Colombia. At trial, the father offered various exhibits and the testimony of witnesses in an attempt to show (i) that the child would be in danger in Colombia, (ii) that Colombia's courts are corrupt and failed to provide due process, and (iii) that the child is mature and wishes to remain in the United States of America. The father's reliance on the article 20 defence to avoid the return of the child to Colombia was found to be unpersuasive.[96] Referring to article 20, the court stated as follows:[97]

> This seldom-cited and somewhat obscure provision was adopted as a compromise between those countries that wanted a public policy exception in the Convention and those that did not. It was meant to be restrictively interpreted and applied ... on the rare occasion that the return of a child would utterly shock the conscience of the court or offend all notions of due process. There is no record evidence that approaches this threshold. Thus, Article 20 has no application here.

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94 Par 62(1).

95 No. CIV.A. 01-1926-A.

96 Par 614.

97 Par 614.

3.54 The court found that the child was not yet mature nor sophisticated beyond his years, and that his reasons for remaining in the United Stated were more of suggestion and echoed manipulation.[98] An order for the return of the child to Colombia was granted.[99]

(d) Weaknesses of the Hague Convention

3.55 The most prominent weakness of the Hague Convention is that it does not provide for the sanctioning of non-compliance with the provisions of the Hague Convention by Contracting States. This gap opens the way for partial or complete violation of the rules, either as regards the requirements and the procedure, or even the denial of the return of the child retained in its territory, which directly affects the driving objective of the Hague Convention, which is to ensure the return of the child to his / her country of origin.[100] Penalising non-compliance would serve as a deterrent to non-compliance.

3.56 A second weakness of the Hague Convention relates to the fact that the term "habitually resident" is not defined in the Convention. As indicated above, Article 3(a) of the Hague Convention states as follows:

The removal or the retention of a child is to be considered wrongful where -

> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was **habitually resident** [own emphasis] immediately before the removal or retention

3.57 In the unreportable case of ***Central Authority of the Republic of South Africa v MA***[101] *Satchwell J,* referring to the uncertainty around the meaning of "habitual resident" of a child, stated as follows:[102]

> The approach to determination of '*habitual residence'* appears to be based either upon the life experiences of the child herself or the customary associations and intentions of the parents of the dependent child.

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98 Par 615.

99 Par 615.

100 Wilson B, Érico O and Yong W "The limitations of the Hague Convention to solve conflicts arising out of international child kidnapping" (2020) 16 (2) *CAPA* p223.

101 Case No: 11/39798 (2012/1096) Date: 20/03/2012.

102 Par 19

3.58 In the recent case of ***Central Authority for the Central Republic of South Africa and Another v C***[103] the court held as follows, concerning the interpretation of "habitual residence" of a child:[104]

> Three basic models of determining habitual residence of a child have developed from judicial interpretation of habitual residence, namely: the dependency model, the parental rights model and the child centred model. In terms of the dependency model, a child acquires the habitual residence of his or her custodians whether or not the child independently satisfies the criteria for acquisition of habitual residence in that country. The parental rights model proposes that habitual residence should be determined by the parent who has the right to determine where the child lives, irrespective of where the child actually lives. Where both parents have the right to determine where the child should live, neither may change the child's habitual residence without the consent of the other. In terms of the child-centred model, the habitual residence of a child depends on the child's connections or intentions and the child's habitual residence is defined as the place where the child has been physically present for an amount of time sufficient to form social, cultural, linguistic and other connections. South African Courts have adopted a hybrid of the models in determining habitual residence of children. It appears to be based upon the life experiences of the child and the intentions of the parents of the dependent child. The life experiences of the child include enquiries into whether the child has established a stable territorial link or whether the child has a factual connection to the state and knows something culturally, socially and linguistically. With very young children the habitual residence of the child is usually that of the custodian parent.

3.59 There are also problems with the structure of the defences in Article 13. Article 13(a) and (b) sets out two grounds of refusing to return a child even if the child was wrongfully removed.[105]

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103 (20/18381) [2020] ZAGPJHC 236 (15 September 2020).

104 Par 63.

105 Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

3.60 Article 13 provides further for an additional ground (a third ground) for refusing to return a child that has been wrongfully removed.[106] What is confusing here is the fact that this additional ground is not numbered and it is therefore left to the discretion of the judicial authority to decide whether this is a separate defence or not.

3.61 In ***Central Authority for the Republic of South Africa and J v B***[107] it was argued on behalf of the applicants that the part of Article 13 which is unnumbered and which relates to the child's objection to being returned to the habitual place of residence, does not constitute a separate defence and that a court may only refuse to order the return of the child if it finds that the child objects to being returned in circumstances where his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

3.62 Another weakness of the Hague Convention is identified in Article 20, which provides that the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. There is a subjective element in the interpretation of this provision as while the underlying principle of human rights may be the same, the interpretation given to each human right may, however, differ from jurisdiction to jurisdiction.

3.63 The Hague Convention has been found not completely dependable for the return of a wrongfully removed child for, *inter alia,* the following reasons:

1. Article 3(b) makes it impossible for a parent who may for any reason be not exercising his or her rights of custody (care) towards the child at the time of the abduction to petition for the return of the child under the Hague Convention. The SALRC is of the view that a parent of a child should be able to petition for the return of the child under the Hague Convention, if the child was removed (abducted) without that parent's consent.
2. Where a child is removed to a country that is not signatory to the Hague Convention, the Convention has no effect.
3. In some countries, notably South Africa, courts have found that the provisions of the Hague Convention may be overridden if the court in the country to which the child has been removed finds that it is in the child's best interests to remain in such country. For example, in *Central Authority for the Republic of South Africa and Another*

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106 The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

107 (2011/21074) [2011] ZAGPJHC 191; 2012 (2) SA 296 (GSJ); [2012] 3 ALL SA 95 (GSJ).

v LC[108] an application was brought in terms of Article 12 of the Hague Convention for the return of two minor children, aged 4 and 6, to the jurisdiction of Ontario, Canadian Central Authority. The court pointed out that - "Rigid enforcement of the Hague Convention provisions could lead to injustice in individual cases. As the upper guardian of minor children in its jurisdiction, the high court of South Africa should not excuse 5- itself from the obligation to protect the best interests of each individual child on the basis that international undertakings allow it to defer this responsibility".[109] The court took the view that once a defence is raised and the court in exercising its discretion to refuse or order the return of the child, the court may conduct an investigation into the best interests of the individual child concerned.[110] If the return of the child would not be in the best interests of the child, the court was is obliged to order the return of the child to the relevant country of the requesting Central Authority. The application for the return of the children was dismissed.[111]

4. In practice the implementation of the provisions of the Convention appears to be extremely protracted and cumbersome.

3.64 In the light of the above discussed shortcomings of the Hague Convention, specifically as highlighted in paragraph 3.63, it is clear that the Hague Convention, in some instances, cannot be relied upon for the return of an abducted child.

3 Other international legal instruments

(a) The Convention on the Rights of the Child

3.65 The Convention on the Rights of the Child (CRC)[112] has been hailed as a water shed in the history of children rights.[113] South Africa signed the CRC in January 1993 and ratified it on 16 June 1995. Article 3(1) of the CRC provides that the best interests of a child should be

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108 (20/18381) [2020] ZAGPJHC 236; 2021 (2) SA 471 (GJ) (15 September 2020).

109 Par 90.

110 Par 103

111 Par 13

112 Adopted by the UN General Assembly on 20 November 1989 and came into force on 2 September 1990.

113 J Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African Law" (1995) 11 (3) *South African Journal on Human Rights*, 35.

a primary consideration in all actions concerning children.[114] The principle of "best interests of a child" appears in Article 9(1) as well as in other provisions of the CRC.[115] Article 9(1) in short recognises that a child and her or his parents may become separated because of an official decision and that such decisions must take into account the best interests of the child.[116]

3.66 The "best interests of a child" principle is a fundamental legal principle of interpretation developed to limit the extent of adult authority over children (parents, professionals, teachers, medical doctors, judges, etc.). The principle is based upon the recognition that an adult is placed in a position to make decisions on behalf of a child because of the child's lack of experience and judgement.[117]

3.67 Article 3(1) refers to actions made by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies." Article 3(1) requires that active measures to protect the best interests of a child should be undertaken at all levels of government, by Parliament and the Judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests of child principle by systematically considering how the child's rights and interests are or will be affected by their decisions and actions**.**

(b) African Charter on the Rights and Welfare of the Child

3.68 The African Charter on the Rights and Welfare of the Child (ACRWC) is a regional human rights treaty that was adopted in 1990 and came into force in 1999. South Africa ratified the ACRWC in 2000. The main object of the ACRWC is to ensure that the rights of children are protected and fulfilled.[118] Article 1(3) of the ACRWC provides that any custom, tradition,

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Article 3(1) "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Article 9 provides that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Please check quotation – something is not right. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

116 J Zermatten "The Best Interests of the Child -Literal -Analysis, Function and Implementation" *The international Journal of Children's Rights* Volume 18(4) 483.

117 J Zermatten *supra.*

118 Article 2- Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.

cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the ACRWC shall, to the extent of such inconsistency, be discouraged.

3.69 The ACRWC should be seen as uniquely African in that it acknowledges the critical situation facing most children in Africa due to unique factors such as their socio-economic, cultural, traditional, and developmental circumstances. Other unique factors are natural disasters, armed conflicts, exploitation and hunger; and that because of children's physical and mental immaturity, they need special safeguards and care.[119]

3.70 The ACRWC recognises the principle of best interests of a child by providing as follows in Article 4(1):

> In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

3.71 Furthermore, Article 4(2) provides for the taking into consideration of the views of a child in decisions that will affect that child. Article 4(2) provides as follows:

> In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

3.72 The advent of the Charter recognised children as possessing rights and not merely that they are objects or extensions of their parents.[120]

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119 Lloyd A "The African Regional System for the Protection of Children's Rights'" in Sloth-Nielsen J (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 35 (extract from Boyd T "The Determinants of the Child's Best Interests in Relocation Disputes" LLM THESIS, University of the Western Cape, 2015 13.

120 Boyd T *supra* at page 14.

CHAPTER 4: JUDICIAL REVIEW: SOUTH AFRICA

4.1 In the absence of guidelines on relocation in South Africa, court judgments remain an important source of guidance in the settling of relocation disputes. The coming into effect of the Constitution had a definite impact on decision-making in relocation disputes by providing that in matters concerning children, the child's best interests shall be paramount.[121] Later in 2005, the Children's Act was promulgated. The Children's Act further enhanced the process of decision-making in relocation disputes. Section 7(1) sets out a list of factors to be considered by our courts in determining what would be in the best interests of a child in all disputes concerning children, including a relocation dispute. In this Chapter, case law is considered with a view of, *inter alia,* reflecting on the different approaches that have been adopted by our courts in settling disputes on relocation in the absence of a definite legislative framework dealing specifically with relocation.

4.2 While the process of adjudicating relocation disputes is clear in the application of section 28(2) of the Constitution and sections 7(1) and 9 of the Children's Act, what is not clear is whether the approach of the courts towards relocation disputes has changed since the coming into effect of these Acts and if so, in what direction? This Chapter will therefore endeavour to determine the development of the approach adopted by our courts in relocation disputes under the influence of the Constitution and the Children's Act.

4.3 One of the first cases that came before the court after the promulgation of the Constitution[122] is that of ***Van Rooyen v Van Rooyen***.[123] In this case the applicant (mother of the children) wished to move to Australia, her country of birth with the children after divorce. The father of the children refused to give his consent. *King DJP* pointed out that, in matters of relocation there are two preliminary issues which arise, which he stated as follows:[124]

> Turning to the application for relocation, two preliminary issues arise. The first relates to the approach of the court in matters of this nature. It is that there is no *onus* in the conventional sense. The court will evaluate, weigh and balance the many considerations and competing factors which are relevant to the decision whether the proposed change to the children's circumstances is in their best interests. The Court will make an assessment on the particular facts as they concern these particular children, in other words, it will apply individual justice in the sense that all the relevant

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121 Section 28(2) of the Constitution.

122 Constitution, 1996.

123 *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C).

> factors, even the mother's fundamental right to freedom of movement, will be assessed in the context of these children's best interests. The second preliminary consideration is the motivation of the mother. Is she genuine in her belief that her children's interests will best be served by a move to Australia or is she primarily influenced by vindictiveness and spite towards the father after what has undoubtedly been a hostile and antagonistic relationship during and after the marriage, centred after the divorce on the children? Because, if the mother is not *bona fide*, there is every reason to suppose that she will do what she can to frustrate the father's access, to his detriment and that of the children.

4.4 The court expressed the view that “all in all”, the children's lives will be more stable and secure than they are now if the mother is allowed to relocate. The court pointed out that it is trite that the interests of the children are all else being equal best served by the maintenance of a regular relationship with both parents. Sadly, however, children of divorced parents do not live in an ideal familial world and the circumstances necessitate that the best must be done in the children's interests to structure a situation whereby access by the parent without residence of the children is curtailed but contact between him and the children is effectively preserved.[125]

4.5 Further, the court pointed out that if the mother is to relocate, the position can be palliated and there will be less disruption to the children because of the generous allocation of block access, which is proposed.[126] Furthermore, the court pointed out that if this will happen and if the mother recognises and acknowledges the need and desirability of continued contact between the children and their father, the relocation will be in the children’s best interests. The court took the view that the mother’s desire to relocate was *bona fide*.[127]

4.6 In conclusion, the court stated that the decision in this matter was taken after considering the following competing factors and considerations:[128]

1. The decision reflects the court's view of what will best serve the interests of the children.
2. The mother's wish to relocate to Australia is bona fide and genuine.

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125 1999 (4) SA 345 (C) at 439.

126 1999 (4) SA 345 (C) at 440.

127 1999 (4) SA 345 (C) at 440D.

128 1999 (4) SA 345 (C) at 440.

3. There is a strong bond between the children and their mother who has, throughout their lives, she has been their primary caregiver and has shown herself to be a competent and caring mother.
4. The mother's arrangements and prospects in Australia are such that her situation will improve markedly and the present discontent and unhappiness will disappear.
5. The relocation will impact favourably on the children more particularly by reason of the removal of the strife between their parents which has undoubtedly affected them and there will be more effective parenting by the mother who will be at peace with herself and at home with her family.
6. The bond between the children and their father is strong and meaningful. He is a loving and concerned parent.
7. The loss of frequent and immediate contact between father and children will to an appreciable extent be ameliorated by the generous block access (and other arrangements) which will be afforded to the father and which he will be in a financial position to exercise.
8. No account has been taken of the alleged preferences of the children who are not sufficiently emotionally and intellectually mature to express an informed opinion.
9. The degree and permanency of the proposed material change in the children's circumstances and the concomitantly understanding.

4.7 The court found that the mother's wish to relocate is *bona fide* and genuine.[129] The court granted the mother's application to relocate with the children to Australia.[130]

4.8 In the case of ***Godbeer v Godbeer***[131] the applicant (mother) who was the parent residing with the children wished to relocate with her two minor children from South Africa to England. The father of the children refused to give consent for the relocation of the children. In coming to a decision *Nugent J* stated as follows:[132]

> I would be most hesitant to attempt to separate into separate boxes a mother's personal desires and wishes and those she holds for her children. More often than not they are intertwined, and I do not doubt that, that is so in the present case. In approaching the matter I am required to accord paramount consideration to the welfare

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129 1999 (4) SA345 (C) at 438G.

130 1999 (4) SA 345 (C) at 442 par 2.

131 2000 (3) SA 976 (W).

132 2000 (3) SA 976 (W) at 981.

> of the children (see *Bailey's 1979 (3) SA 128 (A) at 141H*) but that is itself a relative concept which can only be judged within the context of their particular circumstances.

4.9 The court found that both parents were not motivated by malice, ill will or bad faith in the approach they have taken in this matter.[133] The court emphasised that the applicant is the parent with residence of child and must therefore decide upon the circumstances in which she and the children should live, and that while the court is the upper guardian of all minors and may insist, in appropriate cases, upon limiting the freedom of choice of the parent with residency of the children that should not be translated into the court imposing its own subjective whims upon the children of the parties concerned.[134] The court further pointed out that it cannot be expected of the mother to "tailor her life" so as to ensure that the children and the father have ready access to one another. That such an expectation would be quite unrealistic.[135] The application for relocation with the children was granted.[136] The court adopted a pro-relocation approach in this case.

4.10 In another case of ***Jackson v Jackson***[137] the main issue to be decided was whether it was in the best interests of the children to immigrate with their father to Australia, leaving their mother behind in South Africa considering their young age. The appellant is the father of the minor children (two girls) and the respondent is the mother of the children. The court in this case noted that none of the parents exercised a greater care and contact role with the children than the other. The wish to relocate by the appellant was found to be *bona fide* and genuine but that was balanced against the interests of the non-relocating parent to reach a decision that was in in the best interests of the children. The court pointed out that the immediate, medium and long-term advantages to the children of emigration to Australia, as they appear from the detailed evidence given in this regard, are clearly established.[138] In a minority judgement, *Scott J* said the following:[139]

> It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is

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133 2000 (3) SA 976 (W) at 977 (I).

134 2000 (3) SA 976 (W) at 982.

135 2000 (3) SA 976 (W) at 982.

136 2000 (3) SA 976 (W) at 983(1).

137 2002 (2) SA 303 (SCA).

138 2002 (2) SA 303 (SCA) par 35.

139 2002 (2) SA 303 (SCA) par 36(2).

> shown to be *bona fide* and reasonable. But this is not because of the so called rights of the custodian parent; it is because, in most cases, even if the access by the noncustodial parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. However, what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same.

4.11 The appeal to relocate with children was allowed.[140] Again we see the court adopting a pro-relocation approach in this case. In the above extract *Scott J* says where, following a divorce, the custodian parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be *bona fide* and reasonable. Also that it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken.

4.12 In ***JP v JC***[141] the applicant (mother), sought an order of court authorising her to relocate to England with minor children in terms of section 18(5) of the Children's Act. The applicant stated that it is in the best interests of the children that she remains the primary care giver of the children and that the primary residency of the children should remain with her. The applicant alleged that she gets a lot of assistance from her parents (who were also relocating to the United Kingdom) including financial and transport assistance for the children.

