

## RELOCATION APPLICATIONS IN FAMILY LAW COURTS IN AUSTRALIA

Grace Lawson<sup>1</sup>

### 1. Introduction

Separating parents generally reach an agreement about parenting arrangements for their children. They may agree, for example, which school the children will attend, and the time they will spend with each parent. Amicable co-parenting may continue until the children grow up. However, even parents who co-parent well together after separation may find themselves disagreeing about certain issues. One example is where a parent wishes to relocate with the children. If the proposed relocation is such a distance away that continuing current arrangements would be impractical, and the time the children spend with the other parent would be significantly reduced, the other parent may oppose the move.

Parents who wish to relocate with the children, whether the relationship with the other parent is amicable or not, often give complex, multiple reasons for their desire to relocate.<sup>2</sup> These reasons often include:

1. To escape family violence or threats;<sup>3</sup>
2. To take advantage of a career opportunity and better care for the children financially;<sup>4</sup>
3. Because their new partner is being transferred to another location by their employer;<sup>5</sup>
4. To move closer to their extended family where support is more readily available;<sup>6</sup> or
5. Because the level of hostility between the parents is so high that it is having an adverse effect on the children's wellbeing, and relocation is the only viable option.<sup>7</sup>

Parents do not need to give compelling reasons for the proposed relocation.<sup>8</sup> They are free to move and courts recognise that they cannot prevent the parent from relocating.<sup>9</sup> However,

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<sup>1</sup> Grace Lawson is a Barrister and Mediator at the private bar in Brisbane. [www.gracelawson.com.au](http://www.gracelawson.com.au); [www.romamitchellchambers.com.au/barristers/glaw/glaw.html](http://www.romamitchellchambers.com.au/barristers/glaw/glaw.html); Liability limited by a scheme approved under professional standards legislation. ©Grace Lawson, 2015.

<sup>2</sup> Behrens, Juliet and Smyth, Bruce. 2010. "Australian Family Law Court Decisions about Relocation: Parents' Experiences and Some Implications for Law and Policy". *Federal Law Review*, 38(1):19; Parkinson, Patrick and Cashmore, Judy. 2015. "Reforming Relocation Law: An Evidence-Based Approach". *Family Court Review*, 53(1):25; Saini, Michael; Allan-Ebron, Daria and Barnes, Jessica. 2015. A Critical Review of Relocation Research Specific to Separation and Divorce". *Journal of Divorce and Remarriage*, 56(5):388-389.

<sup>3</sup> Kaspiew, Rae; Behrens, Juliet and Smyth, Bruce. 2011. "Relocation Disputes in Separated Families Prior to the 2006 Reforms: An Empirical Study". *Family Matters*, 86:74; Saini et al, *ibid*: 401.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid*.

<sup>6</sup> Kaspiew et al, *ibid*: 76; Saini et al, *ibid*: 401.

<sup>7</sup> Kaspiew et al, *ibid*: 27; Saini et al, *ibid*: 401.

<sup>8</sup> *AMS v. AIF* [1999] 199 CLR 160; *U v U* [2002] 211 CLR 238.

<sup>9</sup> *B and B: Family Law Reform Act 1995* [1997] 140 FLR 11; Parkinson and Cashmore, *ibid*: 24; Parkinson, Patrick. 2008. "Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation". *Federal Law Review*, 36(2):151-152.

parents are not free to relocate their children unless the other parent agrees, or the court permits it, and courts can prevent children from being removed from a particular location.<sup>10</sup> There are therefore competing interests involved in relocation cases. One is the freedom of movement of one parent. The other is the other parent's parenting right and the children's right to maintain a meaningful relationship with that parent. One Judge described this as "an unpalatable choice to be made" and referred to the issue of relocation as "one of the most vexing in family litigation".<sup>11</sup>

When deciding relocation cases the courts look at what is in the best interests of the children.<sup>12</sup> In many cases they need to consider whether the children would be better off relocating to an unfamiliar location with the parent with whom they have been spending more time with, or remain in a familiar location with the parent with whom they have been spending less time with. Where children have been spending equal times with their parents then the relocation will result in them spending significantly less time with one parent. Making these decisions is vexing and there is "no easy or universal answer".<sup>13</sup> The decision may be legally right, but considered unfair by one of the parties and possibly the children. The judiciary are conscious of these issues and the fact that making a wrong decision can have serious and long-lasting consequences for the parents and the children.<sup>14</sup>

