

## AUSTRALIAN FAMILY LAW COURT DECISIONS ABOUT RELOCATION: PARENTS' EXPERIENCES AND SOME IMPLICATIONS FOR LAW AND POLICY

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In Australia, decisions about the post-separation relocation of a parent (usually a mother) with children where the other parent (usually a father) has opposed this are increasingly controversial, and have attracted both media and academic attention, including in the pages of this journal.<sup>1</sup> Unlike in the United Kingdom where restrictions even on international relocations appear from analyses of the reported case law to be relatively rare,<sup>2</sup> decisions in Australia restraining relocations are quite common.<sup>3</sup> There has, as yet, been no Australian legislative reform specifically

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<sup>1</sup> Patrick Parkinson, 'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' (2008) 36 *Federal Law Review* 145; Caroline Overington, 'Boy, 3, has Alternate Months in Dubai', *The Australian* (Canberra), 18 September 2009; Caroline Overington, 'Parent Law Ties Women to Men', *The Australian* (Canberra), 29 May 2009; Caroline Overington, "Flaws" in John Howard's Parenting Law', *The Australian* (Canberra), 3 June 2009.

<sup>2</sup> See Robert George, 'Shifting Law: Relocation Law in New Zealand and England' (2009) 12 *Otago Law Review* 107; Mary Hayes, 'Relocation Cases: Is the Court of Appeal Applying the Correct Principles?' (2006) 18 *Child and Family Law Quarterly* 351.

<sup>3</sup> In Patrick Parkinson's study of 58 post-July 2006 relocation decisions of the Family Court of Australia, Federal Magistrates Court and Family Court of Western Australia, relocation was allowed in 53 per cent of cases involving disputes between two biological parents: Patrick Parkinson, 'The Realities of Relocation: Messages from Judicial Decisions' (2008) 22 *Australian Journal of Family Law* 35. Patricia Eastal and Kate Harkins found that from 30 relocation decisions made after July 2006, half allowed relocation with children: Patricia

addressing decision-making on the issue of relocation.<sup>4</sup> The decisions are made under the general provisions dealing with post-separation parenting (Part VII of the *Family Law Act 1975* (Cth), hereinafter referred to as the 'FLA'). It has been argued, however, that court decisions are more likely to prohibit relocation with children in the current legal environment which, particularly since the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) encourages orders for shared parenting by, among other aspects, requiring courts to consider, in certain circumstances, making orders for equal time or substantial and significant time.<sup>5</sup>

In 2006 the Commonwealth government's independent family law advisory body, the Family Law Council, released a report to the Attorney-General on relocation.<sup>6</sup> That report made a number of recommendations for amending the *FLA* to include specific provisions on relocation, although recommending against inserting a legislative presumption as to outcome. These recommendations were not acted on by the previous federal government which received the Council's report, and the current government has not given any public indication of whether it intends to implement them. In any case, the Council recommended that if the changes were to be made they 'should be reviewed when the results of the Australian social science research currently underway become available'.<sup>7</sup>

In this article we report some of the results of one of those research projects, and reflect on the Council's recommendations in light of them. The project is an Australian Research Council Discovery Project 'Experiences of Parents and Children after Family

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Eastale and Kate Harkins, 'Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the *Family Law Act*' (2008) 22 *Australian Journal of Family Law* 259, 263.

<sup>4</sup> Although there are provisions in the *FLA* which specifically relate to relocation contexts: for example, the s 4 definition of 'major long-term issues' notes that:

To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a *major long-term issue* in relation to the child. However, the decision will involve a *major long-term issue* if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent.

Also the 'additional considerations' for assessing children's best interests in *FLA* s 60CC(3) include

(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.

<sup>5</sup> Patrick Parkinson has suggested that 'relocation has become significantly more difficult than it was before 2006': Parkinson, above n 3, 38. See, however, Juliet Behrens, Bruce Smyth and Rae Kaspiew, 'Outcomes in Relocation Decisions: Some New Data' (2010) 24 *Australian Journal of Family Law* (forthcoming), in which the problems with comparing the pre- and post-reform data are referred to. In a recent decision which may affect the trend of outcomes in relocation decisions, the High Court has found that it was not open to the Federal Magistrate at first instance to find that it was reasonably practicable for the child to spend equal time or substantial and significant time with both parents, and that an order for equal time (which effectively restricted the mother's relocation) should not have been made: *MRR v GR* (2010) 84 AJLR 220.

<sup>6</sup> Family Law Council, *Relocation Report* (2006).

<sup>7</sup> *Ibid* 24. At the time, two studies were underway: one by Patrick Parkinson and Judy Cashmore (University of Sydney); and this project by Juliet Behrens, Bruce Smyth and Rae Kaspiew.

Court Decisions on Relocation', and was designed to begin filling the gap in knowledge about the kinds of relocation disputes which are litigated in court, and what happens after court orders are made. The broader project has a number of aspects, including a review of the psychological and sociological literature<sup>8</sup> and Australian demographic data on relocation, and an analysis of all Family Court of Australia ('FCA') decisions on relocation between 2002 and 2004 (quantitative data). The key aspect, however, involved interviews with a qualitative sample of 38 parents who had a contested order in relation to relocation and who responded to an approach from one of the three Australian family law courts inviting them to participate in this study.

For reasons which we discuss below, we were not able to effectively compare situations where a parent was not allowed to relocate with those where they were, as we initially hoped to do. However, analysis of the interviews reveals some important insights into the dynamics of parental relationships before and after the relocation decision, suggesting that such disputes are often part of a broader pattern of high conflict or abusive relationships, and that the relocation matter is often one of many issues about which the parents are in conflict or contest. The analysis also provides insights into how parents 'do' long-distance parenting, and the reasons which parents give for the decisions they make around relocation disputes. While no one study can nor should provide the basis for the development of policy nor for law reform, the insights from this study at least begin to fill the gap in understanding the kind of relocation disputes that require a court determination (and hence the most pointed application of the law), and the aftermath of those disputes. They also enable us to reflect with some better understanding on the recommendations for law reform made by the Family Law Council in its 2006 report.