4.13 The applicant further contended that the children have a close relationship with their maternal grandparents. On the other hand, the first respondent (father) alleged that the relocation is not *bona fide*, reasonable or genuinely taken. He alleged that his ability to spend time with the children will be severely curtailed and his right of contact with the children virtually nullified.

4.14 The court pointed out that the issues to be considered in this case were the following:

(a) Is the applicant's decision to relocate *bona fide* and reasonably and genuinely taken; and

(b) Is it in the best interests of the children to immigrate to England with the Applicant?

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140 2002 (2) SA 303 (SCA) par 36(2).

141 *JP v JC* (140572014) [2015] ZAKZDHC 73; [2016] 1 ALL SA 794 (KZD).

4.15 On the question of whether the applicant's decision to relocate was *bona fide* and reasonable, the court referred to the case of ***Jackson v Jackson*** supra where *Scott JA* stated as follows:[142]

> … Where the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be *bona fide* and reasonable….

4.16 The court pointed out that whether the relocation is in the best interests of a child, the court has to consider the parent with residence of the child, that is the reasonableness of her or his relocation, other practical consideration on which the decision is based and the extent to which the advantages and disadvantages of the relocation on the children have been thought through.[143] Overall, the court pointed out that in determining the best interests of the children the court must also determine which parent is better able to promote the physical, emotional and spiritual aspects of the children's lives. The applicant must demonstrate that the children's lives will be better off in England than in South Africa.[144] The court found that the applicant had demonstrated her capacity to provide for the needs of the children including securing a permanent residence for herself and the children thereby creating a stable environment for the children.[145] Madondo *J* concluded as follows:[146]

> I have no hesitation to conclude that, in my view the interests of the minor children will be best served by allowing the applicant to relocate with her minor children to England where they will be able to have a safe home environment and live a fulfilled life …

4.17 After careful consideration of all relevant factors the court held that the interests of the minor children will be best served by allowing the applicant to relocate with her minor children to England where they will be able to have a safe home environment and to live a fulfilled life.[147] The relocation application was allowed.[148]

4.18 The court quoted from ***Jackson v Jackson*** *supra* where it was stated that a custodian parent wishing to emigrate, must not be lightly refused consent by the court if the decision of

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142 *JP v JC* Par 36(2).

143 *JP v JC* par 38.

144 *JP v JC* par 40.

145 *JP v JC* par 43.

146 *JP v JC* par 48.

147 *JP v JC* par 48.

148 *JP v JC* par 49(2).

the parent is shown to be *bona fide* and reasonable[149]. The court followed the same pro-relocation approach that was adopted in ***Jackson v Jackson*** *supra.*

C Neutral Approach

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OFFICE OF THE FAMILY ADVOCATE

Considerations should be given to a more neutral approach. Each matter should be determined on its own merits. Cognizance should be given to the fact that in certain matters where courts have ordered in favour of international relocation, challenges arise in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

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Suggested that a neutral approach is preferable.

4.19 In ***Cunningham v Pretorius***[150] the mother of the child (applicant) who was also the parent with residence of the child wanted to relocate to the United States of America with the child. The relocation was on the basis that the mother wanted to be with her soon to be husband. The father of the child (respondent) refused consent for the relocation. The respondent was concerned about the strength of the relationship between the applicant and her soon to be husband.

4.20 The court, however, noted that the respondent has made no attempt to assail the *bona fides* of the applicant's reasons for wishing to relocate.[151] The court found that the applicant's decision to emigrate is not only *bona fide*, but also reasonable. Further that; that alone does not justify the granting of permission to relocate with the child.[152] Other considerations of the child's best interests remain that still need to be weighed; not least the competing advantages and disadvantages of the relocation and the impact on the relationship with the non-relocating parent. On the respondent's allegation that the applicant has consistently sought to frustrate

149 *Supra* at 144.

150 *Cunningham v Pretorius* [2008] ZAGPHC 258 (21 August 2008).

151 *Cunningham v Pretorius at* par 65.

152 *Cunningham v Pretorius at* par 69.

his access rights, the court found that the contact proposals put forward by the applicant in her prayer for amending the settlement agreement were reasonable.[153]

4.21 In conclusion, the court pointed out that having regard to the allegations and opinions advanced by the respondent, as well as the facts that were common cause, the court was of the view that it would be in the child's best interests to relocate with his mother. The court held that the applicant had made a reasonable and balanced judgment as to what she thought was best for her and the child.[154] The application to relocate with the child was granted.[155]

4.22 The court took a neutral approach by balancing the right of the mother to move on and start a new life at the tender age of 29 and the right of the father to have contact with the child. The contact arrangements made by the applicant were found to be sufficient.

4.23 In ***E v E***[156] the applicant (mother) had primary residency with the children and the respondent (father) had contact rights. The applicant relocated to Luxemburg and left the two children in the care of their father. The applicant sought an order allowing her to remove one of the children permanently from South Africa to live with her in Luxemburg. The respondent refused consent. The professional reports (including that of the Family Advocate) pointed out that the relocation would not be in the child's best interests. The court noted that nothing had been presented before the court to show that the respondent has not done a good job of caring for the child while the applicant was overseas. On the contrary, there was evidence that the child had improved remarkably in her schoolwork and earned an academic merit award and not all this happened when she was living with the applicant.[157]

4.24 The court pointed out that the relocation of the applicant with the minor child was not found to be unreasonable, but what was considered were the considerations on which her decision was based and the extent to which she had engaged with and properly thought through the real advantages and disadvantages for the child. The court concluded that it would not be in the best interests of the child to remove her from South Africa to live with the applicant

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153 *Cunningham v Pretorius at p*ar 75.

154 *Cunningham v Pretorius* at par 77.

155 *Cunningham v Pretorius* at p79.

156 *E v E* (3718/2013) [2014] ZAKZDHC 10 (26 March 2014).

157 *E v E* par 31.

in Luxemburg.[158] The court dismissed the application and held that the children should continue having primary residency with the father.[159]

4.25 The court took a neutral approach in this case. The relocation of the applicant on her own was not found to be unreasonable. However, all factors taken into consideration, the court found that allowing a removal of the child to Luxembourg will not be in the best interests of the child.

4.26 In the case of ***KM v JW***[160] the applicant (mother of child) relocated to the Democratic Republic of Congo (DRC) without the child, leaving the child in the care of the respondent (the father). When settled in the DRC she wished to have the child relocate to live with her in the DRC.

4.27 The court pointed out that whether or not relocation will be in the child's best interest the court must carefully evaluate, weigh and balance a myriad of competing factors, including the child's wishes in appropriate cases.[161] Our courts have always recognised and will not lightly interfere with the right of a parent who has properly been awarded custody to choose in a reasonable manner how to order his or her life.[162]

4.28 The court pointed out that the court, as the upper guardian of all minor children when dealing with matters affecting the child, must apply the standard of the best interests of a child.[163] Most importantly when dealing with cases of relocation of minor children it is important for the court to determine as to whether such relocation is reasonable, genuine and *bona fide* [164]and in the best interest of the minor child.

4.29 Therefore, the issue that arose for decision was whether the applicant had made out a proper case for the court to consent to the removal of the minor to stay with her in the DRC or whether the applicant has shown that the child's relocation to the DRC is reasonable and

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158 *E v E* par 32.

159 *E v E* par 35(2).

160 *KM v JW* Case No. 95071/2016 (not reportable).

161 *KM v JW* par 11.

162 *KM v JW* par 11.

163 *KM v JW* par 17.

164 *KM v JW* par 17.

bona fide and in the best interests of the child.[165] In this regard, the court considered certain such as the fact that the applicant had not lived with the child for two years out of his life of five years. Also it is not clear why she moved in haste to the DRC. Further, she did not disclose her income or how the relocation to the DRC has improved her financial position.

4.30 The court pointed out that for the two years the respondent had lived with the child he had been the *de facto* parent with residence of child. Furthermore, that consequently it is generally accepted that a parent with residence of child (*in casu* the respondent) has the right to have the child with him or her to regulate its life and to decide all questions of education, training and religious upbringing[166]. As to whether or not relocation would be in the child's best interests the court must carefully evaluate, weigh and balance a myriad of competing factors, including the child's wishes in appropriate cases.[167]

4.31 After considering all the relevant factors the court highlighted, *inter alia,* the following:[168]

(1) The minor child and the respondent created a strong bond between themselves since the applicant left the minor child in the care of the respondent in November 2015.
(2) The applicant's wish to relocate to DRC was not *bona fide* and genuine.
(3) The applicant failed to provide the court with the proper and detailed arrangements of the child when staying in DRC. Judicial notice is taken of the fact that the DRC is not politically stable and safe. Moreover, the court is in the dark as to the exact location of the applicant's residence in the DRC.
(4) Consequently, the application for the removal of the child to the DRC was dismissed.[169]

4.32 In the case of ***D v P***[170] the respondent (mother of child) wished to relocate nationally from Cape Town to Durban with a child. The applicant (father) sought an order restraining the respondent from relocating to Durban pending the finalisation of the assessment and recommendation by an expert and further relief flowing from the foregoing that would enable the court to determine definitively whether the intended relocation would be beneficial to the child. The court noted that the respondent had resigned from her employment, had sold her

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165 *KM v JW* par 18.

166 *KM v JW* par 27.

167 *KM v JW* par 27.

168 *KM v JW* par 32.

169 *KM v JW* par 34 (2).

170 *D v P* (82527/2016) [2016] ZAGPPHC 1078.

house and had packed all her belongings ready to move to Durban. The practical effect thereof being that should the court disallow the relocation the respondent would effectively be unemployed and homeless.[171] Although section 31(2) of the Children's Act obliges a parent holding parental responsibilities and rights in respect of a child to first consult with the other parent before taking a decision contemplated in section 31(1)(b) of the Children's Act, that did not happen in the present instance.

4.33 The respondent, whilst there were pending evaluations and therapy relating to the child, took the decision to relocate and, once all steps were completed in that regard, she merely advised the applicant of the relocation. Much was submitted on behalf of the respondent including the suggestion that should the respondent be denied the relocation, she would be depressed and the child would project the unhappiness of her mother towards the applicant. The court pointed out that most of the submissions were to serve the interests of the parents and not that of the child.[172]

4.34 The court was of the view that the concerns raised in the reports of the experts in relation to the child should be given consideration by the court. The court took into consideration the following factors:[173]

(a) the paramount consideration of the best interests of the minor child and in particular her tender age;
(b) the purpose of the relocation and in particular the irrational and inconsiderate manner in which decision was made;
(c) the respective interests of the relocating and non-relocating parent; and
(d) the views of the minor child in so far as it can be determined and as advanced by the *curatrix ad litem* in the present instance.

4.35 An order restraining the relocation was granted.[174] The court took a neutral approach in this case. The court pointed out that whilst good submissions serving the parents have been made, what is important is to consider the reports and recommendations of experts in respect of the child. When all was considered, the court took the view that it was not in the best interests of the child to move to Durban.[175]

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171 *D v P* at par 24.

172 *D v P at* par 42.

173 *D v P at* par 45.

174 *D v P at* par 45.

175 *D v P* par at 45.

4.36 In the recent case of ***P v P***[176] the applicant was the mother of the children and the respondent was the father. The applicant had primary residence with the children until the respondent applied for care of the children with an allegation that the applicant neglects them. On 5 December 2018 and by agreement the interim care application was postponed. On 20 March 2019, *Allie J* handed down judgment by which the respondent was authorised to have care of the children and to relocate with them to Alaska.[177] The mother (applicant) filed for an appeal against the decision of the trial court.

4.37 On appeal the court pointed out that-[178]

> [w]here a custodian parent wishes to emigrate with a child, the court will be slow to prohibit this if the wish to relocate is genuine and reasonable – not because this is a right of the custodian parent, but because generally the best interests of the child will not be served by thwarting the custodian parent's wish (*Jackson v Jackson* 2002 (2) SA 303 (SCA) at 318E-I; *F v F* [2006] 1 All SA 571 (SCA) paras 9-10). Any such decision must inevitably be subject to a careful and appropriate consideration of the best interests of the child, which must include a consideration of the nature and extent of contact possible with the non-custodian parent if relocation is permitted.

4.38 The court further pointed out that in matters concerning the best interests of children there is no onus "in the conventional sense".[179] The court needs to conducts an investigation into the matter, a process in which it may act more inquisitorially than would be acceptable in adversarial proceedings.[180] The court pointed out that since the respondent sought a variation of the divorce order, he needed (at trial court) to show on a balance of probability that this variation should be granted. In terms of the order under appeal, the applicant had primary care of the children and the respondent wanted the primary care transferred to him coupled with a right to relocate the children.[181] The court pointed out that-[182]

> Section 7(1)(d) requires a court, when applying the standard of the best interests of the child, to consider how a child will be affected by separation from a parent and by separation from a sibling.

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176 *P v P* (6743/2019) [2019] ZAWCH 174 [2020] 2 ALL SA.

177 *P v P* par 25.

178 *P v P* par 55.

179 *P v P* par 69.

180 *P v P* par 69.

181 *P v P* par 70.

182 *P v P* par 164.

4.39 Further, the judge stated as follows:[183]

> I think in this case that splitting for the next couple of years is the option to be preferred. It results in an older son going with his father and the two younger daughters remaining with their mother. With the litigation at an end, Larry will be relieved of the burden of trying to 'win the case' for his father and can become a child again. Temporary separation from his mother might be good for both of them, though steps will have to be taken to ensure that Ann's parental bond with him is not irretrievably severed…. Although the girls will be split from Larry, they will, in addition to the care they will receive from Ann, have each other.

4.40 The court noted that the views of the children were taken into consideration in this case.[184] The appeal was upheld.[185] The court, *inter alia,* held as follows:

> (a) Subject to the further provisions of the order, the parents remain co-guardians of the children as provided in sections 18(2)(c), 18(3), 18(4) and 18(5) of the Children's Act 38 of 2005[186].
> (b) Subject to the further provisions of this order, the parents remain co-holders of parental responsibilities and rights in respect of the children as referred to in sections 18(2)(a) and 18(2)(b) of the Children's Act.[187]

4.41 Furthermore, the court held that the boy (Larry) will relocate to reside with his father in Alaska[188] and the girls will remain and reside with their mother.[189]

4.42 The most recent judgements on relocation show a steady shift towards a neutral approach by our courts. While other competing proposals are considered, the central inquiry is the best interests of the child. In ***Cunningham v Pretorius***[190] the court pointed out that satisfying the requirements of *bona fide* and reasonableness is not sufficient. The court stated as follows:[191]

> That alone [*bona fide* and reasonable] does not justify the grant of permission. There remain other considerations of the child's best interests that still need to be weighed; not least the competing advantages and disadvantages of relocation and the impact on the relationship with the non-custodian parent...

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183 *P v P par 165.*

184 *P v P par 219.*

185 *P v P par 222(1).*

186 *P v P par 222(4).*

187 *P v P par 222(5).*

188 *P v P par 222 (10) and (11).*

189 *P v P par 222(18).*

190 *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 (21 August 2008).

191 *Cunningham v Pretorius* par 69.

4.43 In ***P v P*** *supra* the court pointed out that in matters concerning the best interests of children there is no onus “in the conventional sense” but that the court should conduct an investigation into the matter.[192]

D Summary of Guiding Factors: South Africa

4.44 The following are some of the factors which are highlighted in this Discussion Paper and which may or have been applied by courts in deciding relocation disputes. They mostly emanate from South African case law and scholastic articles:

1 W Domingo[193]

(a) The paramount consideration: "the best interest of the child"
(b) The purpose of relocating
(c) The interest of the relocating parent
(d) The interests of the non-relocating parent
(e) The relationship between the child/ren and parents
(f) The gendered nature of the roles within the post-divorce family
(g) The views of the child

2 LW v DB[194]

(a) The interests of the children are first and paramount;
(b) Each case is to be decided on its own facts;
(c) Both parents have a joint primary responsibility for raising the child where the parents are separated, the child has the right and the parents the responsibility to ensure that contact is maintained;
(d) Where a parent with residence of child wishes to relocate, a court will not lightly refuse leave for the children to be taken out of the country if the decision of the parent with residence of the child is reasonable and bona fide; and

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192 Par 188 and 189 (31187/08) [2008] ZAGPHC 258 (21 August 2008).

193 Domingo at 14.

194 2015 JR 2617 (GJ).

(e) The courts have always been sensitive to the parent who is left behind. The degree of such sensitivity and the role it plays in determining the best interests of the children remain a vexed question.

3 Van Rooyen v Van Rooyen[195]

(1) The mother's wish to relocate to Australia is bona fide and genuine.
(2) The strong bond between the children and their mother who has throughout their lives been their primary caregiver and has shown herself to be a competent and caring mother.
(3) The mother's arrangements and prospects in country of relocation i.e. that her situation will improve markedly and the present discontent and unhappiness will disappear.
(4) The relocation will impact favourably on the children more particularly by reason of the removal of the strife between their parents which has undoubtedly affected them and the more effective parenting which the mother, at peace with herself and at home with her family, will be able to give them.
(5) The bond between the children and their father is strong and meaningful. He is a loving and concerned parent and this will both increase the degree of deprivation which the children will experience and also impact adversely on the father.
(6) The loss of frequent and immediate contact between father and children will to an appreciable extent be ameliorated by the generous block access (and other arrangements) which will be afforded to the father and which he will be in a financial position to exercise.
(7) The degree and permanency of the proposed material change in the children's circumstances and the concomitantly understandable wishes and concerns of the father have of course received due consideration.

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195 1999 (4) SA 435 (C) at 440.