When a parent's proposed relocation is opposed by the other parent, they may have no alternative but to apply to court for permission to relocate with the children. These applications, and the responses to these applications, must be centered on what is in the best interests of the children. Parents may be unaware of what the court considers relevant. It is crucial, therefore, that lawyers representing these parties are familiar not only with the law pertaining to relocation cases, but also how to best obtain and present the evidence to the court to persuade it to permit the relocation. The purpose of this paper is not to discuss the relevant case law, but to assist lawyers in providing guidance on the type of evidence that is relevant in relocation cases and how to present this evidence to the court.

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<sup>10</sup> Kordouli, Vicky. 2006. "Relocation – Balancing the Judicial Tightrope". *Australian Journal of Family Law*, 20(1):89-90; Parkinson and Cashmore, *ibid*: 24; Parkinson, *ibid*: 146.

<sup>11</sup> The Hon. Justice Tim Carmody. 2007. "Child Relocation: an Intractable International Family Law Problem". *Family Court Review*, 45(2):214; see also Kordouli, *ibid*: 89.

<sup>12</sup> Kordouli, *ibid*: 89.

<sup>13</sup> The Hon. Justice Tim Carmody, *ibid*: 214.

<sup>14</sup> *Ibid*.

## 2. The process of hearing relocation applications

In every State and Territory in Australia, except Western Australia, the application should be made in the Federal Circuit Court of Australia<sup>15</sup> or the Family Court of Australia.<sup>16</sup> Some applications are filed in state courts of summary jurisdiction. In Western Australia, the applications are filed in the Family Court of Western Australia.<sup>17</sup> In all jurisdictions, the applicant may seek the relocation order as a final order, or as an interim and final order. Once the application, response and any supporting material are filed and served, the parties attend dispute resolution such as a Case Assessment Conference. However, if the applicant requests an urgent interim hearing and the Registrar is satisfied of the grounds relied on, the application will proceed directly to an interim hearing.<sup>18</sup>

Relocation applications rarely succeed at the interim hearing.<sup>19</sup> The hearing is allocated limited time (generally 2 hours) and the supporting evidence is usually un-tested. Cross-examination in interim hearings is permitted only in exceptional circumstances, and must take place within the limited time provided. Further, courts rely on expert evidence when considering relocation cases and expert family reports are rarely obtained before an urgent interim hearing. An expert requires sufficient time to review the existing documents, interview the parties and the children, and provide their report to the court. This usually takes place before the final hearing. However, there are other orders that a party may seek at an interim hearing, such as permission to take the children to the proposed new location to attend school interviews to secure enrolment in the event that the court permits the relocation.<sup>20</sup>

## 3. The applicable legislation

When drafting the applicant's or respondent's affidavit (whether for the interim or final hearing), the applicable legislation must be addressed. The governing legislation in all States and Territories in Australia, and to some extent Western Australia, is the *Family Law Act 1975* (Cth) ("FLA"). The relevant part of the FLA is Part VII, dealing with children.

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<sup>15</sup> Access at [www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au).

<sup>16</sup> Access at [www.familycourt.gov.au](http://www.familycourt.gov.au).

<sup>17</sup> Access at [www.familycourt.wa.gov.au](http://www.familycourt.wa.gov.au).

<sup>18</sup> The Melbourne Registry of the Federal Circuit Court of Australia has established a Relocation List dealing specifically with relocation applications (Notice to Practitioners and Litigants, dated 11 December 2014).

<sup>19</sup> There must be exceptional circumstances for the court to allow relocation on an interim basis. See, for example, *Don v McGlennan* [2014] FCCA 2178, where the father who was awarded full parental responsibility after a 15 day Family Court of Australia trial was permitted to relocate with the child on an interim basis.

<sup>20</sup> Such an order was obtained by the applicant mother in an unreported decision of *Travers v Travers* [2014] FCCA 26 where, at the conclusion of the hearing of her application to relocate with the children and before judgment was handed down, Judge Turner permitted the mother to take the children to the new proposed school to attend pre-enrolment interviews.