## OUR STUDY

The project involved exploratory research in an area where there is little empirical data. Given this, we adopted a 'flexible design',<sup>9</sup> refining and expanding our methodology as we acquired new knowledge, and as we made assessments of the viability and validity of various aspects of the design – particularly recruitment of participants.

We began with a design based around gathering qualitative data through in-depth semi-structured interviews with parents who had a contested court order in relation to relocation between 2002 and mid-2005. As a result of a smaller than anticipated number of participants, and an over-representation of particular categories of parents (see below), we added a quantitative aspect, involving a detailed analysis and coding of the population of judgments in relocation cases for the same period.

Ultimately, then, the study involved a mixed methods design in which the quantitative and qualitative aspects shed light on each other, and are also of value in themselves. The quantitative analysis allowed us to explore the degree to which our

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<sup>8</sup> See Briony Horsfall and Rae Kaspiew, 'Relocation in Separated and Non-separated Families: Equivocal Evidence from the Social Science Literature' (2010) 24 *Australian Journal of Family Law* (forthcoming).

<sup>9</sup> Colin Robson, *Real World Research: A Resource for Social Scientists and Practitioner-Researchers* (2<sup>nd</sup> ed, 2002) 163.

qualitative data reflected patterns in the broader population. The quantitative data are also of interest in their own right, providing a benchmark study of outcomes and factors influencing outcomes in relocation decisions in the FCA prior to the 2006 shared parenting reforms. While these quantitative data are referred to in places in this article, they are not the focus of it.<sup>10</sup>

We wanted to speak with equal numbers of parents who applied to relocate or had opposed their former partner's application to relocate and equal numbers who had been successful and unsuccessful. We targeted parents who had a decision about relocation made by the FCA, the Family Court of Western Australia ('FCWA') or the Federal Magistrates Court ('FMC') between 2002 and mid-2005. While some relocation decisions are made in state courts of summary jurisdiction, the large majority are made in one of these three courts.

Specifically, we sought to speak with equal numbers of parents from four groups:

- 1 those who had successfully opposed a relocation either through their own application or in response to the other parent's application (mostly fathers) – for simplicity we called these parents 'successful opposers of relocation' ('successful opposers'; 'SO');
- 2 those who had unsuccessfully opposed a relocation (again mostly fathers) – 'unsuccessful opposers of relocation' ('unsuccessful opposers'; 'UO');
- 3 those who had successfully applied for an order allowing them to relocate (mostly mothers) – 'successful applicants to relocate' ('successful applicants'; 'SA');
- 4 those who had unsuccessfully applied for an order allowing them to relocate (again mostly mothers) – 'unsuccessful applicants to relocate' ('unsuccessful applicants'; 'UA').

It should be noted that the project was not designed to interview both members of the former couple (ie, ex-couple dyads).<sup>11</sup> That said, we did not exclude cases where both members of a former couple opted in, but did not compare their accounts<sup>12</sup> and treated these as separate cases for the purposes of our analysis. We also made a decision from the outset not to link respondents' stories with any court material (including judgments).<sup>13</sup>

To participate, parents must have been the subject of an order made in the FCA, FCWA or FMC after a contested hearing which had an effect in relation to relocation. We included only cases that had been finalised between 2002 and the first half of 2005, and thus were interviewing participants where the court order had been made between 18 months and six years previously. It is important to note that the cases were

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<sup>10</sup> The quantitative data are separately reported in Behrens, Smyth and Kaspiew, above n 5.

<sup>11</sup> There are many practical and ethical challenges in interviewing and reporting on ex-couple dyads. As an exploratory study, we opted for the simplest way forward.

<sup>12</sup> This was for ethical reasons – participants had been assured that their accounts would not be compared with those of the other parent.

<sup>13</sup> Initially we did not plan to access judgments but, as explained above, we added this quantitative component during the project. As parents had been told their interviews would not be compared with any other data we were unable, for ethical reasons, to identify and compare their accounts with judgments in their cases.

all finalised before the *Family Law Amendment (Shared Parental Responsibility) Reform Act 2006* (Cth) came into force on 1 July 2006.

In the first instance, we approached the FCA and the FMC to help to identify parents who had been involved in a relocation dispute in one of these courts. The courts then sent out an invitation on our behalf to potential participants who met our selection criteria, inviting them to contact the research team if they would be willing to participate. In cases where mail was returned because the addressee had moved, the letters were forwarded to solicitors with a request that they forward the letter to their client. To deal with an under-representation of mothers in the sample, we then approached several women's groups to circulate an email outlining the project and asking for volunteers who met the selection criteria for participation in the study. This strategy yielded only one more participant. We also then approached the FCWA who sent out similar letters to parents who had been through that Court. Three parents opted in as a result of this approach.

Despite the various recruitment strategies described above, there was a disproportionate representation of unsuccessful male opposers in the respondent group. We are unsure why this is the case. We know from our quantitative sample that, for litigants in the FCA during this period, 57 per cent of those wanting to relocate obtained a court order allowing them to do so. While we do not know if more parents were allowed to relocate in decisions made by the FMC, it seems highly unlikely that there were, for example, so many more unsuccessful opposers than successful opposers in the groups from which we recruited participants.

The final group of participants comprised 38 separated parents (11 mothers; 27 fathers). The breakdown of each target group is shown below in Table 1. We were hoping for 20 participants in each group.

Case outcome	Applied to relocate	Opposed relocation
<b>Successful</b>	6 [SA] – all mothers	7 [SO] – 6 fathers, 1 mother
<b>Unsuccessful</b>	5 [UA] – 3 mothers, 2 fathers (1 subsequently SA)	20 [UO] – 19 fathers, 1 mother

It is noteworthy that, although in 12 cases (that is, the SO and UA cases) relocation had not been allowed, in seven of these one parent was nonetheless living at distance from a child or children. Reasons for this were that the unsuccessful applicant had gone anyway ( $n=2$ ), that the parties had been living at distance but that the dispute had been about a move further away ( $n=4$ ), and that the unsuccessful applicant had been successful in subsequent proceedings ( $n=1$ ). As a result, our study largely involved talking with parents (mainly fathers) who were, or whose partners were, living at significant physical distance from their children.

