B AND B*

FAMILY LAW REFORM ACT 1995 (CTH) — RELOCATING THE RIGHTS DEBATE

I INTRODUCTION

On opposite sides of the country, two Family Court decisions have been attracting considerable media attention.[1] *B and B*, a decision of the Full Court of the Family Court of Australia, had family law practitioners holding their collective breath, as the impact of recent and extensive amendments to the *Family Law Act* 1975 (Cth) on what are commonly known as relocation cases were considered for the first time by that court.[2] The residential[3] mother in *B and B* was proposing to relocate — with the children of the marriage — from Cairns to Bendigo, and both Jordan J at first instance and the Full Court on appeal saw the sense in permitting this parent to get on with her life and move to the place of her choice. In contrast, the custodial mother in *F and S*,[4] a recent decision of the Full Court of the Supreme Court of Western Australia, was not so fortunate. As *F and S* was decided under the *Family Court Act* 1976 (WA), which is yet to be amended in line with the *Family Law Act* 1975 (Cth), the case did not canvass precisely the same issues as *B and B*.[5] However, when one compares the outcomes of these two cases, and the factors relied upon to reach those outcomes, some important questions about the resolution of relocation disputes present themselves. In particular, all else being equal, are courts entitled to deny applications to relocate solely on the basis that the relocating parent's reason for the move is not considered, by the court, to be 'good enough'? The significance

* (1997) FLC 92-755. Full Court of the Family Court of Australia at Brisbane, 9 July 1997, Nicholson CJ, Fogarty and Lindenmayer JJ.

1 For a sample of the media coverage, see, eg, Bettina Arndt, 'A Fairer Share of Parenting', *Sydney Morning Herald* (Sydney), 21 March 1997, 21; Janet Fife-Yeomans, 'Kid's Identity at Risk in Family Law Push', *The Australian* (Sydney), 21 July 1997, 5; Roy Gibson, 'I'm in Jail, Says Mother', *The West Australian* (Perth), 14 July 1997, 7.

2 Some of the provisions considered in *B and B* (1997) FLC 92-755 have been discussed in differing contexts by the Full Court since the amendments: *Holswich v O'Farrell* (1997) FLC 92-735; *In re CP* (1997) FLC 92-741; *B v J* (1996) FLC 92-716; *Re Z* (1996) FLC 92-694). However, *B and B* (1997) FLC 92-755 provides a far more detailed analysis of the amendments than any of those cases.

3 The term custody has been replaced with the term 'residence' by the *Family Law Reform Act* 1995 (Cth). For a more detailed discussion of the amendments, see John Dewar, 'The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared — Twins or Distant Cousins?' (1996) 10 *Australian Journal of Family Law* 18.

4 Full Court of the Supreme Court of Western Australia, Malcolm CJ, Franklyn and Walsh JJ, 17 March 1997. Both parties in this matter have applied to the High Court for special leave to appeal, the father in relation to custody and guardianship, the mother in relation to the relocation issue.

5 See below Part VI.

of this issue is highlighted by some of the human rights arguments which were raised in *B and B*, but which were not fully explored in the context of the case.

II THE AMENDMENTS

The *Family Law Reform Act* 1995 (Cth) came into effect on 11 June 1996. It overhauled the provisions of Part VII of the *Family Law Act* 1975 (Cth), which deal exclusively with children, along the lines of the *Children Act* 1989 (UK).[6] Before exploring those of the amendments specifically relevant to the relocation issue, some new concepts now central to the philosophy of Part VII warrant attention, particularly as the Full Court did not constrain itself rigidly to the relocation issue. The *Family Law Reform Act* 1995 (Cth) introduced into our legislation the English notion of 'parental responsibility', with a provision deeming both parents to be joint holders of this 'responsibility for the child's care, welfare and development' until such time as a parenting order to the contrary is made.[7] Parenting orders comprise residence orders, contact orders and specific issues orders, with the old concepts of guardianship, custody and access having been abolished. Significantly, a residence order, which determines with whom the child is to live, does *not* automatically carry with it day to day responsibility for the child's care, welfare and development[8] — this continues to vest jointly in both parents until a court (using a specific issues order) orders otherwise. The goal of this and other provisions was to encourage 'shared parenting' after separation.[9] This goal reflects one of the important objectives in the making of these changes, namely, the desire to eliminate the perceived win/lose mentality that accompanied the old guardianship/custody/access regimes, where non-custodial parents, even if technically joint guardians, saw themselves as essentially excluded from any significant decision-making in respect of their child.[10]

A question soon on the lips of many family lawyers was whether the Family Court would replace custody/access orders with residence/residence orders or residence/contact orders. A contact order, as its name suggests, provides for a child to have contact with a named individual.[11] The typical pre-amendment regime where the non-custodial parent had access to the child every second weekend and half the school holidays is a familiar one. The question now being asked was why such an arrangement should be styled residence/contact, given that for the periods of 'contact' the child is (usually) residing with that parent.