The Family Court of Western Australia was established in 1976 as a state court and exercises both state and federal jurisdiction.<sup>21</sup> The governing legislation of this court is the *Family Court Act 1997 (WA)* ("FCA"), although the court also has jurisdiction under the FLA.<sup>22</sup> Proceedings in the Family Court of Western Australia are therefore held under either:

1. The FLA, which covers married parties who want to divorce and make arrangements for children, property and spousal maintenance; or
2. The FCA which covers arrangements for children of unmarried parties, and property matters of parties in de facto relationships.<sup>23</sup>

The relevant part of the FCA is Part 5, dealing with children. It is substantially the same as Part VII of the FLA.

Neither the FLA nor the FCA expressly deals with relocation in any discrete sense or as a special category.<sup>24</sup> If parents have a current court order about the living arrangements of the children, then a parent who wishes to relocate with the children must seek a variation of that order.<sup>25</sup> Otherwise, the parent who wishes to relocate must file an application seeking permission to do so with the children. In both instances, relocation cases are decided in the same manner as any other matter relating to the parenting of children.<sup>26</sup> This includes primarily the following issues:

1. Regarding the best interests of the children as the paramount consideration;<sup>27</sup>
2. Determining the children's best interests by examining primary and additional considerations as stipulated in the FCA or the FLA;<sup>28</sup> and
3. If the parents have equal shared parental responsibility, considering whether the children spending equal time or substantial and significant time with each parent is in their best interests and reasonably practicable.<sup>29</sup>

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<sup>21</sup> Dickey, Anthony. 1994. "Jurisdiction Without Tears: A Guide to the Jurisdiction of the Family Court of Western Australia". *University of Western Australia Law Review*, 24(1):21.

<sup>22</sup> Dickey, *ibid*: 21, 22, 25-27.

<sup>23</sup> Dickey, *ibid*: 21-27.

<sup>24</sup> The Hon. Justice Tim Carmody, *ibid*: 220.

<sup>25</sup> Pursuant to the rule in *Rice and Asplund* [1979] 6 FLR 570.

<sup>26</sup> The Hon. Justice Tim Carmody, *ibid*: 220; Parkinson, *ibid*: 146-147.

<sup>27</sup> FLA s60CA/FCA s66A; Parkinson, *ibid*: 146-147.

<sup>28</sup> FLA s60CC/FCA s66C; see also Behrens and Smyth, *ibid*: 2 and Parkinson, *ibid*: 146-147.

<sup>29</sup> FLA s61DA/FCA s70A and FLA s65DAA/FCA s89AA; see also Parkinson, *ibid*: 146-147 and Rathus, Zoe. 2010. "Of 'Hoods' and 'Ships' and Citizens: The Contradictions Confronting Mothers in the New Post-separation Family". *Griffith Law Review*, 19(3):452.

When drafting the supporting affidavits for the applicant or respondent parent, each of the above issues must be addressed. A lawyer will be in a position to prepare thorough affidavits efficiently only if detailed instructions are obtained from the client and the relevant evidence is gathered. Both the lawyer and the applicant need to pre-empt what the respondent might say in their material, and the evidence they might rely on. Some specific examples of how this can be done are provided in the following section.

### **Obtaining instructions from the client**

When a client provides instructions for a relocation application, detailed information must be obtained from the client to address each of the issues referred to above. For example, on the question of what is in the best interests of the children, the lawyer needs to ask about the current arrangements for the children, whether those arrangements are working, and how the client proposes to alter those arrangements. Further, the client needs to verbalise what they consider to be in the children's best interests, and why. Finally, independent evidence needs to be obtained to support the client's assertions, such as reports from counsellors or psychologists treating the children or the client.

To address the primary considerations in determining the best interests of the children, the lawyer needs to ask the client what they understand a "meaningful relationship" to mean and whether the children currently enjoy such a relationship with each parent. If the client considers that the children do not have a meaningful relationship with the other parent, the client needs to explain what they have done to encourage the children to develop such a relationship with the other parent. The lawyer needs to investigate whether the client has acted in any way that may be viewed as discouraging the children from having a meaningful relationship with the other parent (where there are no issues of violence, abuse or neglect). In addition, the client needs to verbalise how they propose to ensure that the children develop or maintain a meaningful relationship with the other parent if they were permitted to relocate. Most importantly, in addressing the primary considerations, information needs to be obtained to determine whether the client or the children have been exposed or subjected to physical or psychological harm, abuse, neglect or family violence of any kind. If that is the case, the nature of the harm, abuse, neglect or family violence needs to be detailed.