CHAPTER 5: PARENTING PLANS AS VEHICLE TO REGULATE RELOCATION

A Introduction

5.1 A parenting plan has been defined as a written agreement between the co-holders of parental responsibilities and rights that sets out in detail their respective rights and duties towards their children (with the aim of co-parenting with minimum conflict).[196] A parenting plan may include reasonable consistent routines and structures that need to be promoted in both homes by both parents so as to, *inter alia*, enable parents to continue with their lives while taking full responsibility for the children during their contact time.[197]

5.2 The concept of a parenting plan in South Africa was formally introduced by sections 33 and 34 of the Children's Act. Section 33(1) and (2) of the Children Act's provides as follows:

> (1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.
> (2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

5.3 In accordance with the wording of section 33(1) of the Children's Act, parents who are in agreement with regard to relevant issues of co-parenting of their children are not compelled to present a parenting plan. It is only when there are disagreements with regard to co-parenting measures that the Children's Act prescribes that parents, before seeking the intervention of a court, must first seek to agree on a parenting plan.[198] According to section 33(5) of the Children's Act: "In preparing a parenting plan as contemplated in subsection (2) the parties must seek-

> (a) the assistance of a family advocate, social worker or psychologist; or
> (b) mediation through a social worker or other suitably qualified person."

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196 Jaarsveld AW "Factors influencing the implementation of parenting plans in South Africa" LLD in Philosophy: Social Work Thesis, University of Pretoria, 2018 67.

197 Jaarsveld AW at p59.

198 Jaarsveld AW at p67.

5.4 Mediation therefore plays an important role in the creation of parenting plans between co-parents who are experiencing difficulties in agreeing on their respective parental responsibilities and rights as will be explained in paragraph 3 (5.13 to 5.18) below.

5.5 Section 33(3) of the Children's Act provides that a parenting plan may determine any matter in connection with parental responsibilities and rights, including -

(a) where and with whom the child is to live;
(b) the maintenance of the child;
(c) contact between the child and -
    (i) any of the parties; and
    (ii) any other person; and
(d) the schooling and religious upbringing of the child.

5.6 While not exhaustive, some of the matters that may be included in a parenting plan are the following:[199]

(a) who will have primary residence of the child;
(b) contact arrangements including how the child will be transported from one household to another;
(c) holiday schedules that will provide for how the child will go on holiday with each parent including the maximum number of days that may be spent with the child;
(d) access to school and medical reports by the non-resident parent so as to monitor the development and progress of the child and be involved where there is a need for intervention;
(e) preferred religion for the child;
(f) safety measures to be implemented by both parents to ensure the safety of the child;
(g) how to enforce discipline;
(h) decision-making and sharing of parenting;
(i) Manner of education, for example type of school to be attended, liability for school fees including tertiary fees;
(j) maintenance – contribution towards maintenance, and annual escalation;
(k) extramural activities;
(l) communication, consultation, information sharing and conflict resolution;

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199 Maree C "How to deal with the legal forms in a parenting plan and the Family Advocate's requirements with child participation" December 2018 *De Rebus* 36-37; Dunne K "What Must Be Included In My Parenting Plan?" October 2018 available at:https://koenigdunne.com/what-must-be-included-in-my-parenting-plan/#:~:text=%20Below%20are%2010%20items%20which%20must%20be,must%20list%20annual%20holidays%20and%20set...%20More%20.

(m) contact between parents to re-evaluate the parenting plan and to address the developmental needs of the minor child/children;
(n) provisions about re-evaluation;
(o) relocation: In South Africa: (Outside of the borders of South Africa- sole guardianship could be a requirement when relocating to certain countries);
(p) cultural heritage;
(q) contact with extended family; and
(r) details on changes to the parenting plan (When and How to effect changes).

5.7 Section 33(4) provides that a parenting plan must comply with the best interests of the child standard as set out in section 7 of the Children's Act.

5.8 Regulation 11, as prescribed by the Children's Act, deals with the participation of a child in preparation of parenting plans and states the following:

> (1) Bearing in mind the child's age, maturity and stage of development, such child must be consulted during the development of a parenting plan, and granted an opportunity to express his or her views, which must be accorded due consideration.
>
> (2) When a parenting plan has been agreed the child must, bearing in mind the child's age, maturity and stage of development, be informed of the contents of the parenting plan by the family advocate, a social worker, social service professional, psychologist, suitably qualified person or the child's legal representative.

5.9 Once the parenting plan is finalised and signed by both parents, it becomes a legally binding agreement. In terms of section 34(1)(b), a parenting plan may be registered with a family advocate or made an order of court. When additionally filed with the Family Advocate's Office or made an order of court, the family advocate or the court will peruse the agreement to determine compliance with the Children's Act and may recommend amendments if appropriate. It is also important to note that the parties to the agreement are allowed by the Children's Act to reassess the parenting plan from time to time in order to adapt to changing circumstances.[200]

5.10 Section 35 of the Children's Act[201] states amongst other things that it is a criminal offence to refuse or prevent a co-holder of parental responsibilities of rights to exercise such

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200 Section 34(4) and (5) of the Children's Act 38 of 2005.

201 Section 3(1) Any person having care or custody of a child who, contrary to an order of any court or to a parental responsibilities and rights agreement that has taken effect as contemplated in section 22(4), refuses another person who has access to that child or who holds parental responsibilities and rights in respect of that child in terms of that order or agreement to exercise

responsibilities and rights and may be liable on conviction to a fine or to imprisonment for a period not exceeding one year.

1 Advantages of Parenting Plan

5.11 A parenting plan assists parents in building a stable and respectful co-parenting relationship where they can communicate, negotiate and cooperate on the matters that affect their children. It enables the parents to work together to raise their children, manage expectations and minimise potential conflict between them and further protect the children's rights by prioritising their best interests.[202] Further advantages of a parenting plan are the following:[203]

(a) It creates a stable environment, which provides the children with a sense of security by discussing and agreeing on key issues in advance. This is turn makes more likely that expectations of all parties involved are met.

(b) It reduces future conflict in that points of contention are discussed and a way of dealing with them is included in the parental plan. Consequently, the reduction in conflict between parents and towards children may result in a stronger bond between the children and each parent.

(c) It can save time and money spent on litigation where there is disagreement in raising the children.

5.12 In the meantime, until we have legislation dealing specifically with relocation, (which will be addressed by the draft Children's Amendment Bill attached as Annexure "A" to this discussion paper), parenting plans can be used by co-parents to regulate relocation and set out the rules that will apply in the case of national and international relocation. A parenting plan should be clear and detailed, as well as contemplate any foreseeable points of contention

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such access or such responsibilities and rights or who prevents that person from exercising such access or such responsibilities and rights is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

(2) (a) A person having care or custody of a child whereby another person has access to that child or holds parental responsibilities and rights in respect of that child in terms of an order of any court or a parental responsibilities and rights agreement as contemplated in subsection (1) must upon any change in his or her residential address forthwith in writing notify such other person of such change.

(b) A person who fails to comply with paragraph (a) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

202 Law for all "Parenting Plans in South Africa" 2020 at http://www.lawforall.co.za.

203 Court coach, Ottawa, Ontario, Canada available at http://www.courtcoach.com.

between the parties because this can assist the parties in avoiding conflict in the future. Doing so will hopefully keep everyone out of court.[204]

5.13 As such, parenting plans can play an important role in relocation cases. A parenting plan may, as broadly provided in section 33(3) of the Children's Act, include provisions such as the following:

(a) no parent may move the children outside the borders Republic without the written consent of the other parent;
(b) the period of time within which the resident parent must inform the non-resident parent of the relocation;
(c) timely cooperation in assisting the other parent in making arrangements and applications for visas, passports;
(d) revised contact arrangements to ensure that a parent's total contact time with his or her children is not substantially reduced as a consequence of the relocation;
(e) visits of children to the non-resident parent;
(f) termination of the non-relocation parent's maintenance obligation in the event that the resident parent relocates with the children; and
(g) agreeing on the distance of relocation away from the non-resident parent.

2 Development of a parenting plan

5.14 As indicated above (para 2.4), mediation plays an important role in the development of a parenting plan between co-parents who are experiencing difficulties in agreeing on their respective parental responsibilities and rights.

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204 Gerhardt, Emerson, & Moodle Family Law, LLC, 27 February 2018 article available at: http://www.familylawco.com.

5.15 In terms of section 33(2) read with section 33(5) parties who are experiencing difficulties in agreeing on their respective parental responsibilities and rights must first seek to agree on a parenting plan by, *inter alia,* seeking mediation through a social worker or other suitably qualified person. It is apparent that the parties may not approach the court as a first resort for the resolution of their disputes. They must first attend mediation.

5.16 Family mediation is defined as "a process in which the mediator, an impartial third party who has no decision-making powers, facilitates negotiations between disputing parties with the object of getting them back on speaking terms and helping them to reach a mutually satisfactory settlement agreement that recognises the needs and rights of all family members."[205]

5.17 In terms of Project 100D, the bigger project of the Commission of which the current discussion paper forms part, mediation will become mandatory for any family law dispute before parties may approach the court [206] when the newly proposed Family Dispute Resolution Bill, 2020, which is set out at the end of Discussion Paper 148 of 2019, is enacted.

5.18 In the mediation process, the mediator will take into account the children's views and facilitate the parents' negotiations about their respective parental responsibilities and rights.

5.19 It appears that individualised parenting plans crafted in mediation often cater better for children's needs than the cookie-cutter solutions that a court would impose.[207]

3 Implementation of a parenting plan

5.20 In order to facilitate joint decision-making between parents in the best interest of their children and to sort out interpretation problems regarding parental responsibilities and rights as set out in parenting plans, a parenting coordinator can be appointed for co-parents.

5.21 Parenting coordination can be defined as a child-focused alternative dispute resolution process in which a health or legal professional, with mediation training and experience, assists high conflict parents to implement their parenting plan. This is done by facilitating the

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205 De Jong M "Child-informed mediation and parenting coordination" (Chapter 5) in Boezaart T (ed) *Child Law in South Africa* (2017) 136.

206 Clause 17 of the Family Dispute Resolution Bill, 2020.

207 MacBeth, *The Art of Family Mediation* (2010) 225.

resolution of their disputes in a timely manner, educating parents about children's needs, and with the prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.[208]

5.22 A parenting coordinator would first attempt to facilitate resolution of the parenting disputes by agreement of the parties, but if this attempt fails, the parenting coordinator has the power to make decisions or directives regarding the disputes, which are binding on the parties until a competent court directs otherwise or the parties jointly agree otherwise. It is apparent that a parenting coordinator's role includes the multiple functions of assessment, parent education, coaching, facilitation, intensive case management, mediation and decision-making.[209]

5.23 The role of a parenting coordinator is to put a parenting plan into effect. The parenting coordinator helps in the implementation of a parenting plan by, *inter alia,* making timely decisions relevant to the children's development.[210]

5.24 A parenting coordinator may be selected by the parents themselves or be appointed by a court and must preferably be accredited as such by the South African Association of Mediators (SAAM) or another member organisation of the National Accreditation Board for Family Mediators (NABFAM).

5.25 If co-parents are unable to reach agreement concerning an aspect where their mutual consent is required, or where they cannot agree on the interpretation of their parenting plan, then the dispute must be referred to the parenting coordinator in writing, who will attempt to resolve the dispute as speedily as possible and without recourse to litigation.

5.26 Parenting coordination contains aspects of both mediation and arbitration, with a certain amount of education or counselling added as well,[211] which means that parenting

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208 Association of Family and Conciliation Courts (AFCC) Guidelines for parenting coordination 2005 (hereafter referred to as "AFCC Guidelines 2005") at 2; see also Association of Family and Conciliation Courts (AFCC) Guidelines for parenting coordination 2019 (hereafter referred to as "AFCC Guidelines 2019") at 2 available at: wwww.afccnet.org.

209 De Jong M "Mediation and other appropriate forms of dispute resolution upon divorce" (chapter 13) in Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014) 615-616; De Jong M "Child-informed mediation and parenting coordination" (chapter 5) in Boezaart T (ed) *Child Law in South Africa* (2017) 159.

210 American Psychologist "Guidelines for the Practice of Parenting Coordination" American Psychological Association, January 2012 available at: http://www.apa.org.

211 AFCC Guidelines 2019 at 2.

coordination as such cannot be equated with either mediation or arbitration. Parenting coordination does not "fit" within the parameters of familiar ADR processes.[212]

5.27 Parenting coordination is also addressed in Project 100D, the bigger project of the Commission of which the current discussion paper forms part and included in the Family Dispute Resolution Bill, 2020. In terms hereof, the matters in respect of which a parenting coordinator may issue a directive include a child's daily routine. This includes the child's schedule in relation to parenting time or contact with the child, the education of a child and his or her participation in extracurricular activities and special events, and the temporary care of a child by a person other than the child's parents. Furthermore, this includes the provision of routine medical, dental or other health care to a child; the discipline of a child; the transport and exchange of a child for purposes of exercising parenting time or contact with the child; and any other matters agreed upon by the parties and the parenting coordinator.[213] However, because the court has the exclusive jurisdiction to determine the fundamental issues of guardianship, care, contact and maintenance,[214] a parenting coordinator may not make directives in respect of a change to guardianship of a child, a change to the allocation of parental responsibilities and rights, a substantial change to the parenting or contact with a child, the relocation of a child and the need for supervised contact by either parent.[215] A parenting coordinator may also not make directives in respect of the need for psychological or psychiatric treatment for either parent[216] or directives that would affect the division or possession of property or the apportionment of family debt.[217]

5.28 Although parenting coordinators may not make directives about the relocation of a child, they can nevertheless play a vital role in cases of relocation as they are allowed to make recommendations on relocation disputes.

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212 Montiel JT "Out on Limb: appointing parenting coordinator with decision making authority in the absence of a statute or rule *Family Law Court Review* 2015 at 377.

213 Clause 47(2)(*a*) of the Family Dispute Resolution Bill, 2020.

214 Clause 46.

215 Clause 47(2)(*b*)(i)-(vi).

216 Clause 47(2)(*b*)(vii).

217 Clause 48(1)(*b*).

CHAPTER 6: COMPARATIVE STUDY

A Introduction

6.1 The statutory frameworks governing the handling of relocation disputes by the courts vary from country to country, so, too, does the approach that is adopted by courts in determining the best interests of a child (child's welfare principle) in a relocation dispute. Some countries or states adopt a neutral approach to resolving relocation disputes (for example Australia and New Zealand), whereas others adopt either a pro-relocation approach (for example England) or an anti-relocation approach (for example Alabama and Pennsylvania in the United States of America). The approaches followed in the various countries are not watertight compartments and development are somewhat fluid.

1 Approach followed in the United Kingdom

6.2 The Children Act of 1989[218] of the United Kingdom (UK) provides that a child may not be removed from the UK permanently where there is a child arrangements order in place, without the consent of every person who has parental responsibility for the child or by leave of the court.[219] A child arrangements order is defined, in the Children and Families Act of 2014, as an order regulating arrangements relating to any of the following:[220]

(a) With whom a child is to live, spend time or otherwise have contact, and
(b) When a child is to live, spend time or otherwise have contact with any person.

6.3 The Children Act of 1989 defines parental responsibility as all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child or his or her property.[221]

6.4 Therefore, a parent with a child arrangements order who seeks to remove the child from the UK permanently can, with the written consent of the other parent or anyone else with parental responsibility, relocate with the child without the intervention of the court.

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218 Chapter 51.

219 Section 13(1)(b) of the Children Act of 1989.

220 Section 12(3) of the Children and Families Act of 2014.

221 Section 3(1) of the Children Act of 1989.

6.5 A parent with sole responsibility of a child can lawfully remove a child from the UK without permission from the other parent. However, the other parent who does not have parental responsibility may prevent the removal of a child from the jurisdiction by applying to the courts for a prohibited steps order.[222]

6.6 The Children Act of 1989 further provides that when a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration.[223] The welfare of the child principle was, in earlier cases, considered to be intrinsically linked to the welfare of the mother.

6.7 In ***Poel v Poel***[224], the mother had primary residence with the child and she wanted to relocate with the child to New Zealand to start a new life with her new husband. She applied to remove the child permanently from the UK. The court refused the application. She appealed the decision of the trial court judge and the appeal was upheld. On appeal, *Winn LJ* stated as follows:[225]

> I am very firmly of opinion that the child`s happiness is directly dependent not only upon the health and happiness of his own mother but upon her freedom from the very likely repercussions of an adverse character, which would result affecting her relations with her new husband and her ability to look after her family peacefully and in a psychological frame of ease, from the refusal of the permission to take this boy to New Zealand which I think quite clearly his welfare dictates.

6.8 The approach of the court in this case is founded on the principle, which links the welfare of the child principle with the welfare of the parent with primary residency of the child (usually the mother). That is to say, the welfare of the child cannot be established without reference and consideration to the welfare of the mother who has primary residency of the child. The view is that if the mother is well emotionally and psychological, the interests of the child will be served in that she will be strong enough to take care of the child.

6.9 This approach was further prompted in the case of ***Payne v Payne***.[226] This was an expedited appeal against the decision of the trial court, where the judge refused an application

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222 In terms of section 8(1) a prohibited steps order means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court.

223 Section 1(1)(a) of the Children Act of 1989.

224 [1970] 1 WLR 1469.

225 [1970] 1 WLR 1469 p 1473.

226 *Payne v Payne* [2001] EWCA Civ 166.

by the father for a residence order for a child and granted an application by the mother of the child to relocate from the UK to New Zealand with the child. The father of the child appealed the decision of the trial court.

6.10 On appeal, Lord Justice Thorpe pointed out that the following factors as sufficiently commonplace to enhance the utility of guidelines:[227]

> (a) The applicant is invariably the mother and the primary carer;
> (b) Generally the motivation for the move arises out of her remarriage or her urge to return home; and
> (c) The father's opposition is commonly founded on a resultant reduction in contact and influence.
> (d) The opportunity for continuing contact between the child and the parent left behind may be very significant.

6.11 The Lord Justice Thorpe pointed out that as a matter of experience the child cannot draw emotional and psychological security and stability from the dependency of a primary carer, unless the primary carer herself is emotionally and psychologically stable and secure, emphasizing that the parent cannot give what she herself lacks.[228] He further pointed out that in most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability.[229] Lord Justice Thorpe pointed out that –[230]

> … in suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.