Participants were asked a range of questions about their experiences related to the relocation dispute. The interview guide had three main sections. We explored parents' accounts of circumstances:

- (i) prior to the relocation dispute arising

- (a) quality of relationships (adult and parent-child)
- (b) patterns of parenting
- (ii) around the time of the relocation dispute, in particular
  - (a) the other parent's decision
  - (b) their decision
  - (c) the court's decision
  - (d) the move (if applicable)
- (iii) after the relocation dispute
  - (a) quality of relationships
  - (b) patterns of parenting
  - (c) parents' and children's wellbeing
  - (d) other relationships
  - (e) change in circumstances.

Participants were also asked for their advice for other parents and reflections about their experiences. If parents indicated that allegations of violence or abuse were issues in their case they were asked about these at that point. If they did not they were asked specifically about any such allegations towards the end of the interview. Most of the interviews in the early stages of the project were conducted as one-on-one, face-to-face, semi-structured interviews of one to two hours' duration. A small number ( $n=8$ ) of the interviews were done by telephone.

For our analysis we used two stages of coding: (i) 'initial' coding, and (ii) 'focused' coding.<sup>14</sup> Initial coding simply involves looking at what can be defined and discovered in the data.<sup>15</sup> Focused coding, on the other hand, starts to filter and give primacy to some codes and lines of investigation depending on the data. Our initial coding involved simply collecting responses to each broad question in the interview guide. This analysis gave us a basic feel for the data. Building on this, we began to develop the more specific codes which form the basis of our thematic analysis.<sup>16</sup>

The number of separated fathers and mothers in the sample is very small, and, as indicated above, participants were not drawn randomly from the general population of separated or divorced parents. Thus no claim is made that the responses are representative of parents with similar arrangements or can be generalised to that population. Qualitative data are not used to draw inferences about a particular population at large. Rather, they provide in-depth information about context, diversity,

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<sup>14</sup> John Lofland and Lyn Lofland, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (3<sup>rd</sup> ed, 1995) 192.

<sup>15</sup> Kathy Charmaz, 'The Grounded Theory Method: An Explication and Interpretation' in Robert Emerson (ed), *Contemporary Field Research: A Collection of Readings* (1983) 109.

<sup>16</sup> We used the software, HyperRESEARCH™, to store and manipulate our codes, and to generate reports for key codes and themes. This package allows different pieces of information (ie, words, phrases, sentences, paragraphs) to be tagged for different codes so that they can be retrieved easily and systematically. Nonetheless, the research team members still had to immerse themselves in the detail of participants' stories to identify key ideas and themes among the data, and to make higher-level connections and abstractions.

meaning and process, and can help to generate hypotheses that may be tested in subsequent empirical work with representative samples. The quantitative aspect of our study, however, enables us to draw some tentative conclusions about the likely representativeness of aspects of the qualitative data.

## KEY THEMES IN OUR INTERVIEW DATA

Here we outline some of the key themes in the interview data, but also make reference to the quantitative data along the way.

### Dynamics in parents' relationships<sup>17</sup>

Consistently with the UK sociological studies of post-separation parenting disputes which end up in court,<sup>18</sup> many of the parents who we spoke with described high conflict or abusive relationships with their child's other parent. Parents who we talked with were quite likely to have had extremely poor and brief relationships prior to separation, and even more likely to have been engaged in serious conflict and litigation throughout the period since separation about a range of issues. A significant minority (10 of the 38 cases) involved very short, unhappy relationships with separation occurring during pregnancy or shortly after the birth of an only child. In some cases there were multiple issues and multiple disputes. For another substantial group there was sustained conflict focussed around the children, and the relocation dispute was often preceded by a more general dispute about parenting time, including conflict over caring roles. For most of the parents we talked with who had applied to relocate, this context of conflict and/or abuse and poor relationships was an aspect of their decision to do so. In other words, while the relocation proposal appeared rarely to be the *cause* of conflict and deterioration in parental relationships, conflict and poor parental relationships were factors in the decision to relocate for most of the parents we talked with who had applied to do so (we deal with reasons for relocation further below).

In keeping with other research highlighting the prevalence of concerns about family violence and child abuse in litigated cases,<sup>19</sup> these issues were relevant in the majority ( $n=26$ ) of situations in our qualitative component. Concerns about family and child abuse<sup>20</sup> coexisted in thirteen situations, with family violence on its own being relevant in eight cases and child abuse on its own in five cases. The men and women in our sample talked in different ways about violence, revealing strongly gendered discourses about this issue. Men's accounts tended to speak of violence in terms of engagement

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<sup>17</sup> This theme is explored in more detail in Juliet Behrens, Bruce Smyth and Rae Kaspiew, 'Australian Family Law Court Decisions on Relocation: Dynamics in Parents' Relationships Across Time' (2009) 23 *Australian Journal of Family Law* 222.

<sup>18</sup> Carol Smart et al, *Residence and Contact Disputes in Court (Volume 1)* (2003) Department for Constitutional Affairs, DCA Research Series 6/03; Carol Smart et al, *Residence and Contact Disputes in Court (Volume 2)* (2005) Department for Constitutional Affairs, DCA Research Series 4/05.

<sup>19</sup> See Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112; Lawrie Moloney et al, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (2007) Australian Institute of Family Studies, Research Report No 15.

<sup>20</sup> A wide definition of child abuse was applied, including physical abuse, emotional and psychological abuse and neglect.

with the legal system over state protection orders obtained on weak grounds, allegations made falsely or blown out of proportion and claims about violence being used in a tactical way. Rarely was any behaviour that led to such engagements discussed in any depth. Psychological defence mechanisms may be at play here – but this is speculation. Women, in contrast, struggled to label violent behaviours in ways recognisable to the law, and for them experiences of violence were a motivating issue (though not usually a deciding factor) in relation to relocation. Some women's stories demonstrate the impact dynamics of control have and the way they can be played out in legal proceedings. Women's experiences of the response of the family law system were varied, with some experiencing recognition and validation, others feeling their concerns had been marginalised and others being advised not to raise a history of family violence. This theme will be explored in more detail in future publications.

