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CONTEMPORARY ISSUES IN AUSTRALIAN FAMILY LAW: DO WE NEED A MORE UNIFIED AND INTERVENTIONIST JUDICIAL MODEL?

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Recent decisions of the Family Court of Australian reflect concerns over the adversarial nature of the legal process. The processes and procedures of the judicial system militate against a detailed examination of the issues and rights of the parties in dispute. The limitations of the family law framework are particularly demonstrated in disputes over the custody of children where the Court has tended to neglect the rights and interests of the primary carer. An alternative "unified family court" framework will be examined in which the Court pursues a more active and interventionist approach in the determination of family law disputes.

I. INTRODUCTION

There have been recent debates in Australian family law over the need for a more active and interventionist family court. The Chief Justice of the Australian Family Court, Alastair Nicholson, has proposed the development of a "unified" family court model or framework in which the judge may exercise more power over the resolution of family disputes.[1] Nicholson's address raises a number of contentious issues in relation to the present Family Court of Australia. For example, is the division of legal responsibility between the State and Federal governments compromising the Family Court's capacity to resolve family law issues? Nicholson's recent address suggests that a more integrated judicial approach may be required to respond to such significant social concerns as child protection and juvenile crime. Nicholson's paper also raises concerns over the efficacy of the common law adversarial system. The present procedures and processes of the courts, according to his Honour, do not allow judges to respond in a comprehensive manner to many of the needs of children, on the one hand, and the rights and interests of parents on the other.[2] An interventionist and active judicial approach may be needed if the courts are to effectively respond to issues of child welfare.

Nicholson's concern with the need for reform of the processes of the Australian Family Court is particularly reflected in the recent so-called "relocation" case law.[3]

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1 A. Nicholson, "Justice for Families and Young Offenders—A Unified Court System as a 21st Century Reform" (John Barry Lecture, Department of Criminology, The University of Melbourne, 14 October 2003) [unpublished].

2 *Ibid.* at 1.

3 See, for example, *U. v. U.* (2002) 29 Fam. L.R. 74; *A.M.S. v. A.I.F.* (1999) 199 C.L.R. 160; *Re B and B; Family Law Reform Act 1995* (1997) 21 Fam. L.R. 676.

These cases centre on disputes over the custody of the child where one party seeks to move to a different location. The reasoning in these judgements has tended to reflect an almost exclusive focus on the "best interests" of the child with little consideration being afforded to the competing interests and rights of the primary carer ("the resident parent") or "parent with care and control". However, it will be suggested that the competing rights and interests of the parties are more complex than what might first appear. For example, a focus on the best interests of the child may not adequately take account of the rights of the parent with care and control of the child ("the primary carer"). A more active judicial role may therefore be needed in addressing all of these interests.

It is further suggested that laws governing the custody and guardianship of children in Singapore reflect a similar concern with the "best interests" or welfare of the child. Section 126 of the *Women's Charter*,[4] for example, provides that "an order for custody … subject to such conditions as the court may think fit to impose … shall entitle the person given custody to decide all questions relating to the upbringing and education of the child." Under this provision, a parent with the custody of the child may not take the child out of the jurisdiction for more than one month without the consent of the other parent or the leave of the court. It is our contention that the Australian relocation cases may therefore be relevant to Singapore when it considers whether to grant leave required under s. 126 to a parent who wishes to relocate to another jurisdiction.

However, the recent decision in *Re C*. (*an infant*)[5] would indicate that the Court of Appeal in Singapore is facing a converse problem to the one which is being confronted in Australian family law. The decision in *Re C*. (*an infant*) suggests that the Court of Appeal has been, in fact, too liberal in allowing a relocating parent to take a child out of the jurisdiction. In this respect, it is suggested that the position in Singapore may reflect a concern which is quite the reverse to the one which has been levelled at the Australian Family Court—that is, that the Court is preferring the rights of the relocating parent over the competing interests of the residential parent.

II. Recommendations for Reform of the Family Court

Chief Justice Nicholson of the Australian Family Court argues that the operation of the Family Court has been compromised by the division of responsibility between the States, on the one hand, and the Commonwealth, on the other.[6] For Nicholson, a more unified court system would avoid the difficulties associated with overlapping and disjointed court services and would treat children and families "in the holistic manner which is so appropriate to their needs".[7]

For Nicholson, the court system has become too complex, "compartmentalised", and rigid.[8] A more flexible approach needs to be adopted. One example, Nicholson cites, is that of the associated areas of family and criminal law. Presently, domestic violence or physical assault that arises from a marriage breakdown is required to

4 Cap. 353, 1997 Rev. Ed. Sing.
5 [2003] 1 S.L.R. 502 (Sing. C.A.)
6 Nicholson, *supra* note 1 at 4.
7 *Ibid.* at 5.
8 *Ibid.* at 5.

be dealt with by two different courts. Under Nicholson's "unified court model" the Family Court would have the power to deal with all associated criminal law matters arising from a family law dispute. According to Nicholson, in relation to issues arising out of marriage, divorce, and the protection of children, as well as juvenile crime, the division of responsibility between the Federal and State governments has reduced the efficacy of the courts. On the one hand, the Commonwealth has responsibility in the areas of marriage and divorce. However, on the other hand, the States are concerned with the issues of juvenile crime and the protection of young persons. For Nicholson, "whatever else may be meritorious about the Australian constitution, it tends to fragment the law relating to children and young persons …"[9]

To resolve this difficulty, Nicholson draws upon the considerable jurisprudential literature in the United States which advocates a so-called "unified family court". According to this concept, the efficacy of the family court increases when courts resolve as many legal problems in as few appearances as possible. Nicholson cites a number of American scholars who have endorsed a unified family court model where jurisdiction is exercised over the areas of juvenile crime, child abuse, guardianship as well as custody, marriage, divorce and paternity issues.[10] For Nicholson, this approach acknowledges the realities of many contemporary social concerns. According to his Honour, "we all know the problems that arise in families are typically interlocked. The young offender of today was often yesterday's victim of family breakdown."[11]

