

# The Best Interests of the Child and Relocation Disputes

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## Abstract

The fluidity of the modern family springs from changing social values on various forms of intimate relationships. But as easily as they form, they are easily unformed, susceptible to separation and re-partnering. In the aftermath of separation, the problem is often exacerbated by the presence of children. It's a painful process in which one of the parents may well at some level need to distance himself or herself physically as well as emotionally from the other. Dissension results and contested relocation emerges in which the best interest of the child is paramount. But what are the child's best interests and who can determine them? This article examines the best interests of the child and its application in relocation disputes.

## Introduction

Family life is morally and emotionally charged at the best of times, more so during divorce or separation when issues of raising children, re-partnering and freedom of movement have to be dealt with. The ideal of children being brought up by their biological parents continue to be espoused, while step-parenting is seen to engender stress and difficulties or even abuse.<sup>1</sup> There is an expectation that the parents will

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<sup>1</sup> Jane Ribbens McCarthy, Rosalind Edwards and Val Gillies "Moral Tales of the Child and the Adult: Narratives of Contemporary Family Lives under Changing Circumstances" (2000) 34 *Sociology* 785 at 786.

continue to look after the best interests of children upon separation. Consequently, parents who re-partner or wish to relocate are morally questionable for putting their interest before their children's welfare.

They reflect the tension between the freedom of people as adults to leave a relationship and begin a new life for themselves, and the harsh reality that while relationships may be dissoluble, parenthood is not.<sup>2</sup> Arguably, children usually benefit from a close and continuing relationship with a non-resident parent who cares about them in the absence of abuse, violence, or very high conflict.<sup>3</sup> Maintaining that connection if one parent moves a long way from the other is difficult, thus the challenge in reconciling the needs of the child in having a relationship with both parents against the primary carer's desire to live where he or she chooses.<sup>4</sup> It creates a kind of situation in which a win-win solution can be rarely achieved if ever possible.

#### The Reality of Separation

When parents separate, one typically cares for the child while the non-resident parent can have access, depending on their willingness to accommodate such arrangements, pending the court's intervention where required. Depending on the age of the child it is generally the mother that maintains responsibility for parenting with minimal involvement from the other.<sup>5</sup> In contrast where the parents agree to a shared care arrangement, the child effectively has two homes. Whatever the arrangement the choice is between the child residing with one parent with reasonable access/visitation for the other; or the child splits his time living in two homes with each parent.

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<sup>2</sup> Patrick Parkinson, Judith Cashmore and Judi P Single "The Need for Reality Testing in Relocation Cases" (2010) 44 Family Law Quarterly 1; Patrick Parkinson "Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation" (2008) 36 Federal Law Review 145; Patrick Parkinson "Family Law and the Indissolubility of Parenthood" (2006) 40 Family Law Quarterly 237.

<sup>3</sup> Parkinson, Cashmore and Single, above n 2, at 1.

<sup>4</sup> Parkinson, above n 2, at 146.

<sup>5</sup> Peter Boshier "Have Judges been Missing the Point and Allowing Relocation too Readily?" (2010) 1 Journal of Family Law and Practice 9 at 36.

The ideal of shared care or co-parenting after separation is supported by research that finds both men and women expressing strong egalitarian attitudes toward parenting.<sup>6</sup> Men are getting more involved and they want to spend more time with their children, indicating as some argue that we are moving toward a social ideal of father as co-parent.<sup>7</sup> However, women continue to spend more time with children than men do and it appears that the time men spend with children does not equate to care in absolute terms.<sup>8</sup> That is, while women spend a great proportion of their care time in physical activities, fathers are more likely to engage in recreational activities.<sup>9</sup>

There is a contradiction between the reality of familial relationships we live with and the ideal that we live by. The flexibility that underlie the modern family is manifested through the ease in which intimate relationships are established, often followed by children and the termination of the relationship. However, in spite of the self-interest, competitive and divisive behaviours associated with separation we continue to uphold the ideal of the permanent nurturing and protective family. And we will go to any lengths that they remain so, “even if it means mystifying the realities of family life”.<sup>10</sup>

### The Legal Framework of Shared Care

The legal framework of shared care is provided by the Care of Children Act (COCA) 2004 which specifies that in most circumstances both parents will have

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<sup>6</sup> See generally Lynne M Casper and Suzanne M Bianchi *Continuity and Change in the American Family* (1st ed, SAGE Publications, Inc, Thousand Oaks, Calif, 2001); Kathleen Gerson *The Unfinished Revolution* (Oxford University Press, Oxford; New York, 2011).

<sup>7</sup> See, Melissa A Milkie and others “Gendered Division of Childrearing: Ideals, Realities, and the Relationship to Parental Well-Being” (2002) 47 *Sex Roles* 21; Marilyn Coleman and Lawrence Ganong *Handbook of Contemporary Families* (SAGE Publications, Inc, Thousand Oaks, Calif, 2003).

<sup>8</sup> Janeen Baxter “Patterns of Change and Stability in the Gender Division of Household Labour in Australia, 1986–1997” (2002) 38 *Journal of Sociology* 399; Lyn Craig and Michael Bittman *The Effect of Children on Adult’s Time Use: An Analysis of the Incremental Time Costs of Children in Australia* (Social Policy Research Centre, Sydney, 2005); Casper and Bianchi, above n 6.

<sup>9</sup> See for example: Lyn Craig *Caring differently* (2002).