To address the secondary considerations in determining the best interests of the children, the lawyer needs to ask questions addressing each of the subsections of s60CC of the FLA or s66C of the FCA:

- a. *On the views of the children*, the lawyer needs to determine the age and the level of the children's maturity and understanding. If the children are old and mature enough to express a view, ask what view have they expressed, and the reasons they have given, in their own words, for or against the relocation. It is important to also ascertain whether the client has discussed the proposed relocation with the children, and if so, how the proposal was put to them.
- b. *On the nature of the relationships the children have with each parent and other persons*, ask the client about the nature of the relationship the children have with both parents, such as the quantity and quality of time spent with each parent. The nature of the relationship the children have with each of the parents' extended family, such as grandparents, uncles/aunties, cousins, step parents, step siblings, is also important. With skilful and tactful questions the lawyer needs to ascertain whether the client has acted in any way that may be interpreted as hindering the children from developing a meaningful relationship with the other parent's extended family (where there are no issues of violence, abuse or neglect). Finally, obtain instructions about what the client has done to facilitate the children developing and maintaining a meaningful relationship with their extended family of both parents, and how the client proposes to ensure that the children maintain a meaningful relationship with the other parent if the relocation is permitted.
- c. *On the extent to which the children's parents have taken, or failed to take, an opportunity to participate in making decisions about major long-term issues relating to the children, and to spend time with and communicate with the children*, some factual information needs to be obtained. For example, how long the parents have been separated, whether the children have spent more time with one particular parent, and to what extent the parent with whom the children have spent less time with has been involved in the children's schooling, extra-curricular activities and health. Further, whether the other parent has been consistent in attending appointments relating to the children, and spending time and communicating with them, and what the client has done to facilitate the other parent's involvement in the children's lives and making long-term decisions. Finally, the lawyer needs to ascertain whether there is anything the client may have done or said that could be interpreted as the client hindering the other parent's involvement in the children's lives and making long-term decisions.
- d. *On the extent to which each of the parents has fulfilled, or failed to fulfil, their obligations to maintain the children*, the lawyer needs to determine what the

client's financial position is (e.g. income, expenses and child support) and the other parent's financial position (if known to the client). If there is a child support agreement in place or a child support assessment has been completed, a copy of those documents needs to be obtained. If the other parent has agreed or has been assessed to pay child support to the client, determine the amount assessed and whether it is being paid. The other parent may have provided any financial support for the children over and above the agreement or assessment, or the client may have requested the other parent to provide additional financial support. If this is the case, evidence of this needs to be obtained. Finally, ascertain the specific expenses relating to the children that the client is solely responsible for are, and whether the relocation would improve the client's ability to maintain the children, and how.

- e. *On the likely effect of any changes in the children's circumstances, including the likely effect on the children of any separation from either of the parents, or any other child or person with whom he or she has been living*, more specific information needs to be obtained from the client. For example, who else lives in the client's home with the children and in the other parent's home when the children live there, who would live in the children's home with the client if they were permitted to relocate, and whether the client understands that the children may be affected if the move significantly reduces the time they will spend with the other parent and their immediate family. The client needs to verbalise how they propose to deal with this potential issue. If the client is prepared to relocate without the children (if the court does not permit them to go), determine what the likely effects on the children could be if they remain with the other parent and no longer live with the client. For example, whether they have spent any substantial time away from the client and whether they would have to change schools.
- f. *On the practical difficulty and expense of the children spending time with and communicating with a parent and whether this will substantially affect the children's right to maintain personal relations and direct contact with both parents on a regular basis*, more specific information needs to be obtained. For example, where the client proposes to relocate with the children, what the proposed mode of transport for the children when they travel to spend time with the other parent would be, and the cost of that travel. Further, how often the client proposes that the children travel, how long the children would be in transit, and whether they would be accompanied. Finally, determine who the client proposes would meet the cost of the travel and whether this proposal is viable.