6.12 *Dame Elizabeth Butler–Sloss P*, agreeing with Lord Justice Thorpe, referred to *Chamberlain v de la Mare*[231] where *Ormrod LJ*, stated as follows:[232]

> What Sachs LJ was saying (*Poel v Poel supra*), I think, is that if the court interferes with the way of life which the custodial parent is proposing and adopt so that he or she and the new spouse are compelled to adopt a manner of life which they do not want and reasonably do not want, the like hood is that the frustrations and bitterness which

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227 *Payne v Payne* par 25.

228 *Payne v Payne* par 31.

229 *Payne v Payne* par 32.

230 *Payne v Payne* par 41.

231 *Chamberlain v de la Mare* [1983] 4 FLR.

232 *Chamberlain v de la Mare* p 442.

> would result from such an interference with any adult whose career is at stake would be bound to overflow on the children.

6.13 *Dame Elizabeth Butler-Sloss P*, pointed out that in the present type of case the true balancing exercise (of interests) must take into account the effect on the children on the serious interference with the life of the custodial parent.[233] *Dame Elizabeth Butler-Sloss P*, stated further as follows:[234]

> … reasonable proposal made by the applicant parent, the refusal of which would have adverse effect upon the welfare of the child, continue to be of great weight… .

6.14 *Dame Elizabeth Butler-Sloss P*, further pointed out that a judge deciding a matter such as this one should consider and apply all the factors below:[235]

> (a) The welfare of the child is always paramount.
> (b) There is no presumption created by s 13(1)(b) in favour of the applicant parent.
> (c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
> (d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.
> (e) The effect on the applicant parent and the new child of the family of a refusal to leave is very important.
> (f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

6.15 The court, *inter alia,* held that reasonable proposals, of the parent with primary residence of the child, to relocate abroad carry a great weight.[236] The appeal was dismissed.[237]

6.16 Greater emphasis was placed on the mother's emotions and the effect of the refusal of the relocation application on her emotions and further, the subsequent effect of her emotional distress on the children in her care.

6.17 In ***Re Y*** *(Leave to remove from Jurisdiction)*[238] a shared residency order was made in August 2010; the effect of which was that the two children spent five nights with their father

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233 *Payne v Payne* par 71.

234 *Payne v Payne* par 84.

235 *Payne v Payne* par 86.

236 *Payne v Payne* par 85 (c).

237 *Payne v Payne* par 88.

238 *Re Y (Leave to remove from Jurisdiction)* [2004] 2 FLR 330.

and nine nights with their mother over the period of a fortnight. In January 2011, the mother made an application to relocate with the children to Canada. She argued that her health and well-being was suffering whilst she remained in England and she missed the support of her family. The court differentiated this case from other similar cases where the factors established in ***Payne*** *supra* were promoted.[239]

6.18 The court pointed out that in the decision of ***Payne*** *supra* the court had contemplated two different situations (a) the common one is where the child lives with one parent and that parent wishes to relocate and the other less common situation is (b) where the child's residence is shared between the parents equally or there is a real issue about where the child should live. The court further pointed out that in cases such as falling under (b) the factors established in ***Payne*** supra may carry less weight than those falling under (a). Justice Hedley concluded as follows:[240]

> In the end I have concluded that the welfare of this child compels me to refuse the mother´s application. In my judgment the cost to this child of such a move is too high. He is settled into a way of life in which he sees effectively an equal amount of both parents; in which he is a settled member of a school with a circle of friends and interests; he is a bilingual and bicultural child. A move to Texas would not mean the complete loss of all this -- of course it would not -- it would, however, involve a major disruption and a significant loss. In this respect I have tested my conclusion by asking myself what the position would be had the mother had a settled determination to return to Texas with or without Y. Even in those circumstances, great though the loss of his mother´s daily care would have been to him, I would still have concluded that Y´s greater loss would have been to have moved to Texas. In my judgment, when one looks at his position in Wales, what he has and what he would lose by moving, and then compares that with his position in Texas -- what he would have gained and what he would have lost -- at the very least I find myself forced to conclude that the course of less detriment is for him to continue to live in Wales.

6.19 It would therefore seem as if the defining aspect in this case was the fact that both parents had primary residence with the child and on equal basis. Unlike other similar cases that had been decided by the court, the court took the view that the principles applied in ***Payne*** *supra* were not applicable in this case which was influenced by the fact that the parents had a shared residency with the child. The distress principle equalling a happy mother to a happy child and *vice versa* could not be applied in this case. The court adopted a neutral approach to the relocation application. The court carefully weighed on all relevant factors including the

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239 Par 5.9 *supra Payne v Payne* par 86: (a) the welfare of the child is always paramount.

240 *Re Y* (Leave to Remove from the Jurisdiction) *supra* at par 23.

possible effect of the refusal of the application on the mother and decided that it would serve the welfare of the child to postpone the valid interests of both the parents and focus on what it considered to be serving the welfare of the child.

6.20 In ***K v K***[241] it was further confirmed that the factors established in ***Payne*** *supra* are not applicable to cases of shared residence. The father in this case applied for permission to appeal against an order granting a mother leave to remove the children to Canada in circumstances where the parents shared the care of the children. Lord Justice Thorpe stated as follows:[242]

> I fully concur with the reasoning and conclusion of Hedley J (in Re Y supra). What is significant is not the label "shared residence" because we see cases in which for a particular reason the label is attached to what is no more than a conventional contact order. What is significant is the practical arrangements for sharing the burden of care between two equally committed carers. Where each is providing a more or less equal proportion and one seeks to relocate externally then I am clear that the approach which I suggested in paragraph 40 in *Payne v. Payne* should not be utilised. The judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in section 1(3) of the Children Act 1989.

6.21 Lord Justice Thorpe further pointed out that the only principle to be extracted from ***Payne*** supra, is the paramountcy principle. All the rest is guidance as to factors to be weighted in search of the welfare of the child. While arriving to the same decision concerning the appeal, Black LJ supported by Moore-Bick LJ, disagreed with Lord Justice Thorpe that it was necessary that the principle set out in ***Payne*** *supra* should be completely set aside. *Moore-Bick LJ* stated as follows:[243]

> Payne therefore identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case. I do not see Hedley J's decision in Re Y as representative of a different line of authority from Payne, applicable where the child's care is shared between the parents as opposed to undertaken by one primary carer; I see it as a decision within the framework of which Payne is part. It exemplifies how the weight attached to the relevant factors alters depending upon the facts of the case.

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241 *K v K* [2011] EWCA Civ 793.

242 *Re Y* par 57.

243 *Ibid.*

6.22 As it appears in this case of ***K v K,*** the focus is on the issue of shared residency of the child and that alone seems to give more weight in favour of the non-relocating parent. It is not clear whether this is a progression from the ***Payne*** principle or a new kind of evil.

6.23 In the recent case of ***R*** *(A Child - Relocation)*[244] the mother applied to remove the child permanently to Hong Kong. The mother was made redundant in 2013 and stated that she needed to return to Hong Kong where she had received a job offer. The father of the child opposed the application and applied for a child arrangements order for the child to spend three nights each week with him. The court found that both parents were capable of raising the child physically and of giving him physical care and nurture.[245]

6.24 Furthermore, the court found that the mother was unable to recognise in any real way the value to the child of having his father in his life and to facilitate and encourage the relationship between father and child which was found by the court to be suggesting that there is a likelihood that the mother would in reality let the child's opportunities for continuing and developing his relationship with his father wither or even cease. The court weighed on the emotional harm on the child if his relationship with the father would cease.[246] The application to relocate was dismissed and the father's application for a child arrangements order was granted.[247]

6.25 The court pointed out that no evidence was presented or existed in proof of the mother's isolation or loneliness in England, a factor which in ***Payne*** *supra* and other similar cases prior to this one was accorded great weight creating a tipping of scales in favour of the relocating mother. This decision by the court makes it unclear as to whether the courts have departed from the *Payne* principle.

6.26 In another recent case of ***Re F*** (*Child-International Relocation)*[248] the mother applied for an order to remove the child from the UK and the father of the child applied for a child arrangements order regarding his contact with the child. The mother was granted the order to relocate with the child and the father appealed against the order. On appeal, the court pointed out that the approach to be taken in cases where one parent seeks permission to remove a

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244 *R (A Child - Relocation)* [2015] EWHC 456 (Fam).

245 *R (A Child - Relocation)* par 25.

246 *R (R (A Child - Relocation) A Child - Relocation)* par 82.

247 *R (A Child - Relocation)* par 85.

248 *Re F* (*Child-International Relocation)* [2015] EWCA Civ 882.

child permanently from the UK has been considered exhaustively in three leading authorities namely ***Payne***[249], ***K v K***[250] and ***Re F.***[251] The court pointed out that *Payne* is to be read in the context of these authorities and not in substitution for, or priority, over them.[252]

6.27 The court pointed out that ***K v K*** is now the starting point in deciding cases of removal of a child permanently from the UK. *Munby LJ* stated as follows:[253]

> … that the only principle to be applied when determining an application to remove a child permanently from the jurisdiction was that the welfare of the child was paramount and overbore all other considerations however powerful and reasonable they might be; that guidance given by the Court of Appeal as to factors to be weighed in search of the welfare paramountcy and which directed the exercise of the welfare discretion was valuable in so far as it helped judges to identify which factors were likely to be the most important and the weight which should generally be attached to them and promoted consistency in decision-making; but that (per Moore-Bick and Black LJJ), since the circumstances in which such decisions had to be made varied infinitely and the judge in each case had to be free to decide whatever was in the best interests of the child, such guidance should not be applied rigidly as if it contained principles from which no departure were permitted.

6.28 Furthermore, the court pointed out that the current approach to relocation cases is clearly summarised in ***Re F*** where *Munby LJ* stated as follows:

> "[37] There can be no presumptions in a case governed by s 1 of the Children Act 1989. From the beginning to the end the child's welfare is paramount and the evaluation of where the child's interests truly lie is to be determined having regard to the 'welfare checklist' in section 1(3)"
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> "[61] The focus from beginning to end must be on the child's best interests. The child's welfare is paramount. Every case must be determined having regards to the 'welfare checklist', though of course also having regard, where relevant and helpful, to such guidance as may have been given by this Court"

6.29 The court pointed out that where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary and further that the sophistication of that analysis will depend on the facts of the case. Each realistic option for the welfare of a child should be validly considered on its own internal merits (i.e. an analysis of the welfare factors

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249 *Payne* [2001] EWCA Civ 166.

250 *K v K* [2011] EWCA Civ 793.

251 *Re F* [2012] EWCA Civ 1364, [2013] I FLR 645 at 37.

252 *Re F* (*Child-International Relocation)* par 20.

253 *Re F* (*Child-International Relocation)* par 29.

relating to each option should be undertaken) which prevents one option (often in a relocation case the proposals from the absent or 'left behind' parent) from being side-lined in a linear analysis.[254] The court found that the judge's reliance upon the ***Payne*** discipline (at trial court) rather than a welfare analysis has led the judge into error, an error of substance not just form.[255] The appeal was allowed, setting aside the relocation and child arrangements orders and directing a re-hearing of the matter.[256]

6.30 In summary, it can be said that the principle in ***K v K***[257] promoted in ***Re F***[258] as discussed above is the starting point in relocation cases. In both cases, the welfare of the child was identified as the principal consideration that needs to be applicable in deciding relocation disputes and that every case must be determined having regards to the welfare checklist. The principle in ***Payne*** should be considered as part of the welfare analysis and should not to be made the central enquiry. Proposals of both parents should be carefully evaluated to determine what is in the best interests of a child.

6.31 Furthermore, it would seem from the case of ***Re F*** *(A Child) (International Relocation Cases)*[259] that there is a gentle shift from the pro-relocation approach, which was supported by the distress principle as enunciated in the case of ***Payne*** *supra*. The shift seems to be towards a neutral approach as courts begin to elevate the welfare of the child above the interests of the parent with residency of the child who wishes to relocate home for emotional support. It is, however, too early to conclude that the courts in the UK have altogether abandoned the pro-relocation approach in relocation disputes other than those involving shared residency of child.

6.32 A study of the case law on relocation in the UK reveals that the courts apply the same principles to internal relocation disputes as to external relocation disputes.

6.33 In ***Re H*** *(Children)(Residence Order)*[260] the father had care of the children (residence order) and he wished to move with them to Northern Ireland (within the UK). He was prohibited

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254 *Re F* (*Child-International Relocation)* par 30.

255 *Re F* (*Child-International Relocation)* par 41.

256 *Re F* (*Child-International Relocation)* par 42.

257 *Re F* (*Child-International Relocation* [2011] EWCA Civ 793.

258 *Re F* [2012] EWCA Civ 1364, [2013] I FLR 645 at 37.

259 *Re F (A Child)(International Relocation)* [2015] EWCA Civ 882.

260 *Re H (Children)(Residence Order)* [2001] EWCA Civ 1338 [2001] 2 FLR 1277.

from doing so. On appeal, the father (appellant) argued that since this was a matter of relocation within the United Kingdom, inferentially the decision was for him as he had care of the child and that he was under no obligation to seek and obtain a court order for the relocation.[261] Section 13(1)(b) of the Children Act of 1989 (UK) provides that where a child arrangements order, to which subsection (4) applies, is in force with respect to a child, no person may remove the child **from the United Kingdom** [**own emphasis],** without the written consent of every person who has parental responsibility for the child or the leave of the court.

6.34 *Thorpe LJ's* response to the submission of the appellant was that -[262]

> The relocation within the UK may be problematic, as this case illustrates. The parent with care rights to the child will give notice of an intended move. The court has power under section 8 of the Children Act of 1989 to make a prohibited steps order or to impose a condition under section 11 (7) to the care order. While the parent with care of the child has no obligation to apply under section 13(1)(b), he will still have the challenge to defeat an application for a prohibited steps order or for the imposition of a condition for the care order…In making its decision the court must always apply the welfare test as paramount, whether the relocation is external or internal.

6.35 It will appear from *Thorpe LJ's* statement above that the point he was trying to convey was that the cardinal point in relocation disputes whether internal or external is that the best interests of the children should be the primary point of consideration. The appeal was dismissed.[263]

6.36 In another case of ***Re C (Internal Relocation)***[264] the mother of the child applied for a specific issue order[265] permitting her to move with the child from London to Cumbria (within the UK). Her application to move with the child was granted. The father appealed the decision of the trial court. The Court of Appeal unanimously dismissed the father's appeal and provided some useful guidance as to the principles that should be applied to applications for internal relocation. *Black LJ* said the following:[266]

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261 *Re H* par 8.

262 *Re H* par 19.

263 *Re H* par 30.

264 *Re C* [2015] EWCA 1305.

265 Section 8(1) of the Children Act of 1989 (UK) "a specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

266 *Re C* par 19.

> The court pointed out that internal relocation cases and external (or international) relocation cases have historically been kept separate, the courts appearing to approach them differently. At first glance, this may not seem surprising given the provisions of section 13 of the Children Act 1989 (hereafter "the Act"). Where a child arrangements order is in force dealing with what would formerly have been called residence or contact, section 13 provides that no person may remove the child from the UK (other than for short periods) without either the written consent of every person who has parental responsibility or the leave of the court. There is no equivalent provision regulating moves within the UK; the freedom of a parent to move with the child will only be constrained if an order is made under section 8 of the Act, usually in these circumstances a prohibited steps order or a specific issue order. When one looks below the surface, however, the separate treatment of the two types of relocation begins to appear more questionable"

6.37 After a comprehensive review of the authorities, *Black LJ* confirmed that there is no distinction between cases involving the relocation of a child within the jurisdiction and those where a parent seeks to relocate with a child to another jurisdiction by stating as follows:[267]

> There is no doubt that it is the welfare principle in section 1(1) of the [Children Act 1989] which dictates the result in internal relocation cases, just as it is now acknowledged that it does in external relocation cases… I would not interpret the cases as imposing a supplementary requirement of exceptionality in internal relocation cases.

6.38 In this same case, *Bodey J* agreed with the decision of *Black LJ* and summarised the proper approach to relocation applications, *inter alia,* as follows:[268]

> 1. There is no difference in the basic approach between external relocation and internal relocation. The decision in either type of case hinges ultimately on the welfare of the child.
> 2. The wishes, feelings and interest of the parents and the likely impact of the decision on each of them are of great importance, but in the context of evaluating and determining the welfare of the child.
> 3. In either type of relocation case, external or internal, a Judge is likely to find helpful some or all of the considerations referred to in *Payne v Payne* [2001] 1 FLR 1052; but not as a prescriptive blueprint; rather and merely as a checklist of the sort of factors which will or may need to be weighed in the balance when determining which decision would better serve the welfare of the child.

6.39 The appeal was dismissed.[269] The court once again took the view that it is not so much about whether it is an internal or external relocation that should be considered but whether the relocation will be in the best interests of the child. Based on the cases discussed above, it can

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267 *Re C* par 50.

268 *Re C* par 85.

269 *Re C* par 85.

therefore be concluded that the UK apply the same approach in relocation disputes whether it's a case of internal or external relocation.

2 Approach followed in Australia

6.40 The Family Law Act, 1975[270] provides in section 60B (1)(a) that the objects of Part 7 of the Family Law Act of 1975, which deals with children, are to ensure that the best interests of children are met by ensuring that children have the benefit of both of their parents; having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child. Section 60B(2) provides that the principles underlying these objects are that (except when it is or would be contrary to a child's best interests)-

> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives);
> (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children;
> (d) parents should agree about the future parenting of their children; and
> (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

6.41 In terms of section 61DA, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child when it makes a parenting order in relation to a child. This presumption is rebutted if there is family violence or abuse as contemplated in section 61DA(2) or if it would not be in the best interest of the child for the child's parents to have equal shared parental responsibility as contemplated in section 61DA(4).

6.42 Section 65AA provides that the court must have regard to the best interests of the child as a paramount consideration when making a parenting order. If the presumption does apply, then the court must, in terms of section 65DAA, consider whether the child should spend equal time or substantial and significant time with each parent unless it is contrary to the child's best interests as a result of the court's consideration of the matters contained in section 60CC of the Act (the primary and additional considerations), and 65DAA(5) (whether it is reasonably

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270 Act 53 of 1975.

practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents).