The *Family Law Reform Act* 1995 (Cth) also appeared to be explicitly giving effect to certain articles of the United Nations Convention on the Rights of the

[6] See generally Dewar, above n 3; Lisa Young, 'Children in the Family Court: The New Law' (1996) 21 *Alternative Law Journal* 286.
[7] *Family Law Reform Act* 1995 (Cth) s 61C.
[8] Ibid s 61D.
[9] See, eg, ibid s 60B(2)(c).
[10] See generally the discussion of the background to the amendments in *B and B* (1997) FLC 92-755, 84,178–81.
[11] *Family Law Reform Act* 1995 (Cth) ss 64B(2)(b) and (4).

Child.[12] This is strikingly apparent in s 60B, which provides, *inter alia*, that 'children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development'.[13] This is but one of four principles said to underlie the major objective of Part VII, which is to ensure that 'children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children'.[14]

Prior to the amendments, the *Family Law Act* 1975 (Cth) provided that a child's 'welfare' was the paramount consideration in any decision concerning that child.[15] This was reformulated in the new s 65E, which requires the court to regard the 'best interests' of the child as the paramount consideration.[16] The *Family Law Act* 1975 (Cth) had long provided guidance as to the factors relevant to determining what best promotes a child's welfare, in the form of mandatory considerations. In the context of relocation cases, an important addition to what is now the 'best interests' checklist is s 68F(2)(d), which requires a court to consider any difficulty and expense associated with a parent exercising contact and the impact thereof on a child's right to maintain 'personal relations and direct contact with both parents on a regular basis'. Even prior to these provisions coming into effect, the impact of s 60B(2)(b) and s 68F(2)(d) on relocation cases was raised:[17] would courts now feel compelled to restrain parents from relocating, even where their reason for doing so was seen to be an honest and legitimate one?[18]

III FACTUAL BACKGROUND

The parents in *B and B* had resided together for a total of eight years and, by the time the appeal was heard, had been separated for over six years. There were two children of this marriage, both girls, one nearly twelve and the other ten years of age. The children were born and raised in Cairns. Despite their obvious incompatibility, the parties had managed to cooperate sufficiently to 'ensure that their children [had] been very well cared for and [had] continued to enjoy close relations with each of their parents'.[19] There were consent orders in place which

12 United Nations Convention of the Rights of the Child, 20 November 1989, 28 ILM 1448 (1989) (entered into force 2 September 1990) ('UNCROC'). For further discussion of the UNCROC and the *Family Law Reform Act* 1995 (Cth), see *B and B* (1997) FLC 92-755, 84,182–3.

13 *Family Law Reform Act* 1995 (Cth) s 60B(2)(b). This corresponds closely with art 9(3) of the UNCROC.

14 *Family Law Reform Act* 1995 (Cth) s 60B(1).

15 Before its repeal, this was found in s 64(1)(a) of the *Family Law Act* 1975 (Cth).

16 As to the (in)significance of that terminological change, see *B and B* (1997) FLC 92-755, 84,217–8; *Re Z* (1996) 82 FLC 92-694, 82,229.

17 Family Law Section, Law Council of Australia, *National Seminar Series on the Family Law Reform Act: Handbook* (March 1996) 29.

18 See, eg, Juliet Behrens, 'Ending the Silence, But ... Family Violence under the Family Law Reform Act 1995' (1996) 10 *Australian Journal of Family Law* 35, 42; Maggie Troup, 'The Family Law Reform Bill No 2 and its Ramifications for Women and Children' (1995) 5 *Australian Feminist Law Journal* 111, 118; Lisa Young, 'Are Primary Residence Parents as Free to Move as Custodial Parents Were?' (1996) 11(3) *Australian Family Lawyer* 31.

19 *B and B* (1997) FLC 92-755, 84,176–7.

gave the mother sole custody, maintained joint guardianship and established a minimum access regime. This arrangement continued the pattern during the marriage, as the father's professional commitments as a legal practitioner were seen as 'a matter of logic' to have caused the 'bulk of the responsibility for the day to day care of these children both prior to and subsequent to separation [to have] fallen upon the wife'.[20]

All was reasonably well until the mother became engaged to W, who resided in Bendigo. W had business and other commitments in Bendigo, whereas Mrs B, although not originally from Cairns, was somewhat more flexible, being essentially a full-time caregiver to the children. The couple therefore decided that the only reasonable course of action was for Mrs B to relocate to Bendigo with the children. Neither court questioned the assertion that it was impracticable for W to relocate to Cairns. The mother's disclosure of this plan to the father was, not surprisingly, the genesis of this litigation, which included an application by the husband for custody of both children. Mrs B gave evidence, which was accepted, that being forced to remain in Cairns was making her desperately unhappy but that she would not leave without the children.[21] As Mr B had made it clear, he was not intending to contest residence in the event his wife stayed with the children in Cairns, the issue before the court was whether to grant the mother's application to vary the existing access orders so as to permit her to relocate to Bendigo. By the time the matter came to trial, the *Family Law Reform Act* 1995 (Cth) had come into effect.

