Relocation Disputes - Has Anything Changed? *In The Matter Of B And B*: Family Law Reform Act 1995

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Part 1 Introduction

This article analyses the Full Court of the Family Court's decision of *In the Matter of B and B*[1] where the Court was called upon to decide what effect the enactment of the *Family Law Reform Act* 1995 (Cth) ("FLRA") had on the manner in which the Family Court should approach the issue of whether to authorise the relocation of the primary residence parent[2] in the face of opposition by the lesser residence parent.[3] The review of the Family Court's attitude towards relocation disputes as anticipated by this appeal reignited gender based arguments over the fairness of the family law system, and this appeared to generate considerable media attention.[4] This was fuelled by the

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1 (1997) 21 Fam LR 676; FLC 92-755. Full Court of the Family Court of Australia at Brisbane, 9 July 1997, per Nicholson CJ, Fogarty and Lindenmayer JJ.

2 In this article, 'primary residence parent' will describe the parent who has the greater share of the residence of the children, and who would have been the custodial parent under the *Family Law Act* 1975 (Cth) prior to enactment of the FLRA ("the old regime"). "Custodial parent" will still be used where the context is the law pursuant to the old regime. The use of the word 'parent' is perhaps a misnomer; it is possible for any person to be the subject of a parenting order under the FLRA. The term 'parent' is perhaps an acknowledgment that in the vast majority of cases it will be a parent who is the primary residence parent or was granted custody under the old regime.

3 'Lesser residence parent' is also meant to include 'contact' parents under the FLRA, as well as 'access' parents under the old regime. I have used this expression in preference to 'contact' parent as the Full Court stated that in the typical situation where this parent cares for the children on weekends and school holidays, providing that this involves the children staying overnight, such a parent will be entitled to a residence order. The preferred order for the Family Court to make in such situations, given the shared parenting concept contained in the FLRA, would be residence/residence orders rather than residence/contact orders (*B and B* at [9.41]). It thus seems that as overnight stays are likely to constitute the majority of situations, the position of the 'access' parent under the old regime is best described as the 'lesser residence parent', rather than the 'contact' parent.

4 See Arndt B, "A Fairer Share of Parenting", *Sydney Morning Herald*, 21 March 1997, p 21; Arndt B, "A moving ordeal", *Sydney Morning Herald*,

unprecedented personal appearance[5] of the Federal Attorney-General as an intervener in the appeal.[6] For both family law practitioners and academics the case potentially also had much importance and wider ramifications beyond relocation disputes as this was the first significant case where the Full Court discussed the aims, construction and effect of the FLRA in considerable detail.

The issue of relocation dramatically highlights many of the tensions which surround post-separation arrangements. There is little doubt that Australia is a highly mobile society. Australians tend to change their place of residence for a variety of reasons - personal, family, travel, employment requirements or opportunities, and other economic circumstances. This has been accentuated in recent years by high unemployment levels, which mean that for many any employment possibility or chance of promotion simply cannot afford to be passed up. This need or desire to relocate in itself may contribute to the incidence of relationship breakdown in our society.

Where relationship breakdown occurs, this will almost automatically mean relocation for at least one of the parties.[7] The termination of a relationship frequently also leads to remarriage or repartnering[8], which provides yet another reason for relocation. As Australia is a very large country in area, with our capital cities at very large distances away from each other in comparison to other continents, relocation often will be significant in terms of distance and cost if a reasonable amount of contact between the lesser resident parent and their children is to be maintained. Where the primary residence parent decides to move a considerable distance away from their former

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24 May 1997, p 37 and Scott, A, "Tug of love case brings Williams to the bar", *The Australian*, 22 May 1997, p 3.

5 This was the first time in the Family Court's history that a Federal Attorney-General has appeared in person.

6 s 91 FLA allows the Federal Attorney-General to intervene in Family Court proceedings as of right, and with full rights of a party to the proceedings.

7 Unless you have the rare circumstance where former partners decide to continue residing under the same roof or on the same property (this is actually not that uncommon on the far North Coast of NSW where Multiple Occupancies are popular).

8 Remarriage has increased in modern times as a proportion of total marriages. See Parker, P, Parkinson, P, & Behrens, J, *Australian Family Law in Context: Commentary and Materials*, Law Book Company, 1994, p 43. While repartnering figures are difficult to obtain, it does appear that repartnering occurs far more frequently than remarriage. See Weston, J, "Once Bitten Twice Shy" (1991) 29 *Family Matters* 22.

abode, this is likely to have traumatic consequences for the children of the separating couple, as they will have to readjust to new schools and a new environment, relinquish established friendships, and their contact with the lesser residence parent and their family will inevitably be diminished. This will naturally also be traumatic for the lesser residence parent, who is often the father[9], and this reduction of contact seems to be one of the primary reasons for a general dissatisfaction with the family law system by some fathers' rights groups.[10] It is thus not surprising that these fathers' rights interest groups have lobbied for a different regime for relocation cases from the one that they perceived existed under the *Family Law Act* 1975 (Cth) ("FLA") prior to the 1995 amendments. They have argued that the Family Court was previously too willing to permit the custodial parent to relocate, even where their motives for doing so were questionable. The effects of this were to deprive the access parent of sufficient contact for them to have a meaningful role in their children's lives. While there is little doubt that in a minority of cases fathers were unfairly deprived of contact with their children, some writers dispute the general perception that the law was too favourable towards the custodial parent, and instead contend that the Family Court's attitude towards relocation was fair and reasonable.[11] Furthermore, women's organisations have argued that for the Court to take a restrictive approach to the relocation of the primary residence parent would be to deprive them of possible employment opportunities and/or their ability to make a fresh start to their lives (which may involve repartnering or remarriage).[12] Given the inferior economic position of women in society and within the family, they further argue that any restrictions on relocation would be likely to exacerbate this

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9 A study revealed that in 1980 in undefended cases fathers had all their children living with them in only 18% of cases, whereas in defended custody cases, this became 31%. See Bordow, S, "Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome" (1994) 8(3) *Australian Journal of Family Law* 252, pp 255-256.

10 For a comprehensive and detailed analysis of such interest groups, see Kaye, M, & Tombie, J, "Fathers' Rights Groups in Australia" (1998) 12(1) *Australian Journal of Family Law* 19. Professor Stephen Parker argues that there has been a resurgence since the mid 1970s in rights thinking, such as "women's rights, children's rights and the reactive forces of men's rights". See Parker, S, "New Balances in Family Law", Working Paper No. 2, Family Law research Unit, Griffith University, p 10.

11 See Young, L, "Are Primary Residence Parents as Free to Move as Custodial Parents Were?" (1996) 11(3) *Australian Family Lawyer* 31.