6.43 The primary and additional considerations to be considered by the court in determining what is in the child's best interests, in terms of section 60CC subject to subsection (5) are as follows:

1 Primary considerations

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

2 Additional considerations

(a) 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;

(b) the nature of the relationship of the child with:

(i) each of the child's parents; and

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

(c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:

(i) to participate in making decisions about major long-term issues in relation to the child; and

(ii) to spend time with the child; and

(iii) to communicate with the child

(ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;

(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

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

(e) 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;

(f) 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

(g) 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;

(h) if the child is an Aboriginal child or a Torres Strait Islander child:

(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and

(ii) the likely impact any proposed parenting order under this Part will have on that right;

(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(j) any family violence involving the child or a member of the child's family;

(k) if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order, taking into account the following:

(i) the nature of the order;

(ii) the circumstances in which the order was made;

(iii) any evidence admitted in proceedings for the order;

(iv) any findings made by the court in, or in proceedings for, the order;

(v) any other relevant matter;

(l) 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; and

(m) any other fact or circumstance that the court thinks is relevant.

6.44 The primary considerations that the court may consider include reference to the benefit of the child having a meaningful relationship with both parents[271] and the nature of the relationship[272] of the child with each of the parents and other persons. For example, grandparents and relatives of the child and the willingness and ability of each of the child's parents to help and encourage a close and continuing relationship between the child and the other parent.[273] In addition, the court must consider the practical difficulty and expense of the child spending time with and communicating with the parent.[274]

6.45 The Family Law Act requires the court to have regard to "the need to protect the rights of children and to promote their welfare" in any matter with which it deals under the Act.[275]

6.46 In the case of ***A v A***[276] the mother sought a parenting order permitting the child to relocate with her to Portugal. The mother's appeal was allowed and the matter was remitted for rehearing.

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271 Section 60CC(2).

272 Section 60CC(3)(b).

273 Section 60CC(3)(c).

274 Section 60CC(3)(e).

275 Section 43.

276 (2000) FLC 93-035, Family Court of Australia, Full Court, 01 August 2000.

6.47 The court stated that the following binding principles of law that were established by a majority of the High Court in *AMS v AIF*; *AIF v AMS* applied:[277]

(a) 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.
(b) 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).

6.48 The court further pointed out that in determining a parenting case that involves a proposal to relocate the residence of a child, the evaluation of the competing proposals (properly identified) must weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child's best interests.[278] Furthermore, the court expressed the following guiding factor:[279]

6.49 In determining a parenting case that involves a proposal to relocate the residence of a child and which proposal best promotes the best interests of the child, it is necessary to follow the legislative directions espoused in s 60B and s 68F of the *Family Law Act* 1975 (Cth). The wording of s 68F(2) makes it clear that the court must consider the various matters set out in (a)-(l) of that subsection.

6.50 The court held that there is no onus on the relocating parent to present “compelling reasons” for the relocation.[280]

6.51 In summary, the court set out the following guidelines to guide on determining a parenting case that involves a proposal to relocate the residence of a child either within Australia or overseas:

> (a) 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.
> (b) 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

277 *AMS v AIF* (1999) 73 ALJR 927.

278 *A v A* par 71.

279 *A v A* par 72.

280 *A v A* par 97.

that the welfare of the child would be better promoted by maintenance of the existing circumstances.
(c) It is necessary for a court to evaluate each of the proposals advanced by the parties.
(d) A court cannot proceed to determine the issues in a way, which separates the issue of relocation from that of residence and the best interests of the child. There can be no dissection of the case into discrete issues, namely a primary issue as to who should have residence and a further or separate issue as to whether the relocation should be ”permitted".
(e) The evaluation of the competing proposals (properly identified) must weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child's best interests.
(f) It is necessary to follow the legislative directions espoused in sections 60B and 68F of the Family Law Act of 1975. The wording of section 68F (2) makes it clear that the court must consider the various matters set out in (a)-(l) of that subsection.
(g) The object and principles of section 60B provide guidance to a court's obligation to consider the matters in section 68F (2) that arise in the context of the particular case.
(h) It is to be expected that reasons for a decision will display three stages of analysis and:

1 A court will identify the relevant competing proposals;
2 For each relevant section 68F(2) factor, a court will set out the relevant evidence and the submissions with particular attention to how each proposal is said to have advantages and/or disadvantages for that factor and make findings on each factor as the court thinks fit having regard to section 60B;

(i) As one, but only one, of the matters considered under s 68F the reasons for the proposed relocation as they bear upon the child's best interests will be weighed with the other matters that are raised in the case, rather than treated as a separate issue[281].
(j) The ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges upon those interests then it must give way.
(k) Even where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves, despite the inevitable implications they have for the child's contact with, and access to, the other parent.
(l) On the basis of the prior steps of analysis, a court will determine and explain why one of the proposals is to be preferred, having regard to the principle that the child's best interests are the paramount but not sole consideration.

6.52 The process of evaluating the proposals must have regard to the following issues:

(a) None of the parties bears an onus:
In determining a parenting case that involves a proposal to relocate the residence of a child, neither the applicant nor the respondent bear the onus to establish that a proposed change to an existing situation or continuation of an existing situation will best promote the best interests of the child. That decision must be made having regard to the whole of the evidence relevant to the best interests of the child.[282]

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281 Par 9.63 of B: Family Law Reform Act 1995, is no longer an accurate statement of the law as new amendments to the Family Law Act has changed the format and section structure of the Act. The relevant sections should now be section 60CC and section 68F is no longer relevant.

282 *A v A* par 96.

b) The importance of a party's right to freedom of movement:

(i) In determining a parenting case that involves a proposal to relocate the residence of a child, care must be taken by a court to ensure that where applicable, it frames orders which in both form and substance are congruent with a party's rights under section 92 of the *Constitution*, where applicable.

(ii) In determining a parenting case that involves a proposal to relocate the residence of a child and in deciding what is in the best interests of the child, the court must consider the arrangements that each parent proposes for the child to maintain contact with the other and, if necessary, devise a regime which would adequately fulfil the child's rights to regular contact with a parent no longer living permanently in close physical proximity. If the Court is not satisfied that suitable arrangements have been made for the child to have contact with the other parent, it may be necessary for the Court to order a regime which would best meet the right of the child to know and have physical contact with both its parents.[283]

(c) Matters of weight should be explained:

(i) In determining a parenting case that involves a proposal to relocate the residence of a child, a court must consider all the relevant matters referred to in section 60B and section 68F (2)[284] and then indicate to which of those matters it has attached greater significance and how those relevant matters balance out.

(ii) In a parenting case that involves a proposal to relocate the residence of a child, no single factor should determine the issue of which proposal is preferred by a court.[285]

6.53 In the case of ***U v U***[286] the mother wished to relocate with her child and the father successfully opposed the relocation application. On appeal and in a minority judgement *Kirby J* pointed out that there is no presumption in favour of the parent with residence of child. He stated as follows:[287]

> In light of what was said in A v A, I want to make it clear that by referring to Gordon v Coertz in AMS, I did not embrace the minority view stated in that case in the Supreme Court of Canada. That was to the effect that there is a presumption of law that the custodial/residence parent has a right to reside where she or he decides unless good reason, relevant to the welfare or best interests of the child, can be shown to the contrary. Like the majority of the Supreme Court of Canada, I consider that such a presumption, elevated to a legal rule or invariable approach, would be incompatible with the statutory obligation to exercise the discretions involved having regard to an individualised assessment of the best interests of the child. I thought that I made this clear in AMS. I make it clear now.

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283 *A v A* par 108(3)(b).

284 Reference to these sections is not accurate as new amendments to the Family Law Act has changed the format and section structure of the Act. The relevant sections should now be section 60CC.

285 *A v A* par 108.

286 *U v U* [2002] HCA 36.

287 *U v U* par 157.

6.54 The courts' approach to relocation disputes in Australia is clearly neutral. There is no presumption in favour of relocation, and this is evident in the cases discussed above and more evidently in the judgment of Justice Jennifer Boland in the case ***Morgan v Miles.***[288] The judge stated as follows:[289]

> … There is nothing in the legislation which provides that a parent who has existing order which provides that the child spends fifty per cent or more of his or her time with that parent has a unilateral right to move the child, (on the basis that this is in the child's best interests). While such a move may, after exploring all relevant factors, be found to be in the child's best interests, those interests can only be determined by examination of the relevant factors in the structured exercise of discretion required by the legislation. It is illogical to suggest it is appropriate for an unauthorised unilateral move to occur, and that a court's discretion in determining a child's best interests, including time to be spent with the other parent, be inappropriately fettered by a move which has already occurred.

6.55 When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child in terms section 61DA(1).

6.56 In ***Taylor and Barker***[290] the court granted an order allowing the mother of a child to relocate with a child so that she could live with the father of her second child whom she wished to marry. The appeal court noted that the federal magistrate had considered one of the two primary considerations as set out section 60CC(1) (the benefit of the child having a meaningful relationship with both parents) and stated that the child would continue to have a meaningful relationship with his father "even if face-to-face contact is confined to school holidays".[291] *Bryant CJ* and *Faulks DC* stated as follows:[292]

> … any relocation proposal will then have to be balanced against the option of "equal time" or of "substantial and significant time", if either of those options has been found to be in the child's best interests, with the outcome normally emerging from a consideration of whether such an arrangement was "reasonably practicable*".*

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288 *Morgan v Miles* (2007) 38 Fam LR 275.

289 *Morgan v Miles* par 55.

290 *Taylor and Barker* [2007] FamCA 1246.

291 *Taylor and Barker* par 31.

292 *Taylor and Barker* par 81.

6.57 The Court found that the presumption of equal shared parental responsibility is 'the starting point for a consideration of the practicability of the child spending equal time with each of the parents'.[293] Further, *Bryant CJ* and *Faulks DC* pointed out that –[294]

> However consistently with what the Full Court said in Goode[295], the options of the child spending "equal time" or "substantial and significant time" with each parent must now be given separate and real consideration, notwithstanding that a relocation proposal may also have to be given subsequent consideration, with the advantages and disadvantages of that proposal then being balanced against the advantages and disadvantages of an "equal time" or "substantial and significant time" arrangement. Not to approach a case involving a relocation proposal in this way, would devalue the imperative imposed by the Act to consider whether it is in the best interest of a child in a case to spend "equal time" or "substantial and significant time" with each parent.

6.58 In ***Beaufort and Beaufort*****,**[296] the mother wished to relocate with the children from Sydney to Melbourne. The court heard that both parents had a close relationship with the children and, because of this close relationship, the court found that it was in the best interests of the children that they should live with their mother and spend substantial and significant time with their father.[297] The court concluded that the father would find it difficult to spend significant and substantial time (as defined in section 65DAA(3) with the children if the mother lived interstate and accordingly decided that the mother was to remain in Sydney with the children.[298]

6.59 It has been said that it is very difficult indeed to justify a relocation in Australia, where the child has a close relationship with both of the parents. This is because it is very difficult to justify a relocation as being in the best interests of the child if it is likely to result in the loss of significant involvement by one parent to whom the child has a close bond. Furthermore, it needs to be borne in mind that the court has a responsibility to ensure as far as possible the involvement of both parents in the children's lives in the absence of countervailing factors such as violence and abuse.

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293 *Taylor and Barker* par 65.

294 *Taylor and Barker* par 83.

295 In *Goode and Goode* (2006) 36 Fam LR par 65, the Court made orders that the child spend equal time with each of the parents if the mother remained in Mount Isa. In the event that the mother returned to Sydney, the child was to live with the father.

296 *Beaufort and Beaufort* (2009) FMCAfam 191.

297 *Beaufort and Beaufort* par 131.

298 *Beaufort and Beaufort* par 132.

6.60 This means that even where a relocation is permitted, there are likely to be significant requirements to maintain contact with the child, many of which will fall upon the relocating parent. This may make the prospect of relocation less attractive than it would otherwise be.[299] Having said that the cases discussed above seem to suggest that the courts in Australia tend to lean towards a neutral approach (not an anti-relocation approach) in settling relocation disputes.

3 Approach followed in New Zealand

6.61 Section 4(1) of the New Zealand's Care of Children Act, 2004[300] provides that the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration in —

> (a) the administration and application of the Act, for example, in proceedings under the Act; and
> (b) any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

6.62 Section 4(4)(b) provides for the consideration of any relevant matters in determining the child's welfare and best interests.

6.63 Section 5 of the Care of Children Act, 2004, list the following principles that have to be considered by the court in determining what would be in the child's best interests in each relevant case:

> (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act of 2018) from all persons, including members of the child's family and, family group;
> (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians;
> (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
> (d) a child should have continuity in his or her care, development, and upbringing;
> (e) a child should continue to have a relationship with both of his or her parents, and the child's relationship with his or her family group should be preserved and strengthened; and

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Online article: Parkinson P, McCray W "Relocation in the Era of Shared Parental Responsibility" 2008 d.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/May_2008,_Sound_Education_in_Family_Law,_Relocation_in_the_Era.

300 Care of Children Act, 2004 (Act 90 of 2004).

(f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

6.64 Further, 6(2) provides that-

> In proceedings to which subsection (1) applies [proceedings relating to children],— (a) a child must be given reasonable opportunities to express views on matters affecting him or her; and (b) any views the child expresses (either directly or through a representative) must be taken into account.

6.65 In ***C v S*** [301] the court held that a lawyer and a Family Court Judge had failed to comply with section 6(2) by not affording a four-year-old child the opportunity to express her views on matters affecting her. Neither the lawyer nor the Judge asked the child if she wanted to express views on the matters affecting her and the Appeal Court held that there was non-compliance, with section 6(2) of the Care of Children Act of 2004, even though the non-compliance was not considered significant to the appeal outcome.

6.66 In earlier cases, courts in New Zealand seem to have adopted a pro-relocation approach. In ***Wright v Wright***[302] the court pointed out as follows:[303]

> Unless restricted by statutory provision or court order or agreement, the person entitled to custody must have reasonable freedom to select the child's place of residence.

6.67 In ***D v S***[304] the court seemed to be moving away from the pro-relocation approach as reflected in ***Wright v Wright*** *supra*. The Court of Appeal in ***D v S*** unanimously rejected the English influence emanating from ***Payne v Payne***[305] in the law pertaining to relocation in New Zealand. The Court of Appeal set out the following factors as relevant to relocation:

> (a) The child's welfare, although not the only factor to take into account, must be more than just the top item on a list of factors;
> (b) The welfare principle in s 23 of the Guardianship Act 1968 is consistent with the United Nations Convention on the Rights of the Child;
> (c) All aspects of welfare have to be taken into account: 'there is no room for *a priori* assumptions';
> (d) There must be no gender bias in deciding custody;
> (e) Decisions about residence and relocation may be affected by the longevity of existing arrangements;

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301 *C v S* [Parenting orders][2006] NZFLR 745.

302 *Wright v Wright* (1984) 2 NZFLR 335, CA (NZ).

303 *Wright v Wright* at 341.

304 [2001] NZCA 374; [2002] NZFLR 116, CA (NZ) at [37].

305 *Payne v Payne* [2001] EWCA Civ 166: [2001] Fa. 473.

> (f) Decisions of courts outside New Zealand are likely to be of limited assistance because of different social landscapes: 'two relevant features of the New Zealand scene [...] are the growth and degree of involvement of both parents in family care, and a clear move away in Family Court orders from [...] older "property" based concepts of sole custody and access, to shared care'; and
> (g) Relocation cases are difficult and family judges have given anxious thought to the appropriate way to deal with them.

6.68 The decision in ***D v S*** *supra* gives no presumptive weight to any specific factor but favours the consideration of all relevant factors like the emotional well-being of the custodial parent, the contact rights of the non-relocating parent, and the child's views to construe what is in the child' best interests of the child. The happiness of the custodial parent is not on its own a decisive factor in a relocation dispute.

6.69 While this position may stem from a desire to distance the New Zealand approach from that adopted in England, New Zealand courts are cautioned to be careful that they do not throw the baby out with the bathwater.[306] Furthermore, Family Court judges must be able to conclude, if they see fit, that the applicant parent's well-being is the decisive factor in relation to a particular child's welfare – so long as that conclusion is a finding of fact and is not based on a presumption.[307]

6.70 After a consideration of relocation cases in New Zealand, it does seem true that the courts in New Zealand have made a great effort to distance themselves from the law pertaining to relocation in England (Payne principle) to the point of frustrating the parent with residence of child on whom the law used to place a presumptive advantage in English law. This is evident in ***B v B***[308] where *Duffy J* stated as follows:[309]

> Relocation will only be in the child's best interests if his mother is so harmed by having to remain in New Zealand that her emotional and psychological health will deteriorate to a point where it will impact detrimentally on the child.

6.71 The principles in the Care of Children Act also found application in the case of ***Kacem v Bashir***.[310] The mother of two minor children wanted to relocate to Australia with the children

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306 George RH "The Shifting law: relocation disputes in New Zealand and England" [2009]. OtaLawRw 6; (2009) 12 Otago Law Review 107, updated in 2012 http://www.nzlii.org.

307 George RH s*upra*.

308 *B v B* (HC Auckland, CIV-2007-404-5016, 9 May 2008).

309 *B v B* at par 62.

310 *Kacem v Bashir* [2010] NZCA 96.

in order to be close to her family and to reduce the conflict between the father of the children and herself.

6.72 However, the father wanted the children to continue residing in New Zealand. The court in this case pointed out the following:[311]

> … In the forgoing paragraph we have addressed the facts in light of the principles contained in s 5(a), (b), (c), (d) and (e). Our overall assessment of the principles is that the factors which favour relocation (the mother's wishes and the possibility of parental conflict) are outweighed by those against it (in particular, the need for the children to have a meaningful relationship with their father and his family). We consider that the principle contained in s 5(f) is neutral – under either option, the cultural identity of the children is likely to be maintained.