IV The Submissions

The father's case on appeal was essentially that the amendments referred to above necessitated a different approach by the courts in relocation cases.[22] The alleged 'onus once weighted in favour of freedom of movement' of the custodial parent should, the father argued, now be 'weighted in favour of preserving the integrity of the relationship with a contact parent ... [He] said that the amendments impose upon the applicant a heavy onus to satisfy the court that the objects ... are not compromised by the relocation'.[23] In other words, relocation would only be permitted where the applicant could establish that continuing the existing arrangement, that is, not relocating, would be contrary to the child's best interests.[24] Necessary corollaries of this position were twofold. Firstly, the father accepted that these principles applied to contact parents (so that they too could be restrained by court order from relocating). Secondly, he accepted that the child's rights 'were superior to, and, where necessary, extinguished any right

[20] Ibid 84,178.

[21] Ibid 84,186–7.

[22] Ibid 84,187–9.

[23] Ibid 84,184. While these particular submissions are extracted from the first instance decision, they accurately reflect the essence of the husband's submissions on appeal.

[24] Ibid 84,219. The Full Court referred to this as the husband's 'defeasance' argument, his submission being that s 65E of the *Family Law Reform Act* 1995 (Cth) acted as a defeasance provision to s 60B.

which a parent, as a private individual, may enjoy'.[25] This change in direction, argued the father, demanded the abandonment of the pre-amendment case law on relocation.

The mother, in her argument in support of the trial judge's findings, naturally asserted that pre-amendment case law remained apposite.[26] The amendments, she contended, simply gave legislative force to principles long endorsed by Australian courts. The mother went somewhat further, however, in making particular mention of the tension between children's rights in proceedings of this nature and parents' rights. She argued that an examination of a child's best interests necessarily includes a consideration of both parents' human rights, including the right of freedom of movement enshrined in the International Covenant on Civil and Political Rights.[27] She also pointed to the Canadian courts' recognition of the potentially disparate effect on women of a restrictive policy with respect to relocation.[28]

An indication of the perceived significance of the outcome of this case was the intervention in these proceedings by both the Commonwealth Attorney-General and the Human Rights and Equal Opportunity Commission ('the Commission'). While generally supportive of the father's proposition that the amendments demanded a new approach of decision-makers, and in particular that s 60B of the *Family Law Reform Act* 1995 (Cth) required that the inquiry in relocation cases '*commence* from the position that the child has the right to regular contact',[29] the Attorney-General did not go so far as to argue that relocating parents bore any special onus of proof.[30] The thrust of his submission was that the introduction of the new statutory regime requires *per se* the abandonment of pre-amendment case law, as the new regime emphasises the notion of shared parental responsibility. This is not least because residential parents under the new legislation do not have the same rights to daily care and control that normally accompanied custody orders.[31] The force of this latter argument was no doubt lessened by the fact that a decision to permit a relocation may well be accompanied by a specific issues order granting the residential parent responsibility for the child's day to day care, welfare and development, that is, the equivalent of a custody order may be made. Despite his adherence to the adoption of a new approach in relocation cases, the Attorney-General accepted that the child's best interests remain the sole determinant of these cases and he conceded that the court should not disregard a legitimate need to relocate.[32]

The Commission, somewhat ambitiously, argued in more detail the interrelationship between the rights of the child and those of the parents.[33] In addition to any

[25] Ibid 84,188.
[26] Ibid 84,189.
[27] Ibid 84,190. International Covenant on Civil and Political Rights, 19 December 1966, 99 UNTS 171, 6 ILM 368 (entered into force 23 March 1976) ('ICCPR').
[28] *B and B* (1997) FLC 92-755, 84,190.
[29] Ibid 84,191 (emphasis added).
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid 84,193–4.

rights accruing under the ICCPR, the right of each adult to move freely between the States enshrined in s 92 of the *Australian Constitution* was relied upon. Nonetheless, the Commission accepted that the statutory intention explicit in the *Family Law Act* 1975 (Cth) was that the child's best interests be paramount in a relocation dispute. This did not, according to the Commission, create a 'hierarchy of rights' and so, it argued, as a matter of statutory interpretation, the relevant sections of the *Family Law Act* 1975 (Cth) should be 'interpreted within the context of international human rights principles in so far as that interpretation is compatible with Parliament's express intention in the Reform Act'.[34] This was further argued by the Commission to mean that the UNCROC, to which the amendments undeniably owed much, provided a basis for interpreting the amendments in a way consistent with international norms. As the preamble to the UNCROC recognised the rights of *all* family members, so too, said the Commission, should the Family Court. Another interesting thread in the Commission's submissions was the argument that the attainment of the objects set out in s 60B of the *Family Law Reform Act* 1995 (Cth) might be better promoted by giving proper recognition to a parent's right to freedom of movement.

V The Full Court Decision

The Full Court took the opportunity in *B and B* to address in some detail (certainly more detail than was strictly necessary) the effects of certain amendments contained in the *Family Law Reform Act* 1995 (Cth). Before considering their significance in the relocation context and the actual decision on the facts, some important statements of general principle made by the court deserve attention.