12 This formed part of the mother's counsels submission in *B and B* (at [6.19]), referring to *Moge v Moge* (1992) 43 RFL (3d) 345; [1992] 3 SCR 813 and *In the Marriage of Mitchell* [1995] FLC 92-601; 19 *Fam LR* 44.

trend.[13] Both sides of this debate (sometimes characterised as a 'gender war') also rely upon the best interests of the child principle[14] to bolster their case. For fathers' rights organisations, the argument is that it is in the best interests of the children for them to have significant contact with both their parents. On the other hand, women's organisations emphasise the link between the interests of children and the primary residence parent, and stress that the best interests of children are best served when the primary residential parent is able to live wherever he or she feels better suits their social, economic and personal needs.

The arguments in favour of a different approach to relocation disputes were potentially bolstered by the enactment of the FLRA. In particular, s 60B(2)(b) was seen as pivotal to advocates for a change in approach. This subsection states that one of the principles underlying the objects of the children's section of the FLA (Part VII) shall be, subject to the best interests of the child, that: "children have a right of contact, on a regular basis, with both their parents ...".[15] Another argument in favour of change is the addition of the following factor which must be considered by the Family Court in making decisions as to residence and/or contact orders: "the practical difficulty and expense of a child having contact 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".[16]

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13 A submission compiled by the Women's Legal Education and Action Fund to the Canadian Supreme Court in *Gordon v Goertz* (1996) 134 DLR (4th) 321 discussing this issue was adopted by the mothers' counsel in *B and B* (see [6.19]).

14 This is the language now prevalent in the FLA. It has largely (but not totally) replaced the 'welfare' terminology. The Full Court in *B and B*, however, stated that the new terminology does not involve a significant difference in the law, but rather was chosen as it "represent(s) a more child-centred and less paternalistic concept". See *B and B*, at [9.34].

15 It was further pointed out that s 60B(2)(a) was of significance. This provides that another of the principles underlying Part VII of the FLA is that: "children had a right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together". Again, this is subject to the best interests of the child.

16 s 68F(2)(d) FLA. Lisa Young criticises this amendment on the basis that it is closely aligned with a parents' rights type of approach as found in some parts of the United States of America. See Young, already cited n 11, pp 33-34.

Following an examination of the facts of the case and the trial judge's decision in Part 2, this article will in Part 3 then discuss the arguments of the parties and the interveners in the appeal. The main part of the article is Part 4, where a detailed analysis of the decision of the Full Court is provided from a number of different perspectives. The article concludes in Part 5 by affirming that the appellate judgment is a balanced and progressive one and should prove to be very useful for future decision makers and practitioners, but doesn't really change the law significantly from how it existed prior to the enactment of the FLRA.

Part 2 The Facts Of *B And B* And The Decision Of The Trial Judge

B and B concerned a Cairns couple who had separated after over six and a half years of a very strained marriage. In the trial judge's opinion, despite the 'significant conflict' that existed between the parents, they managed to ensure that this did not affect the upbringing of their two children, who were aged 11 and 9 at the time of the trial. He described the children as being "well cared for", and who "have continued to enjoy close relations with each of their parents"[17] and with their paternal grandmother. Following separation, by mutual consent the children resided with their mother, with the father having very liberal access during most weekends.[18] The father did not at that stage contemplate applying for custody. The mother, following separation, supported herself and the two children from social welfare payments, child support from the father, and occasional part time work.[19]

In 1994 the mother renewed an old association with a man whom the court called W, who lived in Bendigo, Victoria. The situation of a relative accommodation between the parties[20] changed when in February 1996 the mother informed the father that she and W had decided to marry and that she

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17 *B and B* at [2.5].

18 The children stayed with their father two out of every three, or three out of every four weekends. Consent orders in the Family Court were made on 10 May 1993, which provided that the husband have access for at least one weekend in two, but in general the access arrangements did not alter as a result of these consent orders. See *B and B* at [2.6].

19 id at [2.12].

20 At least as far as the children were concerned. However, the mother was still clearly dissatisfied, due to the high level of conflict that continued to persist between her and her former husband (the parties were divorced in 1993). See *B and B* at [2.4].

planned to move to Bendigo with the children. Not surprisingly, the father opposed the children leaving Cairns, and commenced proceedings in the Family Court shortly thereafter, applying for custody of both children. However, he indicated that if the mother stayed in Cairns, he would drop his application for custody. The mother simultaneously instituted proceedings for a variation of the access orders which would allow her to take the children with her to Bendigo. She also reiterated that if she was not permitted by the Court to take her children with her to Bendigo, she would not move. The trial judge described her state of mind as follows:

"... the wife genuinely does feel powerless. She genuinely does feel persecuted. She is distressed and she is angry ... [She] has endured an increasing level of unhappiness for a long time. I accept that she genuinely perceives that (W.) and Bendigo represent something of a personal salvation and that, objectively, that is not an unreasonable point of view to hold. ... [She] would be devastated by a refusal to be allowed to leave at this time and that she would suffer trauma and a long period of grieving."[21]

Neither the father, being a successful legal practitioner in Cairns and intending to remarry himself to someone with two children living in Cairns, nor W, having business interests as well as two children from a previous relationship who lived with him in Bendigo, were prepared to relocate in order to facilitate both parents of the children being able to live in the same part of Australia. The Court accepted that their reasons for not relocating were valid.

Both parents acknowledged that the other enjoyed a loving and caring relationship with their children, and accepted that the other formed a very important part of their children's lives.[22] If the relocation application succeeded, this situation is a good example of a primary residence parent moving a significant distance away from their former home, thereby creating traumatic consequences for their children and the lesser residence parent and their family. On the other hand, if the relocation application failed, this would be likely to also have traumatic consequences for the primary residence parent. Clearly, this will never be an easy decision for the Court, and

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21 id at [5.7].
22 id at [2.14] and [2.15].

as the trial judge stated "each of the parties have an understandable and personally legitimate point of view".[23]

While it is true that every family situation is unique, in many ways the above facts do represent a typical relocation dispute in today's society - following a relationship breakdown, there is the need of one of the parents to move due to financial, professional and/or personal commitments. Thus, the type of media interest that the case attracted, as well as the personal intervention of the Federal Attorney-General, must have taken the participants by surprise. In all probability, the intervention of the media and the Attorney-General had far more to do with the timing of the appeal being so soon after the FLRA came into effect, rather than the particular circumstances of the case.

The trial commenced in September 1996. Jordan J, the trial judge, found in favour of the mother, permitting her to take the children with her to Bendigo after the 1996 Christmas holidays, and ordering that the children have contact with their father as agreed between the parties, but failing agreement, for four weeks over the Christmas school holidays and all other school holidays. The mother in her proposals had already consented to allow the father such contact, as well as offering to pay half the costs of the airfares needed to facilitate such contact. As it will be shown, this willingness by the mother was of some importance to the reasoning of both Jordan J and the Full Court.