6.73 The need for the children to have a meaningful relationship with their father and his family was identified as the principal factor against the relocation. This factor was set against the factors identified as supporting the relocation. The court concluded that in these circumstances it was in the best interests of the children to remain in New Zealand in order to maintain a relationship with their father and the father's family.[312] The mother appealed the decision of the High Court to the Court of Appeal. The Court of Appeal considered a psychologist report (that was not available to the trial court). The psychologist report recommended that it was in the best interests of both children to maintain meaningful relationships with both parents acknowledging the shared parenting regime that was in place. The Court of Appeal dismissed the appeal, and pointed out the following:[313]

> For these reasons we are satisfied that the court's erroneous statements in [51] and [52] were not carried into its reasoning when the court evaluated the facts of this particular case. We should revert here to the court's acceptance that ……It must also be borne in mind that the Court of Appeal's evaluation was obviously and appropriately influenced by the updated psychological evidence. In the light of these considerations, were the matter to be remitted to the Court of Appeal for reconsideration, the outcome would clearly be the same.

6.74 Furthermore, the Appeal Court held as follows:[314]

> We do not therefore consider it is necessary or appropriate to remit the case to the Court of Appeal, despite the erroneous statements made in [51] and [52]. The matter of relocation is, furthermore, something which can always be considered again on the

311 *Kacem v Bashir* par 61.

312 *Kacem v Bashir* par 67.

313 *Kacem v Bashir* par 44.

314 *Kacem v Bashir* par 45.

basis of contemporary circumstances. The appeal should therefore be dismissed, but without any order for costs.

6.75 From the cases discussed above, it seems clear that courts in New Zealand concerns themselves with the best interests of the child principle as central enquiry in settling relocation disputes.

4 Approach followed in the United States of America

6.76 Many States in the United States of America (USA) have adopted child relocation laws governing the relocation of a parent with residence of a child. Some States require that the parent with no residence of the child be given notice before a move greater than a certain distance by the parent with residence of a child. If the parent without residence of the child consents to the move, litigation would be avoided but if such parent objects to the relocation then both parents may need to participate in a relocation case heard by a state family court or domestic relations court. When a parent seeks to relocate against the other parent's wishes, the court will only approve a relocation that represents the child's best interests.

6.77 The American Academy of Matrimonial Lawyers has developed a Model Relocation Act, which could provide South Africa with some guidance in the area of relocation.[315] The Model Relocation Act requires a 60 day notice of change in the principal residence of a child and permits the non-relocating parent to object to the relocation. The Model Relocation Act defines “relocation” as "a change in principal residence of the child for a period of sixty days or more, but does not include a temporary absence from the principal residence.”[316]

6.78 Some States like the ones discussed below have adopted the Model Relocation Act and have used it to formulate their State specific relocation legislation.

(i) State of Pennsylvania

6.79 Section 5322(a) of the Pennsylvania Child Custody Act (Child Custody Act)[317] defines relocation as a change in a residence of the child which significantly impairs the ability of the non-relocating parent to exercise his or her custodial rights with the child. Furthermore, section

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315 Domingo at 165 with reference to AAML 1998 http://www.aaml.org.

316 Domingo at 165 with reference to Albertus 2009 *Speculum Juris* 85.

317 Act 112 of 2010.

5337(b) of the Child Custody Act provides that no relocation shall occur unless: (1) every individual who has custody rights to the child consents to the proposed relocation; or (2) the court approves the proposed relocation. In terms of section 5337(c), the party proposing the relocation must further notify every other individual who has custody rights to the child. Section 5337(d)(1) provides that the party entitled to receive such notice may file with the court an objection to the proposed relocation and seek a temporary or permanent order to prevent the relocation. Furthermore, the non-relocating party shall have the opportunity to indicate whether he objects to relocation or not and whether he objects to modification of the custody order or not.

6.80 The afore-mentioned statutory provisions were applied and clarified in the case of ***CMK v KEM***.[318] In this case, the court denied both the mother's application to relocate with the minor child and the related request to modify the terms of custody for the parent's minor son, finding that it was not in the best interests of the child.[319] The mother appealed to the Supreme Court. First, the mother alleged that the trial court erred in finding that her proposed move was a "relocation" within the meaning of the Act because she offered additional hours of partial custody time for the father. The mother claimed that the move to Albion would not impair the father's ability to exercise his custodial rights.

6.81 The Superior Court agreed with the trial court that the proposed relocation threatened significant impairment of the father's ability to exercise his custodial rights. However, the Superior Court disagreed with the trial court's conclusion that the mother tacitly conceded to the relocation merely by serving notice of a proposed move and requesting a hearing on her petition to relocate.[320] The father objected to the move on the basis that it would prevent him from maintaining the close relationship and contact he currently had with the child. He also claimed it would severely impair the child's relationship with his family (father's family). The Supreme Court rejected the trial court's analysis that the mother's proposed move constituted relocation under section 5322(a) as serving notice or requesting a hearing did not raise a presumption of relocation.[321]

6.82 The Supreme Court found that the trial court correctly determined that the proposed move significantly impaired the father's ability to exercise his custodial rights with the child by

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318 *CMK v. KEM* No. 1419 WDA 2011. Decided on March 27, 2012.

319 *CMK v. KEM* par 84.

320 *CMK v. KEM* par 425.

321 *CMK v. KEM* par 426.

breaking the continuity and frequency of the father's involvement with child.[322] Further, that the proposed move constituted relocation for that reason. Furthermore, the Supreme Court found that the mother did not meet the burden of establishing that the proposed move was in the best interests of the child. In terms of section 5337(h) of the Child Custody Act, there are 10 factors that a trial court must consider in deciding whether or not to grant relief to a parent seeking to relocate, namely:

> (1) The nature, quality, extent of involvement and duration of the child's relationship with the parent proposing to relocate and with the non-relocating parent, siblings and other significant persons in the child's life.
> (2) The age, developmental stage, needs of the child and the likely impact the relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.
> (3) The feasibility of preserving the relationship between the non-relocating parent and the child through suitable custody arrangements, considering the logistics and financial circumstances of the parties.
> (4) The child's preference, taking into consideration the age and maturity of the child.
> (5) Whether there is an established pattern of conduct of either parent to promote or thwart the relationship of the child with the other parent.
> (6) Whether the relocation will enhance the general quality of life for the party seeking the relocation, including, but not limited to, financial or emotional benefit or educational opportunities.
> (7) The reasons and motivation of each parent for seeking or opposing the relocation.
> (8) The present and past abuse committed by a parent or member of the parent's household and whether there is a continued risk of harm to the child.
> (9) Any other factor affecting the best interest of the child.

6.83 The court reviewed these factors and found that the advantages of the proposed move were minor as compared to that of not moving.

6.84 The court found that even though the move would benefit the mother's life by reducing turmoil from an alleged abusive relationship with the father, the mother would lose the benefits provided by the father's family and also that the economic improvement to be brought about by the relocation was speculative.[323] Further that the move would have a negative impact on child's emotional development and his bond with the father, father's family and his friends.

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322 *CMK v. KEM* par 426.

323 *CMK v. KEM* par 428.

6.85 The court found that the trial court did not err in finding that the mother failed to meet her burden of proving that the relocation would be in the best interests of the child. The appeal was dismissed.[324]

(ii) State of Alabama

6.86 Section 30-3-163 of the Alabama Parent-Child Relationship Protection Act[325] provides that except as provided by Section 30-3-167[326], a person who has the right to establish the principal residence of the child shall provide notice to every other person entitled to custody of or visitation with a child of a proposed change of the child's principal residence as required by subsection (b) of Section 30-3-165.

6.87 Furthermore, section 30-3-164 of the Alabama Parent-Child Relationship Protection Act[327] provides that, except as provided by section 30-3-167, a person entitled to custody of or visitation with a child shall provide notice to every other person entitled to custody of or visitation with a child of an intended change in his or her principal residence as required by subsection (b) of Section 30-3-165.

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324 *CMK v. KEM* par 429.

325 2015 Code of Alabama (Article 7).

326 Disclosure exceptions.

(a) In order to protect the identifying information of persons at risk from the effects of domestic violence or abuse, on a finding by the court that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of the identifying information required by Section 30-3-163 or Section 30-3-164 in conjunction with a proposed change of principal residence of a child or change of principal residence of a person having custody of or rights of visitation with a child, the court may order any or all of the following:

(1) The specific residence address and telephone number of a child or the person having custody of or rights of visitation with a child and other identifying information shall not be disclosed in the pleadings, other documents filed in the proceeding, or in any order issued by the court, except for in camera disclosures.

(2) The notice requirements provided by this article may be waived to the extent necessary to protect confidentiality and the health, safety, or liberty of a person or a child.

(3) Any other remedial action that the court considers necessary to facilitate the legitimate needs of the parties and the interests of the child.

(b) If appropriate, the court may conduct an ex parte hearing under subsection (a). Issuance of a final order of protection under Sections 30-5-1 to 30-5-11, inclusive; a conviction for domestic violence pursuant to Sections 13A-6-130 to 13A-6-135, inclusive; or an award of custody of the child pursuant to Sections 30-3-131 to 30-3-135, inclusive, shall be considered prima facie evidence that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of identifying information or by compliance with the notice requirements of this article.

327 2019 Code of Alabama.

6.88 Section 30-3-165 of the Act provides that when a notice is required by either section 30-3-163 or section 30-3-164, except as provided by section 30-3-167, the notice of a proposed change of principal residence of a child or the notice of an intended or proposed change of the principal residence of an adult must be given by certified mail to the last known address of the person or persons entitled to notification under this section. This is to be done not later than the 45th day before the date of the intended change of the principal residence of a child or the 10th day after the date such information required to be furnished by subsection (b) becomes known, if the person did not know and could not reasonably have known the information in sufficient time to comply with the 45-day notice, and it is not reasonably possible to extend the time for change of principal residence of the child.

6.89 Section 30-3-169.1(a) provides that a person entitled to custody of or visitation with a child may commence a proceeding objecting to a proposed change of the principal residence of a child and seek a temporary or permanent order to prevent the relocation. Section 30-3-169.1(b) provides that a non-parent entitled to visitation with a child may commence a proceeding to obtain a revised schedule of visitation, but may not object to the proposed change of principal residence of a child or seek a temporary or permanent order to prevent the change.

6.90 Section-30-3-169.3 provides that-

(a) Upon the entry of a temporary order or upon final judgment permitting the change of principal residence of a child, a court may consider a proposed change of principal residence of a child as a factor to support a change of custody of the child. In determining whether a proposed or actual change of principal residence of a minor child should cause a change in custody of that child, a court shall take into account all factors affecting the child, including, but not limited to, the following:

(1) The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate with the child and with the non-relocating person, siblings, and other significant persons or institutions in the child's life.

(2) The age, developmental stage, needs of the child, and the likely impact the change of principal residence of a child will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

(3) The increase in travel time for the child created by the change in principal residence of the child or a person entitled to custody of or visitation with the child.

(4) The availability and cost of alternate means of communication between the child and the non-relocating party.

(5) The feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties.

(6) The preference of the child, taking into consideration the age and maturity of the child.

(7) The degree to which a change or proposed change of the principal residence of the child will result in uprooting the child as compared to the degree to which a modification of the custody of the child will result in uprooting the child.

(8) The extent to which custody and visitation rights have been allowed and exercised.

(9) Whether there is an established pattern of conduct of the person seeking to change the principal residence of a child, either to promote or thwart the relationship of the child and the non-relocating person.

(10) Whether the person seeking to change the principal residence of a child, once out of the jurisdiction, is likely to comply with any new visitation arrangement and the disposition of that person to foster a joint parenting arrangement with the non-relocating party.

(11) Whether the relocation of the child will enhance the general quality of life for both the custodial parent seeking the change of principal residence of the child and the child, including, but not limited to, financial or emotional benefit and educational opportunities.

(12) Whether or not a support system is available in the area of the proposed new principal residence of the child, especially in the event of an emergency or disability to the person having custody of the child.

(13) Whether or not the proposed new principal residence of a child is to a foreign country whose public policy does not normally enforce the visitation rights of non-custodial parents, which does not have an adequately functioning legal system, or which otherwise presents a substantial risk of specific and serious harm to the child.

(14) The stability of the family unit of the persons entitled to custody of and visitation with a child.

(15) The reasons of each person for seeking or opposing a change of principal residence of a child.

(16) Evidence relating to a history of domestic violence or child abuse.

(17) Any other factor that in the opinion of the court is material to the general issue or otherwise provided by law.

(b) The court making a determination of such issue shall enter an order granting the objection to the change or proposed change of principal residence of a child, denying the objection to the change or proposed change of principal residence of a child, or any other appropriate relief based upon the facts of the case.

(c) The court, in approving a change of principal residence of a child, shall order contact between the child and the non-relocating party and telephone access sufficient to assure that the child has frequent, continuing, and meaningful contact with the non-relocating party and shall equitably apportion transportation costs of the child for visitation based upon the facts of each case.

(d) The court, in approving a change of principal residence of a child, may consider the costs of transporting the child for visitation and determine whether a deviation from the child support guidelines should be considered in light of all factors including, but not limited to, additional costs incurred for transporting the child for visitation.

(e) The court, in approving a change of principal residence of a child, may retain jurisdiction of the parties and of the child in order to supervise the transition caused by the change of principal residence of the child; to insure compliance with the orders of the court regarding continued access to the child by the non-relocating party; to insure the cooperation of the relocating party in fostering the parent-child relationship between the child and the non-

relocating party; and to protect the relocating party and the child from risk of harm in those cases described in Section 30-3-167.

6.91 In ***Clements v. Clements***,[328] the father appealed against the order of the lower court denying a modification of custody of the child and allowing the mother to relocate with the child. On appeal the father contended that the trial court erred by placing the burden of proof on him instead of the relocating parent (the mother) as contemplated in section 30-3-169-4 of the act which provides that there shall be a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child. The appeal court found that the evidence presented supported the trial court's decision that it would not be in the best interest of the child to transfer custody of the child to the father.[329]

6.92 The court found that the benefits the child will receive by moving to New York with the mother, the mother's role as the child primary care giver and the mother and her husband willingness to support a relationship between the father and child, all support the lower court's judgement allowing the mother to relocate with the child and denying the father's petition to modify custody.[330] Therefore the appeal court concluded that it cannot find that the trial court to have erred in denying the father's petition.[331]

6.93 In ***Toler v Toler*** [332] the father of the child filed a petition to modify custody invoking the provisions of the Alabama Parent-Child Protection Act[333] in particular alleging that the mother has notified him by letter that she planned to relocate with their minor son. The father objected to the relocation of the minor child, *inter alia,* alleging that the parties resided in the Altadena area of Birmingham, approximately 200 yards from each other, allowing the minor child frequent contact with him and further that the child had expressed his desire to reside with him. The trial court, after reviewing evidence (in the form of affidavits) denied the father's petition. The mother relocated with the child. On review, the father contended that-

(a) the trial court ignored "the presumption, burden of proof, custody considerations and mandates" of the Parent-Child Relationship Protection Act;

(b) that the trial court failed to "take into account all factors" affecting the child as stated in section 30-3-169.3;

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328 *Clements v Clements* Case No. 2030768 (Ala. Civ. App. February 11, 2005).

329 *Clements v Clements* par 960.

330 *Clements v Clements* par 960.

331 *Clements v Clements* par 960.

332 47 So. 2d 416 (Ala. Civ. App. 2006).

333 Section 30-3-160.

(c) that the mother failed to meet her burden of proof as to statutory notice as described in section 30-3-165; and

(d) that the trial court erred by not awarding the father custody of the child.

6.94 After reviewing the record, the court pointed out that there is no evidence indicating that the father "committed domestic violence or child abuse".[334] Thus, as the father correctly notes, there was a rebuttable presumption that a change of the son's principal residence was not in the son's best interests. The mother bore the initial burden of proof as to whether a change of principal residence was in the son's best interests in light of the factors described in section 30-3-169.3(a). Until that burden of proof was met, the burden of proof in the present case did not shift to the father. The court pointed out that in review of the evidence presented to the trial court, and considering the factors that the trial court is required to consider under the Parent-Child Relationship Protection Act, it cannot conclude that the mother met her burden of proof.[335]

6.95 Furthermore, the court stated that, based on the evidence presented to the trial court, it appeared that before the mother's proposed move the parents of the child resided within a walking distance of each other after their divorce. The father participated in the child's school activities. The son also visited his paternal grandmother, who resided near the father, on an almost weekly basis. The father was self-employed and worked out of his home. He was able to spend a considerable amount of time with his child. This demonstrates that the mother uprooted the child from his settled life.[336]

6.96 The court held that the trial court erred by dismissing the father's petition emphasizing that the initial burden of proof in the case was upon the mother. She was required to rebut the presumption that a change of principal residence was not in the son's best interests. By dismissing the father's petition without requiring the mother to meet her burden of proof, the trial court failed to give effect to the presumptions prescribed by the Parent-Child Relationship Protection Act.[337]

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334 *Toler v Toler* par 421.

335 *Ibid.*

336 *Toler v Toler* par 422.

337 *Toler v Toler* par 422.

(iii) State of Arizona

6.97 The Arizona Revised Statutes[338] provides as follows:[339]

> If by written agreement or court order both parents are entitled to joint legal decision-making or parenting time and both parents reside in the State, at least 45 days' advance written notice shall be provided to the other parent before a parent may do either of the following:[340]
>
> 1. Relocate the child outside the state.
> 2. Relocate the child more than one hundred miles within the state.

6.98 Section 25-408G provides that the court shall decide whether to allow the parent to relocate with the child in accordance with the child's best interest. Subparagraph G further provides that, to the extent practicable, the court shall also make appropriate arrangements

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338 Arizona Revised Statute 9 January 1956.

339 Section 25-408 A.

A The court shall determine legal decision-making and parenting time either originally or on petition for modification, in accordance with the best interests of the child. The court shall consider all factors that are relevant to the child's physical and emotional well-being including-

1. The past, present and potential future relationship between the parent and child.
2. The interaction and interrelationship of the child with the child's parents, the child's siblings and any other person who may significantly affect the child's best interests.
3. The child's adjustment to home, school and community.
4. If the child is of suitable age and maturity, the wishes of the child as to decision-making and parenting time.
5. The mental and physical health of all individuals involved.
6. Which parent is more likely to allow the child frequent meaningful and continuing contact with the other parent. This paragraph does not apply if the court determines that the parent is acting in good faith in protecting the child from witnessing an act of domestic violence or being a victim of domestic violence.
7. The one parent intentionally misled the court to cause unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent.
8. Whether there has been domestic violence or child abuse pursuant to section 25-403.03.
9. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.
10. Whether a parent has complied with chapter 3, article 5 of this title.
11. Whether either parent has been convicted of an act false reporting of child abuse or neglect under section 13-2907.02.