Nicholson contends that issues arising in relation to marriage, custody, divorce, juvenile crime and the care of children are often different facets of the one social problem. Separating these issues into individual problems deflects attention away from the significant social concerns which underlie them. His Honour remarks that:

> I want to suggest that family law, child protection law and the law relating to juvenile offenders represent different facets of the same societal problem and that by treating them in different compartments as we do, we are not only complicating matters unduly but are missing important opportunities to overcome what are major social problems.[12]

It is our view that Nicholson's advocacy of a more unified family law model is very persuasive. Under the present system, a child is often subject to different court proceedings. For example, in the case of child abuse, a child may be required to appear as a witness in both family and criminal proceedings. A similar situation may arise in relation to cases of domestic violence. Moreover, in cases where the child has become an offender, this may also require appearances in different jurisdictions. For Nicholson, "this fragmentation leads to considerable delay, is expensive and places intolerable pressures upon the people involved. It is anything but child-focussed."[13]

Under Nicholson's proposed "unified court model", issues such as criminal child abuse, domestic violence, divorce, guardianship and juvenile crime would all be dealt with in the one court. This approach acknowledges the close association

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9 *Ibid.* at 5.
10 *Ibid.* at 7.
11 *Ibid.* at 7.
12 *Ibid.* at 7.
13 *Ibid.* at 8.

between family related issues. Indeed, in the concluding stages of his Honour's paper, Nicholson points to a study by the United States National Center for State Courts, which demonstrates that in 64 percent of child abuse cases, 48 percent of delinquency cases and, as well, in 16 percent of divorcing families, children appeared in court for another family related matter.[14] The efficacy of such an integrated model is reflected in elements of Singapore's *Women's Charter.* For example, s. 65 incorporates aspects of criminal law by providing penalties and imprisonment for breaches of protection orders.[15]

This model adopts a more comprehensive, and less confrontationist, approach to the care and protection of children. A feature of the Anglo-Australian adversarial system has been that the issues raised in proceedings, as well as the witnesses called upon to testify, have been controlled by the parties themselves. According to Nicholson, this process has tended to hinder the complete resolution of family concerns. For Nicholson, a more inquisitorial approach needs to be adopted where the judge plays a prominent role in defining all of the issues required for resolution.

Such an approach tends to conceptualise family law issues, less as a private matter where the parties themselves play the major role in defining and resolving the dispute, and more as a public concern, where the court assumes responsibility for identifying and settling the problem, and protecting the interests and rights of the parties. Moreover, Nicholson's conceptualisation of the court requires the judge to demonstrate skills and knowledge beyond narrow legal training and to possess the necessary interpersonal and counselling skills to respond to the concerns of young people.

The advantage of Nicholson's model is that it views family law concerns in an integrated and contextualised manner. Juvenile justice and delinquency, for example, is viewed in terms of the child's family background, and not merely in the context of narrow and abstract legal rules. Nicholson acknowledges this when he comments that:

> … it is, in fact, a mandate to integrate a juvenile's behaviour, environment, history- and family into a service-oriented therapeutic remedy that is the unified family court's greatest strength in addressing delinquency matters. Rather than addressing juvenile delinquency from the perspective of a "scaled-down, second-class criminal court", the unified family court's approach gives the judge authority to fashion an effective solution to that juvenile's problems in managing and directing agencies in their delivery of services to children and families.[16]

There are, however, difficulties with this conceptualisation of a more activist Family Court. First, the perception of judicial independence may be prejudiced if judges pursue too active a role in the resolution of family disputes. For example, Nicholson's argument that the Family Court should cooperate with various community services and private agencies in resolving family difficulties and implementing court orders could be perceived as bias on the part of the courts.

On the other hand, a comparative examination of Singapore's Family Court, with its effective system of counselling and mediation, indicates the potential for such

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[14] *Ibid.* at 8.

[15] See Leong Wai Kum, *Cases and Materials of Family Law in Singapore* (Singapore: Butterworths, 1999) at 901.

[16] *Supra* note 1 at 9.

an interventionist model.[17] For example, the *Women's Charter* makes provision for parties in a family hearing to attend compulsory counselling both in protection[18] and divorce[19] proceedings. Directions as to mediation and counselling can also be made at pre-trial hearings. The Family Court is proposing to extend the role of counsellors by enabling them to participate in the drafting of parenting plans. The effective links established between Singapore's Family Court and community based counsellors in the so-called "Family Protection Unit" also reflect the potential for an interventionist family court model.

A further difficulty with Nicholson's "unified family court model" is the issue of vesting jurisdiction in the Family Court to determine such matters as child protection. Nicholson argues for greater cooperation between the courts and the government departments. He points to such legislation as s. 132 of the *Children and Young Person's Act 1989* (Vic.) and s. 91B of the *Family Law Act 1975* (Cth.), which allows government departments to refer "child protection" matters to the State (Victorian) Children's Court and the Family Court. Nicholson believes that such provisions have been neglected and hold the potential for facilitating greater judicial intervention in relation to the protection and care of children.

The problem here is that there have been few referrals that have been made by government departments to the courts. Further, there is no duty on the part of such departments as those of community services to refer child protection matters to the courts. They are not accountable to the courts. In view of this concern and given that the legislative cross-vesting scheme was invalidated in *Re Wakim*[20] it is therefore difficult to see how the Family Court will hold the required constitutional and statutory power to fulfil the more activist role which Nicholson advocates in his "unified" family court model.