There is some evidence in the quantitative data which tentatively supports a conclusion that the broad trends identified in the qualitative data related to dynamics in parents' relationships were not atypical for relocation cases decided in the FCA. Over 80 per cent of the 190 cases were classified by the research team based on the information in the judgment to involve either high conflict or abusive relationships. In classifying a case as 'high conflict' the coder made an assessment of the extent to which, based on the descriptions in the judgment, there were other issues in dispute between the parties, previous court proceedings and poor relationships between the parents (in other words, the sorts of factors which we used to analyse the interview data). On the basis of the way the facts were described in the judgment, the larger percentage of these was high conflict, with at least 11 per cent of the cases clearly involving abusive relationships. Allegations of violence or abuse were a feature of many of the cases (70 per cent of cases). The research team classified less than 20 per cent of cases as not 'high conflict' or abusive.

Other characteristics which suggest that the broad patterns we saw in our qualitative sample are not atypical of the general population include:

- a significant minority of the quantitative sample were cases involving only one child (45 per cent);
- sixty nine per cent of cases involved prior court proceedings – half of these went all the way to a court-determined outcome;
- there had been prior moves in nearly half of the cases;
- there was a high prevalence of alleged mental illness or drug/alcohol addiction among parents in the population of FCA relocation cases: nearly half (46 per cent) of cases involved allegations that mothers (22 per cent), fathers (15 per cent) or that both (9 per cent) parents had a mental health or substance abuse problem.

As to the degree of involvement with the child prior to the relocation decision in our quantitative data, almost half (48 per cent) of the relocation cases involved parent-child contact that occurred on weekends and in school holidays before the court proceeding and an additional one third (30 per cent) of cases involved little or no contact, or no overnight stays. Shared care was reported to be occurring in 11 per cent of cases, and in a similar percentage of cases contact was occurring more frequently than every other weekend (11 per cent).

It is important to note, however, that we only had court judgments from the FCA, which typically deals with the more complex cases. An analysis of FMC decisions might present a different picture.

While the qualitative data do not seek to be representative, and the quantitative data do not tell us anything about what happened after the court decision, there is enough in the data to tentatively suggest that the patterns of relationship dynamics for parents we interviewed are not atypical – at least for matters that go to the FCA. Those data suggest that, in general, relocation disputes decided in the FCA at least are characterised by multiple layers of complexity and challenges, and point to the difficult nature of these cases for courts.

Based on the relationship dynamics between parents disputing relocation in court, as reported to us by one of the parents in that dispute in our qualitative sample, we tentatively identified three emerging patterns of cases across the pre-relocation dispute and post-relocation dispute periods. These groups we describe as 'Rough Roads', 'Smoother Paths', and 'Separate Pathways'.

The 'Rough Roads' pattern is by far the largest in our qualitative study. In these cases relocation disputes usually followed a series of conflicts, often involving prior court action and/or prior moves, and very poor or abusive inter-parental relationships. In these cases the relocation dispute was part of a much larger story about relationship enmeshment and conflict. For most of these cases the 'Rough Roads' continued after the relocation, although there was a small subgroup for whom parental relationships improved, though remaining troubled.

The smaller number of cases involving 'Smoother Paths' was those where the relocation was the main issue in dispute, and these were characterised by less conflict both before and after the court order.

The smallest group of parents were in the 'Separate Pathways' pattern, in which contact – and hence relationships between parents and between one parent and the child/children – after relocation is minimal or nonexistent. These cases were marked by quite extreme factors (drug use, controlling violence, mental illness) which preceded the relocation dispute and continued after it.

Outside of these patterns was a tiny number of parents who reported circumstances that could be characterised as lower conflict before the relocation dispute and higher conflict afterwards – in other words, where the relocation dispute appeared to have resulted in deteriorating relationships.

A tentative theory which we have developed as a result of the research is that it is the quality of inter-parental relationships before the dispute arises which determines the dynamics of those relationships over time, rather than the outcome of the court proceedings. Unfortunately, however, although we designed our study to speak with parents where there had been relocation and those where there had not, as we have indicated, our eventual qualitative sample was made up largely of parents whose child or children were living at distance either from them, or from the other parent. Thus, we are not able to draw any useful comparisons between relocation and no relocation situations. Further research is necessary to map the experiences of those who remain living close together as a result of a contested court decision and to explore further the intersection of family dynamics and geography in relation to post-separation parenting. What are the patterns of conflict before and after the court decision in these cases? Perhaps most importantly, does distance make conflict worse, or better or easier

to cope with? The answers to such questions are really important, given that it is well-documented that feeling caught in ongoing parental conflict is one of the most significant predictors of adverse impacts on children's wellbeing.<sup>21</sup>

Our data allude to the danger of making assumptions about the kinds of cases for which relocation law is needed. In particular, the data suggest that it would be wrong to assume when designing law and policy on relocation that judicial decision-making will take place largely in a context where the dispute between the parties is about relocation only. Similarly, it would be wrong to assume that the sorts of relocation disputes which are resolved in court arise when there are well-established relationships and histories of care and communication between the parents of a child. Of course, relocation law is not just used to resolve disputes which involve a judge determining the outcome: parties negotiating outcomes do, to some extent at least, use the 'shadow of the law' to resolve their disputes. It appears, however, that the relocation cases which are decided in the FCA, and for which the law is most directly used, often involve families with multiple issues where the relocation dispute is one of many sources of conflict. This may raise questions about the appropriateness of specific legislative provisions dealing with relocation decision-making.

If our theory is right, and the quality of parental relationships before relocation is the key to what happens afterwards, it might be expected that decision-making should take account of those relationships. The Family Law Council's recommendations are focused on parent-child relationships. While this is of course understandable given that children's best interests are paramount in any decision-making, it would be counter-intuitive and contrary to well-established research to suggest that those interests are unaffected by the quality of their parents' relationships.<sup>22</sup> More specifically, given the prevalence in parents' accounts of high conflict and/or abusive parental relationships preceding (and often part of) the decision to relocate, it might be expected that laws on the issue would make specific reference to these variables. On the other hand, as indicated, further research is needed to determine if physical distance reduces children's exposure to, and involvement in, parental conflict or not. It seems likely that it would, and that exposure to family violence would be lessened by physical distance.