<sup>10</sup> John R Gillis *A World of Their Own Making* (Harvard University Press, 1997) at xv.

joint legal guardianship of their children.<sup>11</sup> Guardianship is broadly defined to include “having the role of providing day-to-day care for the child” and “contributing to the child’s intellectual, emotional, physical, social, cultural, and other personal development”.<sup>12</sup> The assumption is that the involvement of both parents in a child’s life after separation will be in that child’s best interests,<sup>13</sup> even if there is no requirement for the court to consider the child spending equal or substantial time with both parents before any other care arrangements.<sup>14</sup> The court however is obligated to ensure that any order conferring day to day care of the child to one parent should consider contact with the other parent.<sup>15</sup>

Evidently, COCA is silent on how shared care is to be facilitated nor does it offer suggestions on any ideal parenting allocation. The onus is on the parents to make their own arrangement or failing their agreement the court will determine an arrangement in accordance with individual circumstances. In spite of this there have been suggestions that family court officials and family law professionals do emphasise equal shared care when care and contact for children are being negotiated.<sup>16</sup> If this is so, mothers who are compelled to facilitate a shared care regime from the outset are indeed destined for a no win situation. Any reluctance to accept shared care would be viewed with a moral consternation that warrants

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<sup>11</sup> Section 17 of the Care of the Children Act 2004.

<sup>12</sup> Section 15(1)(a) and (b) of the Care of the Children Act 2004. In other words, guardianship is not confined to being involved in ““big picture” decisions (s 16(1)(c) and (2)(a)–(e)). A court order can, however, limit the legal responsibility of a guardian for the child’s day-to-day care when they are not in the role of providing day-to-day care (s 16(3))”.

<sup>13</sup> Section 5(a) of the Care of the Children Act 2004 elaborating on principles relevant to the child’s welfare and best interests, provides that “the child’s parents and guardians should have the primary responsibility” for the child’s “care, development and upbringing.” Section 5(b) provides that children should have continuity in arrangements for their care, development and upbringing, “and the child’s relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents)”.

<sup>14</sup> Julia Tolmie, Vivienne Elizabeth and Nicola Gavey “Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand” (2010) 24 NZULR 136 at 138.

<sup>15</sup> Section 52 of the Care of the Children Act 2004.

<sup>16</sup> This has been supported by responses from some mothers that individual family law professionals (lawyers, counsellors, mediators and judges) appear to be adopting an idealistic approach to shared day-to-day care, viewing it as the presumptively right arrangement for all children and, on this basis, one the family court is likely to award, see Tolmie, Elizabeth and Gavey, above n 13 at 139.

legal intervention.<sup>17</sup> But once contact or shared care is established, no matter how superficial, it triggers the continuity principles in sections 5(d) and (e),<sup>18</sup> which would be difficult to disrupt in relocation cases.

### Relationships after Separation

The principle that children should have an ongoing relationship with both parents after separation is only one of a number of important considerations set out in COCA. The other principles set out import issues relevant to the best interests of the child, such as the need to ensure the child's safety which might override this principle on any particular set of facts.<sup>19</sup> Furthermore, the Act's focus is concerned with the care of children as opposed to parental rights, to promote children's welfare and best interests,<sup>20</sup> which must be the first and paramount consideration<sup>21</sup> in any proceedings involving a child's day-to-day care and contact.

The scheme of this parental relationship illustrates the disconnection between its normative ideal and the reality we live with. This is not intended to question the desirability of shared care arrangements and their outcome for children where agreement is achieved out of court. However, for high conflict cases that require the court's intervention, outstanding personal issues can effectively impede the parents' ability to even consider the interests of the children. More so, if the separation stemmed from infidelity or violent dysfunctional relationships in which the aggrieved party prefers nothing more than a clean break. Suffice to point out

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<sup>17</sup> Vivienne Elizabeth, Nicola Gavey and Julia Tolmie "Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas they Face During Custody Disputes" (2010) 18 Fem Leg Stud 253 at 254.

<sup>18</sup> Care of the Children Act 2004.

<sup>19</sup> Section 5(d) of the Care of the Children Act 2004.

<sup>20</sup> Section 3 (1)(a), Care of the Children Act 2004.

<sup>21</sup> Section 4(1)(b) Care of the Children Act 2004; Interestingly the phrase "best interests" has been added to the concept of the child's "welfare" as the paramount principle in the Care of Children Act 2004. The concept of "best interests" has been interpreted by various judges as being different and adding something to the notion of the child's "welfare". The distinction drawn is that "welfare" covers the child's immediate needs for nurture, whereas "best interests" covers their longer term developmental needs. Examples given of the latter specifically tend to include the maintenance of their relationships with both parents and their wider family. See *C v W* (2005) 24 FRNZ 872 (FC) at [24] per Judge O'Dwyer.

that in the no-fault family court jurisdiction the wrongdoer is not required to account for such behaviour but is at liberty to enforce the contact or care proviso for the best interests of the child. In effect, the relationship that supposedly ends with divorce or separation is being perpetuated by the interest's child; the idealisation of durability often attached to traditional family values.

Where separating parents choose to be involved and are in agreement to a sustainable co-parenting regime the courts determination does not arise. But in high conflict disputes, access becomes a fundamental issue. Separated couples with outstanding personal issues become easily indigent, hurt, angry, bitter and unreasonable in a no holds barred contest using the child as an object of leverage.<sup>22</sup> The intervention of the court where access and co-parenting is ordered, potential hazards for the child is a valid consideration. Summed up by Gault J that:<sup>23</sup>

Any arrangement by which a child spends substantial time with each parent has the potential for harm to the child arising from inconsistent activities, influences and living patterns....I think the difficulties are likely to be less when primary responsibility of care of the child rests with one parent rather than with both.

#### The Welfare and Best Interests of the Child

The mantra of the child's welfare and best interests is posited on the purposive intent of protecting children with the relevant principles which the court must take into account.<sup>24</sup> Furthermore, in the application of these principles "the best interests" of the child must be paramount and "a parent's conduct may be considered only as it is relevant to the child's interest".<sup>25</sup>

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<sup>22</sup> Paul Geraghty *Family Law in New Zealand* (11th ed, Butterworths, Wellington, NZ, 2003) vol 1 at 347.