To begin with, the Full Court confirmed the paramountcy of the 'best interests' principle.[35] Suggestions both in this case[36] and elsewhere[37] that the introduction of s 60B disrupted the established supremacy of the best interests principle were thereby rejected. It thus remains the case that in parenting disputes the overriding consideration will be the best interests of the child in question. As we have seen, in determining how to best promote those interests, the legislation had previously set out a checklist of mandatory considerations. In the view of the Full Court, the underlying principles set out in s 60B(2) simply add to that list. In other words, the correct approach for Family Court judges will be to acknowledge the 'best interests' principle, to consider in turn each of the matters listed in s 68F(2) and s 60B(2)[38] so far as they are relevant and then to decide, in light of all that information, what order serves the best interests of the child.[39] A corollary to

[34] Ibid 84,194.
[35] Ibid 84,219. See also *Holswich v O'Farrell* (1997) FLC 92-735, 83,918.
[36] *B and B* (1997) FLC 92-755, 84,176–7.
[37] Family Law Section, Law Council of Australia, above n 17, 29.
[38] While the Full Court talks generally of s 60B here and elsewhere in this context, given their later comments it would appear that they were really referring to sub-s (2) thereof.
[39] *B and B* (1997) FLC 92-755, 84,219–20.

these findings was the clear statement by the Full Court that s 60B did not give any legally enforceable rights to children.[40]

These findings left the court valiantly attempting to attach to s 60B(1) — which identifies the 'object' of Part VII — some meaning, lest it otherwise be seen to be empty rhetoric. Statements such as '[s]ection 60B(1) provides an optimum set of values for children of separated parents and is the goal to which ... parents, society and the courts should aim'[41] show the difficulty of this task. In the end, the court concluded that that particular sub-section was 'unlikely to be of great value in the adjudication of individual cases'.[42] Equally problematic was explaining the relationship between s 60B(1) and sub-s (2), the latter of which states the principles underlying the object.[43] Clearly the two are essentially different in nature, but they are not mutually exclusive, as the purpose of sub-s (2) is to give effect, in part at least, to the former. Perhaps the Full Court's previous conclusions answer their own question by telling future decision-makers to consider sub-s (2) (and s 68F(2)) in determining the child's best interests, and to do this in light of the 'optimum set of values' enshrined in sub-s (1).

What, though, is to be made of the Full Court's suggestion that in a case 'where there were no countervailing factors the s 60B principles may be decisive'?[44] This resonates with a statement made by Martin AJ in an unreported decision of the Family Court of Western Australia.[45] By way of *obiter*, she had postulated that s 60B might be of particular importance in what she described as 'finely balanced' cases.[46] After all, as the Full Court questioned, all else being equal, why should the child *not* have as much contact with a parent as is 'practicable'?[47] It is interesting to speculate whether such an approach would result in any real difference in decision-making. The use of the word 'practicable' immediately distances this approach from one that accords the non-residential parent indiscriminate contact, as courts are unlikely to disregard long held precepts about what is practicable by way of contact regimes. On the other hand, if a parent fails to provide what a court would see as a 'good enough' reason for moving, will that lead, in the absence of any other special facts, to the case being categorised as 'finely balanced', thus inviting the use of s 60B to restrain the move?[48]

The Full Court also made mention of the content of the new notion of 'parental responsibility', which, as we have seen, is now conferred jointly on parents by the *Family Law Act* 1975 (Cth) in place of guardianship and custody. Section 61B, which defines this term as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children', was accepted

[40] Ibid 84,233.
[41] Ibid 84,214.
[42] Ibid 84,220.
[43] Ibid 84,215, 84,220.
[44] Ibid 84,220–1.
[45] *Jacob and Jacob* (Family Court of Western Australia, Martin AJ, 29 August 1996) 37.
[46] Ibid 37.
[47] *B and B* (1997) FLC 92-755, 84,221.
[48] See below Part VI for the discussion of this issue.

as probably amounting to more than the sum of those two abandoned concepts.[49] Without exploring this issue in detail (in particular, what the other duties, powers and the like might be), two consequences of this finding immediately present themselves. Firstly, the joint division of these responsibilities under the *Family Law Act* 1975 (Cth) might now change the manner in which some of these newly included responsibilities might otherwise have been divided (whether at common law or by statute). Secondly, *all* these responsibilities may now be redistributed (to anyone) by the making of a specific issues order.[50] However, such a power would no doubt have resided in the court anyway by virtue of its usurpation of the *parens patriae* jurisdiction.[51]

A related, and perhaps more important, issue in practice, is whether joint parental responsibility requires parents to consult each other before making any decision. That is, whether this joint power is able to be independently exercised. Recognising that even cohabiting couples do not operate in this fashion, the court affirmed the pre-amendment position, namely, that the parent with whom the child is then residing has the power independently to make decisions concerning the child's day to day care, welfare and development with only major issues (like those once described as guardianship matters) requiring consultation.[52] This is an interesting conclusion when read in conjunction with a statement later made by the Full Court. Apparently, one of the fundamental differences effected by the amendments is that, whereas in the past, the making of guardianship/custody orders necessarily carved up the decision-making between parents, things should now be very different, the court said, with bare residence and contact orders becoming the norm.[53] *Even if* a bare residence/contact order is made,[54] and parental responsibility remains joint, the ability of each parent to independently exercise the day to day parental responsibility for the child while the child is with them replicates the position under the old regime — when a child was on access, the non-custodial parent could exercise all the day to day decision-making power in respect of the child.[55] The Full Court assures us that '[r]esidence is not custody by another name' and that the 'changes are obviously far more than semantic'.[56] However, one has to wonder how lawyers are going to explain to their clients this 'fundamental' difference between the old and the new.