The father's main arguments were based primarily on the effect of the enactment of the FLRA, and in particular the new s 60B. His counsel claimed that this meant that there should be a reversal of the previous onus in favour of the freedom of movement of the primary residence parent to one that imposed a heavy onus against relocation. As a further consequence of the enactment of the FLRA, previous relocation cases decided by the Family Court should no longer be considered relevant. However, Jordan J rejected these arguments. He held that the best interests of the child remained the paramount consideration, and disagreed with the notion that s 60B created a hierarchy in the factors to be examined. Instead, in considering what is in the child's best interests, the Court: "must have regard to the principles and objects of the [FLRA]"[24], as well as the mandatory factors that the Court is obliged to

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23 id at [5.1].
24 id at [4.7].

examine as set out in s 68F(2). He directly endorsed the reasoning of the Family Court in the case of *Holmes*.[25] Finally, he reiterated some of the relevant principles taken from previous cases decided prior to the enactment of the FLRA - that parties should normally be free to pursue a new life subject to meeting their responsibilities as parents, and the fact that one parent has been the unchallenged primary caregiver for a long time was considered very important.[26]

Based on the above analysis of the law, Jordan J decided that the children's best interests were served, on balance, by them moving to Bendigo with their mother. He based this reasoning upon a number of factual considerations - the effect on the state of mind of the mother of an adverse decision[27] and the impact this would have on her parenting[28], her willingness to agree to regular school holiday access and to meet half the airfares[29], and the counsellor's opinion that the happiness of the mother was intimately connected with the happiness of her children.[30]

Part 3 The Arguments Of The Parties And The Interveners In The Appeal

Not surprisingly, the father's counsel on appeal utilised similar arguments to those used by the father during the trial. These were based primarily upon the changes to family law brought about by the enactment of the FLRA, and in particular s 60B. This, he contended, "represented a 'sea change' in the 'culture' of family law in Australia".[31] By enacting the FLRA, the parliament had set out for the first time a charter for the rights of children, largely based upon the *United Nations Convention on the Rights of the Child*[32] ("UNCROC"). These rights of children, including their right to contact on a regular basis

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25 [1988] FLC 91-918. See Part 4.2 below.

26 *B and B* at [4.7].

27 See the accompanying text to note 21.

28 See *B and B* at [5.9].

29 Jordon J stated: "... whilst this is clearly not as desirable as the current access regime, it does represent some form of compensation in that the children would have regular contact with their father every two months or so". *B and B* at [5.3] One can only speculate as to whether his Honour would have come to a different conclusion had the mother not been as accommodating.

30 See *B and B* at [5.10]. In fact, these were the type of factors used in previous case law, such as *Holmes* [1988] FLC 91-918.

31 id at [6.1].

32 UN Doc A/44/49 (1989), entered into force 2 September 1990.

with both their parents as found in s 60B(2)(b) FLA[33], were meant to be predominant, unless it can be shown that they were contrary to their best interests. In particular, he argued that Article 9 of UNCROC and s 60B(2) FLA gave rise to a presumption that both parents continuing to have contact with their children would be in the best interests of the children. As a matter of law, the principles and criteria set out in s 60B were to take priority and be the starting point to any residence or contact decision, with the checklist factors found in s 68F(2) being secondary to, or only being a guide to, the s 60B considerations. In the opinion of the father's counsel, s 60B was enacted to overcome "the indeterminacy which is inherent in the best interests principle".[34] Given the change to the law that the enactment of the FLRA has instituted, all previous cases dealing with relocation were thus no longer of assistance.

In terms of the particular case before the Court, the father's counsel argued that given the children had regular contact with both their parents from the moment of separation onwards, then removing the children's ability to continue to have such contact could only be allowed if the party desiring to do so was able to satisfy the Court that "the full enjoyment of existing rights would be contrary to the child's best interests".[35] In other words, the applicant for relocation would have the burden to show that the existing situation was contrary to the children's best interests. Given that the father had a loving and meaningful relationship with both the children, the mother could not discharge this burden as she could not show that a continuation of the present circumstances were contrary to the children's best interests. Thus, the relocation of the children should not be permitted.

Central to the arguments of the father's counsel was that the words "on a regular basis" in s 60B(2)(b) meant contact had to be both meaningful and frequent; otherwise the mother's proposals for regular school holiday contact may have satisfied the requirements of s 60B(2)(b). He relied on Articles 7 and 9 of UNCROC to support his contention that the words "regular contact" imported notions of frequency.

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33 The father also argued that s 60B(2)(a) FLA (the right of children to know and be cared for by both parents) was important.

34 *B and B* at [6.9]. The criticism that the best interests or welfare principle is indeterminate is also found in Elster, J, *Solomonic Judgments: Studies in the Limitations of Rationality*, 1989, Cambridge University Press, Cambridge, pp 134-8.

35 id at [6.7].

Naturally, the mother's counsel took a very different view of the effect of the FLRA. She argued:

"[T]he amendments do no more than to restate conclusions which Australian and overseas Courts have already reached about the rights of children and their best interests. ... the legislation did little more than place additional emphasis upon these considerations, and .. that at best s 60B could be regarded as a starting point and as an indication that Parliament intended that the Court specifically identify those matters and give them proper weight. However, they were to be weighed against all other relevant matters including those set out in s 68F(2), and ultimately the paramount consideration is the best interests of the child."[36]

In other words, there was no hierarchy between s 60B and the factors set out in s 68F(2); all factors and principles were subject to the overriding principle of the best interests of the child. Previous case law was thus still of significance as the FLRA did not represent a great change in the law. A rigid construction of s 60B would also mean that it would be virtually for either parent to ever relocate despite significant changes in their personal or economic circumstances, and this could not have been what parliament intended when it enacted the FLRA. She further argued that there was a direct relationship between children's best interests and the right of parents to relocate where their circumstances showed that this was desirable, referring to the right of freedom of movement under international law.[37] She also requested that the Court take judicial notice of the possible economic and social consequences for women if they are prevented from relocating by relying on a submission from the Canadian Women's Legal, Education and Action Fund to the Canadian Supreme Court in the case of *Gordon v Goertz*[38].

Thus, according to the mother's counsel, the trial judge's view of the law had been correct, and he had properly applied the facts of the case and legitimately exercised his discretion. Finally, she submitted that even if the father's arguments were accepted and s 60B was predominant, s 60B(2)(b) could be satisfied by her client's proposals as the requirement of

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36 id at [6.15].

37 See *B and B* at [6.18], referring to the *International Covenant on Civil and Political Rights* and the *UN Covenant on the Elimination of All Forms of Discrimination Against Women.*

38 (1996) 134 DLR (4th) 321. See *B and B* at [6.19].

"regular contact" under this subsection was fulfilled by the father having contact during school holidays.

The Attorney-General's submission to the Court gave some support to the father's argument that the enactment of the FLRA did make a significant difference to the law. He stated that the FLRA heralded "a fundamental shift in the approach to the resolution of disputes about children"[39], citing the principles in s 60B as evidence of this, as well as the change in emphasis from notions of custody under the old FLA to those of parental responsibility found in the FLRA.[40] In the Attorney-General's opinion, the effect of s 60B was that the Court must *start* from the position that the child had a right to regular contact with both parents and anyone significant to the child's welfare. This meant that decisions of the Court prior to the enactment of the FLRA had to viewed with "caution".