- g. *On the capacity of each parent and any other person to provide for the needs of the children, including emotional and intellectual needs*, the lawyer needs to ascertain whether both parents have been providing for the children's physical, emotional and intellectual needs. If the client states that the other parent has not been providing adequately for the children's needs, determine exactly what the other parent has done, or failed to do. For example, the other parent may be suffering from substance abuse or may have exposed the children to family violence. If one of the reasons for the client's proposed relocation is that the other parent has failed to provide for the needs of the children, ascertain how the proposed move improves the situation or assists the client to meet the children's needs better. For example, the client may have better support network in the proposed location.
- h. *On the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the children and of the parents, and any other characteristics of the child that the court thinks are relevant*, the lawyer needs to obtain information about the client's and the children's lifestyle and how the proposed relocation would improve it. For example, the client may have received a career opportunity with a higher income. Further, the children may have special needs or characteristics that are better addressed by relocating. For instance, there may be a school that offers programs specifically for those needs or characteristics in the proposed location. If the client has concerns about the other parent's maturity or lifestyle and this is one of the reasons for the proposed relocation, determine how the other parent's maturity or lifestyle directly and adversely impacts on the children.
- i. *If the children are Aboriginal or Torres Strait Islander children, on their right to enjoy their culture and the likely impact any proposed parenting order will have on that right*, the lawyer needs to obtain information about how the current arrangements allow the children to enjoy their culture and whether the proposed relocation would improve or impair this right. If the proposed relocation improves this right, ascertain how it would do that. If the proposed relocation impairs that right, the client needs to express how they propose to deal with this issue.
- j. *On the attitude to the children, and to the responsibilities of parenthood, demonstrated by each of the child's parents*, the lawyer needs to ascertain how the client has shown a responsible attitude in raising the children and meeting

their needs. If one of the reasons for the proposed relocation is that the other parent has shown a poor attitude to the children and their responsibility of parenthood, determine how exactly the other parent has demonstrated this. Further, the client needs to verbalise how the proposed relocation directly impacts the client's or the other parent's ability to discharge or improve their attitude to and parenting of the children.

- k. *On family violence involving the children or a member of the children's family*, the questions the lawyer needs to ask the client relate specifically to family violence. Detailed information needs to be obtained about the instances of family violence that may have occurred including financial, economic, physical, emotional or psychological. If the authorities have been involved, obtain evidence about the outcome of any action taken. It is important to ascertain whether there is anything that the client has done or said that might be interpreted as the client being either the perpetrator of the family violence, or lacking the ability to protect the children from it. Further, determine how the proposed relocation would protect the children from any further family violence. If a family violence order even been made in relation to the children or a member of the children's family, obtain a copy of that order. It will evidence the nature of the order, the circumstances in which the order was made, whether any evidence was admitted in proceedings for the order, and whether any findings were made by the court in proceedings for the order.
- l. *On 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 children*, the lawyer needs to ask the client whether they would consider lodging an appeal if they are not successful in obtaining the order permitting them to relocate with the children. If so, specify what the cost of the institution of further proceedings such as an appeal would be, and how this cost and further proceedings would impact on the client and the children.
- m. *On any other fact or circumstance that the court thinks is relevant*, the lawyer needs to ask the client about the other parent's situation and whether they may be able to relocate as well. For example, the client may have information about the other parent's employment status and extended family support network in the proposed location, or the other parent may have indicated a possibility of relocating. In addition, obtain instructions about the client's current social, psychological and economic position and how this may improve

if the children's relocation is permitted, or damaged if it is not. Finally, obtain information about any other facts which may warrant the client seeking an order for sole parental responsibility for the children.

### **Gathering evidence**

Once thorough instructions are obtained, it is imperative that the client's claims and assertions are substantiated. Documentary evidence needs to be obtained wherever possible. For example:

1. In allegations of family violence, obtain a copy of the family violence applications or orders, a copy of the police file, the department of child safety file, medical and school files, and any witness statements or affidavits. If the client or the children are consulting any professionals, reports should be obtained from them about the benefits of the client and the children relocating and how it would be in their best interests.
2. To describe the nature of the relationship the children have with each parent and any extended family members, photographs, letters, emails and text messages may be relied on. However, caution must be exercised that the children are not coerced or manipulated into writing such letters, emails or text messages.
3. If claiming that the other parent has demonstrated a poor attitude to the children or their parental responsibility, or failed to participate in their lives or in making long term decisions, the applicant may rely on diary entries of appointments that were missed, or email and text messages from the applicant which were ignored. However, if claiming that the other parent does not take interest in the children, the applicant's communication to the other parent must show that they try to actively encourage the children's relationship with the other parent.
4. In instances where the other parent fails to provide financially for the children, and where the relocation would improve the financial position of the applicant and the children, the evidence that needs to be obtained includes copies of child support assessments, bank statements, rental leases or mortgage statements, tax returns and notices of assessment, a list of current and future expenses, and a list of future income.