By way almost of postscript, the Full Court concluded its general discussion of the amendments by sharing its views on the making of residence/residence, as

[49] *B and B* (1997) FLC 92-755, 84,216.

[50] *Family Law Reform Act* 1995 (Cth) s 64B(2)(d).

[51] *Family Law Reform Act* 1995 (Cth) s 67ZC now contains the so-called 'welfare' power. As any application which can be brought under Part VII *must* be so brought (s 69B), there seems little doubt that the Supreme Courts no longer maintain any residuary *parens patriae* jurisdiction: *Re Z* (1996) FLC 92-694, 83,230.

[52] *B and B* (1997) FLC 92-755, 84,217.

[53] Ibid 84,218. Perhaps the Full Court meant residence/residence orders given its later comments (see the text accompanying below n 57).

[54] Anecdotally, there seems to be a practice developing in some jurisdictions to routinely make specific issues orders which, when read with the residence/contact orders, simply replicate the old regime.

[55] Anthony Dickey, *Family Law* (2nd ed, 1990) 368–9.

[56] *B and B* (1997) FLC 92-755, 84,218.

opposed to residence/contact, orders. The latter, it said, should be reserved for situations where 'contact is of *relatively* short duration, particularly where there is no overnight aspect.'[57] Presuming the comparison being made is between contact orders and not contact and residence orders, the use of the word 'relatively' seems to indicate that a typical 'every second weekend and half the school holidays' order should be termed a residence order. Something less, and one is looking at a contact order.

What then is the effect of the amendments on relocation cases? Having reached the conclusion that, despite s 60B, the best interests principle remains paramount, it was no surprise that the Full Court confirmed the relevance of pre-amendment case law on relocation.[58] The court went further, however, reviewing the case law in Australia, New Zealand, the United Kingdom and Canada so as to clarify, in case there were any doubt, the principles which have been considered relevant to relocation cases. This body of case law, particularly recent superior decisions in Canada,[59] was felt by the court to reflect a 'broad consensus of approach' to relocation cases and clearly influenced their decision to reject the idea that the amendments required any change, let alone the introduction of a rebuttable presumption in favour of contact.[60] Without reciting in detail the various factors the court subsequently considered relevant to relocation cases, a brief summary highlights their breadth:

1. In addition to the relationship between the child and both the relocating parent and the contact parent, the court emphasised the significance of a situation involving an application for relocation by a longstanding primary carer of the child who would 'generally be regarded as the preferred residence parent';
2. The parent's reason(s) for relocating;
3. The test in *Holmes and Holmes*;[61]
4. The right of the residential parent to re-establish herself or himself free of restriction, including her or his right to freedom of movement;
5. The potential that the move may enhance the family's, and thus the child's, circumstances;
6. The degree of unhappiness that restraint of movement would cause the parent, and the impact this may have on the child's home environment; and
7. The distance and permanency of the move.[62]

These were in addition to all the usual concerns about the dislocation of the child from its current environment.

57 Ibid (emphasis added).
58 Ibid 84,222.
59 In particular *Gordon v Goertz* (1996) 134 DLR (4th) 321.
60 *B and B* (1997) FLC 92-755, 84,220. The Full Court recounted in some detail the findings of McLachlin J on this point in *Gordon v Goertz* (1996) 134 DLR (4th) 321.
61 (1988) FLC 91-918. See below Part VI.
62 *B and B* (1997) FLC 92-755, 84,221–2.

The court also addressed the question of whether the reference in s 60B(2)(b) to 'regular' contact connoted any notion of frequency, an argument which had already been raised in unreported decisions[63] and was relied upon by the father.[64] Notably, the court felt that infrequent contact was unlikely as a rule to achieve the goal stated in s 60B(1) and preferred a broad construction of s 60B(2)(b), envisaging that contact should 'be as frequent as is appropriate'.[65]

The Full Court next tackled the interrelationship between the best interests principle and rights conferred on parents pursuant to other human rights' instruments. It may be that the context in which this case was argued inhibited, to some extent, the full development of the Commission's central thesis that 'a court is to interpret statutes in light of a rebuttable presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms'.[66] Both the Commission and the mother were utilising this argument to parry the perceived attack on freedom of movement inherent in the father's submissions. At risk was the pre-amendment recognition, however limited, of this fundamental human right. The mother had also drawn attention to the potentially discriminatory impact of the adoption of a more restrictive approach to relocation, as highlighted in some of the influential Canadian case law.[67] While the Full Court *did* reject the father's submissions and instead preserved the pre-amendment position, as the findings detailed above reveal, this was achieved essentially without resort to these human rights arguments. The acceptance in Australia of the right to freedom of movement was acknowledged and the potential for discrimination conceded. However, it was held that if the child's best interests demanded it, this right *must* give way,[68] presumably regardless of any actual discrimination. Of course, whilst the Full Court said that a 'doctrinaire approach to the question of relocation'[69] might result in such discrimination, they obviously felt that the approach favoured by them *was* applied with sufficient regard to practical considerations.[70] So, while the Commission's proposed presumption was in no way endorsed, this did not adversely affect the mother's case as she was always bound to succeed once the previously established relocation principles were secured.[71] The next section will query whether these *existing* principles safeguard women's human rights and avoid discrimination in practice, a matter not seriously argued, given the facts, in *B and B*.