However, the Attorney-General differed from the father's submissions in a number of important aspects. First, he strongly argued that despite the significant changes the FLRA had brought in, the best interests[41] of the child still remained the paramount principle in all of the Family Court's decisions regarding children.[42] In this respect, the main inquiry for the Court was to examine which proposed option was in the best interests of the children, and the effects of this option on the parents were peripheral to this question. Thus, the trial judge had been in error by giving weight to the wishes and interests of the parents. Secondly, he emphasised that he did not believe any onus existed on the party proposing change to show that the change was in the children's' best interests, nor for that matter, was there any onus on the other party. Thirdly, he disagreed with the father's submission that s 60B was more important than the factors in s 68F(2). The only hierarchy in the FLA was that the best interests principle was predominant, and the s 68F(2) factors had to be assessed in the light of the principles set out in s 60B in order to guide the court as to what option was in the best interests of the children. Fourthly, he conceded that there were circumstances where the Court

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39 id at [6.21].

40 id at [6.22] See Part 4.3 below.

41 The Attorney agreed that the change in terminology in s 65E FLA from 'welfare' to 'best interests' made no difference to the substance of the law. See *B and B* at [6.37].

42 He relied upon both s 65E and the proviso to s 60B(2) which specified that the principles contained in s 60B(2) were all subject to the children's best interests. See *B and B* at [6.24].

should endorse relocation by the primary residence parent, such as where a refusal to allow a relocation would affect that parent's economic and psychological capacity to provide for the needs of the children. In such a situation, relocation is likely to be in the children's' best interests, and thus he did not agree with that part of the father's submission which implied that existing parenting orders should be very difficult to change. Finally, he disagreed that "regular contact" necessarily required face to face contact and also was meant to mean "frequent" contact.[43]

The other intervener in the proceedings was the Human Rights and Equal Opportunity Commission ("the Commission").[44] Not surprisingly, its submission emphasised the human rights aspects of the case, particularly the right of every adult to freedom of movement. Such a right was found expressly in s 92 of the Australian Constitution[45], was also implied from the Constitution[46], was a common law right[47], and was also found in Article 12(1) of the *International Covenant on Civil and Political Rights* (the "ICCPR").[48] This right to freedom of movement should, in the Commission's opinion, "be afforded recognition and status no less than any other 'right' and/or 'principle' in s 60B(2)".[49] A related argument of the Commission was that because the underlying principles of the FLRA derived from UNCROC, its relevance to the interpretation of the FLRA was substantial. As the Preamble of UNCROC emphasises the rights of all family members, the freedom of a parent to exercise their human rights (such as freedom of movement) are factors

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43 id at [6.21] to [6.40].

44 The Commission was able to intervene in the proceedings by leave of the Court pursuant to s 92 FLA. s 11(1)(o) of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) ("HREOC Act") lists Court intervention as one of the functions of the Commission in cases "that involve human rights issues".

45 This guarantees, *inter alia*, that "intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free".

46 See *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 and *Australian Capital Television Ltd v Commonwealth* (1992) 177 CLR 106.

47 As it "underlies common law rights to liberty and security of the person, freedom of peaceful assembly ..., and to a democratic society representing the rule of law." *B and B* at [6.42]

48 UN Doc A/6316 (1966), entered into force 23 March 1976. Australia ratified the ICCPR in 1980, and the Commission pointed out that the rights contained in the ICCPR are defined as a human rights in s 3(1) HREOC Act. *B and B* at [6.42].

49 id at [6.41].

in determining the interpretation of the expression 'best interests of the child' as found in the FLRA. Clearly, this emphasis on the right of freedom of movement as being at least the equal to the principles set out in s 60B(2) seemed to support the mother's arguments.

Part 4 An Analysis Of The Full Court's Decision

The Full Court, in a unanimous decision, dismissed the father's appeal, finding that the trial judge had interpreted the law correctly, and that his conclusions based upon the facts of the case were free from error. The Court stated early in its judgment that given the importance of the case to the interpretation of the FLRA, it would go beyond the legal analysis of the particular case and consider in a more general sense how the FLRA was to interpreted in future cases.[50] A detailed analysis of the most important aspects of the Full Court's decision now follows.

4.1 The effect of the FLRA on the exercise of the Family Court's discretion in residence/contact disputes

The construction of the FLRA was central to the Court's ultimate decision in this case. The primary question was whether, as the father's counsel had suggested, the enactment of the FLRA meant that the principles as set out in s 60B(2) were dominant in Family Court decisions regarding children. This rights-based approach was emphatically rejected by the Court. The best interests of the child would remain the paramount consideration in all children's matters. This was expressly set out in s 65E FLA, and furthermore, s 60B(2) FLA clearly stated that the principles contained therein were subject to the best interests test.

A second important issue of construction was the question of the interrelationship between the principles found in s 60B(2) and the checklist factors found in s 68F(2) that the Court is obliged to take into account when determining the best interests of the child. The father's counsel had argued that, in effect, the principles contained in s 60B(2) were more important than the checklist factors in s 68F(2), as they were "primary and irreducible" rights of the child and constituted "a set of defined, normative criteria".[51] These principles should thus apply unless it can be shown that the continuance of these

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50 id at [1.4].
51 id at [6.1 & 6.3].

rights would be contrary to the child's best interests. On this issue, the father had some support from the Attorney-General.[52]

The Full Court also rejected this construction of the FLRA. Its opinion was that the principles set out in s 60B(2) simply added to the checklist contained in s 68F(2), they do not have preference, nor is there any onus or presumption in favour of any of the principles set out in s 60B(2).[53] This part of the Court's decision is not without some difficulty, as the obvious question arises that if parliament intended that the principles set out in s 60B(2) were to be added to the checklist factors contained in s 68F(2), why then did it not simply add these principles to the checklist? Another question was the role of the object of Part VII of the FLA as set out in s 60B(1).[54] The Court simply said that the checklist factors in s 68F(2) and s 60B(2) should be considered in the light of the 'optimum set of values' enshrined in s 60B(1).[55]

These findings of the Court in relation to the construction of the FLRA, namely, the maintenance of the paramountcy of the best interests test, and of the checklist approach, in effect means that the Court will continue its virtual total discretion in children's matters. This is because nowhere does the legislation specify which factors in the checklist should be considered more important, or what weight should be attached to each particular factor, or what happens if the factors appear to be in conflict. Thus, critics argue, the best interests

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52 The Attorney-General agreed that the principles set out in s 60B were more important than the checklist factors found in s 68F(2). However, he was careful to point out that rather than the principles set out in s 60B being primary, the best interests of the child was the overriding test, and there was no presumption in favour of the right of contact with both parents.

53 An important corollary to this was the Court's statement that s 60B(2) did not provide children with any legally enforceable rights. See *B and B* at [10.57].