<sup>23</sup> *B v VE* [1988] NZFLR 65 (New Zealand[NZ]) at 70.

<sup>24</sup> Sections 4, 5 and 6 of the Care of the Children Act 2004.

<sup>25</sup> Section 4(1) and (3) of the Care of the Children Act 2004.

It is often argued that welfare and best interests mean the same thing,<sup>26</sup> however, in *Director General of Social Welfare v L*,<sup>27</sup> Bisson J outlined the distinction between welfare and interests. Welfare connotes the duty and care of parents to nurture the child including the provision of shelter, clothing and food with love and affection that requires close and attentive physical/emotional connection.<sup>28</sup> Notably, welfare is a social construct incapable of objective measurement and involves value judgments on what is beneficial or detrimental to a child's wellbeing, ranging from physical, psychological, emotional, social, cultural, to spiritual development.<sup>29</sup> The effect of the court's assessment of welfare remains problematic in that the child is denoted as an entity of adult concern. The focus is on current circumstances thus the difficulty of following a child's path into adulthood.<sup>30</sup>

As an example of the "interests" of the child, Bisson J referred to the consequences of terminating the parent/child relationship for the child. The potential conflict between the welfare and best interests of the child in a situation where the relationship between a child and foster parent (welfare) may be sacrificed for the long term interests of the child – to have a relationship with a natural parent.<sup>31</sup> Interests designate the child as an autonomous individual with rights and interests distinct from that of adult carers but with a focus on the future. Thus in the determination of what is in the best interests of the child all relevant factors must be weighed and it is by necessity a predictive assessment, a decision about the future.<sup>32</sup> The dilemma of Judges is to arrive at a predictive conclusion based on a

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<sup>26</sup> For instance, in *Director General of Social Welfare v L* Richardson P felt that the word "welfare" was a broad expression and the term "and interests" found in s11(b) of the Adoption Act 1955 were merely added words of emphasis, cited in Mark Henaghan "Going, Going.Gone - To Relocate or Not to Relocate, That is the Question" (2010) 1 Journal of Family Law and Practice 30 at 34.

<sup>27</sup> *Director General of Social Welfare v L* [1989] 2 NZLR 315 (New Zealand|NZ).

<sup>28</sup> Henaghan, above n 26, at 325.

<sup>29</sup> Richard Chisholm "The Paramount Consideration" (10th National Family Law Conference, Melbourne, March 2002) at 2 at <http://www.familycourt.gov.au/wps/wcm/resources/file/ebab2249e0a8faa/chisholm1.pdf> on 03/04/2013; Robert Ludbrook and Lex de Jong *Care of Children in New Zealand: Analysis and Expert Commentary* (BrookersLtd, Wellington, 2005) at 11.

<sup>30</sup> Ludbrook and Jong, above n 29, at 11.

<sup>31</sup> Cited in Henaghan, above n 26, at 325.

<sup>32</sup> *D v S* [2002] NZFLR 116 (New Zealand|NZ CA) para 33.

child's individual qualities, current circumstances and relationship with parents and others.

### Paramount Consideration

To be considered as “first and paramount” does not imply “sole” consideration but rather the first to be considered and this in turn trumps all other considerations. Lord MacDermott in a House of Lords decision observed that “first and paramount consideration” includes:<sup>33</sup>

... all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare... That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

The central theme of COCA is the care and protection of children and how parents (or others) can meet those interests. The guiding principles are provided in ss 4, 5 and 6 which must be taken into account. In fact, former Principal Family Court Judge, Peter Boshier in reference to s 5(b) that “the child should have continuing relationships with both parents” indicated that parents should not relocate if to do so would be detrimental to the child's relationship with the other parent.<sup>34</sup> However, as argued by Henaghan, the consideration of continuing relationship with both parents is but one of the considerations that must be taken into account; it cannot be raised to the level of an overriding consideration.<sup>35</sup>

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<sup>33</sup> *J v C* [1970] AC 688 (England & Wales) at 710; *J v C* [1969] 1 All ER 788 (England & Wales) at 820.

<sup>34</sup> Peter Boshier “Relocation Cases; An International View from the Bench” (2005) 5 NZFLJ 77 cited in; Henaghan, above n 26, at 35.

<sup>35</sup> Henaghan, above n 26, at 35.

It is argued that the paramountcy principle as outlined by legislation, though definitive lacks the descriptive precision necessary for conceptual clarity. It fosters an ideal that we live by, contrary to the reality we live with. In that, the decision to separate is often made without due consideration of the welfare and interests of the child. Even in the aftermath of separation the child's interests to continue a relationship with both parents cannot be invoked to prevent the relocation of the non-carer parent. In contrast, the parent responsible for day-to-day care is required to facilitate contact with the other parent, to forego freedom of movement, and choice that may even affect new relationships.

The reality of family life we live with is characterised by divorce, remarriage, blended families, single parenthood, joint custody, abortion, domestic partnership, two career households, and the like but we still yearn nostalgically for the durability of familial relationships that we have lost.<sup>36</sup> Historian John Gills aptly puts it as:<sup>37</sup>

“...the anticipation and memory of family means more to people than its immediate reality. It is through the families we live by that we achieve the transcendence that compensates for the tensions and frustrations of the families we live with.”

We cling to the paramountcy mantra as more compelling with its pivotal imaginary elements that separated parents can put their personal lives on hold for the interests of the child to maintain contact with both parents. We treat as secondary the need of separated parents to move on with their lives socially and economically, particularly where job opportunities, new relationships or new families are concerned.

#### Assessing the Welfare and Best Interests of the Child

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<sup>36</sup> Gill Jagger and Caroline Wright *Changing Family Values* (Routledge, London, 2003) at 189.