B In contested legal decision-making or parenting time case, the court shall make specific findings on the record about all factors and the reasons for which the decision is in the best interest of the child.

340 Section 25-408 A.

that will ensure the continuation of a meaningful relationship between the child and both parents.

6.99 Section 25-408I provides that in determining the child's best interests the court shall consider all relevant factors including the following:

1 The factors prescribed under section 25-408.[341]

2 Whether the relocation is being made or opposed in good faith and not to interfere with or to frustrate the relationship between the child and the other parent or the other parent's right of access to the child.

3 The prospective advantage of the move for improving the general quality of life for the custodial parent or child.

4 The like hood that the parent with whom the child will reside after the relocation will comply with parenting time order.

5 Whether the relocation will allow a realistic opportunity for parenting time with each parent.

6 The extent to which moving or not moving will affect the emotional, physical or developmental needs of the child.

A The court shall determine legal decision-making and parenting time either originally or on petition for modification, in accordance with the best interests of the child. The court shall consider all factors that are relevant to the child's physical and emotional well-being including-

11. The past, present and potential future relationship between the parent and child.
12. The interaction and interrelationship of the child with the child's parents, the child's siblings and any other person who may significantly affect the child's best interests.
13. The child's adjustment to home, school and community.
14. If the child is of suitable age and maturity, the wishes of the child as to decision-making and parenting time.
15. The mental and physical health of all individuals involved.
16. Which parent is more likely to allow the child frequent meaningful and continuing contact with the other parent. This paragraph does not apply if the court determines that the parent is acting in good faith in protecting the child from witnessing an act of domestic violence or being a victim of domestic violence.
17. The one parent intentionally misled the court to cause unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent.
18. Whether there has been domestic violence or child abuse pursuant to section 25-403.03.
19. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.
20. Whether a parent has complied with chapter 3, article 5 of this title.
21. Whether either parent has been convicted of an act false reporting of child abuse or neglect under section 13-2907.02.

B In contested legal decision-making or parenting time case, the court shall make specific findings on the record about all factors and the reasons for which the decision is in the best interest of the child.

7 The motives and the validity of the reasons given for moving or opposing the move including the extent to which either parent may intend to gain a financial advantage regarding continuing child support obligations.

CHAPTER 7: POLICY CONSIDERATIONS

COMMENTS ON SALRC ISSUE PAPER 31

1. REGIONAL COURT PRESIDENT: LIMPOPO REGIONAL DIVISION: J WESSELS

The AAML might be a good starting point, so too the factors referred to in 2.3.52 up to 2.3.58 (p76 – 79). This is another instance where the importance of the child's right to be heard and possibly be given legal representation might need to be included in the legislation.

2. FAMILY ZONE

It is possible to set out factors that need to be considered in addition to Section 7 of the Children's Act. These factors are clearly articulated by Dr Stahl.

3. CAPE TOWN LAW SOCIETY: VAN STADEN S, BICCARI BOLLO MARIANO

Many of the factors listed on Pages 76 through to 77 are already considered by our courts due to the fact that most of the factors listed in paragraph 2.3.52: (a) to (k) (Washington Declaration) are usually raised in the affidavits/papers filed by the litigants.

7.1 Worldwide, acrimonious policy debates are taking place about whether there should be a presumption for or against relocation. So difficult are these issues that the Uniform Law Commission in the United States of America decided in 2009 to give up its attempt to develop a model law on the subject.

7.2 In these debates, the gender issue is unavoidable, because it is usually women who want to relocate and men (usually non-resident parents) who oppose such moves.[342] The point has also been raised that the law can, and sometimes does, prevent the parent with residence of the child (usually the mother) from moving, but there is no similar limits on the other parent of the child (usually the father).

7.3 Another point to consider is whether the parents will comply with the applicable order.[343] Contact often seems to be lost through estrangement, or becomes very intermittent owing to the disengagement of the parent who was awarded contact. There are significant issues of cost and logistical difficulty in terms of travel. There should be a reality test to determine whether the court's orders for children to spend time with the non-relocating parent

342 Parkinson, Cashmore & Single at 2.

343 Parkinson, Cashmore & Single at 26.

are likely to be complied with. The probability of compliance should be one of the factors taken into account in determining whether the relocation is likely to be in the best interests of the child.[344]

7.4 Regular air travel between cities can be unaffordable for parents who earn average incomes. This could render certain relocation arrangements unrealistic. A young child may have to be accompanied by a parent; with the result that two adult return airfares (one trip to fetch the child, and another trip to return the child) plus one child's return airfare are likely to be necessary to facilitate a single visit for one child. Such travel costs could be prohibitive and may lead to a break-down in child-sharing arrangements and significant stress for the travelling parent. In turn, that could have deleterious effects on the child's well-being.

7.5 The visiting parent might alternatively be able to stay in the other parent's town for the duration of the visit; however, this option could also impose financial stress if there is no free accommodation available. It may also exceed the amount of annual leave the travelling parent has.[345]

7.6 Court orders may provide that the parents should share the cost of travel for the children. In Australia, high costs incurred to see one's children are a ground for reducing the normal level of child support.[346] To the extent that a proposed relocation is based upon cheaper housing or better financial prospects, the child support impact of the relocation should be taken into account. The expected financial benefit of a relocation need to be assessed in the light of all the above costs.[347]

7.7 Another issue is the burden of travel on children. Onerous journeys might be necessary for the child to spend face-to-face time with the other parent. It is a common pattern that a relocating parent will take the initiative to propose generous arrangements so that the other parent can spend time with the child. However, even if a relocating parent proposes to fly children backwards and forwards on a regular basis, so much travel might not be in the best interest of the child.[348]

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344 Parkinson, Cashmore & Single at 27.

345 Parkinson, Cashmore & Single at 28.

346 Parkinson, Cashmore & Single at 30.

347 Parkinson, Cashmore & Single at 30.

348 Parkinson, Cashmore & Single at 32.

7.8 If the relocation is abroad, court orders should compel the relocating parent to ensure that the order is enforceable in the foreign country, and that a trust fund be created. Should the matter concern relocation within the Republic, the relocating parent may also be compelled to set up a trust fund. Such provisions would provide some protection to the non-relocating parent in the event of the resident parent failing to uphold the contact arrangements.[349] Courts may be authorised to impose restrictions associated with international moves, including the ordering of bonds, to help ensure that funds are available in the event that the orders are not followed.[350]

7.9 It has been argued that where a mother, who is the parent with residence of child, forms a relationship with a new partner in another city, there seems no reason in principle why courts should not also have to consider whether the new partner could move to the same city as the mother. The mother's new partner makes a choice to form a relationship with someone who has ties, through her children, to a specific location. The mother also needs to accept responsibility for the consequences of her choice of a new partner.[351] However, the courts could also consider whether the father could relocate as well as the mother, if a move is inevitable.

7.10 The main concern is the obvious lack of legislative guidelines.[352] Parkinson, Cashmore and Single have remarked as follows:[353]

> … it is tempting to resolve these difficult cases with the assistance of wishful thinking. That makes the decision a little easier. The value of empirical research is to help test that wishful thinking against the realities of other people's experience.

7.11 On 3-25 March 2010, more than 50 judges and experts in family law from all over the world met in Washington, DC to discuss international family relocation. This meeting

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349 Albertus at 77.

350 Stahl at 432.

351 Parkinson, Cashmore & Single at 18. In Australia the parent who wishes to move does not bear any onus of proving that the relocation is reasonable. The court must examine, not only the resident parent's proposal to relocate, but also whether the non-resident parent could relocate as well. This reduces the gendered nature of the issues in relocation cases.

352 Andrews thesis at 57.

353 Parkinson, Cashmore & Single at 34.

culminated in the release of the "Washington Declaration on International Family Relocation".[354] South Africa can draw on these recommendations.[355]

7.12 The declaration states that relocation determinations should be made without any presumptions for or against relocation. This stance accords with the neutral approach discussed earlier. To identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach, the declaration recommends that the exercise of judicial discretion should be guided in particular - but not exclusively - by the following factors, listed in no order of priority-

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

(b) the views of the child to be considered having regard to the child's age and maturity;

(c) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;

(d) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;

(e) any history of family violence or abuse, whether physical or psychological;

(f) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;

(g) pre-existing (care) and (contact) determinations;

(h) the impact of the refusal of the relocation on the child, in the context of his or her extended family, education and social life, and on the parents;

(i) the nature of the inter-personal relationship and the commitment of the relocating parent with primary residence of child to support and facilitate the relationship between the child and the non-relocating parent after the relocation;

(j) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;

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354 This meeting took place at the Hague Conference on Private International Law, hosted by the International Centre for Missing and Exploited Children, with the support of the United States Department of State (hereafter the Hague Conference on Private International Law). Hague Conference on Private International Law. It is a global inter- governmental organisation that develops and services multilateral legal instruments, which respond to global needs. The official website of the Hague Conference on Private International Law is accessible at http://www.hcch.net.

355 Andrews's thesis at 66 refers to various attempts to agree on common standards in relocation disputes, to wit International Family Justice Judicial Conference 2009; International Conference on Cross-Border Family Relocation, 2010; International Child Abduction, Forced Marriage and Relocation Conference, 2010, Second and Third Malta Judicial Conferences on Cross-Frontier Family Law Issues 2006 and 2009, Special Commission, 2012.

(k) issues of mobility for family members; and

(l) any other circumstances deemed to be relevant by the judge.

7.13 The weight afforded to any one factor will vary from case to case. In addition to the above guidelines, Domingo[356] recommends that when courts consider different proposals set forth by the parties, they need also to consider:

(a) possible alternatives to the proposed relocation;

(b) whether or not it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted; and

(c) whether or not the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.

356 Domingo at 164 and the references made therein.

CHAPTER 8: LEGISLATIVE PROPOSALS – PROPOSED AMENDMENTS TO THE CHILDREN'S ACT 38 OF 2005

Responses on SALRC Issue Paper 31

Ministry for Social Development, Western Cape

We support the proposal that legislation should be drafted on the issue of relocation in order to provide certainty.

Women's Legal Centre

The proposed introduction of certainty in this area of law by mandating notice of a proposed move is a positive step, but must apply to relocation within the Republic and abroad. The distance that a parent wishes to move with the child will always be crucial, as will the practicalities of the child spending time with the left-behind parent. Legislative measures need to be put in place in order to ensure the safe movement of children.

J Wessels: Regional Court President: Limpopo Regional Division

Both internal and international relocation should be addressed in legislation.

The Cape Law Society, Z du Toit

Relocation should not be codified in legislation. Families' change, the social fabric changes…to legislate it narrowly would be problematic.

Sandra van Staden, Biccari Bollo Mariano Inc Attorneys

There is no need for more legislation on relocation. The current legislation sufficiently covers this, more particularly the various sections in the Children's Act No. 38 of 2005, as amended, as well as Schedule 2 (Hague Convention on the Civil Aspects of International Child Abduction) in particular has reference. This, coupled with case law, provides sufficient guidance.

Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD

It should be borne in mind that in today's world contact between people is very easy with technology. So contact between parents and children is even easier than physical visits, although physical contact is absolutely necessary for the child's development. Should legislation be drafted, due consideration to the Constitution should be given and the same

restriction on the non-resident parent must be imposed on the resident parent as the same principle applies, namely contact with children.

8.1 It has been suggested[357] that a model Relocation Act, fashioned along the lines of the AAML's proposed Model Relocation Act, would be beneficial in a country with no clear guidelines on the topic - save for the diversity of approaches that are reflected in its jurisprudence.

8.2 The current case law does not provide all the answers with regard to relocation of a child (chapter 4). Furthermore, the Children's Act also does not specifically deal with relocation and the Hague Convention has the shortcomings that are identified in Chapter 3 above, it does seem necessary that relocation should be regulated to some extent in South Africa.

8.3 Legislation dealing with relocation should deal, among other things, with the definition of relocation,[358] a notice of relocation, objections to relocations, factors to be considered by the courts in deciding a relocation dispute and the burden of proof.

8.4 In addition, it is proposed that the legislation "should also govern the mediation process to be followed in respect of relocation disputes and provide guidelines as to how a parenting plan can best deal with such disputes should they arise."[359]

8.5 It should, however, be borne in mind that the Commission's recommendations in respect of relocation should be seen in conjunction with its recommendations in respect of Family Dispute Resolution in Project 100D, under which this investigation with regard to relocation falls. The recommendations of the Commission with regard to relocation therefore forms part of the bigger project, Project 100D, and more specifically Discussion Paper 148 of June 2019. In terms of this discussion paper, the Commission proposes the adoption of the Family Dispute Resolution Bill, 2020, which, *inter alia,* provides for mandatory mediation for any family law dispute before parties may approach the court (chapter 4 of the Bill).

8.6 Mediation is also mandatory in terms of other provisions of the Children's Act, which might, of course, also be applicable to relocation matters:

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357 Andrews's thesis at 81.

359 Domingo at 165 with reference to Albertus 2009 *Speculum Juris* 85.

(a) In terms of section 33(2) read with section 33(5), of the Children's Act, the co-holders of parental responsibilities and rights in respect of a child, who are experiencing difficulties in exercising their responsibilities and rights, must first seek to agree on a parenting plan by attending mediation through a social worker or other suitably qualified person before taking their dispute to court.

(b) In terms of section 69, when a matter is contested, the children's court may order that a pre-hearing conference be held in order to mediate or settle disputes between parties and to define the issues to be heard by the court.

(c) In terms of the proposed new section 30A(1) read with section 30A(5), which will be inserted into the Act by clause 17 of the Children's Amendment Bill [B18-2020], the parents of a child must agree on the residence of the child, and if there is a dispute between them as to his or her residence, the matter must be referred for mediation to a family advocate, social worker or such other suitably qualified person as may be prescribed before approaching the relevant court.

8.7 Referring matters to alternative dispute resolution in the form of mediation is also consonant with section 60(3) of the Children's Act, which provides as follows:

> Children's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.

8.8 Furthermore, mediation is strongly encouraged by the new Rule 41A of the Uniform Rules of Court.[360] In terms of the rule, a plaintiff/applicant, at the time of instituting an action or application, must file a notice indicating whether she or he is willing to mediate the matter.[361] The defendant/respondent is required to follow suit at the time of delivering his or her notice of intention to defend/notice of opposition, or when delivering the plea/answering affidavit.[362] Furthermore, in terms of the judicial case management rules, a judge may during a case management conference 'explore settlement, on all or some of the issues, including, if appropriate, enquiring whether the parties have considered voluntary mediation.'[363]

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360 Uniform Rules of Court: Rules Regulating the Conduct of Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa GNR 48 in *GG* 999 of 12 January 1965.

361 Rule 41A(2)(a).

362 Rule 41A(2)(b).

363 Rule 37A(11).

8.9 It must be noted that the Rules Board is currently engaged in the process of harmonising the mediation rules in Chapter 2 of the Magistrates' Courts Rules[364] with rule 41A of the Uniform Rules of the High Court. In the magistrates' courts and in the High Courts, court-connected mediation forms part of the civil procedure of the courts, and can be applied to most types of civil litigation.

8.10 It is submitted that pending substantive family mediation legislation, in matters relating to children, and in particular, relocation matters, there is no reason why such matters should not be mediated between the disputing parties in an attempt at arriving at a mutually acceptable solution that would be in the best interests of the child. When making the mediation settlement agreement an order of court, the judicial officer would have to determine whether the mediated parenting plan facilitating the relocation is in the best interests of the child. The proceedings would be more inquisitorial and less adversarial.

8.11 Nonetheless, to ensure that parties who are entangled in relocation disputes, benefits from the many advantages of mediation, as alluded to in Chapters 4 to 7 of the SALRC Discussion Paper 148 of 2019 and Issue Paper 31 of 2015, mediation will also be integrated into the proposed relocation legislation set out below.

8.12 The goal of legislation regulating relocation in South Africa is to introduce some certainty to the area of relocation in South Africa by mandating notice of a proposed move, defining what constitutes a relocation, and directing courts about both circumstances that should be considered and those that should not. The introduction of certainty will reduce the need for lengthy litigation and, thus, reduce the costs associated with disputes over relocation.

8.13 It is recommended that South Africa should follow no presumptive approach but that each case should be decided on its own merits after considering all relevant factors, including the factors listed in section 7 of the Children's Act and the additional factors set out in section 30H of the draft Bill.

8.14 The SALRC therefore makes the following recommendations:

(1) The term "relocation" should be defined in the proposed relocation legislative guidelines. This will clarify what move, by a person with the rights of care of and / or

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364 Rules Regulating the Conduct of the Proceedings of the Magistrates' Court of South Africa GNR 740 in *GG* 33487 of 23 August 2010, as amended.

contact with a child, constitutes a relocation in terms of which a notice has to be served to the other parent or person with rights of contact / or care with respect to a child.

(2) All persons with rights of care of and / or contact with a child should give a notice about an intended relocation, regardless of the distance between the place of residence from which it is relocated from and the place of residence to which it is being relocated to. This will assist in ensuring that the residential address of the relocating person with rights of care of and / or contact with a child is always known to other persons with rights of care of and / or contact with a child.

(3) Mediation should be integrated into the relocation process.

(4) There should be a distinction between national relocation with or without the child and international relocation without the child, on the one hand, and international relocation with the child, on the other hand.

(5) The relocating parent should have the burden of proof that the relocation is in the best interests of the child, once met the burden of proof shifts to the non-relocating parent.

(6) Additional factors to those listed in Chapter 7 of the Children's Act should be included in the Act as the factors listed in Chapter 7 of the Children's Act are not wide enough to address relocation disputes.

8.15 To give effect to the recommendation in Chapter 8, the draft Children's Amendment Bill has been prepared and it is attached hereto as Annexure "A".