54 This states that: "[t]he object of this Part 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".

55 This would seem to leave s 60B(1) in a similar position to s 43, which sets out the 'principles' (as opposed to the 'objects') of all Courts exercising family court jurisdiction. The Court concluded that s 60B(1) would unlikely to be of much use in the adjudication of individual cases. *B and B* at [9.54].

approach is indeterminate[56] as it is too easy for a judge to make whatever finding they wish, and be able to justify their decision on the basis of any one or more of the checklist factors. This ruling thus has clear similarities to previous Court decisions which have stated that the Court's discretion cannot be fettered without there being a clear legislative intent for the parliament to have done so. An important example of this is in relation to applications for property adjustment, which also has a 'checklist' approach to the exercise of the Court's discretion[57]. In *Mallet v Mallet*[58] the issue before the High Court was whether there could be a starting point of 'equality is equity'.[59] Gibbs CJ commented:

"Even to say that in some circumstances equality should be the normal starting point is to require the courts to act on a presumption which is unauthorised by the legislation. The respective values of the contributions made by the parties must depend entirely on the facts of the case, and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power ..., unfettered by the application of supposed rules for which the [FLA] provides no warrant."[60]

B and B clearly confirms that this approach, of "a wide discretionary power, unfettered by the application of supposed rules", would apply to residence and contact decisions pursuant to the FLRA. Decisions will continue to be made according to the individual facts of each case; there would be no presumptions or 'starting points'; the best interests principle would be paramount, and this does not allow for presumptions or starting points.

4.2 Relocation Cases And The FLRA

Very early in its judgment the Court stated that "relocation cases are not a special category",[61] Yet, given the greater likelihood of relocation disputes in modern society and the public interest in the Full Court's decision (see Part 1 above), there is little doubt that practitioners and others concerned

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56 See Elster, already cited n 34.
57 See ss 79(4) & 75(2) of the FLA.
58 (1984) 156 CLR 605.
59 This meant that a starting point of the equal division of marital assets could be assumed where a marriage was of a reasonable duration.
60 (1984) 156 CLR 605 at 610.
61 *B and B* at [1.4].

with the workings of family law looked towards the decision to provide guidance in relocation cases above and beyond the reiteration of the best interests principles.

In view of the discussion in Part 4.1 above, it was not surprising that when it came to examining relocation issues, the Court was able to reject the father's and Attorney-General's arguments that the enactment of the FLRA made the previous jurisprudence of the Family Court redundant. The Court reviewed this jurisprudence in some detail, as well as case law in the United Kingdom[62], Canada[63] and New Zealand[64] Despite there being significant differences between the legislation in these jurisdictions[65], the Court felt there was "a broad consensus of approach" in respect of relocation issues. These cases were thus held to be relevant to relocation cases under the FLRA, and the Court extracted from the cases various factors which should guide the Family Court in making decisions regarding the possible relocation of the primary residence parent. At first instance, such an approach may seem to be in conflict with the indeterminate nature of the best interests test and the checklist approach (see above). However, as Dewar points out, there is a false assumption that there is such a thing as a purely discretionary system (or for that matter, a pure 'rules-based' system). This is because there is always a gap between norms and practice, and thus what appears to be an absolute discretion "may be constrained through rules of thumb or interpretive practice".[66] The need to provide guidance for the future led the Court to articulate some of these 'rules of thumb' beyond what was required for the particular case before them.

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62 Such as *P v P* [1970] 3 All ER 659. Other English cases were mentioned in *B and B* at [8.19], as was the Scottish case of *Sanders v McManus*, unreported, House of Lords, 6 February, 1997.

63 See *Carter v Brooks* (1990) 30 RFL (3d) 53; 77 DLR (4th) 45 and *Gordon v Goertz* (1996) 134 DLR (4th) 321.

64 See *Stadniczenko v Stadniczenko* [1995] NZFLR 493.

65 For example, under the Canadian Divorce Act 1985, the best interests of the child is the only consideration and the terminology remains 'custody' and 'access'. The United Kingdom's *Children Act* 1989 does not contain a provision similar to s 60B FLA.

66 Dewar, J, "Reducing discretion in Family Law" (1997) 11(3) *Australian Journal of Family Law* 309 at 313.

The guidelines extracted from the Court's analysis of the relocation cases from Australia and other jurisdictions can be summarised as follows:[67]

1) Where the applicant for relocation is the longstanding and uncontested primary carer, and thus the likely primary residence parent, the Court felt that this was a matter of significance. Presumably, this implies that this person should normally be entitled to live where he or she wished.

2) Related to 1), the Court referred to the right of the primary residence parent to relocate without restriction, placing some emphasis on their right to freedom of movement (see Part 4.5 below).

3) The reasons for the primary residence parent's application for relocation. Some writers have argued that this is central to the Family Court's decisions prior to the enactment of the FLRA.[68] This was also clearly one of the most important factors that the Full Court discussed, and in doing so, endorsed the three part test in the case of *Holmes*.[69] The first part of this test is that the applicant's reasons for moving must be 'bona fide', and if they are not "then that would normally be the end of the application".[70] Thus, for example, where the primary reason for moving is to thwart the lesser residence parent's contact with the children, then this should result in the relocation application being unsuccessful.

A more difficult issue is whether or not there is a further requirement that, apart from the need for the application for relocation to be genuine, the primary residence parent must also have a 'good'[71] reason for relocating. Such 'good' reasons, from previous jurisprudence, includes where the move

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67 This list will exclude those matters already set out in the mandatory checklists (both the s 68F(2) factors and the principles set out in s 60B(2) - see above) which apply in all cases where the court must determine a parenting order. I have largely adopted this list from the one used by Lisa Young in her casenote entitled "*B and B: Family Law Reform Act* 1995 (Cth) - Relocating the Rights Debate", (1997) 21(2) *Melbourne University Law Review* 722 at 730. Naturally, all these guidelines are subject to the best interests test.

68 See Young, already cited, n 11 p 32.

69 (1988) FLC 91-918.

70 id, at 76,663.

71 This is the terminology used in previous decisions of the Family Court, such as *I and I* (1995) FLC 92-604.

enhanced the family's economic circumstances, and the related reason of where the primary residential parent wished to remarry or repartner.[72] The latter reason was the undoubted reason why the mother in *B and B* wished to move to Bendigo. As this clearly was a 'good' reason, the Full Court did not need to discuss the issue of whether the absence of a good reason is necessarily fatal to an application for relocation. This issue will thus need further clarification in the future. In some cases, the lack of a 'good' reason has been fatal to the application for relocation. For example, desiring to relocate due to educational opportunities[73] or, in a case that followed *B and B*, simply liking the place where the applicant wished to relocate to, and thinking it would be a good place to raise her child[74], have resulted in unsuccessful applications for relocation. These cases have been viewed with some concern by those who generally support a primary residence parent's desire to relocate[75], as well as providing contrary evidence to the assertions by some fathers' rights groups that the Family Court is too permissive in allowing the primary residence parent to relocate.[76]

4) Where the effects of restraining the primary residence parent from relocation contributes to that parent's unhappiness to the extent that it may also significantly effect the child(ren), then this is also a factor in allowing that parent to relocate. This is largely forms the basis of part three of the *Holmes* test.