[63] See, eg, *Lee and Sim* (Family Court of Western Australia, Holden CJ, 18 December 1996) 8.
[64] *B and B* (1997) FLC 92-755, 84,188.
[65] Ibid 84,216.
[66] Ibid 84,230.
[67] Ibid 84,230–1.
[68] Ibid 84,231.
[69] Ibid.
[70] See the definition of 'doctrinaire' in William Little, H Fowler and Jessie Coulson, *The Shorter Oxford English Dictionary on Historical Principles* (revised ed, 1973) 589.
[71] See below Part VI.

VI *F and S*: Future Directions

Shortly before the decision in *B and B* was handed down, the Full Court of the Supreme Court of Western Australia was called upon to decide a similar case. The parents in *F and S*[72] had never been married.[73] However, they had been living together in Perth for three and a half years when Ms F discovered she was pregnant. In October of that same year the father took up an offer of employment in the Northern Territory and the mother followed him there six weeks later. Their son, J, was born on 2 March 1990. Despite their separation in early 1994, the parties continued residing in the Northern Territory. The father remained at Adelaide River, while the mother and child moved to an outer suburb of Darwin. Access was exercised by the father regularly, notwithstanding the 160 kilometres separating the parties. In the second half of 1994, the father began a relationship with his current wife, M. A few months later he resigned from his employment and followed M to Perth.

Not surprisingly, the father missed the frequency of contact with his son and so the mother agreed to move to Perth on a temporary basis to see if she would be happy living there again.[74] Within a year, the mother realised the move had been a mistake and she resolved to return to Darwin. After making all the necessary arrangements, the mother informed the father of her intentions, at which juncture the father instituted proceedings in the Family Court of Western Australia to restrain the mother from removing the child from Perth. At first instance, Holden J granted this order.[75] The mother appealed the decision (which appeal had to be heard by the Supreme Court of Western Australia),[76] but again was frustrated when the Supreme Court upheld the trial judge's exercise of discretion.

While resort can be had to the stock phrase that every case 'turns on its own facts' to distinguish this decision from that of *B and B*, the 'guiding factors' so frequently formulated by the Family Court to give substance to the notoriously indeterminate best interests test,[77] often point unmistakably to the true reason for the difference in outcome. Before returning to those factors,[78] it is important to note that the question of the effect of the amendments to the *Family Law Act* 1975 (Cth) was not at issue here, as ex-nuptial child disputes in Western Australia are determined under the *Family Court Act* 1976 (WA).[79] While the Western

[72] Full Court of the Supreme Court of Western Australia, Malcolm CJ, Franklyn and Walsh JJ, 17 March 1997.

[73] *S and F* (Family Court of Western Australia, Holden CJ, 24 April 1996).

[74] Gibson, above n 1.

[75] *S and F* (Family Court of Western Australia, Holden CJ, 24 April 1996) 22.

[76] The Family Court of Western Australia was exercising its state jurisdiction under the *Family Court Act* 1976 (WA), which requires appeals be heard by the Full Court of the Supreme Court of Western Australia: *Family Court Act* s 81(2a).

[77] See generally Jon Elster, *Solomnic Judgments: Studies in the Limitations of Rationality* (1989) 134–8.

[78] See above Part V.

[79] The Commonwealth's power to legislate on family law matters essentially arises from the marriage power contained in s 51(xxi) of the *Australian Constitution*. In all other Australian jurisdictions the Commonwealth has acquired the power to legislate in respect of ex-nuptial children by virtue of a reference of that power pursuant to s 51(xxxvii) of the *Australian Constitution*. Western Australia declined to refer this power and so ex-nuptial children remain exclusively within the state legislative domain.

Australian legislation has always largely replicated the child provisions in the *Family Law Act* 1975 (Cth), it has not yet been amended in line with the *Family Law Reform Act* 1995 (Cth). Until that happens, the old provisions on custody and guardianship remain. Thus, the question here was simply whether, in applying the best interests principle in line with existing case law, the mother should be permitted to move.