In addition, there are inevitable questions about the appropriateness both from the point of view of children's best interests, and that of parents' interests, of expecting one parent to live in the same place as the other when there is little history of connection with place, effective cooperation and communication and little sharing of parenting. So, while the Family Law Council has recommended that the courts consider whether 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',<sup>23</sup> it may also be appropriate to include explicit consideration of these questions from the point of view of the person

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<sup>21</sup> Jan Pryor and Bryan Rodgers, *Children in Changing Families: Life After Parental Separation* (2001); E Mark Cummings and Patrick Davies, *Children and Marital Conflict: The Impact of Family Dispute and Resolution* (1994).

<sup>22</sup> Jennifer McIntosh and Richard Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation' (2008) 14 *Journal of Family Studies* 37.

<sup>23</sup> Family Law Council, above n 6, 5.

who it is proposed should remain.<sup>24</sup> While these factors may be considered as part of the reasons for relocation, this may oversimplify the circumstances of the parent applying to relocate, as we discuss below.

### How parents 'do' long-distance parenting

For parents in our small qualitative sample, relocation was rarely the end of a parent-child relationship, but rather could be seen as a significant point of transition which parents managed differently depending on their own parenting styles, their relationships, their personal resources and the support available to them. The small number of cases ( $n=4$ ) in our sample where a parent lost contact with a child after relocation involved significant violence, mental health, and/or substance abuse issues, based on their, or the other parent's, report.

Two patterns of long-distance parenting emerged from our interviews with parents living at distance from their children. These might be called a 'Separate Homes, Separate Lives' pattern and a 'Parental Engagement in Both Locations' pattern. In the first pattern, children travelled to the distant parent and that parent knew little of the child's life in the new location. The second pattern involved a more flexible approach based on active engagement by the parent in children's lives in both parents' locations.

An example of a parent whose long-distance parenting typified the second pattern is Liz (unsuccessful applicant),<sup>25</sup> whose children were living with their father for several years. Liz travelled to see the children at school functions, driving long distances there and back in one day to do so. Two fathers we spoke with who were living at distance from their children had rented rooms on a permanent basis in the new location to enable them to share their children's lives there. This pattern even occurred in the context of overseas relocations. Raymond, whose children live overseas with their mother, has continued to see the children for several blocks of holiday time every year. Sometimes the children fly to Australia, other times he flies there.

Parents in the 'Parental Engagement in Both Locations' pattern talked about the benefits of it to their relationships with their children. Liz, for example, reflected:

Yes and even though it was really tough I would go up to the children's functions at school ... and that's about showing the children that you care and I would endeavour to get to their assemblies, their plays, if they were presenting or their plays or go up and try and, you know, if they were doing a reading session at school if I knew that was coming up or sports days or I would go and watch them at volleyball or rugby. I'd go and just be there and watch them and then he'd take them away but that's okay, they knew that I came up. Do you know what I mean, and I just think that you just have to have fun when your kids are with you. ... I'm going to be normal, I'm going to go up to sports day and help out with sports day and I'll go up to the swimming carnival and help out with the swimming carnival and their assemblies and try and be involved, even though it's long-distance, yeah get up for parent teacher interviews, show that interest.

Some resident parents we spoke with commented on the fact that their former partners did not travel to the new location themselves:

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<sup>24</sup> We are grateful to Nicolette Norris for this point: personal communication with Juliet Behrens, October 2009.

<sup>25</sup> To protect the identity of participants and their significant others, names have been changed, as have some non-material details.

He has had the option and it's in the orders that he could come up here and see the children and even though I understand that there is an expense involved in that and it's not as easy. ... It is possible to get some reasonable accommodation up here so it would be nice if he did that once or twice a year from the kids' point of view. He would then be able to watch them play their weekend sports and meet some of their friends and see what their life is like up here. That would mean a lot to the kids – unfortunately that just hasn't happened (Carol, successful applicant).

The development of patterns of long-distance parenting did not seem to be closely linked to the amount of distance between the parent and the child; as we have indicated above, some parents whose children were living overseas engaged in this pattern, and in other cases a parent who was not living at a great distance engaged in the 'Separate Homes, Separate Lives' pattern. This was true of Donny (unsuccessful opposer) who lives less than 300 kilometres from the new location. He sees his teenage children in his home location half the school holidays and some weekends. The children usually catch the train to see him, and he rarely travels to the new location. However, he does use email, msn and other forms of electronic communication to keep in touch with them.

The development of these patterns seemed partly to reflect child-centredness in the parent living at distance from their children, and to be linked to the extent to which the parent living at distance had been involved in 'hands-on' parenting at earlier stages. Parents who adopted the 'parental engagement in both locations' model of parenting were much more likely to have been 'hands-on' parents at earlier stages. So, for example, Liz had been the children's primary carer, and the fathers in this group had often either shared care or been heavily involved before the dispute arose. However, the pattern adopted did not only reflect these factors. Other factors, including resource considerations, the age of the children and flexibility on the part of the parent with whom the child was living were also relevant to how long-distance parenting evolved. Many fathers talked of the expense and difficulties of travelling to the other location, and resident mothers too recognised the limitations these factors imposed.

The Family Law Council recommended that the specific legislative provision dealing with relocation refer to

what arrangements can be made to ensure that the child maintains as meaningful a relationship with both parents ... as is possible in the circumstances ... [how] the increased costs involved for the child to spend time with or communicate with a parent or people who are significant to the child's care, welfare and development should be allocated.<sup>26</sup>

We talked with many parents living at distance from their children who did manage to maintain what they would characterise as meaningful relationships with their children. This does not mean those relationships did not change from the pre-relocation situation, but, as all parents know, change in relationships with children is an inevitable part of life. As discussed, our study suggests the benefits at least in some kinds of cases of the 'Parental Engagement in Both Locations' pattern of long-distance parenting, while recognising the costs and difficulties in developing this pattern.