5. If the applicant proposes a better school for the children, evidence needs to be obtained of the programs that the school offers and that these are not available in the current location. School reports and any letters from the children's teachers may be advantageous.
6. Where the proposed relocation is to be closer to any extended family members, statements or affidavits should be obtained from those parties to evidence the support that they are willing to provide, whether financial or emotional.
7. If the applicant or their current partner need to relocate for employment purposes or a career opportunity, evidence must be obtained whether the employment would be terminated if they did not relocate, or evidence of the offer of employment, hours of work and remuneration. The employers must be prepared to give evidence at the hearing.
8. If the applicant wishes to relocate because of the current level of hostility between the parents, evidence needs to be obtained from a professional treating the client (such as a psychologist, psychiatrist, social worker or counsellor). The client may be under the impression that this may in fact show them to be an unfit parent, and may be hesitant to obtain such reports. However, family courts give considerable weight to the link between the child's welfare and the parent's social, psychological and economic welfare, and reports obtained for this purpose would not render the client as an unfit parent.<sup>30</sup>

If the client is unable to obtain the documentary evidence, consider requesting the document on the client's behalf with their written consent. It may also be requested from a third party, for example, under freedom of information. As a last resort, the evidence could be obtained by a way of a subpoena.

Once thorough instructions are obtained from the client and the lawyer has gathered relevant documentary evidence to support the client's relocation application, the lawyer may proceed with drafting the application and the supporting affidavits. The affidavits should be filed in accordance with the procedural rules of the relevant court, or directions issued in the particular case.

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<sup>30</sup> Kardouli, *ibid*: 104.

## Drafting the application and affidavits

When drafting the application, the orders sought should be detailed. For example, the following order would be insufficient:

*That the applicant be permitted to relocate the children to X.*

This order does not tell the court where the children are to be relocated, and there are no orders providing for the contact arrangements between the children and the other parent. It also does not identify the children, and makes no mention of parental responsibility.

The orders should reflect the proposal that the applicant is putting to the court for the living arrangements of the children, and for the time that they are to spend with the other parent. For example, these would include:

- 1. That the mother and father have joint parental responsibility.*
- 2. That the children A born on 1 January 2010 and B born on 1 January 2012 live with the applicant.*
- 3. That the applicant be permitted to relocate the children from C to D at the commencement of the first school term in 2016.*
- 4. That the children be enrolled at the ABC school.*
- 5. That the children spend time with the respondent during the April, July and October school holidays, and half of the summer school holidays.*
- 6. That the children communicate with the respondent at any reasonable time by means of Skype and telephone.*

The orders would also specify how the children would travel between the applicant's and the respondent's residences, who would accompany them, and who would pay for the cost of the travel. Once the proposal for the children's relocation and contact with the other parent is outlined, other general orders may be included, such as exchange of contact details, school reports, etc.

Although the parties in these types of matters bear their own costs,<sup>31</sup> an order seeking costs should still be included in the application. During the proceedings the other party may conduct themselves in a way that would justify costs being awarded against them. The court can only make an order that is sought by the party in their application. If the party does not

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<sup>31</sup> FLA s117/FCA s237.

seek costs, costs cannot be ordered. It is sufficient for the application to include one of the following orders:

1. *Costs*; or
2. *That the respondent pay the applicants costs.*

When drafting the affidavits, evidence must be provided to support each of the orders sought. The lawyer should address the weaknesses of the client's case as well as the strengths. It is advantageous for the client to admit any weaknesses or problems with the orders they are seeking and address them first. This will build the client's credibility. It will also allow the lawyer to pre-empt what the respondent might say and the evidence they may produce. Of course, this can only be done effectively if the client is forthcoming with the relevant information. If the parties have had the benefit of attending dispute resolution before a hearing, then the applicant will have a fair idea of what the respondent's position may be.

The client may be precluded from filing an affidavit, by the rules of the relevant court, unless such a direction or an order is made. However, this does not mean that the lawyer cannot begin drafting the affidavit or gathering the evidence. Without considering such evidence it would be difficult for the lawyer to advise the client on the prospects of success of the application.