There is at least one significant difference between the facts of *B and B* and those of *F and S*. In the former case, the mother was moving to be with her fiancé. The Full Court made it abundantly clear that repartnering and seeking to enhance one's economic security are perfectly legitimate explanations for wishing to relocate.[80] In *B and B* the father and children had a close relationship. Contact would be diminished by the move. The children had no connection with Bendigo, nor did the mother, apart from her new partner. Nonetheless, the mother was permitted to go. In *F and S*, however, the mother's reasons for moving were seen to be far less compelling. The Northern Territory was where the mother had lived for four years, where she had given birth to and raised the child and where she wished to continue residing. In essence, these were her reasons for moving — she liked Darwin and she thought it would be a good place to raise her child.[81] Holden J (as he then was) said it was 'necessary to examine closely the mother's reasons for wishing to move' as they were 'not based on any of what might be regarded as the more usual reasons such as, for example, economic advantage, to return to the bosom of her family, or to further or maintain a new relationship'.[82] Having so examined them and having reiterated that there was no evidence to suggest that the mother's reason fell within one of these usual categories,[83] Holden J seemed unpersuaded that Ms F's particular reasons were compelling enough to justify the diminution in contact that would necessarily follow the relocation. His reasons indicate that his decision may have been otherwise had the mother been able to establish one of the more 'usual' good reasons. The Supreme Court did not question the significance placed by Holden J on this aspect of the mother's case.

Holden J noted in relation to another facet of Ms F's case that '[n]owhere does she suggest that the fact that she is missing the Territory impinges upon her ability as a parent'.[84] This issue was raised in Mrs B's case, it having been accepted that she was truly devastated by the refusal to allow her to move. How significant, however, is this point? Would the Full Court really have restrained Mrs B if she had been made of sterner stuff?[85] And would Holden J have relented and let Ms F go if she had pleaded depression because she could not

[80] *B and B* (1997) FLC 92-755, 84,221.

[81] *S and F* (Family Court of Western Australia, Holden J, 24 April 1996) 22–3; Gibson, above n 1.

[82] *S and F* (Family Court of Western Australia, Holden J, 24 April 1996) 20.

[83] Ibid 21.

[84] Ibid 23.

[85] Compare both *Lee and Sim* (Family Court of Western Australia, Holden CJ, 18 December 1996) 12 and *Glenn and Glenn* (Family Court of Western Australia, Anderson J, 16 December 1996) 32 where two mothers with new jobs to go to, neither of whom appeared from the judgments to have raised distress in this way, were permitted to leave.

return to sunny Darwin?[86] Ms F may well have perceived some risk in taking such a line, as the father was of course also contesting custody. As it was, this was not argued.

So were these judges justified in attaching so much weight to the reasons proposed for the move? Holden J identified the factors relevant to relocation cases as being those set out in *Holmes and Holmes*,[87] namely:

1. Whether the application to remove the child is made bona fide, that is, not solely to spite or alienate the other parent;
2. Whether the relocating parent will comply with any contact regime put in place; and
3. What the general effect of the relocation is on the child's welfare, which necessarily includes a consideration of the impact of a diminution of contact between the child and its other family members.

The Full Court in *B and B* held this three tiered test to be a 'valid guide' in assisting courts' determination of whether the parents' reasons for relocating are 'genuine, whether they are optional or whether they are seen as important or essential for the orderly life of that parent'.[88] It is hard to see how the two latter considerations in *Holmes and Holmes* relate at all to the parent's reasons for moving. Conversely, the first consideration does not, on its face, speak of anything other than whether the parent genuinely desires to move for the stated reason. It is very difficult to discern what the court means by 'optional' reasons and what would flow from such a finding. Must the reasons be 'important or essential' to the court or the parent? What is clear is that, regardless of whether an examination of the reasons for the move was *necessary* under pre-existing case law (it seeming to be more of a practice than a principle),[89] *B and B* establishes that the reasons proffered *can be* a relevant consideration. The question remains, however, whether *B and B* endorses the de facto practice, seemingly applied in *F and S*, of restraining moves solely upon the basis that the parent's reason is not, in the eyes of the court, sufficiently compelling? In other words, should the applicant be required to establish both a *bona fide* and a 'good' reason, or alternatively, should the reason only be a consideration when it can be shown to be relevant to that parent's ability to meet the needs of the child? Given that this issue was not argued in *B and B*, it is hardly surprising that the Full Court did not address the question. McLachlin J in *Gordon v Goertz*,[90] to whom the Full Court referred with approbation, adhered to the latter position. Moreover, such a conclusion is a natural extension of the position put by the Commis-

[86] Compare *Annert and Murphy* (Family Court of Western Australia, Holden J, 16 July 1996) 8 where a mother who did not satisfy the judge that she had a good reason for leaving, but who did plead distress at not being able to travel to the United States, was restrained from removing the child.

[87] (1988) FLC 91-918.

[88] *B and B* (1997) FLC 92-755, 84,221.

[89] Perhaps the most overt recognition of the proposition that both a *bona fide* and a good reason are required before a move will be permitted is *Skeates-Udy and Skeates* (1995) FLC 92-626, 82,295.

[90] (1996) 134 DLR (4th) 321.

sion that courts should adopt a presumption against interpreting the *Family Law Act* 1975 (Cth) in a way that abrogates other family members' fundamental human rights and freedoms.