The deficiencies of the present divided and adversarial court structure are particularly reflected in the context of the so-called "relocation" family court decisions. This case law in Australia involves disputes over the custody of a child where one of the parties seeks to relocate to another jurisdiction. Frequently, in these cases, the "parent with care and control" of the child (the "primary carer" or "resident parent") is often required to move for the purposes of finding gainful employment or to pursue a meaningful relationship. How are the rights of the primary carer to be balanced with the interests of the child and the "non-resident" parent? Should the "best interests" of the child preclude the primary carer's right to move in order to seek gainful employment? The Court has so far failed to adequately address the rights of all parties and, in particular, the rights of the primary carer. A more active role for the judge, as proposed in Nicholson's unified family court model, may be needed.[21]

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17 See, for example, Carole Brown, "Family Mediation and Counselling in the Family Court" (Paper presented to the International Conference on Mediation, Singapore, August 1997) [unpublished]. The Family Court comprises a Court Support Group with trained counsellors and social workers who may assist in reconciliation processes.

18 Women's Charter (Cap. 353, 1997 Rev. Ed. Sing.), s. 65(5)(b).

19 *Ibid.* at s. 50(2).

20 *Re Wakim; Ex parte McNally and Anor* (1999) 163 A.L.R. 270.

21 Juliet Behrens, "*U v. U*: The High Court on Reflection" (2003) 20 Melbourne U.L. Rev. 27 at 30.

Further, as will be demonstrated, it is possible to compare this "relocation" issue in Australia with similar concerns involving s. 126 of the *Women's Charter*. Under this provision, a parent with custody of a child may not take the child out of the jurisdiction for more than one month without the consent of the other parent or the leave of the court. The relocation cases may therefore be relevant to Singapore when it considers whether to grant leave to a parent seeking to move home under s. 126.

Moreover, Singapore's family law would appear to place a similar emphasis on the "best interests" of the child as Australian law. For example, s. 3 of the *Guardianship of Infants Act*[22] stresses that the "welfare of the infant" is to be the "paramount consideration". In a similar manner, s. 125 (2) of the *Women's Charter* provides that "in deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child". The case law on these provisions further reinforces the primacy of the interests of the child.[23] Given this similar emphasis on the welfare of the child, we suggest that similar issues that are presently being canvassed in the Australian family law system may, in the future, be raised in Singapore's Family Court.

It is suggested that balancing the rights of the child and parents may be more complex than the present "best interests" approach has traditionally ruled. In particular, the "best interests" of the child have assumed an almost determinative character in relocation disputes where one party seeks to move and retain custody of the child.[24] The conventional approach has been to hold that the rights of the primary carer should always be subject to the "best interests" of the child. Yet should the interests of the child deprive the parent of the right to choose how they should live? The competing rights and interests of the parties are complex. A simple focus on the best interests of the child may not adequately acknowledge all of the rights and interests involved in the case. A more active judicial role, as envisaged by Nicholson, may therefore be needed in addressing all of these interests. An examination of the leading judicial decisions in this area of the law reflects this concern for a more active judicial role in family court proceedings.

III. Recent Family Court Decisions

The Australian *Family Law Reform Act 1995* (Cth.) ('*Family Law Reform Act*') is central to any consideration of the "relocation" cases. Section 60B(2) of the Act has replaced the previous provisions relating to the "welfare of the child" with the "best interests of the child". Further, the section provides some guidance as to the principles which should be considered when determining the child's "best interests". In particular, "children have a right of contact, on a regular basis, with both of their parents". Moreover, the Family Court, in making decisions as to residence, is required to consider "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

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22 Cap. 122, 1985 Rev. Ed. Sing.

23 See, for example, *L. v. L.* [1997] 1 S.L.R. 222 (Sing. C.A.)

24 Lisa Young, "*U v. U*: The High Court Reconsiders Relocation in the Family Court" (2002) 6 University of Western Sydney Law Review 246 at 248.

regular basis".[25] A similar focus on the best interests of the child is also reflected in s. 3 of the *Guardianship of Infants Act* and s. 125 (2) of the *Women's Charter*.

A. *Re B and B; Family Law Reform Act 1995*

The case of *Re B. and B.; Family Law Reform Act 1995*[26] reflects the complex nature of the Australian provisions and the inability of the Full Court of the Family Court to comprehensively address the rights and interests of the parties involved. *Re B. and B.* concerned proceedings brought by the mother and custodial parent of two children, aged 9 and 11, who applied for a change in access orders in order to allow her to take the children from their residence in Cairns to the home of her new partner in Bendigo. The father challenged this application, submitting that the provisions of the *Family Law Reform Act* provided a presumption against the freedom of movement of the custodial parent. He argued that the Act placed a heavy onus on the primary carer to provide a valid reason as to why the child's interests would be better served by moving residence. Finally, the father argued that the principles of the *Family Law Reform Act* were to take priority when considering the "best interests" of the child.

Significantly, the trial judge, Jordan J., rejected this argument and held in favour of the mother. His Honour found that there was, indeed, no onus on the mother to demonstrate that the existing situation was prejudicial to the interests of the children. Jordan J further considered the adverse reaction on the mother and her ability to care for her children if the application was refused. His Honour concluded that the *Family Law Reform Act* created no hierarchy of principles or guidelines for considering the "best interests" of the child.[27] Rather, the amendments merely restated the general law that the court was to consider all the circumstances of the case when determining the "best interests" of the child.

The Full Court of the Family Court subsequently reaffirmed the decision. The appeal court held that:

> In our view, the essential inquiry is clear. The best interests of the particular children in the particular circumstances of that case remain the paramount consideration. A court which is determining issues under Pt VII of the type to which we have referred, starts from that essential premise and it remains the final determinant.[28]

Counsel for the mother, however, emphasised the right of freedom of movement of the primary carer. It was argued that this freedom derived from both international and domestic law.[29] In particular, counsel contended that a presumption existed that the *Family Law Reform Act* did not intend to abrogate fundamental freedoms of the individual as provided for in international treaties and conventions. The mother's counsel, for example, highlighted the right of women to be treated equally and

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25 Sam Garkawe, "Relocation Disputes—Has Anything Changed? In the Matter of B and B: Family Law Reform Act 1995" (1998) Southern Cross University Law Review 2 at 124-52.