<sup>37</sup> At 189.

In assessing the welfare and best interests of the child three different approaches can be identified from decisions in relocation cases. The first approach considers the principle as contingent to the welfare of the primary caregiver and her ability to provide a reasonable standard of care. Thus, to restrict the movement of the caregiver and confine her to an arduous existence could be detrimental to the child. The second approach views the interests of each child as unique which must be assessed on their individual merits. It involves identifying and weighing up the relevant factors on a case by case basis in recognition of the variety of family circumstances. The third approach focuses on enabling the child to have a relationship with both parents, which effectively militates against relocation.<sup>38</sup>

To illustrate the three approaches I will discuss the leading New Zealand case in relocation: *Kacem v Bashir*,<sup>39</sup> its progress through the entire Court hierarchy and the different judicial opinions it generated. The case involved two young Muslim girls (aged seven and a half and nearly six at the time of the Supreme Court hearing) and where they should live. The mother wanted to relocate to Australia with the two children to be close to her family and to reduce the conflict between the father and herself. However, the father wanted the children to remain living in New Zealand.

### The Family Court Decision

In the Family Court,<sup>40</sup> the mother's application for relocation to Australia was denied. Judge de Jong after identifying and weighing up the relevant factors considered that the reasons against relocation outweighed those favouring a move.<sup>41</sup> The judge pointed out that established face to face contact with the children would

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<sup>38</sup> Discussed in Boshier, above n 34.

<sup>39</sup> *Kacem v Bashir* [2010] NZFLR 884 (New Zealand|NZ); *Kacem v Bashir* [2010] SC 112 (New Zealand|NZ SC).

<sup>40</sup> *B v K* FC Auckland FAM-2006-004-1761, 5 September 2008.

<sup>41</sup> At [48] Judge de Jong stated: "Although the Australian proposal may result in continuity and stability in the children's care it is most unlikely to promote ongoing parental consultation and co-operation, or strengthen relationships between the children and paternal family in a way which allows both families to be a part of the children's lives in a real and significant way."

be affected because the father's legal status prevents him from visiting Australia.<sup>42</sup> Judge de Jong also raised his concern on the mother's level of insight and ability to provide future stability, given that she had disrupted the status quo by moving on several occasions.<sup>43</sup>

It is argued however, that the judge failed to explore the possibility of the girls travelling to New Zealand for visitations rather than focusing on the father's inability to travel to Australia. Furthermore, the mother's previous moves may have been an attempt to alleviate the stressful high conflict relationship she had with the children's father. The fact that she keeps returning to New Zealand indicated her ongoing concern for the welfare of the children. In any event, the decision rested on the judge's view that "it is in the children's interest and welfare for them to live in New Zealand where both parents are able to care for and participate in their daily lives".<sup>44</sup>

#### The High Court Decision

The decision was reversed on the mother's appeal to the High Court,<sup>45</sup> which sanctioned her relocation to Australia with the two children. In making this decision the judge recognised the negative effect of the relocation in limiting the children's face-to-face relationship with their father. However, Courtney J, focused on the detrimental effects of the high conflict between the two parents and how this has affected, and will affect, the children in the future if they remain in New Zealand.<sup>46</sup> Apart from the different approaches adopted by the two judges it is interesting to

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<sup>42</sup> At [49].

<sup>43</sup> At [49].

<sup>44</sup> At [50].

<sup>45</sup> *K v B* [2009] 27 FRNZ 417 (New Zealand|NZ HC).

<sup>46</sup> At [59] "I have reached the conclusion that remaining in New Zealand carries an unacceptable risk of damage to the children as a result of the conflict between their parents. In my judgment moving to Australia ultimately carries less risk because the girls' attitude to their father and relationship with him are more likely to remain positive than if they remain in New Zealand and are exposed to the ongoing and damaging conflict between their parents. I accept that there will be disruption and a sense of loss, especially for [the oldest child]. But if there is provision made for regular contact and visits with [the father], the long term prospects for both children are better if they are living in a secure extended family environment free of conflict than growing up amid the kind of destructive conflict to which they are now exposed."

observe that the male judge (de Jong) ruled in favour of non-relocating parent (father) while the female judge (Courtney J) empathised with the relocating parent (mother).

### The Court of Appeal Decision

The father's appeal to the Court of Appeal<sup>47</sup> focused on the approach to be adopted on an appeal from the Family Court, the application of the principles enshrined in s 5 of the Care of Children Act 2004, the role of parental conflict and whether Courtney J had given appropriate weight to all relevant factors in reaching her decision.<sup>48</sup> The appeal was allowed and the court found that it was in the children's best interests to remain living in New Zealand.<sup>49</sup> The decision turned on the basis of an updated psychological report about the children (that was not available to the High Court). The report suggested that while the "long-running litigation posed increased risk to the children's well-being" there was "some indication that the parents were doing better in sheltering their children from the conflict between them."<sup>50</sup> The report concluded that it was in the interests of both children to maintain meaningful relationships with both parents<sup>51</sup> emphasising the settled shared parenting regime that was in place.<sup>52</sup>

The Court of Appeal acknowledged the likely adverse effects of the ongoing parental conflict on the children, as well as the difficulties that the mother would face from having to remain in New Zealand without the support of her family.<sup>53</sup> However, the Court found on the basis of the psychological report that a relocation would disrupt the shared parental regime in place and significantly reduce the

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<sup>47</sup> *Bashir v Kacem* (2010) [2010] NZFLR 865 (New Zealand|NZ CA).

<sup>48</sup> At [26].

<sup>49</sup> At [42].

<sup>50</sup> At [44].

<sup>51</sup> At [44].

<sup>52</sup> At [62].