This suggests a need for creativity in policy responses to the issues relocation cases raise and may point to the need for some public resources to be directed to facilitating long-distance parenting. Possible resources might include: the establishment of houses where parents visiting their children in the 'new' location could stay with them; the

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<sup>26</sup> Family Law Council, above n 6, 68.

provision of airline or petrol vouchers for travel; subsidies to the purchase of webcams and like equipment; and the inclusion of a 'parenting at a distance' social security allowance. These are challenging proposals in light of public policy positions to date, which have focused on reducing child support paid to the resident parent to allow for the high costs of parent-child contact (in other words, which see these kinds of expenses as private, rather than public, responsibilities). They would also be challenging to 'sell' politically, given that they might be seen to give a preference to separated families over those which are not. On the other hand, they would be consistent with other government-funded measures adopted to support post-separation parenting, including educational programs and access to Family Relationship Centres. Measures to support long-distance parenting deserve further exploration.

The flexibility which is necessary to encourage this 'Parental Engagement in Both Locations' pattern includes flexibility either in court orders or in the attitude of the other parent. Of course, such flexibility will be inappropriate in some cases, particularly those where there is ongoing violence and/or abuse.

#### **Reasons parents give for the decisions they made**

While the High Court has clearly stated that a parent seeking to relocate does not have to show compelling reasons to do so,<sup>27</sup> the Full Court of the Family Court has subsequently noted that this does not mean that the reasons are irrelevant, but rather that they must be weighed with the other matters particularly in so far as they bear on the child's best interests.<sup>28</sup> In the judgments we examined there was inevitably evidence brought about the reasons for the proposed relocation (which were fairly easy to discern from the judgment), and the link between those reasons and children's best interests was explored by judges. As we indicate below, the Family Law Council has recommended that a particular provision dealing with relocation mention the relevance of the reasons for relocation.

We explored with participants in our qualitative sample the reasons for their decision to relocate (if they were applying to do so), and with those opposing the relocation we explored the reasons for this, as well as reasons for decisions they made about whether or not to relocate themselves.

A very consistent theme in what applicants to relocate told us was that they gave multiple, mixed and complicated reasons for their decision to move, often involving a combination of work and relationship factors, and a combination of 'push' and 'pull' factors. Parents seemed to be more or less self-focused and more or less child-centred in their reasons.

One successful applicant's words capture what most applicants to relocate told us: 'You never move for one reason, you always move for many' (Carol, successful applicant). For Carol the decision to relocate was in part to give her children better educational opportunities in a larger town, but, as she said, this was not the only reason and would not have been enough in itself to lead to that decision. Other 'pull factors' in the mix were the fact that her family lived in the new location and that there were better work opportunities for her. A significant 'push factor' was her desire to

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<sup>27</sup> *AMS v AIF* (1999) 199 CLR 160.

<sup>28</sup> *A v A* (2000) 26 Fam LR 382.

remove herself and the children from ongoing conflict with her former partner. This was also a case where one source of conflict was her dissatisfaction with the care arrangements which she had agreed to and which she felt did not provide the children with the stability they needed.

All of the parents we spoke with who had applied to relocate indicated more than one reason for the move. One successful applicant mother, Belle, referred to the fact that she had no-one to look after her son where she was living prior to the relocation decision, but was also motivated by a fear of his father and potential work opportunities in the family business in the new location. An initially unsuccessful male applicant, Asher, talked about his desire that his boys should get to know their grandparents a lot better, but also about the better schooling in the new location and the fact that he and his former partner had always planned to move there. One of the unsuccessful female applicants, Jenn, talked about wanting her children 'to know the wider family and have wider family around them', as well as the fact that their abusive father was not an appropriate role model for the children.

While the law and legal strategy tends to focus on reasons in a somewhat simple, reductionist way and on reasons that can be established by objective evidence, the parents we spoke with often talked of reasons which were hard to capture in language and evidence. Some quotes give the flavour of this complexity:

pretty much the pressure ... I felt I had to go ... (Debbie, successful applicant);

he's got a lot of family around here, sisters, mum, aunts and I was bumping into them all the time and over the years since we separated I found he had a new wife, a new partner – I didn't feel I wanted to be around here anymore. I just wanted to get away, and I was being, I was just cut off from the family ... and he was just having another baby and I felt I just wanted to get away ... their first child and I just wanted to go away. My head was just I felt ... I did not feel good (Caitlin, successful applicant);

Also my children were at the same school as his girlfriend's child, it was just awful, and her friend's children went there, and Mick and Adam would be at their house having a play and I'd think 'Oh this is just all too much', and it was so unnatural and so tacky and it was unnecessary ... we didn't need that on a day to day basis in your face (Anna, unsuccessful applicant).

Occasionally the more concrete or material bases for moving (jobs, new relationship) were evidently opening a door which the applicant wanted to go through anyway. For example, for one unsuccessful male applicant (who ultimately moved without the children), there were quite emotional reasons for wanting to move, but it was only when he was offered a job that he applied to do so:

I was offered a job up here. [Interviewer: ok and that was why you wanted to move obviously?] Yes and no. It was part of the reason. The other reason was I found it very difficult to live in the same town and see total strangers – men – carrying my children around on their hips ... I wanted to grab them and choke them. ... It was also very difficult for me to sit in the mall and the children are walking past. I can't touch them, talk to them, they can't sit on my lap. That used to hurt. So I said 'I can't bear this'. ... And then a job came up advertised for what I do with my employer in [city], and my boss said 'here's the chance you've been waiting for ...' (Cuthbert, unsuccessful applicant).

This also seemed to be the case for Anna (unsuccessful applicant):

I was angry. I was an ... angry mother who has been restricted from her children because of the shenanigans that had been going on with him and his girlfriend for the past year,

and I said 'I am sick of this. I don't want to live in the same state as this person. Ed [new partner] happens to be moving to [another capital city], we are moving' ....

As indicated in our discussion of dynamics in parental relationships, a significant number of parents who had applied to relocate talked about the poor relationship with their child's father and the need to get away from ongoing conflict as important aspects of their decision to move. For example, a successful female applicant had given her new partner's job as a primary reason for the relocation, but explains a long process she went through considering her decision:

Honestly, if the relationship between Brendan and myself had have been a lot better, maybe that decision may have been different. Maybe I would have thought 'I can live with this'. But because things were so unpleasant and because [town] is only a very small town, and basically he had to drive past my door every day, yeah, that was ... the answer was a definite 'No I can't'. But if things had have been better between us, I may have thought differently, I don't know ... (Debbie).