5) The greater the distance and the greater the permanency of the move, the more reluctantly the court will view the suggested relocation. Thus, proposals to move overseas are generally more difficult to win approval for than proposals to

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72 In both instances, presumably the Courts felt that these would be in the child(ren)'s best interests. One might also cynically suggest that governments have a vested interest in ensuring that under these circumstances the primary residence parent will be permitted to move, as government's welfare liability will be likely to be reduced.

73 See *Re K* [1992] 2 FLR 98; *M and M* [1992] 2 FLR 303 and *Skeates-Udy and Skeates* (1995) FLC 92-626.

74 See *F and S*, Full Court of the Western Australian Supreme Court, 17 March 1997.

75 This would include many women's organisations. See also Young, already cited, notes 11 and 67.

76 For an example of such a reaction shortly after the Full Court's decision, see "Dads Furious as Court Frees Divorced Mother to Move", *The Australian*, 10 July 1997, p 1.

move interstate.[77] This is clearly related to the fact that distance and permanency make it far more difficult and expensive for the lesser residence parent to maintain contact with their children.

6) The more the primary residence parent is prepared to comply with any order for contact in favour of the lesser residence parent following relocation, the more the Court will judge favourably their application to relocate. This in substance represents the second part of the three part test in *Holmes*. Thus, the Full Court viewed the mother's willingness to allow the father substantial school holiday contact time, and pay half his costs for doing so, as a significant factor.

7) Finally, one issue where the Court did go some way towards accepting the father's submissions was that the reference in s 60B(2) to 'regular' contact "normally encompasses direct contact" and should contain some element of 'frequency', but in all practicality "should also be as frequent as is appropriate" in the circumstances of the case.[78] While regular school holiday contact as envisaged in the mother's proposals might not have been sufficient to satisfy s 60B(2)(b), as this was only one factor out of many in the checklist (which included the principles found in s 60B(2) and the s 68F(2) factors), this was not enough anyway to shift the decision in favour of the father.

4.3 The Meaning Of 'Parental Responsibility'

The Court also made some important comments in relation to the English concept of 'parental responsibility', which was incorporated into the FLRA. These comments were partially in response to the argument of the Attorney-General that the introduction of this concept at the expense of the former concepts of custody and guardianship was significant in the way the Full Court should approach the resolution of disputes concerning children.[79] The Court again went beyond what was strictly necessary to decide the case.

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77 The Court at [7.37] endorsed the dicta of the Full Court on this issue in the case of *Armstrong* (1983) 9 Fam LR 402, at 407.

78 *B and B* at [9.18].

79 This was because, as the argument went, the strong emphasis on the responsibility of both parents characterised by the 'parental responsibility' terminology meant that there was a presumption that both parents should continue to have contact with the child. This clearly reinforced the arguments based upon s 60B(2)(b) FLA.

Section 61B FLA defines 'parental responsibility' as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children". This definition, which refers back to the common law, is far from precise, and some writers have expressed dismay over its lack of clarity.[80] Feminist writers have also been critical of the supposed 'gender neutral' language of the concept.[81] Others have suggested that legislation along the lines of ss 1 & 2 of the *Children (Scotland) Act* 1995, which provides a tentative checklist of the rights and responsibilities of parents towards their children, should be enacted.[82] Section 61C FLA deems that both of the parents of a child who is not 18 have parental responsibility for the child, until a parenting order to the contrary is made. Such a parenting order could redistribute any of the various rights and responsibilities encompassed under the previous notions of custody and guardianship to anyone who is able to obtain a parenting order.

As a residence order only determines where a child should live, a person in receipt of such an order does not necessarily also have the day to day responsibility for the child's care, welfare and development. These were, however, rights that a former custodial parent did have. A similar situation existed in respect of the holder of an access order.[83] One major practical question here is how are the myriad of the other rights and responsibilities in relation to a child (apart from where the child will live and who it will have contact with) to be exercised as between the primary residence parent and the lesser residence parent, in the absence of specific issues orders? Does every decision have to be exercised jointly? Such a state of affairs would clearly be unsatisfactory. Not surprisingly, the Court stated that in general and as a matter of practical necessity, both the primary residence parent and the lesser residence parent would be able to make all the decisions concerning the child's daily care and control individually while

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80 See Gordon-Clark, H, "Parental Responsibility: The Legal Consequences" (1997) 71(4) *Law Institute Journal* 40, p 40.

81 See Kaspiew, R, "Equal Parenting or the Effacement of Mothers?: *B and B* and the Family Law Reform Act 1995 (Cth)" (1998) 12(1) *Australian Journal of Family Law* 69 and Behrens, J, "Shared Parenting: Possibilities and Realities" (1996) 21(5) *Alternative Law Journal* 213.

82 See 1997 Appendix to Parker et al, already cited n 8, pp 22-23. A handy and comprehensive list of what are a parents' rights and duties under Australian common law is found in *Laws of Australia*, Volume 17.6, Chapter 2, "Status of Children", [4] pp 11-12.

83 See Dickey, A, *Family Law*, 2nd ed, Law Book Company, 1990, pp 368-9.

they had sole physical care of the child.[84] However, long term decisions concerning the child, such as their place of education, religion and decisions in respect of major surgery[85], would have to be agreed upon by both parents. The ultimate result of these conclusions of the Court is that the situation as existed under the FLA prior to the enactment of the FLRA would, in all practical reality, continue to exist under the new legislation[86], despite the assurance by the Full Court that "[r]esidence is not custody by another name", and the changes are 'fundamental'.[87]

The obvious advice for practitioners is that if a client who has a residence order in their favour wishes to have all the rights associated with the daily care and control of their child, it would probably be better, although not compulsory, to seek specific issues orders to that effect. However, if their client wishes to make the long term decisions about their child's upbringing so that, for example, the lesser residence parent cannot interfere, then it would be essential that they seek specific issues orders to ensure that this will be the case.[88]

4.4 The Role Of International Law

Three out of the four submissions relied heavily on the domestic effect of UNCROC[89] in order to bolster their respective arguments. The father's submitted that the strong reliance on UNCROC during the drafting of the FLRA, and the fact that the FLRA gave partial domestic effect to the provisions of UNCROC, meant that the FLA should be perceived as a 'mini-charter' of children's rights. In particular, the objects provided for by s 60B should be given greater status and importance than other object provisions in the FLA[90], as s 60B was designed to comply with Australia's obligations under UNCROC.

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84 *B and B* at [9.30].

85 These are in effect all the powers that a guardian exercised under the old regime.

86 See Young, already cited n 67, p 729. However, there appears to be one difference between the old and the new legislation, more in terms of terminology rather than practical effect. Under the old legislation guardians had 'joint' responsibility for children; whereas under the FLRA each parent has 'separate and discrete' responsibility for children.

87 *B and B* at [9.39].