<sup>53</sup> At [62].

children's relationship with their father.<sup>54</sup> Thus, the Court of Appeal held that factors favouring relocation were outweighed by factors against relocation.<sup>55</sup>

The question remains: who decides what is in the best interests of the children? And on what basis is that decision made? The Court in this case made its decision on the basis of an observation contained in the psychological report. This observation is given more weight than the personal feelings of the children as indeed required under s 6 of COCA.<sup>56</sup> As such, the Court must take into account the expressed views of the children supporting the relocation to Australia.<sup>57</sup> Unfortunately, the Court of Appeal dismissed the views based on the children's "cognitive and emotional maturity" and "limited ability to project into the future".<sup>58</sup> In effect, the children's perspective were consistent with the mother's feelings of isolation from her family in Australia which the Court failed to consider alongside other factors rather than merely dismissing their views as "immature."<sup>59</sup>

It is further argued that the Court placed undue emphasis on the assertion made by the psychological report that the parents were "making greater efforts to shelter their daughters from exposure to their hostility to one another."<sup>60</sup> The efforts being made in this regard does not negate the fact that the children may have been exposed

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<sup>54</sup> At [62].

<sup>55</sup> At [66] and [67] stating that: "In the present case, in part because of the length of the litigation, the girls have been the subject of shared parenting arrangements that appear to be working for them, and have become settled at school. Given the desirability of preserving continuity for the children and the importance of strong child/parent relationships, we do not think the risks associated with parental conflict, or the risk that the mother might become isolated to the extent that it affects her ability to be a good parent, are sufficient to justify disturbing what has become a good, working solution for the children [...] In these circumstances, we consider that it is in the best interests of the girls that they remain in New Zealand."

<sup>56</sup> Section 6(2) of Care of the Children Act 2004 states: In proceedings to which subsection (1) applies: (a) a child must be given reasonable opportunities to express views on matters affecting the child; and (b) any views the child expresses (either directly or through a representative) must be taken into account.

<sup>57</sup> According to Court of Appeal, the (then) six-year-old child in *Bashir v Kacem* "expressed a clear wish to reside in Australia" and the younger five-year old child appeared to be "fairly positive about relocation to Sydney".<sup>58</sup> Without taking account of the children's views the Court of Appeal dismissed the views based on the children's "cognitive and emotional maturity" and "limited ability to project into the future"; *Bashir v Kacem*, above n 47 para [45].

<sup>58</sup> At [45].

<sup>59</sup> Mark Henaghan "Case Note: *Kacem v Bashir* Relocation in the Supreme Court of New Zealand The Best Interests of the Child?" (2010) 6 NZFLJ 375 at 378.

<sup>60</sup> *Bashir v Kacem*, above n 47, at [44].

to high conflict in the past and will be at risk to psychological abuse that they will see or hear in the future. The report did not assess how the children felt about the ongoing conflict between their parents nor indeed whether the risk of psychological consequences for the girls no longer existed.

### The Supreme Court Decision

In appealing to the Supreme Court,<sup>61</sup> the mother argued that the Court of Appeal erred in holding there was some weighting or priority in favour of the principles contained in s 5(b) and (e) of COCA. However, the Supreme Court unanimously dismissed the appeal, which means the children remain living in New Zealand.

The majority (Blanchard, Tipping and McGrath JJ) concluded that the Court of Appeal did err in their interpretation of s 5, but held that the error was not material. The majority held that none of the principles contained in s 5 have any greater weight but rather that “individual principles may have a greater or lesser significance in the decision-making process, depending on the circumstances of individual cases.”<sup>62</sup>

Notably, the Supreme Court focused on the interpretation and application of ss 4 and 5. Subsequently, there was no analysis of whether or not the children’s views had been considered in compliance with s 6, which requires the children’s views to be ascertained, taken account of and then given the appropriate weight.<sup>63</sup>

### UN Convention on the Rights of the Child

The Convention is premised on the ideal that the “best interest of the child” should be respected as fundamental in all cultures. In fact, the principle had been evoked earlier by the 1959 Declaration of the Rights of the Child, stating that “the best interest of the child shall be the paramount consideration” in the enactment of laws

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<sup>61</sup> *Kacem v Bashir*, above n 39.

<sup>62</sup> At [19].

<sup>63</sup> Henaghan, above n 59, at 378.

relating to children,<sup>64</sup> as well as “the guiding principle of those responsible for (the child’s) education and guidance.”<sup>65</sup>

The Convention<sup>66</sup> when it came into being extended the scope of the principle to all decisions affecting the child on actions taken by state authorities, parliamentary assemblies, judicial bodies and relevant private institutions.<sup>67</sup> However the “best interest of the child” is now a “primary” instead of being the “paramount” consideration. The difference is superficial, but the change of emphasis from being to the supreme or overriding consideration (paramount) to be the main consideration amongst others (primary) does influence the application of the principle by courts.

The broad scope of Article 3 incorporates the reality of different situations that would arise when other legitimate or competing rights cannot be ignored. Thus, the adoption of a less decisive formulation that the best interest of the child is a primary rather than the paramount consideration. It recognises that the best interests of the child cannot be considered in isolation but should be the first amongst others to be considered and given considerable weight in decisions affecting children.

#### Paramount or Primary Consideration

The term “first and paramount consideration” evokes a sense of finality in the choice to be made amongst competing interests, that they trump all other considerations.<sup>68</sup> In the wake of a family break-up competing legal interests are inevitable but the rights of the father and mother are considered relevant only as they affect the welfare of the child. It implies that the child’s interests can be viewed without regard to the interests and welfare of the primary care giver and other

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<sup>64</sup> Article 2 *Declaration Of The Rights Of The Child* (United Nations, 1959).

<sup>65</sup> Article 7 “Declaration Of The Rights Of The Child”, above n 64.

<sup>66</sup> *Convention on the Rights of the Child* (United Nations, 1989).