Of course, whilst the Full Court speaks of situations in which reference to the parent's reasons for moving would be appropriate, nowhere does it explicitly say that any threshold test of a 'good' reason exists. However, it does endorse the *Holmes and Holmes* test which requires at a minimum that the *bona fides* of the reason be tested. This, in and of itself, requires a valuing of the relocating parent's reasons. If the reason for moving is simply to spite the other parent then it is immediately the end of the application, that is, the 'wrong' reason is fatal. One step further than *Holmes and Holmes* is the requirement that the *bona fide* reason also be a 'good' reason, that is, one of the few endorsed by the court. Perhaps the closest the Full Court comes to supporting this position is in its concluding statement that s 60B 'has to be interpreted in a reasonable way ... where the relocation of one or both parents for *good reason may* be important not only to that parent but also to other members of that family unit'.[91] Interestingly, McLachlin J's solution allows for the retention of the *Holmes and Holmes*' *bona fides* element while discarding the further prerequisite of a 'good' reason. A bad faith reason could be just as easily argued to adversely impact on the residential parent's ability to meet the child's needs, as a 'good' reason could be argued to positively impact on this ability. So, a parent's reason for moving could still be considered by a court where that reason was *relevant*, but would otherwise be disregarded.

There is one further matter discussed by the court in *B and B* that might shed some light on the issue of the appropriateness of such a threshold requirement. The father had submitted that both contact and residential parents should be able to be restrained from moving by virtue of the new provisions. The Full Court confirmed the power to make such an order[92] but saw this as an unlikely occurrence. The basis of this conclusion was an assumption that contact parents who relocate do not wish to have to contact with their children,[93] which is unlikely to be true of most cases. A contact parent wishing to relocate to be with a new partner, or with family, or to exploit better employment opportunities, or for any other reason, will remain, it seems, free to do so, regardless of the impact of this on the child's welfare. True, the relocating parent does not remove the child from an established home. However, as the Full Court rightly pointed out, s 60B(2) talks of the child's right to *contact* with both its parents.[94] Will future courts see a scenario where the contact parent wishes to move interstate, simply because they prefer the new location, to be a 'finely balanced' one and rely on s 60B(2) to justify the restraint of that parent? The Full Court would probably see this as unlikely.

91 *B and B* (1997) FLC 92-755, 84,234 (emphasis added).

92 The Full Court suggested the power to make and vary contact orders would be the most likely source, leaving open the question of the use of the court's injunctive power to that end: ibid 84,234.

93 Ibid 84,234.

94 Ibid 84,233.

The purpose of this section is not to explore in detail the various arguments which might be used to re-evaluate the Family Court's position on relocation cases, but rather to contrast these two recent cases to highlight some questions for future consideration. If Family Court decision-makers require, in practice, that residential parents (predominantly mothers) provide a 'good' reason for relocating, when they do not, in practice, require the same of contact parents (mostly men), is the discrimination potential or real? Is the Family Court more willing to abrogate the fundamental right of a mother to move freely than that of a non-residential father? Should the freedom of *both* parents to continue their lives free of intrusion from the court or the other parent and their right to freedom of movement be given greater regard by the court, perhaps through the adoption of the rebuttable presumption suggested by the Commission? After all, does it really enhance a child's welfare to, on the one hand, confirm a parent as the best suited to have residence of the child, and on the other hand, to strip that parent of what the court would say is the only real responsibility it gives with a residence order, namely, the right to determine where the child lives?

VII CONCLUSION

Was *B and B* worth the wait? Whilst it certainly answered some burning questions about the effects of the latest wave of family law reforms, it no doubt disappointed many by not carving out a new path for the resolution of parenting disputes. Regardless of what the legislative intention may have been in introducing s 60B, the clear words of the *Family Law Act* 1975 (Cth) have guaranteed the continuation of the Family Court's tradition of eschewing presumptions in favour of a broad, if structured, review of children's best interests. The 'additional' considerations that are now part of that structured review as a result of the amendments are no basis for revolution, the Full Court confirming that these matters had historically been seen as relevant to a child's best interests.[95] The statement of a preference for residence/residence rather than residence/contact orders will appease some, whether or not it results in any immediate difference in the ability of parents to exercise parental responsibility. The potential for such a change in nomenclature to assist in the reconceptualisation by parents of post-separation parenting, minimising the win/lose attitude, should not, however, be overlooked.

In the context of relocation cases, the Full Court has followed the international trend of resisting legislative exhortations to maximise contact where that would place an undue restriction on a residential parent. While making it clear that the child's best interests would, if necessary, prevail over the parent's right to freedom of movement, this case endorses the continued relevance of the parent's right. As the contrasting decision in *F and S* suggests, however, the question remains whether parents wishing to relocate will find their applications being denied in the absence of one of the recognised 'good' reasons for moving. As a general rule, the Full Court in *B and B* thought it inappropriate that parents be '"captives of fortune" to their children', realising that the 'relocation of one or

95 Ibid 84,215.

both parents for *good reason* may be important'.[96] Notwithstanding this, it was considered unlikely that contact parents would easily be restrained from relocating. On the other hand, the court openly contemplated the restraint of the residential parent 'for the sake of the child'. It would seem that some of the arguments raised by the Commission as to the interrelationship between the rights of children and those of their parents deserve further attention, particularly in light of Mrs B's argument that Family Court practice, when considering relocation cases, is susceptible to discrimination.

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96 Ibid 84,234 (emphasis added).

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