88 See Gordon-Clark, already cited n 80, p 41.

89 Some of the parties also relied on other International Treaties. See Part 4.5 below.

90 Such as ss 43 & 66B FLA.

At first glance it would seem that reliance on UNCROC would be counter productive to the mother's case, given that Article 9(3) of UNCROC sets out the right of children to contact with both parents, and this provision has been domestically implemented in the form of s 60B(2)(b) FLA. Clearly, this adds extra weight to the father's arguments that relocation would diminish this right of the children. Ironically, given the history of the opposition to Australia's ratification of UNCROC[91], what the Commission and the mother argued was that UNCROC also provided for the wellbeing of all members of the family, including those of the parents.[92] The mother's counsel thus submitted that "it was artificial and inappropriate to consider the rights of the child in a vacuum, that the child is a member of a family and that included the rights of the parents ...".[93] Thus, the FLRA, and in particular s 60B, must be read subject to the parent's ability to exercise their human rights, which included their right to freedom of movement (see Part 4.5 below).[94]

The Attorney-General took a narrow approach to the effect of international law, and was alone in arguing that UNCROC and the other International Treaties referred to by the mother and the Commission (see Part 4.5 below) were not relevant. He first correctly pointed out that all express reference to UNCROC was deleted from the final form of the FLRA, even though reference to UNCROC had been prominent throughout the drafting stages of the legislation. He then argued that as Part VII of the FLA comprehensively set out the law in relation to children's matters, it was in effect 'a code'. Because there was no ambiguity or obscurity in the legislation, s 15AB of the *Acts Interpretation Act* 1901 (Cth)[95] was inapplicable and the Court should not rely upon UNCROC as an aid to interpret the FLRA. This negative attitude towards the relevance of international

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91 This opposition was based mainly on the arguments that UNCROC undermined the rights of parents, and constituted unwarranted state intrusion into families. For example, see Renkema, V, "A Threat to Family Privacy" (1989) 10 *The Australian Family* 1 and Byrne, J, "Anti-Parent Charter Worry", [1990] *Australian Association for Adolescent Health Newsletter* 22.

92 Relying upon the first paragraph of the Preamble and Article 5 of UNCROC.

93 *B and B* at [6.16 & 6.18].

94 id, at [6.45].

95 This section sets the circumstances under which extrinsic material can be used to aid in the interpretation of a provision of an Act.

legal principles reflects the generally conservative approach of the present Federal Government towards international law.[96]

The Full Court emphatically rejected the Attorney's submissions on this issue. Not only did the Court specifically state that UNCROC was a very important source as an aid in the interpretation of the FLA, it also decided to make some more general statements regarding the domestic effect of International Treaties. This was despite the fact that the Court admitted that these issues were not raised during the trial, and were not ultimately relevant to the outcome of the appeal.[97]

In relation to the specific effect of UNCROC on the FLA, the Court stressed a number of factors. First, the presence of s 43(c) FLA, which emphasised the obligation of all Courts having jurisdiction under the FLA to have regard to "the need to protect the rights of children and to promote their welfare", imported notions of the rights of the child into the FLA. The Court rejected the Attorney's submission that this provision does not apply to UNCROC because UNCROC was not in existence at the time s 43 was originally enacted.[98] Secondly, the rights of the child as envisaged in s 43(c) FLA were not static over time, and had to be interpreted in the light of modern developments, such as the almost universal acceptance of UNCROC.[99] This near universal acceptance was a third reason why it should have greater significance for the purposes of domestic law.[100] Fourthly, the declaration in 1993 which made UNCROC a schedule to the HREOC Act 1985 added weight to it having a special significance in Australian law.[101] Fifthly, the Court rejected the Attorney's argument that the FLA was a comprehensive code, and thus all extrinsic material, including international legal principles, could not be used to

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96 This is indicated by the concern expressed by various members of the government that the effect of international law will undermine Australia's sovereignty and pose a threat to our Federal system of government. For example, see Kemp, R, "UN's right to meddle stifles nation's voice", *The Australian*, 8 April 1994, p 13.

97 *B and B* at [10.1].

98 On the basis that the rights of children had been recognised internationally well beforehand in the 1959 UN *Declaration of the Rights of the Child*, and Australia had played an important role in the subsequent formulation and drafting of UNCROC. See *B and B* at[10.11].

99 As at the time of writing, only the USA and Somalia have not yet ratified UNCROC.

100 *B and B* at [10.19].

101 id at [10.20].

aid in the interpretation of s 60B.[102] The consequences of this rejection meant that many cases where various Courts had stated that resort to international law can be made where there is an ambiguity in the law, or to develop the common law, or to provide guidance where a discretion is to be exercised, were relevant in this situation.[103] Sixthly, s 60B and other sections of the FLRA relied upon UNCROC as a source during the formative stages of the passage of the FLRA through parliament.[104] Finally, the Court stressed that where an Act such as the FLA incorporated part of an International instrument, the rest of that instrument could be used as an aid to the interpretation of the Act. Thus, because the FLRA did generally incorporate some of the principles set out in UNCROC[105], the rest of UNCROC was a legitimate aid in the interpretation of the FLRA.[106]

Some of the more general statements by the Family Court regarding the domestic effect of International instruments showed a progressive approach to this issue. Although the Court reiterated the traditional incorporation approach to the relationship between domestic and international law[107], nevertheless it stated that there were many circumstances where an international instrument will have importance despite there being no implementing domestic legislation. For example, the Court thought that any Treaty or international instrument that had been scheduled to the HREOC Act was of particular relevance to the interpretation of domestic legislation.[108] The court further confirmed that, in their opinion, international law

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102 This was because the FLA was couched in terms of general broad principles, and thus lacked the sort of precision required for a comprehensive code.

103 The Court analysed *Minister For Foreign Affairs and Trade v Magno* (1992) 112 ALR 529 and *Murray v Director, Family Services, ACT* (1993) FLC 92-416 in some detail, and also relied upon *Teoh* (1995) 183 CLR 273. See *B and B* at [10.16].

104 The Court specifically referred to the second reading speeches and the explanatory memoranda that made it apparent that UNCROC was extremely influential. See *B and B* at [10.21].

105 See the list of articles of UNCROC referred to by the Court at [3.30].

106 The Court at [10.22] referred to the judgment of Kirby J in *De L v Director General, NSW Department of Community Services* (1996) FLC 92-706.

107 Some writers have argued, however, that the incorporation and transformation approaches are not a simple dichotomy. See Walker, K, "Treaties and the Internationalisation of Australian Law" in Saunders, C, (ed) *Courts of Final Jurisdiction: The Mason Court in Australia*, 1996, Federation Press, 204 at pp 227-234.

108 *B and B* at [10.20].

can also be used as an aid where there is a gap in the common law, not just (as is well accepted even by conservative approaches to the issue[109]) where there is an ambiguity in the common law, or to aid in the interpretation of an ambiguous or obscure statute. Furthermore, the Court also felt that universally accepted human rights Treaties such as UNCROC had an even greater significance for the purposes of domestic law than Treaties that were not as internationally accepted.