<sup>67</sup> Thomas Hammarberg “Commissioner for Human Rights - ‘The principle of the best interests of the child – what it means and what it demands from adults’: lecture by Thomas Hammarberg, Commissioner for Human Rights, Warsaw” (2008)

<<https://wcd.coe.int/ViewDoc.jsp?id=1304019>>.

<sup>68</sup> *D v S* [2002] NZFLR 116 (New Zealand|NZ) at para 30.]

members of the family.<sup>69</sup> This ignores the fact that children exist in families and communities where their safety and wellbeing is contingent on relationships, in particular the primary care giver and his or her ability to provide for the needs of the child. It follows therefore, that in the reality of daily lives the best interests of the child is a primary consideration; the first amongst other considerations including the rights of the parents.

The New Zealand Court of Appeal noted that the Court is required to make “a decision about the future” in regards to relocation: “it is not a reward for past behaviour [and] there is no room for a priori assumptions.”<sup>70</sup> Judges however, do not have crystal balls to see into the future and are susceptible to the influence of personal perspectives and experience. More so, when rules, presumptions or burdens are rejected for a checklist of non-prioritised principles based on how individual judges see the facts.<sup>71</sup> Most Family Court Judges have children of their own, notwithstanding their wider social family or their work experience in which they come into contact with a broad range of children in a variety of family and social situations that are likely to influence their assessments.<sup>72</sup>

Indeed, the notion of the child’s welfare has been criticised as a “pre-scientific myth” or “the personal values and prejudices of the decision maker dressed up as objective fact.”<sup>73</sup> Beneath the veneer of open-ended, multi-factor, approach, “value choices are being made based on various ways families are seen after a break-up” and how issues are framed in relocation cases.<sup>74</sup> The welfare of the child pertains to benefits and detriments which require prioritising, in which some factors are given more weight over others.<sup>75</sup> When prioritising is left to individual judges the “assessment of the facts, and...conclusion as to which alternative was best... may

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<sup>69</sup> Jonathan Herring “Human Rights Act and the Welfare Principle in Family Law - Conflicting or Complementary, The” (1999) 11 Child & Fam L Q 223 at 225.

<sup>70</sup> *D v S* (n 15) [33]

<sup>71</sup> Mark Henaghan “Relocation Cases - The Rhetoric and the Reality of a Child’s Best Interests - A View the Bottom of the World” (2011) 23 CFLQ 226 at 227.

<sup>72</sup> Ludbrook and Jong, above n 29, at 11.

<sup>73</sup> At 11.

<sup>74</sup> Henaghan, above n 71, at 227.

<sup>75</sup> Ludbrook and Jong, above n 29, at 11; Henaghan, above n 71, at 227.

well be the subject of differing opinions”.<sup>76</sup> An observation supported in *D v S*,<sup>77</sup> in which the New Zealand Court of Appeal accepted that “while seeking total objectivity, we are all influenced to some extent by our own perspectives and experience”.

The conceptualisation of an interest which is “the first and paramount consideration” projects the assumption that the child’s interest is separate from that of the parents. In reality such determination is based on a number of factors related to the rights and obligation of parents and the capacity of the primary care giver to contribute to the child’s ultimate safety and well-being.<sup>78</sup> The Concise Oxford Dictionary defines welfare as the “health, happiness and fortunes of a person”. Interest is defined as the “advantage or benefit of someone”. In the determination of what is in the best interests of the child all relevant factors must be weighed and it is by necessity a predictive assessment, a decision about the future.<sup>79</sup>

The future however is fraught with uncertainties and as Janus Korczak wrote: “to reform the world means to reform the methods of bringing up children” and “children are not the people of tomorrow they are people of today”.<sup>80</sup> Preferably their current welfare or circumstances should be the starting point; the impact of the proposed change to the status quo is the fundamental question. Only then should predicative assessment be applied to support a position rather than being the locus of determination.

### Human Rights Framework

This article suggests that the best interest of the child in relocation disputes can be better realised through the human rights framework in which the individual rights

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<sup>76</sup> *Standniczenko v Standniczenko* [1995] NZFLR 493 (New Zealand|NZ) at 501.

<sup>77</sup> *D v S*, above n 32.

<sup>78</sup> US Department of Health & Human Services “Determining the Best Interests of the Child: Summary of State Laws” (2010) <[https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.cfm](https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm)>.

<sup>79</sup> *D v S*, above n 32, at [33].

<sup>80</sup> Hammarberg, above n 67, at 1; Commissioner of Human Rights, Janusz Korczak and Commissioner of Human Rights *Janusz Korczak* (Council of Europe, Strasbourg, 2009) at 7.

of parents and the child (or children) are addressed independently and weighed against each other to ascertain what is in the best interest of the child. The child lives in the present and his/her welfare or best interests are best met today rather than through projections to an unknown future.

Relocation cases when viewed through the lens of human rights bring multiple rights into focus. The rights involved will usually be an aspect of the right to respect the private and family life of the parties, though other rights may be involved. Ironically parental rights like the right to marry or set up a family (as well as the termination of that relationship);<sup>81</sup> to provide day to day care for children;<sup>82</sup> and freedom of movement,<sup>83</sup> while they impact on the life of the child are usually exercised without consideration of the child's best interests. The conflict with "the best interests of the child" emerges only in relocation or access disputes. As such the European Court of Human Rights perceives the child's welfare and best interests not as the sole consideration, but rather of particular importance and depending on individual circumstances and seriousness, may override those of the parents".<sup>84</sup>

In essence, the rights of children articulated in the Convention on the Rights of the Child and encapsulated in sections 4 and 5 of COCA are protective rights. These are distinguishable from adult rights because children cannot waive or exercise enforcement of these rights<sup>85</sup> nor do the rights represent grounds for holding another to be subject to a duty.<sup>86</sup> They are rights that turn, not only on the legal and moral obligation of parents, but their ability and commitment to provide for day-to-day care as well. The right of maintaining contact with both parents should be assessed

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<sup>81</sup> "The Universal Declaration of Human Rights"  
<<http://www.un.org/en/documents/udhr/index.shtml>> at 16.