26 (1997) 21 Fam. L.R. 676 [*Re B. and B.*].

27 Young, *supra* note 22 at 248.

28 *Supra* note 26 at 733-4.

29 Garkawe, *supra* note 24 at 124.

without discrimination, as enshrined in the UN Covenant on the Elimination of All Forms of Discrimination Against Women ('CEDAW').[30]

This submission acknowledged the gendered nature of care-giving and the adverse economic position in which women were placed following separation and divorce. Counsel for the mother highlighted the necessity of primary residential parents, who were mostly women, to relocate in order to improve their economic and social positions. To therefore prevent primary carers from relocating would therefore breach their right to equal treatment pursuant to CEDAW.[31]

However, the Full Court of the Family Court failed to acknowledge these considerations in finding for the mother. In particular, the Court still reflected an emphasis on the exclusive nature of the interests of the child.[32] Moreover, the Court specifically rejected the contention that the primary carer's right to be free from discrimination might take precedence over the best interests of the child. Implicit in this finding was the view that the Court will not consider the gendered and discriminatory nature of the role of primary carers and the inferior economic and social position of women. Of greater concern was the broad discretion which this judgement provided to future courts when deciding the outcome of relocation disputes. The Court failed to provide any clear guidelines or approaches when considering the child's interests in the case of relocation disputes. All that appeared to be established was that the "best interests" of the child was to take priority and that the principles of ss. 68F(2) and 60B(2) were to be given equal consideration. Other issues, such as the role of human rights concerns, were not specifically addressed and no guidelines were laid down as to their consideration in future cases. The Court therefore limited itself to a narrow focus on the submissions raised by the parties. Little consideration was afforded to a more comprehensive examination of the human rights implications of the decision. Moreover, the technical and mechanistic focus on the child's "best interests" precluded a wider consideration of the interests and rights of all parties involved, including those of the primary carer.

Moreover, in finding for the mother, the Court did not establish a general and absolute right, on the part of the primary care giver, to relocate. Indeed, a number of presumptions are evident in the judgement which further entrench women's inferior economic and social position. For example, an assumption inherent in the Court's reasoning was that the longer the distance which the primary carer was to move from her original place of residence, the more reluctant would the Court be in granting approval. The applicant would first be required to demonstrate a "compelling" reason for the move and further demonstrate that the child's interests were not being satisfactorily addressed in his or her present place of residence.

The decision in *Re B. and B.* therefore reflects a need to assume a more interventionist and active judicial role in considering all of the issues involving the care of the child and the interests of the primary carer.[33] The case reflects the gendered

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30 Young, *supra* note 22 at 248.

31 Garkawe, *supra* note 24 at 124.

32 John Dewar and Stephen Parker, "The Impact of the New Part VII Family Law Act 1975" (1999) 13 Austl. J. Fam. L. 108 at 110.

33 *Ibid.* at 108.

and discriminatory assumptions which presently underpin issues in relation to the custody of children.[34]

B. *A.M.S. v. A.I.F.*

The complexity of the rights and interests involved in these "relocation" disputes was further evident in the subsequent decision of *A.M.S. v. A.I.F.*[35] The decision in this case clearly shows how the Court failed to appreciate the interests of the mother and how it limited itself to addressing the matters in dispute, as opposed to considering all the potential issues which the facts raised.[36] The trial judge approached the different interests in this case by first identifying the primary carer and then asking whether the carer was the party wishing to relocate. If the carer was indeed the relocating parent, the judge was to then determine whether she should be allowed to relocate.

As Young demonstrates, this approach was the incorrect one and further prejudiced the consideration of the mother's case.[37] The approach should have been to evaluate the competing claims or proposals of the parents and the arrangements each could make in relation to the child. According to Kirby J. in the High Court, the appropriate question was to ask whether the child is to live with the relocating parent in the proposed location or with the other parent.[38] The trial judge's reasoning required the mother to justify her proposed move. No consideration was given to the father moving nor was a proper evaluation or critique undertaken as to the adequacy of the father's proposals.

The facts of the case in *A.M.S. v. A.I.F.* were complex. The mother of child "J." wished to relocate from Perth to Darwin. The parents had met in Perth, and later moved to Darwin where their child was born. They continued to live in Darwin after their separation, but then agreed to move back to Perth where their families resided. The father had always had regular contact with J., visiting him on most weekends. The mother then informed the father of her desire to move back to Darwin, and she began to make arrangements for she and J. to return there. The father filed an application to restrain the mother from removing J. from Western Australia, and for joint guardianship and joint custody.

The trial judge awarded joint guardianship and custody to the father, and ordered that the mother be restrained from moving the child's principal place of residence out of Perth. He asserted that from the point of view of the welfare of the child, J. should continue in his current situation, where he had close interaction with both parents and sets of extended family, 'in the absence of any compelling reasons to the contrary'.[39] The Full Court overturned these orders in part, awarding sole guardianship and custody to the mother, but retaining the requirement that the child's residence remain in the Perth metropolitan area.

The mother appealed this decision on the grounds that an obligation on the part of the residence parent to demonstrate "compelling reasons" to justify relocation was

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34 Young, *supra* note 22 at 250.
35 (1999) 199 C.L.R. 160.
36 Young, *supra* note 22 at 251.
37 Young, *supra* note 22 at 251.
38 *A.M.S. v. A.I.F.*, *supra* note 35, at paras. 140-192.
39 *Ibid.* at para. 140.

not warranted by statute, and that such a requirement would impose an unreasonable inhibition on residence parents. It was submitted by her that the appropriate approach was for the judge to consider the proposals advanced by the parties and either decide between them or formulate an alternative regime that would serve the best interests of the child.