The Court's pronouncements on the principles governing the relationship between international law and Australian domestic law highlight just how out of step the narrow views of the Attorney-General were in respect of this issue. While the overall importance of international legal arguments is obvious in all areas of the law, in family law they are particularly important. One reason for this is the central role and weight attached to UNCROC, given that the rights of children are so prevalent in many areas of family law. However, an even more important reason is that as family law is one of the most discretionary areas of the law, international principles can be argued more frequently as being relevant to the exercise of the Court's discretion. The discretionary system also means that there it is relatively easy to show that an ambiguity or gap in the law exists, allowing the Court to go beyond the text to international instruments and other extrinsic materials. The endorsement by the Court of the following views of Kirby J are particularly notable: "By the time cases get before courts of high authority, international and municipal, suggestions of ambiguity or uncertainty tend to be insistent. Even parties which support a construction, based upon text alone, ordinarily seek to bolster their arguments by reliance on extrinsic material."[110] This has significant implications for both practitioners and academics in family law.

4.5 Human Rights Arguments

Very much interrelated with arguments based upon international law were the submissions by the parties (except the Attorney-General) which stressed certain human rights principles, both domestic and international. The father argued that the rights of the children, as embodied in s 60B and

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109 The Court at [10.5] indirectly quoted at length from the judgment of Gummow J in *Magno*, already cited n 103, p 534 as an example of a 'conservative view' on this issue.

110 *De L*, already cited n 106, pp 83, 464, and quoted in *B and B* at [10.22].

UNCROC, should take priority.[111] The Commission emphasised that the right to freedom of movement of the mother, derived from both international and domestic law[112], had to be recognised in the interpretation of the FLRA, particularly s 60B(2).

Furthermore, the Court should take note of the rebuttable presumption that parliament does not intend to abrogate fundamental freedoms.[113] The mother supported these arguments of the Commission, as well as arguing that the rights of the children supported her case (see Part 3 above). Furthermore, her counsel stressed the right of women to be treated equally and without discrimination as enshrined in the *UN Covenant on the Elimination of All Forms of Discrimination Against Women* ("CEDAW").[114] This argument emphasised that primary residence parents, being mostly women, often needed to relocate in order to improve their social and/or economic position, or to escape family violence. The Court was asked to take judicial notice of the evidence of the gendered social and economic consequences of caregiving, the inferior economic position of women in society, and the likely serious consequences if primary resident parents were to be prevented from relocating. This would thus be a breach of their right to equal treatment pursuant to CEDAW.

Those familiar with human rights law will be aware that there is nothing unusual about opposing parties using different or even the same human rights arguments in order to bolster their case. Human rights are often a question of which human rights will take priority[115], not just whether a particular human right is applicable to the situation. Given the uncertainty that

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111 His counsel was careful not to argue that the lesser residence parent had rights in relation to the children. This is because the FLRA does not specify that parents have rights in relation to their children, only obligations and responsibilities.

112 See Part 3 above.

113 See *B and B* at [10.34]. The Commission's submission also attempted to tackle the difficult issue of the relationship between the rights of the child and of their parents. See Young, already cited n 67, pp 726-727.

114 UN Doc A/34/46 (1979), entered into force 3 September 1981. The mother's counsel pointed out that CEDAW also enshrined both rights associated with marriage (Article 16) and to choose one's place of residence (Article 15(4)).

115 The classic example is the issue of racial vilification - is freedom of speech a more important human right than the rights of potential victims of vilification?

a clash of rights might entail, some writers have thus criticised human rights regimes as being indeterminate.[116]

The Court's responses to the above human rights arguments were short and unclear. The Court did not reject the importance of these human rights. However, it did reject the concept that rights such as the rights of parents to freedom of movement or to live their lives without discrimination could take precedence in any way over what was the Court's essential inquiry, namely the issue of what was in the best interests of the child in the particular case.[117]

What is not clear from this decision is the role of human rights arguments in future cases. Should an established human right simply be added to the checklist factors found in s 68F(2) and s 60B(2)? Or do they have some other status, such as a mere guideline in relevant circumstances, like the guidelines referred to above in Part 4.2 that apply in relocation disputes?[118] This uncertainty as to the status of human rights principles adds another factor to the indeterminate nature of the 'best interests' test.

Part 5 Summary And Conclusion

From many perspectives, with the possible exception of the lack of clarification of the status of human rights principles, the judgment of the Full Court can be seen to be a constructive and progressive decision. It provides clear direction for future decision makers[119], and justifies the view of some writers that it is a "seminal authority".[120] It is also a balanced decision, as contrary to some fathers' rights groups reaction to the decision, it does not provide a carte blanche for primary residence parents to relocate. There will still be a need for that parent to show a genuine and possibly also a 'good' reason for relocation,

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116 For example, see Morgan, J, "Equality Rights in the Australian Context: A Feminist Assessment" in Alston, P, (ed) *Towards an Australian Bill of Rights*, Centre for International and Public Law, Canberra, & the Commission, Sydney, 1994, p 123.

117 *B and B* at [10.46].

118 However, it is possible to argue that the guidelines might be included as a checklist factor under s 68F(2)(l): "any other fact or circumstance that the court thinks is relevant". See Part 5 below.

119 Admittedly, however, the decision does nothing to disturb the indeterminate nature of the 'best interests' test.

120 Finlay, H, Bailey-Harris, R, & Otlowski, M, *Family Law in Australia*, 5th Edition, Butterworths, 1997, p 479.

and where the move is permanent and a long distance away, he or she will have significant problems in gaining the Court's approval.

The Court established the following principles in relation to the construction of the FLA and how decisions in relation to children's matters should be made. The overriding consideration will continue to be the best interests of the child, as set out in s 65E. To help the Courts to make this determination, the matters contained in the checklists of s 68F(2) and s 60B(2), which are both to be given equal priority, will be used. The next step for a Court will be, for particular types of cases, to refer to the unwritten guidelines, such as the ones referred to above in Part 4.2 in relation to relocation cases. However, it is possible to argue that these guidelines might be included as a checklist factor, under s 68F(2)(l): "any other fact or circumstance that the court thinks is relevant". Whether or not this is the case is perhaps more a matter of semantics rather than being of any practical consequence given the discretionary nature of the 'best interests' test.

To enable the Court to establish the above principles, particularly in the interpretation of the FLRA, it made considerable use of international legal principles, despite there being no direct reference in the FLRA to any international instrument. It also was prepared to utilise extensively the jurisprudence of a number of relevant overseas jurisdictions, despite their legislation having considerable differences to the FLA.[121] It also took a broad approach to the use of extraneous and non-legal materials as aids to the interpretation of the FLRA. This willingness to utilise international, comparative and non-legal sources is something that all practitioners and those designing law curricula need to be aware of. It also confirms Chief Justice Nicholson's assessment of the Family Court being a world leader and innovator.[122] On the other hand it should also be noted that by rejecting a more rule-based system for determining residence and/or contact as argued by the father in *B and B*, the court preserved much of the pre-FLRA case law and the largely indeterminate nature of the 'best interests' test.

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121 See n 65.

122 See Nicholson A, "Keeping Justice in Divorce", *The Weekend Australian*, 3-4 February, 1996, p 5.

For this reason, it must be remembered that despite the progressive nature of the Full Court's decision, how trial judges in the future will decide individual relocation disputes will depend as much upon the individual values of the judge involved as on the jurisprudence of the Full Court.