<sup>82</sup> Care of Children Act 2004 s 5(a) and 16.

<sup>83</sup> "The Universal Declaration of Human Rights", above n 81, at 13.

<sup>84</sup> *Johansen v Norway* (1996) 23 EHRR 72 at [78]; Jonathan Herring, Rebecca Probert and Stephen Gilmore *Great Debates in Family Law* (Palgrave Macmillan, London, 2012) at 81.

<sup>85</sup> The will theory

<sup>86</sup> The interest theory; Herring, Probert and Gilmore, above n 84, at 55–56.

on its contribution to the wellbeing of the child as opposed to enhancing the ability of the primary carer to provide day-to-day care by relocating.

### The Father's Right Projected by the Best Interest Principle

In most cases where the primary care giver is refused relocation out of New Zealand the key factor was the preservation of children's relationship with their father.<sup>87</sup> As Judge Von Dadelsszen said in *AMH v SH*, it "trumps all other considerations" in that case.<sup>88</sup> The "child father relationship" has acquired prominence not from the father's status as primary carer but rather from regular care of one or two days a week. The reason for the emphasis is clear in *K v L*, where the risk of the mother (who wanted to relocate with child) becoming severely depressed and "emotionally unavailable to the children" was accepted as "real" but "much less concrete than the risk to the children's relationship with [their father] should they relocate".<sup>89</sup>

Similarly in *S v L*,<sup>90</sup> the mother was refused relocation to Australia on the basis that the father had recently developed a relationship with the child. The mother relocated without the child but six months later the father decided that the child would be better off with the mother.<sup>91</sup> The legal deception, if you want to call it that, is the right or interest of fathers being protected on the pretence of serving the best interests of the child. Whether a human rights framework would have changed the outcome of the cases is debatable. It is argued however, that a human rights framework would clearly discuss the assessment of the individual autonomy of those involved and how they contribute to the wellbeing of the child

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<sup>87</sup> Henaghan, above n 71, at 244.

<sup>88</sup> *AMH v SH* FAM 2009-000369, 2010 at [68] and [68].

<sup>89</sup> *K v L* CIV-2009-404-4457, 2010 at [77].

<sup>90</sup> *S v L* [2008] NZFLR 237 (New Zealand|NZ).

<sup>91</sup> Jasmine Smart "Relocation - whose interests should be paramount" [2011] Extra edition 32 NZLawyer online.

## Conclusion

One of the most common criticisms of no rules or presumptions with non-prioritised principles in relation to the best interests of the child is indeterminacy or unpredictability.<sup>92</sup> It is unrealistic to expect judges “cruelly exposed” to the best interest principle to work out what is best for the child from a myriad of unknown and hotly disputed facts.<sup>93</sup> Family court users expect hard decisions to be made in an open publicly accountable manner and some degree of finality to help them get on with their lives. The propensity for appeal is costly both financially and psychological, it cannot be in the best interests of the child, more so when financially and mentally drained parents have to pick up the pieces at the end of it all.

Uncertainty arises when judges are putting weight on different facts in the same case through the appeals process.<sup>94</sup> The presumption of shared care is self-defeating for mothers who have to take responsibility of young children on separation. They must put the needs of children first and agree to access arrangement with the father; they must protect the children from physical and psychological harm,<sup>95</sup> which puts them in a no win situation when they decide to relocate later on. In particular when shared care has been allowed to develop over time allowing “continuity of arrangements” and “strengthening relationships” as required under section 6(b)(d) of COCA) to kick in. Likewise, children’s views have to be considered but the court often dismisses them based on “cognitive and emotional immaturity” and “limited ability to project into the future”,<sup>96</sup> even though the law is silent on maturity.

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<sup>92</sup> Henaghan, above n 71, at 248; Shazia Choudhry and Jonathan Herring *European Human Rights and Family Law* (Hart, 2010) at 112.

<sup>93</sup> John Eekelaar “‘Trust the Judges’: How Far Should Family Law Go?” (1984) 47 *The Modern Law Review* 593 at 596; Choudhry and Herring, above n 92, at 112.

<sup>94</sup> Henaghan, above n 71, at 248.

<sup>95</sup> Elizabeth, Gavey and Tolmie, above n 17, at 256.

<sup>96</sup> *Bashir v Kacem*, above n 47; Henaghan, above n 59, at 378.

Under the circumstances this article supports the position taken by the European Court of Human Rights that the child’s welfare is not the sole consideration, but “the best interests” of the child is of particular importance, and depending on individual circumstances and seriousness, may override those of the parents”.<sup>97</sup>In line with article 3 of the Convention on the Rights of the Child the “best interests” of the child becomes a primary consideration rather than the paramount or overriding one. A human rights framework is not the panacea to relocation cases but as discussed above it provides the opportunity for clear concise discussions on the rights of individuals involved in relocation disputes and the reasoning behind the court’s determination.

## REFERENCES

*B v K* FC Auckland FAM-2006–004–1761, 5 September 2008.

*K v B* [2009] 27 FRNZ 417 (New Zealand|NZ HC).

*Bashir v Kacem* (2010) [2010] NZFLR 865 (New Zealand|NZ CA).

*AMH v SH* FAM 2009–000369, 2010.

*K v L* CIV–2009–404–4457, 2010.

*B v VE* [1988] NZFLR 65 (New Zealand|NZ).

*Director General of Social Welfare v L* [1989] 2 NZLR 315 (New Zealand|NZ).