The court held (Callinan J. dissenting) that the mother's appeal should be allowed. Kirby J., in particular, offered the most comprehensive consideration of the facts. His Honour held that the court should take account of a number of principles when balancing the conflicting interests of the parents. First, according to his Honour, the Court should have regard to the disproportionate effects of decisions of the court on women.[40] Kirby J. held that consideration should be given to the fact that the great majority of primary carers were women. Further consideration, according to his Honour, needed to be given to the implications of any approach which required the parties to justify, or show compelling reasons, for their proposed move.[41] An approach which required the primary carer to justify their move would adversely affect the rights of women, since the majority of carers were in fact women. Finally, Kirby J. emphasised that account needed to be taken of whether one party was unfairly disadvantaged or prejudiced by the court's approach.[42]

Gaudron J. offered an even more critical judgement of the trial court's reasoning. Similar to Kirby J., Gaudron J. held that the trial court's approach was fundamentally incorrect. The issue was not to consider the primary carer's or residential parent's reason for relocating, but rather, to evaluate the alternative proposals of the parties.[43] Gaudron J. emphasised that the approach taken would influence the findings of the court. In other words, for her Honour, the "process" which was adopted affected the "outcome" of the case.[44] In particular, the manner in which the issues were defined played a role in determining what evidence was admitted. In this case, by requiring the mother to provide "compelling" reasons as to her proposed move deflected any scrutiny or attention away from such issues as to evaluating the competing arrangements of each party. This issue was particularly highlighted by Lisa Young who argued that "… if the question at issue is 'with whom the child should live', evidence of parent's reasons for moving is only relevant if it sheds some light on the consequences of the child living with one parent in one location, as opposed to the other parent in a different location".[45] For Gaudron J.:

> The mother's case was one which permitted of two possible outcomes. The first was that she should have custody regardless of where she lived. The second was that she should have custody only for so long as she resided in Perth. Each of those possibilities had to be assessed against the alternative for which the father contended namely, that the child live with him and his new family. A decision then had to be made as to which of those possibilities was preferable, the welfare

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40 *Ibid.* at para. 140.
41 *Ibid.* at para. 191.
42 *Ibid.* at para. 194.
43 *Ibid.* at para. 94.
44 *Ibid.* at para. 90.
45 Young, *supra* note 22 at 249.

> of J being the paramount but not only paramount consideration to which regard was to be had in making the decision.[46]

Gleeson C.J., McHugh and Gummow JJ. emphasised the impact of the "best interests" principle on the primary carer when making parenting orders.[47] Their Honours pointed to such indirect effects as the failure to grant the order to the mother. They argued that a parent who wishes to relocate to join a new partner and find new employment may be unhappy and feel trapped in her present location. As a result, the child's interests could well be harmed because of the mother's disappointed and depressed condition.

Gleeson C.J., McHugh and Gummow JJ. concluded that:

> … we agree with Kirby J that the State Family Court erroneously exercised its discretion by requiring the demonstration by the mother of 'compelling reasons' to the contrary of the proposition that the welfare of the child would be better promoted by him continuing to reside in the metropolitan area of Perth.[48]

These judgements reflect the concern to undertake a more extensive consideration of the interests of all parties in "relocation" disputes. They emphasise the importance of moving beyond a narrow consideration of the issues raised by the parties to a concern with the direct and indirect effects which different determinations may have on the child and parents.

Following the *A.M.S.* decision the Court appeared to accept that the correct approach to the relocation issue was to evaluate each of the parties or parents' proposals. The Court seemed to adopt a more active or "inquisitorial" approach when considering the rights and interests of the parties. This approach was particularly reflected in the later decision of *A. v. A.*[49]

In this case, the Full Court outlined what they considered to be the preferred approach to relocation disputes. The Court, in particular, described the principles and criteria which should be used when balancing each of the parents' proposals and set out the method that was to be employed in approaching relocation cases. The Full Court noted that it was necessary to evaluate each of the proposals advanced by the parties. In analysing these arrangements the advantages and disadvantages of each submission should be considered and balanced. Specifically, the Court in *A. v. A.* sought to identify seven main principles which should guide the consideration of the competing interests of the parties.[50]

However, the case was still committed to the overriding principle of the "best interests" of the child.[51] According to the Full Court of the Family Court, "the ultimate issue is the best interests of the child and to the extent that the freedom of a parent to move impinges upon those interests then it must give way."[52] In this respect, the decision in *A. v. A.* appeared to offer no hope of a more thorough

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46 *A.M.S. v. A.I.F., supra* note 35 at para. 95.
47 *Ibid.* at paras. 20-47.
48 *Ibid.* at para. 47.
49 [2000] F.L.C. 93-035.
50 *Ibid.* at para. 108.
51 See, in particular, Young, *supra* note 22 at 246.
52 *A. v. A.*, *supra* note 49 at para. 93.

investigation into the rights of the primary carer, both in relation to the other parent, as well as in the context of the "best interests" of the child.

C. *U. v. U.*

The most recent decision in *U. v. U.*[53] has brought into even clearer focus the inability of the present Australian family law system to take account of all interests and issues raised in "relocation" disputes.[54] The Court again failed to address the gendered and discriminatory nature of approaches to care-giving and limited itself to a narrow consideration of the issues raised by the parents. The indirect impacts of any decision in relation to custody on the mother were not considered.

In the case, the appellant and respondent were the mother and father of the child "N." respectively. Both parents were born in India, where they married in 1989. At that time, the father was an Australian citizen resident in Australia, while the mother lived in India. She moved to Sydney a short time after the marriage. While not an Australian citizen, she had obtained permanent resident status.