8.16 The following aspects are regulated in the proposed amendments to the Children's Act:

(a) definition of the term "relocation";

(b) serving of Notice of Relocation by person who is entitled to care of or contact with a child;

(c) application to the children's court, regional magistrates' court or the High Court objecting to a proposed relocation;

(d) application for leave to relocate with the child outside the borders of the Republic to the High Court in terms of section 18(5);

(e) attendance of mediation by disputing parties in relocation matters;

(f) proof of onus in relocation matters;

(g) factors to guide the court in determining a relocation dispute; and

(h) each party to bear his or her own costs in a relocation dispute.

ANNEXURE "A"

CHILDREN'S AMENDMENT BILL, 2021

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Children's Act, 2005, so as to regulate relocation by inserting certain definitions; providing for a mandatory notice prior to relocation by a person entitled to care of or contact with a child; providing for attendance of mediation before any court process is initiated; providing for an application to the children's court objecting to a proposed relocation and an application to the High Court for leave to relocate with the child outside the borders of the Republic; making orders regarding the expenses involved in exercising contact responsibilities and rights; and to further provide for matters connected therewith.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa as follows:

Amendment of section 1 of Act 38 of 2005, as amended by section 3 of Act 41 of 2007, section 48 of Act 7 of 2013, section 1 of Act 17 of 2016 and section 1 of Act 18 of 2016

1. Section 1 of the Children's Act, 2005 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion after the definition of "medical practitioner" the following definitions:

" **'mediation'** means a process in which a mediator facilitates and encourages communication and negotiation between the mediating parties and seeks to assist the mediating parties in arriving at a voluntary agreement;"

" **'mediator'** means a neutral third party who conducts mediation;"

(b) by the insertion after the definition of ''regulation" of the following definition:

" 'relocation' means moving the residence of a person entitled to care of or contact with a child to a location outside the municipal area, province or country of the present location of a person's residence;"

Insertion of heading after the new section 30A of the principal Act (as will be inserted by clause 17 of the Children's Amendment Bill [B18-2020] and which deals with the residence of a child)

2. The following heading is hereby inserted in the principal Act after section 30A:

''Relocation"

Insertion of sections 30B, 30C, 30D, 30E, 30F, 30G, 30H, 30I, 30J

3. The following sections are hereby inserted in the principal Act after section 30A:

"30B Notice of Relocation

(1) Except as provided by section 30F and in addition to section 35(2), a person entitled to parental responsibilities and rights in respect of a child must notify every other co-holder of parental responsibilities and rights of a proposed relocation of his or her residence with or without the child;

(2) A notice of a proposed relocation must be given-

(a) by registered mail or in any other legally recognised manner to the last known address of the person to be notified;

(b) no later than sixty days before the date of the intended move or proposed relocation; and

(c) ten days after the date when the person knows the information required to be furnished by subsection (3), if the person did not know and could not reasonably have known the information in sufficient time to comply with the 60 day notice in subpara (b), and it is not reasonably possible to extend the time for the relocation so as to comply with the notice period.

(3) The following information, if available, must be included in the notice –

(a) the intended new residential address, if known;

(b) the mailing address and the new home telephone number, if known;

(c) the date of the proposed relocation;

(d) a brief statement of the specific reasons for the proposed relocation of the person entitled to parental responsibilities and rights in respect of a child;

(e) a proposal for a revised schedule of contact with the child;
(f) notice to any other person entitled to care of or contact with a child that an objection to relocation within the Republic with or without the child, or outside the borders of the Republic without the child, must be made within 30 days as provided for in section 30C; and
(g) notice to any other guardian of a child that if consent to the relocation is not given, an application for leave to relocate with the child outside the borders of the Republic will be brought in the High Court as provided for in section 30D.
(4) A person required to give notice of a proposed relocation under this section has a continuing duty to provide information of a change in or an addition to the information required by this section as that information becomes known.

30C Objection to Notice of Relocation with or without the child within the Republic or without the child outside the borders of the Republic

(1) If the relocation is within the Republic with or without the child, or outside the borders of the Republic without the child, the person entitled to parental responsibilities and rights in respect of a child may relocate to the new residence after delivering a notice as provided for in section 30B(1), unless the person entitled to notice files an application seeking a temporary or permanent order to prevent the relocation.
(2) If the relocation is within the Republic with or without the child, or outside the borders of the Republic without the child, the co-holder of parental responsibilities and rights entitled to a notice in terms of subsection (1) may within 30 days after receipt of the notice, bring an application to the children's court objecting to a proposed relocation and seek a temporary or permanent order to prevent the relocation.

30D Application for leave to relocate with the child outside the borders of the Republic if all guardians' consent is not obtained

(1) If the relocation with a child is outside the borders of the Republic, the person entitled to parental responsibilities and rights in respect of a child may only relocate to the new residence, with the consent of all guardians of the child as required by section 18(3)(c)(iii) and (iv).
(2) If the required consent referred to in subsection (1) is not obtained, the person entitled to parental responsibilities and rights in respect of a child may make application to the High Court in terms of section 18(5) for leave to relocate with the child outside the borders of the Republic.

30E Failure to Give Notice of Relocation

(1) The court may consider a failure to provide notice of a proposed relocation of a child as provided for in section 30B(1) and (2) as -

(a) a factor in making its determination regarding the relocation;

(b) a factor in determining whether the parental responsibilities and rights of the non-complying person should be varied;

(c) a basis for ordering the return of the child if the relocation has taken place with the child without notice; and

(d) sufficient cause to order the relocating person to pay reasonable expenses and attorneys' fees incurred by the non-relocating person.

30F Non-disclosure of Relocation Information in Exceptional Circumstances

(1) On a finding by the court that the health, safety, or liberty of a person or a child would be unreasonably put at risk by the disclosure of the required identifying information in conjunction with a proposed relocation, the court may order that-

(a) the specific residential address and telephone number of the child or of the adult and other identifying information must not be disclosed in the pleadings, other documents filed in the application, or the final order, except for an *in camera* disclosure;

(b) the notice requirements provided for in section 30B be waived to the extent necessary to protect the confidentiality and the health, safety or liberty of a person or child; and

(c) any other remedial action that the court considers necessary to facilitate the legitimate needs of the parties and the best interest of the child.

(2) If appropriate, the court may conduct an *ex parte* hearing under this section.

30G Provision for mediation in relocation disputes

(1) Before a person entitled to parental responsibilities and rights in respect of a child brings an application to the relevant court in terms of section 30C(2) or 30D(2), the parties must attend mediation offered by a certified mediator agreed upon by the parties, or one appointed by a mediation service provider or the court, in an attempt to resolve the relocation dispute.

(2) The relevant court may at any stage of litigation, if it deems it to be in the best interests of any family member, refer a matter to a certified mediator to facilitate mediation of the relocation dispute, and the court may do so with or without the consent of the parties to the proceedings.

(3) The parties participating in the mediation process must share the costs of the mediator, unless one party offers to pay the fees of the mediator in full or the mediation services are provided free of charge.
(4) Notwithstanding the provisions of subsection (1) and (2), a party may, within five days after attending one session with a certified mediator, opt-out of further mediation contemplated in those subsections, on the following grounds:
(a) the issue constitutes a question of law only; or
(b) any other good reason, including urgency or potential hardship.
(5) Parties who refuse to participate in further mediation in terms of subsection (4) must provide the mediator with an explanation, in writing, for their refusal.
(6) The court may impose a punitive order as to costs, or another appropriate order, if during a subsequent hearing, it concludes that a party unreasonably refused to engage in mediation.

30H Burden of Proof

In an application in terms of section 30C(2) or in terms of section 30D(2), the relocating person has the burden of proof that the proposed relocation is in the best interests of the child.

30I Factors to be Considered in Determining a Relocation Dispute

In determining whether to grant or refuse an application objecting to a proposed relocation in terms of section 30C(2) or a relocation application in terms of section 30D(2) the court may, in addition to the factors listed in section 7(1), consider any other factor or circumstance relevant to the issue including but not limited to:
(a) the reasons and motivations of each party for seeking or opposing the relocation;
(b) the importance of both parties' freedom of movement;
(c) whether or not the proposed relocation is to a foreign country which is not a signatory to the Hague Convention on Civil Aspects of International Child Abduction;
(d) the arrangements proposed by each parent for the child to maintain contact with the other parent, and the cost of facilitating such contact;
(e) whether there are any grounds to believe that any of the parties will not abide by a new care and contact arrangement or a joint parenting plan;
(f) whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party; and
(g) the effect of the relocation order on the capacity of the parents to provide maintenance for the child.

30J Costs of a relocation dispute

Subject to section 30E(1)(d), in a relocation dispute, each party must bear his or her own costs, except in exceptional circumstances.

Short title and commencement

This Act is called the Children's Amendment Act, 2021, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

ANNEXURE "B"

RESPONSES TO ISSUE PAPER 31

1. Ministry for Social Development, Western Cape

We support the proposal that legislation should be drafted on the issue of relocation in order to provide certainty.

2. Women's Legal Centre

(1) It is submitted that further legislative measures need to be put in place in order to ensure the safe movement of children.

(2) Section 2.3.59 of the Issue Paper rightly acknowledges that relocation and abduction of a child are two sides of the same coin. For this reason, there must be consistent application of the law for both internal relocation and relocation abroad. Relocation within the Republic without the consent of a co-parent has the same impact on the child as relocation outside of the Republic but without the protections afforded by national and international legislation regarding child abduction. It is recommended that, save in situations where there is a domestic violence interdict in place, a parent must obtain the consent of the co-parent if they wish to locate, whether it be within the Republic or abroad.

(3) The proposed introduction of certainty in this area of law by mandating notice of a proposed move is a positive step, but must apply to relocation within the Republic and abroad. The distance that a parent wishes to move with the child will always be crucial, as will the practicalities of the child spending time with the left-behind parent. It is not to be expected, for instance, that the court will impose restrictions on a parent who wishes to move to the next village, or even the next town or some distance across the county, and a parent refusing to consent to relocation ought to be given short shrift. At the other end of the spectrum, cases in which a parent wishes to relocate to a distant part of the country and the co-parent withholds their consent require the due consideration of the court to ensure that the best interests of the child are prioritised and that a parent is not indirectly discriminated against.

3. Family Zone[365]

Relocation and abduction are dissimilar in many ways. The motivation for these two actions may overlap in motive where a parent may relocate or abduct in order to reduce contact

[365] Dr Ronel Duchen & Irma Schutte

between the child and other parent. It is possible to set out factors that need to be considered in addition to Section 7 of the Children's Act. These factors are clearly articulated by Dr Stahl.

4. Jakkie Wessels , Regional Court President: Limpopo Regional Division

Both internal and international relocation should be addressed in legislation. The AAML as suggested might be a good starting point, so too the factors referred to in 2.3.52 up to 2.3.58 (p76 – 79). This is another instance where the importance of the child's right to be heard and possibly be given legal representation might need to be included in the …

5. Sandra van Staden, Biccari Bollo Mariano Inc Attorneys (Cape Law Society support)

I am of the view that there is no need for more legislation on relocation. I believe that the current legislation sufficiently covers this, more particularly the various sections in the Children's Act No. 38 of 2005, as amended, *inter alia,* sections 7,9, 18 and Chapter 17 as well as Schedule 2 (Hague Convention on the Civil Aspects of International Child Abduction) in particular has reference. This, coupled with case law, provides sufficient guidance.

6. Gauteng North Services to People with Disabilities (Dr Laetitia Botha)

No. Adequately addressed under mediation. There is no need for a separate legislation to deal with this issue as it can be addressed in a Parenting Plan.

7. The Cape Law Society (Zenobia du Toit)

I am of the view that relocation should not be codified in legislation. Families change, the social fabric changes, the movement of people changes and way relocation is looked at has always in law across the world evolved over the years. It will still evolve, particularly with the changing face of families. To legislate it narrowly would be problematic. Principles have emerged in case law and should continue to evolve in case law as the best interests of children and as society evolve. The case law that has evolved is clear from time to time and also accommodates the fluidity of modern families. Again it would be problematic to codify law which may become stultified and outdated in five years' time. The nature of family law is fluid and evolves along the best interests of children. Account can be taken of international case law, instruments, agreements and articles.

8. Lawrence Bassett, Deputy Chief State Law Adviser: Legislative Development, DOJCD

(1) The answer to the first question would be no. This will definitely be an infringement on sections 21 and even 22 of the Constitution. These rights may, however, be limited but in the question of relocation it will be almost impossible to meet the standards set out in section 36 of the Constitution. The SALRC clarification sought: In re par 3 (relocation of families) you

have indicated that addressing relocation in legislation will result in an infringement of the Constitution. However, is it the freedom of movement or the parental rights and responsibilities of the parent that are being restricted? It would seem as though it is not the right of the parent to move away that is at stake, but whether the parent should be allowed to take the child along: a different question? I would appreciate your comment in this regard.

(2) DOJCD response: The freedom of movement and residence was uttermost in my mind but also the freedom of trade, occupation and profession. The best interest of the child should of course take preference, but then it might be in the best interest of the child if the father/mother earns more money elsewhere. To only put the limitation on one parent will infringe on the equality clause. The relocation of children together with a parent is another issue altogether. It might be in the best interest of the child to re-locate together with a parent. But it must also be borne in mind that there are a whole lot of variables here. Does the other parent even care? Some parents 'abdicate' there parent status and wish no contact. The other parent may have consented to such a move. It gets trickier if the parent does not agree. Then there are various rights which must be taken into account. I feel that to put a provision like that into legislation is asking for trouble and should best be left, if there is a dispute, to the courts to decide in each case what will be in the best interest of the child.

(3) **Question: 26. What considerations should be considered in drafting legislation in this regard?** It should be borne in mind that in today's world contact between people is very easy with technology. So contact between parents and children is even easier than physical visits, although physical contact is absolutely necessary for the child's development. Should legislation be drafted, due consideration to the Constitution should be given and the same restriction on the non-resident parent must be imposed as on the resident parent as the same principle applies, namely contact with children.

9. Office of the Family Advocate

In this regard, it is our submission that considerations should be given to a more neutral approach. Each matter should be determined on its own merits. Cognizance should be given to the fact that in certain matters where courts have ordered in favour of international relocation, challenges arise in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980.

10. Karen Botha, Benita Ardenbaum Attorneys

The considerations set out in para 2.3.58 should be considered.

11. Cape Law Society (Sandra van Staden, Biccari Bollo Mariano Inc.)

(1) I would respectfully suggest that a neutral approach is preferable.

(2) Many of the factors listed on Pages 76 through to 77 are already considered by our courts due to the fact that most of the factors listed in paragraph 2.3.52: (a) to (k) (Washington Declaration) are usually raised in the affidavits/papers filed by the litigants. The points/issues listed in paragraph (i) - (l) are either speculative or subject to unilateral change and will thus be difficult for the Court to adjudicate on.

(3) Paragraph 2.3.53 on page 77 (Domingo):

These are, similarly, problematic. Whilst it could be explored and the parties could address same in their court papers, paragraph (b) will amount to speculation by all concerned including the court. It will constitute the making of a decision by the court on behalf of the parent opposing the application to move and could be open to a Constitutional challenge. In respect of paragraph (c) - this proposal will no doubt in any event be made by the parent opposing the relocation in his/her opposing papers as an alternative solution.

(4) Paragraph 2.3.54 (Stahl). This does not take the matter any further. If a child is to relocate to a country which is not a signatory to the International Hague Convention on Private International Law, it is the relocating parent who is at risk and this point thus becomes irrelevant.

(5) Paragraph 2.3.55 (a) to (c) on page 78 (Arizona Revised Statutes)

(a) This will amount to speculation on the part of the court and is not helpful.

(b) If a party intentionally misleads the court, it affects his/her credibility and will have a negative impact on his/her case.

(c) It is a reality of relocation that the parent with whom the child is allowed to relocate or stay, will have the main share of *"parenting time".*

(6) Paragraph 2.3.58 on Page 79 (Albertus)

(a) I submit that it will create an unmanageable situation if parties other than and in addition to the parents of a child be allowed to object, separately and independently, to a relocation.

(b) It will serve to create an opportunity for "third parties" to "veto" a decision by the parents of the minor child where the parents may have reached an agreement regarding the relocation. This will cause not only uncertainty but unnecessary legal costs for the parents. This should not be allowed.

(c) Creating a burden of proof, essentially means to a move away from a neutral policy and will create either a presumption in favour of or against relocation, depending on where the burden of proof lies. In my view, this militates against the principle of applying the Child's Best Standard as is envisaged in Sections 7 and 9 of the Children's Act No. 38 of 2005, as amended.

(d)I do not believe that Parenting Plans can "pre-empt" disputes which may arise in the event of a relocation. Not only will such provisions be speculative by nature, but it

will also give rise to unnecessary complex Parenting Plans which, in turn may cause unnecessary problems for the parties.

(7) Paragraph (h) - Conclusion: Page 81 (Andrews)

The difficulty with mandating a notice of a proposed move is that it could create a rebuttable presumption that, failing an objection from the parent to whom notice has been given, such parent has acquiesced to the proposed move. This flies in the face of the principle that all decisions and changes to prevailing care and contact arrangements must be based on what is in the best interest of the child. By creating legislation directing courts as to which circumstances should be considered and which not, can easily lead to an unfair hearing and could, in fact, even border on a denial of justice to one or both parties. One has to bear in mind that each case is unique and has its own set of circumstances. It cannot be assumed (as a rigid rule) that all factors relevant in one matter will always be relevant in another and *vice* a *versa.* It is very possible that a factor which might not be relevant in one matter, could be extremely relevant in another.

12. Child Welfare South Africa (Julie Todd)

SA Law is guided by the principles of Article 9 (3) of the UNCRC. New legislation by the Department of Home Affairs would suggest that a refusal in terms of Sec 18(5) of the Children's Act 38/2005 would prevent a parent taking a child out of the country (even on holiday or for specific time specific contract work). The constitutionality of this has yet to be tested by the courts. *Carte blanche* application without legal recourse would seemingly be unconstitutional and cannot always be said to be in a child's best interests and this needs to be born in mind in the drafting of any legislation.