*D v S* [2002] NZFLR 116 (New Zealand|NZ CA).

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<sup>97</sup> *Johansen v Norway*, above n 84, at [78]; Herring, Probert and Gilmore, above n 84, at 81.

*J v C* [1970] AC 688.

*J v C* [1969] 1 All ER 788.

*Kacem v Bashir* [2010] NZFLR 884 (New Zealand|NZ).

*Kacem v Bashir* [2010] SC 112 (New Zealand|NZ SC).

*D v S* [2002] NZFLR 116 (New Zealand|NZ).

*Standniczenko v Standniczenko* [1995] NZFLR 493 (New Zealand|NZ).

*Johansen v Norway* (1996) 23 EHRR 72.

*S v L* [2008] NZFLR 237 (New Zealand|NZ).

Care of the Children Act 2004.

Casper, Lynne M and Bianchi, Suzanne M *Continuity and Change in the American Family* (1st ed, SAGE Publications, Inc, Thousand Oaks, Calif., 2001).

Choudhry, Shazia and Herring, Jonathan *European Human Rights and Family Law* (Hart, 2010).

Coleman, Marilyn and Ganong, Lawrence (eds) *Handbook of Contemporary Families* (SAGE Publications, Inc, Thousand Oaks, Calif., 2003).

Commissioner of Human Rights, Korczak, Janusz and Commissioner of Human Rights *Janusz Korczak* (Council of Europe, Strasbourg, 2009).

Craig, Lyn *Caring differently* (2002).

Craig, Lyn and Bittman, Michael *The Effect of Children on Adult's Time Use: An Analysis of the Incremental Time Costs of Children in Australia* (Social Policy Research Centre, Sydney, 2005).

Geraghty, Paul (ed) *Family Law in New Zealand* (11th ed, Butterworths, Wellington, N.Z, 2003) vol 1.

Gerson, Kathleen *The Unfinished Revolution* (Oxford University Press, Oxford; New York, 2011).

Gillis, John R *A World of Their Own Making* (Harvard University Press, 1997).

Herring, Jonathan, Probert, Rebecca and Gilmore, Stephen *Great Debates in Family Law* (Palgrave Macmillan, London, 2012).

Jagger, Gill and Wright, Caroline *Changing Family Values* (Routledge, London, 2003).

Ludbrook, Robert and Jong, Lex de *Care of Children in New Zealand: Analysis and Expert Commentry* (BrookersLtd, Wellington, 2005).

Baxter, Janeen “Patterns of Change and Stability in the Gender Division of Household Labour in Australia, 1986–1997” (2002) 38 *Journal of Sociology* 399.

Boshier, Peter “Relocation Cases; An International View from the Bench” (2005) 5 *New Zealand Family Law Journal* 77.

Boshier, Peter “Have Judges been Missing the Point and Allowing Relocation too Readily?” (2010) 1 *Journal of Family Law and Practice* 9.

Eekelaar, John “‘Trust the Judges’: How Far Should Family Law Go?” (1984) 47 *The Modern Law Review* 593.

Elizabeth, Vivienne, Gavey, Nicola and Tolmie, Julia “Between a Rock and a Hard Place: Resident Mothers and the Moral Dilemmas they Face During Custody Disputes” (2010) 18 *Fem Leg Stud* 253.

Henaghan, Mark “Going, Going...Gone - To Relocate or Not to Relocate, That is the Question” (2010) 1 *Journal of Family Law and Practice* 30.

Henaghan, Mark “Case Note: *Kacem v Bashir* Relocation in the Supreme Court of New Zealand The Best Interests of the Child?” (2010) 6 *NZFLJ* 375.

Henaghan, Mark “Relocation Cases - The Rhetoric and the Reality of a Child’s Best Interests - A View the Bottom of the World.” (2011) 23 *CFLQ* 226.

Herring, Jonathan “Human Rights Act and the Welfare Principle in Family Law - Conflicting or Complementary, The” (1999) 11 *Child & Fam L Q* 223.

McCarthy, Jane Ribbens, Edwards, Rosalind and Gillies, Val “Moral Tales of the Child and the Adult: Narratives of Contemporary Family Lives under Changing Circumstances” (2000) 34 *Sociology* 785.

Milkie, Melissa A and others “Gendered Division of Childrearing: Ideals, Realities, and the Relationship to Parental Well-Being” (2002) 47 *Sex Roles* 21.

Parkinson, Patrick “Family Law and the Indissolubility of Parenthood” (2006) 40 Family Law Quarterly 237.

Parkinson, Patrick “Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation” (2008) 36 Federal Law Review 145.

Parkinson, Patrick, Cashmore, Judith and Single, Judi P “The Need for Reality Testing in Relocation Cases” (2010) 44 Family Law Quarterly 1.

Smart, Jasmine “Relocation - whose interests should be paramount” [2011] Extra edition 32 NZLawyer online.

Tolmie, Julia, Elizabeth, Vivienne and Gavey, Nicola “Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand” (2010) 24 New Zealand Universities Law Review 136.

Hammarberg, Thomas “Commissioner for Human Rights - ‘The principle of the best interests of the child – what it means and what it demands from adults’: lecture by Thomas Hammarberg, Commissioner for Human Rights, Warsaw” (2008) <<https://wcd.coe.int/ViewDoc.jsp?id=1304019>>.

US Department of Health & Human Services “Determining the Best Interests of the Child: Summary of State Laws” (2010) <[https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.cf m](https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cf m)>.

“The Universal Declaration of Human Rights” <<http://www.un.org/en/documents/udhr/index.shtml>>.

Chisholm, Richard “The Paramount Consideration” (10th National Family Law Conference, Melbourne, March 2002).

*Declaration of the Rights of the Child* (United Nations, 1959).

*Convention on the Rights of the Child* (United Nations, 1989).