In some of the cases it appeared that the proposal to relocate arose in part because the parents were unable to agree on care arrangements for their children. Typically, cases in this pattern involved the father pressing for more time with the children than the mother was willing to give (including 50:50 arrangements). This was often in a context where there appeared to have been a fairly traditional division of labour before separation. It appeared as though the relocation was in part an attempt to resolve ongoing conflict over this issue, although parents rarely described it explicitly in these terms, and there were always other reasons given for the relocation proposal.<sup>29</sup>

Carol, whose story we have referred to above, had agreed to the two children living with their father two nights a week in the old location, but after a time came to regret this decision and the disruption to the children's lives she says that this caused. As indicated above, she had a whole range of reasons for wanting to move. She reports that she and the children are doing well, but that the relationship between her and her former partner is still very poor five years after the court order. She reports that the distance between them makes this more bearable.

Caitlin was another successful applicant with whom we spoke. The court proceedings in which she was given approval to relocate began as proceedings by the father of her children to have one of the children live with him and his new partner. The relocation proposal was put in response to this, although again Caitlin had other reasons for wanting to relocate – including the need to move away from a small country town where she felt controlled by her children's father and his family.

In both of these cases the mothers were supportive of relationships between the children and their fathers, but did not believe the care arrangements sought by the father were in their children's best interests.

Men also reported this conflict over caring roles as a motivating factor either for their opposition to the application, or for their partner's decision to move. Abel reports that his former partner only proposed to relocate after litigation commenced about the amount of time their daughter was to live with him. They had been sharing care equally but his former partner wanted to end this arrangement. As a result of the court proceedings the daughter has lived full-time with Abel, as her mother said she would

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<sup>29</sup> Given this, an interesting question is whether 'relocation disputes' have become more common as arrangements and court orders for 'shared care', or men pressing for such care, have become more common.

relocate irrespective of the outcome of the proceedings. Subsequently his former partner has moved back and now sees their daughter every second weekend and half the school holidays. Nikolas indicated that inability to agree on contact arrangements made him decide to oppose a relocation which he was prepared to agree to if access was what he called 'fluid and flexible.' 'In the end I said "ok deal's off. You are not going anywhere darling. We are going to the Family Court.'" This inability to agree on care arrangements was also an aspect of Mike's decision:

Yeah well he'd been in my care 50/50 from the time she left ... and then from 50/50 she said no I want him all the time, I want to take him away from you. She said to me 'I'm going to take him away and you're never going see him again'. So I've gone, 'Oh well we'll see about that.'

A subgroup of the women we spoke to who reported experiencing violence were motivated in part by a need to escape from violence, although they did not always describe it explicitly in this way:

99.9 per cent of that was just getting away from him ... He can't come around and knock on your door any time he likes – put distance really – that's what it was about (Rita, successful applicant);

And I was being controlled by him still and his family, he was being very controlling – no I had to get away (Caitlin, successful applicant);

Cody never physically hit me, but he was violent and it rages, every, like there was cycles. And basically I didn't want the kids to grow up with that as a model. (Jenn, unsuccessful applicant);

by the time we got to court, I just so needed to get away from him, that I just ... and even now, the thought of him living in the same town. It's a bit creepy (Belle, successful applicant).

None of these women we talked to wanted to stop their children's father from seeing the children, but rather they wanted to put some distance between them, in part, but not solely, for safety reasons or to get away from conflict.

We also asked parents who we spoke to who had opposed the move to talk about their reasons for doing so. As indicated above, some were motivated in part by conflict over caring roles. But a number of parents who had opposed the relocation did not engage with the question we asked at all, preferring to focus on their chances of success in the proceedings. Some parents gave child-focused reasons for the decision to oppose the relocation, although their explanations were quite brief. The following are quotations from male unsuccessful applicants:

Well, so soon after separation, I also didn't consider that it was a good idea that the children be pulled away from me. I don't want to lose contact with them (Markus);

It was very simple. I know for a fact, it was against the child's best interest. To me – she had settled into the school; she had been at the school at that stage for four years; she had a lot of friends, was quite happy; the routine, if you like was there (Dominic);

Even when the case was on I was under pressure just to capitulate but I couldn't and for the prime reason that I wanted to be able to, I believe when the kids became adults they would not believe for an instant what was going down at that time and any sign of capitulation would be seen as 'your dad didn't care that much, your dad didn't want to spend that much money to keep you there' (Lance).

Some parents told us they opposed the move in whole or in part because of their children's wishes:

you could tell, she [child- Evangelina] walked into the house and went 'this is my house, this is where I want to be.' I don't care if she's only four, I think she can think logically enough then ... So I was doing it for myself, for selfish reasons because I wanted to the kids to be with me, but I also didn't want Evangelina, I didn't want to leave Evangelina high and dry (Markus, unsuccessful opposer);

if the kids had of told me, well Ted in particular, that he wanted to go with his mum I wouldn't have fought through court. [Interviewer – is that right so that was another main reason for you opposing it then was it?] Yeah he did not want to go (Sebastian, unsuccessful opposer).

Other parents gave reasons which were more self-focused or which relied on justice-based arguments. Marty (unsuccessful opposer) said that he was considering allowing the relocation until he was shown an affidavit with what he called a

pack of lies in it – that made me angry and that made me think if the kids ever saw that and thought that I'd backed down because I was afraid. I have to let them know that I'm fighting to keep them – so that's why I went ahead with it.

Another unsuccessful opposer wanted to hold his former partner to her word that she would never take the children away from him, and that she would leave him a particular piece of property to which he was attached:

I wasn't so concerned about the block of land it was more that she'd told me that she'd never take the children away from their father because she knew how important it was for the father and the children to have a father there (Rex).

Another male unsuccessful opposer seemed surprised at the question: 'How did I come to that decision? Well I just wanted to see my kids, that's all – like it wasn't even a decision.'