In July 1995, the mother purported to leave her husband, taking N. to India with her without previously informing him. The father travelled to India and brought custody proceedings there, however the Family Court in Mumbai awarded custody to the mother. N. and her mother continued to reside in India until 1998, during which time the father had made a number of visits to India to see N. In January 1998, the mother decided to return to Australia to reconcile with the father, but the attempted reconciliation failed and the mother tried to take N. back to India. She was unable to do so, however, because the father had obtained an order restraining N.'s removal from Australia. Instead, the mother took N. to Wollongong, where they were living until these proceedings.

The mother filed an application in the Family Court of Australia for a parenting order enabling her to relocate with N. to India. The father's cross-application sought a parenting order whereby N. would live with him in Australia. A court counsellor's report was obtained, the counsellor asserting that "[i]deally, [N.'s] best interests would be served by her having frequent and liberal contact with both parents". He went on to say that "[s]hould [the mother] be ordered to remain in Australia with [N.] to facilitate contact between [N.] and her father, it is unclear how [the mother]'s distress might manifest itself, and what the implications of this might be for [N.]".[55]

The mother advanced a number of reasons for her desire to relocate to India. She was an educated woman, and in India, she had been employed in a position where she was able to utilise her skills. In Australia, however, she had only been able to secure employment as a junior cleric and at the time of the proceedings, she was reliant on government benefits as her primary source of income. Her parents, extended family, and the father's extended family lived in India, and she had a wide circle of friends there, while in Australia she had no family and few friends. Thus her chief reasons

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53 (2002) 29 Fam. L.R. 74.

54 *Supra* note 21.

55 *Supra* note 53 at para. 12.

for relocation were the prospect of gainful employment and reunion with family and friends.[56]

The trial judge ordered that N. continue to reside with the mother, but that the mother be restrained from removing her residence out of the Sydney/ Wollongong area. The Full Court did not disturb this finding. It held that although the trial judge had erred in thinking that the counsellor had recommended that N. maintain liberal contact with both parents, and had failed to record the counsellor's view that this would cause significant distress to the mother which might in turn impinge on the best interests of N., this was not an error of sufficient magnitude to disturb the judgement at first instance.

The mother appealed to the High Court primarily on the grounds that the trial judge and the Full Court erred in their approach by focusing on the issue of whether the appellant should be permitted to relocate to India, rather than analysing the separate proposals of the parties and reaching a conclusion on this basis. She argued that she had been "bullied" into admitting that she would rather remain in Wollongong with her child than move to India without her, and that the court had wrongly interpreted her responses to this effect in cross-examination as suggesting a third, alternative option.

By a five to two majority, the High Court dismissed the mother's appeal. The majority of the court held that the trial judge had regarded the best interests of the child as the paramount consideration in this case, taking all relevant considerations into account. It held that the trial judge was not bound by the propositions of the parties in determining what arrangement would serve the best interests of the child, and that it was open to him to formulate an alternative option from the evidence.

In strong dissents, Gaudron and Kirby JJ. argued that the findings of the majority conflict with the decision of the High Court in *A.M.S. v. A.I.F.*[57] and discriminate against residence parents who are most often women. In view of the decision of the court in this case, it seems extraordinary that the High Court reached the conclusions it did in *U. v. U.* While the trial judge in that case did not use the same terminology as the trial judge in *A.M.S. v. A.I.F.* in expressing the reasons for his decision, it is clear that the same principles were followed in both cases. In both cases, a third option, maintenance of the status quo, was devised by the court which accorded substantially with the proposals of the non-residence parent. Once this option was raised, and (reluctantly) conceded to by the residence parent, the court was relieved from considering the very question of relocation. The trial judge in *U. v. U.* was wise enough to express his decision as being, on balance, in the best interests of the child, and to state that his conclusions were reached upon the consideration of the conflicting interests and desires of the parties. However, the logic behind the decision is consistent with that which was held to be erroneous in *A.M.S. v. A.I.F.*, namely that where the existing parenting arrangement between the parties enables the child to have liberal contact with each parent, and where in the circumstances that is in the best interests of the child, the court will choose not to disturb the status quo.

In *A.M.S. v. A.I.F.*, the court held that a requirement that the primary carer provide "compelling reasons" for the relocation would impose an unreasonable inhibition

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[56] *Ibid.* at para. 20.

[57] (1999) 163 A.L.R. 501.

on them. Indeed, Kirby J. held that if "compelling reasons" were the criterion for relocation, few indeed would be the custodial parents who could meet that standard. However, the premise that the status quo will not be disturbed in the absence of compelling reasons to the contrary may be less inhibiting for a primary carer or parent with care and control of a child than the precedent set by *U. v. U.* Under the formulation of the court in *A.M.S. v. A.I.F.*, Mrs. U. may have succeeded in having her move or relocation approved.

D. *"Compelling" Reasons for Relocation*

In *Re B. and B.*, the Full Family Court commented on the inevitability of the need to move or relocate in circumstances where parents separate:

> When parents separate the relocation of some or sometimes both is inevitable. Both parents do not continue to live in the same home. Often it is necessary for the house to be sold, requiring both to relocate. Sometimes they can do that within the same locality; often not.[58]

In that case, the court described various situations in which the relocation of a primary carer may be desirable or even essential. They considered one "compelling" reason for relocation to be the prospect of a significant advance in employment and its associated economic benefits for the parent and the children. Another is reunion with family, as this allows for the parent to escape an "otherwise isolated lifestyle after marriage breakdown".[59] In *U. v. U.*, both of these factors were present. In this respect, it seems that on the facts of this case, Mrs. U. could have demonstrated compelling reasons for relocation. However, she was unsuccessful.

One wonders in what circumstances a relocation or move would be permitted under *U. v. U.* It seems that the only time relocation would be permitted in the context of a shared parenting arrangement is where it is not in the best interests of the child to have liberal contact with both his/her parents. Since such circumstances are likely to be rare, it seems that it will be difficult for a residence parent to have their relocation approved by the court in light of this decision.