The affidavits should be drafted according to the rules of the relevant court, which are:

1. Part 15.2 of the *Family Law Rules 2004* (Cth), for applications filed in the Family Court of Australia, and for applications of married parents filed in the Family Court of Western Australia; or
2. Division 15.4 of the *Federal Circuit Court Rules 2001* (Cth), for applications filed in the Federal Circuit Court of Australia.

There are no equivalent parts in the *Family Court Regulations 1998* (WA) or the *Family Court Rules 1998* (WA). However, the same principles may be adopted in formatting the affidavit of a de facto parent in the Family Court of Western Australia as in the other jurisdictions. In particular, the affidavit should be divided into consecutively numbered paragraphs, with each paragraph confined to a distinct part of the subject matter. To achieve this headings and subheadings should be used. For instance, the affidavit could be set out as follows:

1. Background information (parties names, dates of birth, date of marriage or cohabitation, names and dates of birth of the children, date of separation);

2. History of proceedings (applications and responses filed, any hearings already attended, any orders made);
3. Health of the parties;
4. Employment of the parties;
5. Living arrangements of the children since separation;
6. Circumstances leading up to the application;
7. Best interests of the children (addressing each of the primary and secondary considerations of s60CC of the FLA or s66C of the FCA); and
8. Proposals (the applicant may have one or more proposals e.g. that the respondent also relocate, or alternative arrangements for the children to spend time with the respondent if the preferred proposal is not accepted).

The client's affidavit must include at least one detailed proposal, also addressing how the children would maintain a meaningful relationship with the other parent and their family if the relocation was permitted.<sup>32</sup> Supporting affidavits should always be obtained from relevant parties such as extended family members.

### **Responding to a relocation application**

A parent who is served with a relocation application is rarely surprised. Some discussions would have taken place between the parents, and the responding parent would have had some time to gather evidence to support their position if they are opposed to the relocation. Alternatively, the respondent may be agreeable to the relocation, but not to the proposal put forward for the contact arrangements between them and the children. If the responding parent is not opposed to the relocation, the lawyer should attempt to arrange a round table conference or a mediation to assist the parties to negotiate a proposal that will meet each of the parties' objectives.

If the responding parent is opposed to the children being relocated, then the application must be responded to. Similar principles apply to the respondent as to the applicant. That is, the orders in the response should be detailed. For example, the following order on its own would be insufficient:

*That the applicant's application be dismissed.*

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<sup>32</sup> The Hon. Justice Tim Carmody, *ibid*: 231; Parkinson, *ibid*: 158.

In addition to this order, the respondent should include at least one alternative proposal. For example, the respondent may seek that the children not be permitted to relocate with the applicant, live with the respondent parent, and travel to spend time with the applicant parent if that parent nevertheless relocates. However, it would also be prudent for the respondent to concede that the applicant may be successful. The respondent should therefore include orders for contact where a meaningful relationship may be maintained, if the court was minded to grant the application for relocation of the children.

Any issues raised by the applicant that the respondent disagrees with must be addressed in the respondent's affidavit. If the respondent does not accept the evidence of the applicant, evidence in rebuttal should, where possible, be obtained. For example:

1. If the respondent does not agree that the school proposed by the applicant is the only school that meets the children's special needs, evidence of a different school may be obtained;
2. If the respondent does not agree with the applicant's claim that the cost of living in the proposed location is lower than the current location, evidence of rental properties, insurance premiums or specific items referred to by the applicant may be obtained;
3. If the respondent does not agree that the proposed relocation has better prospects of employment for the applicant, evidence may be obtained of similar positions advertised in the current location; and
4. If the applicant claims that there is insufficient support network in the current location, and the respondent disagrees, affidavits should be obtained from relevant family members who could provide that support in the current location.

If there are any issues which the applicant did not address, or evidence that may be against them, this should be included in the respondent's affidavit. Not all applicants are forthcoming with evidence that may disadvantage their case. For example, there may be evidence of the applicant's conduct that may be harmful to the children. This should be included in the respondent's material.

### **Reply and written submissions**

Some applicants fail to appreciate the importance and relevance of an affidavit in reply. If the respondent's affidavit raises new issues, they cannot be ignored by the applicant. They must be addressed, particularly if they expose weaknesses in the applicant's case. The affidavit in reply should not, however, repeat the information already provided for in the applicant's prior affidavit/s. Where the parties contradict themselves on any given issue, it will be up to the court to determine whose evidence should be accepted.