We asked those opposing the relocation whether they had considered moving themselves. Most responded to this question fairly briefly ('No'; 'I don't know what I would've done, don't know, probably not though' (Oliver)). Often male unsuccessful opposers referred to breadwinning responsibilities: 'No it wasn't. My business was based in and around [old location]' (Abel). One male unsuccessful opposer seemed surprised that the question should be asked. 'No I've got my own business. I employ ten people. I just can't uproot and sell everything and move. A judge actually mentioned that once and I just looked at him' (Gavin).

Those who responded in more detail often referred to lack of work in the new location as a reason for deciding not to move: 'I suppose you always think of it but it's a matter of being practical as well. It's not practical for me. I have a good job down here – all my family is here, all my friends are here. I have nothing there – nothing at all' (Leighton).

A significant number of opposers said that they had considered moving, but did not do so because they expected that if they did the relocater would move again: 'I move, she just moves there, and that wasn't going to solve the situation' (Nikolas); 'You know if we go up there and she then moves back, what do you do?' (Raymond); 'When I do, she would move again' (Alonzo). These were all men, but two women also gave this as a reason for not moving closer: 'I still have this gut feeling that if I relocate, he'll move' (Abbie). One mother (Jess) living at distance from her son said that there was no point in her moving closer because her former partner would not be flexible about contact arrangements anyway and she could not afford to go back to court.

When asked if she had considered moving to be closer to her son, who is living with his father, Jess said:

I have on several occasions. I have yes, but I know that I mean Jose grew up here, he was given months when I moved here and he was six when he left and I just knew he loved it here. My parents were here and I wanted to keep that continuity as much as I was wanted to go back, but I also thought that Brock's not the sort of person to say, yeah, sure you can have him this weekend, I'll have him the next weekend. It wouldn't have worked that way and if it would've, I probably would have gone back ... I just thought that animosity would have not been at all healthy for him. I sort of did it for a few reasons but mainly to keep the continuity with his grandparents. You've got my mum, he went to pre-school here, and plays hockey here every second weekend, and just to keep a continuity, that familiarity going.

A number of opposers either did move, or said they would have if the decision had been to allow the relocation. Christopher simply said 'eventually I might have ended up in [new location] I suspect ... but yeah is that reasonable?' Although he successfully opposed a further relocation, his children are living at distance from him anyway. He currently rents a room in the town where they live, which he uses during contact, and he expects to move there permanently in the medium term. Ivan has also rented accommodation in the new location. Jake (unsuccessful opposer) moved closer to his daughter. After an extended period of litigation, Jarret moved to where his son was living, and his son now lives with him full-time. After considerable visa difficulties, Markus was able to move to Australia from Canada to be nearer to his daughters.

In summary, those applying to relocate gave multiple, complex and multi-layered accounts of the reasons for their decision, with psychological factors often more significant than material ones, and the quality of their relationship with their former partner often a key aspect. When asked about their decision whether or not to relocate themselves, opposers of relocation tended to see things through a less complex lens, often giving breadwinning responsibilities primacy. An important factor for a significant minority of opposers in deciding not to relocate themselves was a concern that the relocator would move again.

The Family Law Council recommended that '[t]he court may also consider the reasons the parent wishes to move away and any other relevant consideration.<sup>30</sup> We suggest that our data have important implications for any law reform which gives greater emphasis than there is already on the reasons for relocation, as this amendment arguably would. The danger of such an approach is that it requires reduction of a complex mix of factors into a more simplistic picture, which may actually misrepresent and inadequately capture what lies behind the relocation. There is also a danger that there will be an artificial focus on more concrete reasons of which evidence can be provided (employment, repartnering and so on), whereas for the parents we spoke with who wanted to relocate, psychological, personal and relationship issues were at least as strong as these and often stronger. For many of these parents the poor quality of the relationship with the other parent was an important aspect of their decision. We wonder, however, whether they would have been successful in the current legal environment, in which reasons like these may be used against them to portray them as 'unfriendly parents', a description which simply does not accord with what many of the mothers were telling us. They wanted their children to have a relationship with

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<sup>30</sup> Family Law Council, above n 6, 68.

their father, but did not want to live too close to him given the poor relationship or abusive behaviour.

## CONCLUSION

While this project was designed largely to explore the experiences of parents and children *after* court decisions about relocation, our working hypothesis when we began this project was that it may be important to understand the *pre-court* situation in order to make sense of what happens afterwards. At the conclusion of our study, this appears to be the case, particularly so far as relationships between parents and patterns of long-distance parenting are concerned. In short, we can tentatively suggest that, for these aspects, the past has significant predictive power. This is not to say that parents are incapable of breaking from the past, particularly if there are good processes in place to support them doing it.

The other themes that emerged from the interviews included:

- a high prevalence of high conflict and/or abusive relationships predating the relocation dispute, including a significant minority of short, unhappy relationships with separation occurring during pregnancy or shortly after the birth of a single child;
- the relocation dispute was one of many sources of conflict and dispute between most parents we spoke with;
- smoother paths after relocation for parents who were in less high conflict relationships, and for whom this was really a 'relocation only dispute';
- relocation as a significant point of transition in parent-child relationships, with long-distance parenting falling into one of two patterns: 'Separate Homes, Separate Lives' or 'Parental Engagement in Both Locations' and only a very small number of parents with significant problems losing contact with their children after relocation;
- those applying to relocate giving complex, multiple reasons for their decision, often including the poor quality of their relationship with the other parent.

Due to the fact that all but five of the parents we spoke with were either living at distance from their children, or their child's other parent was living at distance from them, we are unable to draw any conclusions which compare the experiences of relocation versus no relocation. Unfortunately this, along with other methodological issues, means that we have not been able to draw any conclusions about one of the most important questions: how is children's psychological wellbeing after a decision to allow relocation compared with a decision not to allow relocation.

No single study, and particularly not a small qualitative study with all the limitations to which we have referred, can tell us what the law should be. We do, however, feel confident in saying that our study has helped us to begin to fill the gap in understanding about which relocation disputes require a court determination (and hence the most pointed application of the law), and about the aftermath of those disputes. This knowledge will be tested and added to by other studies, and in particular, we hope, studies which focus on the circumstances in which children do well psychologically, and which explore to a much greater extent than we have been able to do the experiences of those who have not been allowed to relocate. Our data do begin to make the case for more lateral approaches to relocation law and policy than those which have been considered so far.