This represents quite a turnaround in comparison to past relocation cases in Australia. In a study conducted in 1998, Easteal, Behrens and Young found that over an 18 month period, 68% of residence parents had their relocation approved by the courts.[60] Despite numerous comments from the courts along the lines that a more stringent approach may be adopted in cases where an overseas move is proposed, there was no significant difference in outcome between the proportion of movers wanting to move long distances or overseas and those wanting to relocate only a short distance.[61] It was also found that those whose reason for moving was to pursue employment prospects or reunite with extended family were more likely than others to have their move approved by the courts.[62]

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58 (1997) 21 Fam. L.R. 676 at para. 7.4. [Re B. and B.]

59 *Ibid.* at para. 7.4.

60 Joanne Easteal, Juliet Behrens and Lisa Young, "Relocation Decisions in Canberra and Perth: A Blurry Snapshot" (2000) 14 Austl. J. Fam. L. 234 at 240.

61 *Ibid.* at 240.

62 *Ibid.* at 240.

E. *The Third Option*

In the *U. v. U.* case, only two options for residence were presented to the court by the parties. The father proposed that N. live with him in Sydney, while the mother proposed that N. reside with her in India. The "third" option which was ultimately adopted by the court emerged from a line of questioning in the cross-examination of the mother. Counsel for the father asked the mother to think about the possibility that she might not be permitted to move to India. She was, understandably, reluctant to do so, and made it clear that this would be very distressing for her. Yet the inference that she would stay in Wollongong in the event that N. was not permitted to leave the country, and continue to make a life for her daughter there, was enough for the court to conclude that this was a satisfactory arrangement. The impact that her mother's long-term unhappiness and loneliness would have on her daughter does not seem to have been seriously contemplated by the court.

The appropriateness and relevance of asking the residence parent whether they would still relocate if the court held that the child was not permitted to leave has been questioned by the courts. For example in *Re B. and B.*, the Full Family Court said:

> … in our view, such an approach in this case and in most cases like this is entirely unrealistic and the suggested choice is no choice at all. It would be untenable to suggest, as it was in this case, that a parent who had been the primary carer of the children during the five years of marriage and in the six and a half years since separation would leave her children and relocate elsewhere. That is true of most relocation cases.[63]

Thorpe L.J. of the English Court of Appeal perhaps put it best in *Payne v. Payne*[64] when he said:

> … in very many cases, the mother's application to relocate provokes a cross-application by the father for a variation of the residence order in his favour. Such cross-applications may be largely tactical to enable the strategist to cross-examine along the lines of: what will you do if your application is refused? If the mother responds by saying that she will remain with the child, then the cross-examiner feels that he has demonstrated that the impact of refusal upon the mother would not be that significant … But experienced family judges are well used to such tactics and will readily distinguish between the cross-application that has some pre-existing foundation and one that is purely tactical.[65]

It seems that in Australia, our judges are often not so perceptive. One wonders whether it would have been in Mrs. U.'s interest to say that if her husband was granted residence she would still move to India. This may at least have restricted the enquiry of the court to deciding between the two residence options presented by the parties, i.e. that N. either live with her father in Sydney or her mother in India. Of course, Mrs. U. (and other residence parents in her position) would probably not be willing to respond in this way for fear of being viewed as a selfish parent who would rather pursue their own happiness than be with their child, and this seems absurd

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63 *Supra* note 58 at para. 10.16.

64 [2001] 2 W.L.R. 1826.

65 *Payne v. Payne* [2001] 2 W.L.R. 1826 at 1834; cited by Kirby J. in *U. v. U.*, *supra* note 53 at para. 138.

considering that a non-residence parent who insists on remaining where they are, rather than moving closer to the child in the event that the relocation is permitted, is not viewed in this way.

In this case, the father agreed that should the mother be permitted to relocate to India, he would be prepared to travel there often to visit his daughter. While it is clear that it is open to the court to devise a parenting arrangement on the basis of evidence presented to it that differs from the suggestions of the parties,[66] it seems unjust that the alternative devised by the court in this case accorded substantially with the status quo, and thus the interests of the father. A possible "fourth" alternative, which was not seriously considered by the court would have been for the wife to be permitted to move to India, and the father to be given liberal contact rights, or even co-residence, on the assumption that he would either move to India himself, or travel there often enough to have regular contact with his daughter. It appeared from the facts that the financial situation of the parties would not prevent this.

F. *A More Active Judicial Role: The Competing Rights and Interests of the Primary Carer*

As *U. v. U.* demonstrates, the "best interests" principle may not therefore reflect the sufficient complexity of the rights and interests involved when one parent seeks to move or relocate. The Court, for example does not appear to have factored in the mother's happiness despite her role as custodian and primary carer. This may indeed raise concerns of hidden discrimination. As noted by the Full Family Court in *Re B. and B.*, 84% of residence parents are women.[67] Thus, in the majority of cases, it will be the mother who is contemplating relocation, and the father who is trying to prevent this. The adoption of a strict approach in relation to such cases may therefore constitute an 'unjust burden on women'.[68] Indeed, Gaudron J states in *U. v. U.* that the assumption that father's choice as to where he lives may not be challenged but a mother's can, is 'inherently sexist'.[69] In this regard, a more active judicial role may be required to address these serious concerns.

As Joanne Roebuck argues, a central assumption which therefore underpinned the reasoning in both the Family and High Courts in *U. v. U.* was the premise that it was always the primary carer that was required to move or relocate, as opposed to the non-resident parent.[70] Roebuck argues that:

> When a mother, who is the resident parent, wishes to relocate with a child, and where the court considers the child would benefit from contact with both parents, equal consideration should be given to a proposal that the father, in order to maintain frequent and regular contact, relocate with them. In this light, his reasons for not wanting to relocate would be examined. A mother's desire to relocate should equate to a father's desire not to.[71]

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66 *U v. U*, *supra* note 53 at para. 171.
67 *Ibid.* at para. 75.
68 *Ibid.* at para. 145.
69 *Ibid.* at para. 35.
70 Joanne Roebuck "U and U: A Chauvinistic Approach to Relocation?" (2003) 17 Austl. J. Fam. L. 208.
71 *Ibid.* at 208.