Some lawyers underestimate the importance of written submissions. If the solicitor conducts the interim hearing, they may not have sufficient time to prepare the written submissions. At a final hearing, these are generally drafted by counsel. However, written submissions will assist the lawyer at the interim hearing greatly, as they will already succinctly outline the following for the court:

1. Background facts;
2. Chronology of events and proceedings;
3. The orders their client is seeking;
4. The relevant legislation and their parts/sections;
5. The relevant case law and principles applicable to their case;
6. The evidence in their client's affidavit addressing each of the questions the court is to determine (best interest of the children, primary and secondary considerations, parental responsibility);
7. How the relevant law applies to the facts of the case and determines what is ultimately in the best interests of the children; and
8. Why the orders the client is seeking on an interim basis should be made.

When addressing the court, the lawyer will then be in a position to supplement their written submissions (which would have been provided to the opponent and the court) with oral submissions. These should aim to persuade the court that it is in the best interests of the children that their client's and not the other party's evidence and proposal should be accepted.

When written submissions are drafted by counsel to supplement their oral closing submissions, they will comprehensively address the above matters. In particular, counsel will address the court on each of the factors relevant in determining what is in the best interests of the children, set out the relevant evidence, and outline the advantages and disadvantages of each proposal for that factor. The court will make findings on each factor as they think fit having regard to the legislation. It is counsel's aim to persuade the court, in their written and oral submissions, that their client's evidence is to be preferred, and that their proposal is in the best interests of the children.<sup>33</sup>

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<sup>33</sup> Kordouli, *ibid*: 95 and 96.

## Conclusion

All parenting applications before the family law courts in Australia are determined by taking into account what is in the best interests of the children. One Judge summarised the best interests of the children in relocation applications as follows:

*Best interests are values, not facts. They are not susceptible to scientific demonstration or conclusive proof. The same body of evidence may produce opposite but nevertheless reasonable conclusions from different judges. There is not always only one right answer. Sometimes, the least worst situation may be the best available. Most cases are finely balanced with the only option being a choice between two or more imperfect alternatives.*<sup>34</sup>

Indeed, even if the applicant and the respondent prepare their cases thoroughly and present them persuasively, the outcome is uncertain. It is difficult to rely on comparable decisions in family law courts, because each case may be decided by one particular factor, which may not be present in another case. Each case, as each family, is unique. Nevertheless, thorough preparation will ensure that all of the relevant evidence and all possible proposals are presented to the court to assist them in determining what is in the children's best interests.

If the decision handed down by the court is not in favour of the client, they should obtain legal advice about the prospects of lodging an appeal before they do so. If possible, counsel's advice should be obtained. Prolonged litigation, in particular if an appeal is unsuccessful, may be more detrimental to the applicant than finding an alternative to the proposed relocation. It may also be more detrimental to the respondent than agreeing to the relocation and a contact regime where the relationship between them and the children may be nurtured. Appeals, like any other court proceedings, are costly, stressful, prolonged, and uncertain. If a compromise can be reached between the parties, it should be encouraged by their lawyers.

This paper provided guidance for family lawyers instructed in drafting a relocation application, or responding to one that has been served on their client. Its purpose was not to recap the principles derived from relocation cases or how they are decided by the courts, but to assist lawyers in drafting the application, response, and affidavits. Particular emphasis was put on addressing each of the factors outlined in the legislation in both the applicant's and respondent's affidavits, and providing the court with a viable proposal. The applicants

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<sup>34</sup> The Hon. Justice Tim Carmody, *ibid*: 215.

were encouraged to consider alternative proposals for the children's living arrangements in the event that their preferred proposal is not accepted. The respondents were also encouraged to consider alternative proposals in the event that relocation is permitted. In all cases, and at any stage of the proceedings, this paper encouraged parties to negotiate and compromise to reach an agreement that they can both live with, rather than have one imposed on them by a court. Finally, this paper stressed out that obtaining thorough instructions from the client and gathering relevant evidence at the earliest opportunity will enable the lawyer to draft comprehensive material, and counsel to prepare the conduct of the trial and persuasive closing submissions.

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- Family Court Rules 1998* (WA)
- Family Law Act 1975* (Cth)
- Family Law Rules 2004* (Cth)
- Federal Circuit Court Rules 2001* (Cth)