An assumption in the running of the case was that the possibility of the father moving to the carer's preferred location, India, in order to have frequent contact with the child was not a feasible option. Hayne J. did make the encouraging point that while only three proposals were canvassed in this case (that is, the child reside with the father in Australia; the child reside with the mother in Australia; and the child reside with the mother in India), it should never be assumed that the non-resident parent (in this case, the father) cannot move to facilitate regular contact with the child. Despite this dictum by Hayne J., the High Court did not consider re-opening or questioning the manner in which the hearing was conducted in this regard. It is hoped that, in the future, a more active judicial role will consider such other options, such as the father (or non-resident parent) moving to facilitate frequent and regular contact with the child.

U. v. U. further raises the difficulty of balancing a child's welfare with the competing right of the parent or primary carer to live where she chooses.[72] The usual rule has been to hold that a parent's freedom of movement is subject to the best interests of the child. However, this may not reflect the sufficient complexity of this issue. In his judgement in *U. v. U.*, Kirby J. canvassed English and Canadian jurisprudence on this topic. According to Kirby J. this case law has acknowledged the almost determinative character which considerations of the child's best interests would assume. For his Honour, the primacy of the child's interests has rendered parents' rights to choose where they live almost meaningless.

Kirby J., in particular, referred to dicta from Kerr L.J. in *Tyler v. Tyler*[73] who summarised the position in England in the following terms:

> This line of authority shows that where the custodial parent herself, it was the mother in all those cases, has a genuine and reasonable desire to emigrate then the court should hesitate long before refusing permission to take the children.[74]

According to Kirby J.:

> The 'hesitation' mentioned in Tyler does, however, evidence a greater attention to the realities of the position of the primary carer (overwhelmingly female). It allows a proper consideration of the factors affecting the carer's life, such as their freedom of movement, association, employment and personal relationships. These are to be weighed against any negative impacts of relocation, such as reduced contact. However, this last factor should not dictate the result, any more than should the carer's desire for relocation.[75]

These quotations reflect the need for a more active judicial role in taking into account the competing interests of all parties. Young has emphasised the fact that English case law is assuming a more sophisticated approach to considering the rights of not just the child, but as well, the primary carer.[76] She argues that the High Court has, in such other areas of the law as torts, taken careful account of English

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72 Young, *supra* note 22 at 246.
73 [1989] 2 F.L.R. 158 (U.K.).
74 Cited in *U. v. U.*, *supra* note 53 at para. 155.
75 *Ibid.* at para. 35.
76 Young, *supra* note 22 at 252.

jurisprudence, yet the Court has failed to look to the international case law in the field of family law and, more particularly, the area of relocation and custody.

As Richard Chisholm argues, issues in relating to the best interests principle may be more complex than they first appear. According to Chisholm, even where the Court appears to be considering the rights of the primary carer, it is still indirectly exercising a broad discretion in relation to the best interests of the child. Chisholm uses the example of a parent who wishes to relocate to join a new partner and find new employment in another country. He argues that the Court, in this circumstance, would take account of the effect on the carer of not granting the application. He suggests that the carer may feel unhappy and be poverty-stricken. As a consequence, that parent may be less able to care for the child. On this basis, the Court would grant the application for relocation since it would indirectly impact on the child's best interests. The adversarial nature of the family law system may therefore prevent an examination of the interests of the primary carer and how these interests affect the welfare of the child.

John Dewar and Stephen Parker indeed argue that the adversarial family law system and the traditional focus on the "best interests" principle has been used to disguise a more thorough and active consideration of the rights of the parties. They argue that the "best interests" principle has resulted in inconsistent and often contradictory judgements in the relocation cases.[77] They have noted, for example, the "reverse effect" of the earlier Full Court decision on relocation, *Re B. and B.* Dewar and Parker found that despite the fact that the mother was allowed to relocate in that case, and that the Full Court said the law had not changed, "its practical effect on the dynamics of disputes, and on professional understandings and advice-giving, had been quite the opposite."[78] For Behrens, this should alert us to the fact that the judicial effect of *U. v. U.* should not be simplistically seen as a tightening of the law relating to relocation.

G. *The Relocation Decisions in Singapore*

A concern with the "best interests" of the child is also evident in Singapore. This commitment to the "best interests" principle is reflected in a number of statutory enactments. For example, s. 3 of the *Guardianship of Infants Act* provides that:

> Where in any proceedings before the any court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income thereof is in question, the court in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and save in so far as such welfare otherwise requires the father of an infant shall not be deemed to have any right superior to that of the mother … nor shall the mother be deemed to have any claim superior to that of the father.

Section 125(2) of the *Women's Charter* further declares that:

> In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this, the court shall have

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77 Dewar and Parker, *supra* note 30 at 108.

78 *Ibid.* at 106.

regard:

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

The concept of the "welfare" of the child has been defined in very wide terms. In *Tan Siew Kee v. Chua Ah Boey*,[79] it was considered that "welfare" covered both the material and non-material aspects relating to the well-being of the child. Similarly, in *Re C.* (*an infant*)[80] the Court associated the welfare or best interests of the child with a concern "with the stability and security, the loving and understanding, care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents."[81]

However, unlike the Australian legal position, the Singapore Court of Appeal has adopted a more liberal approach to allowing a parent to take a child out of his or her residential jurisdiction. In this respect, it would appear that there are less restrictions on a parent's ability to obtain permission to transfer a child abroad. Contrast this situation with the Australian legal position as reflected in *U. v. U.* The law in relation to relocation is particularly reflected in the recent decision of *Re C.* (*an infant*).[82] In this case, the Court granted custody of the child to the appellant's parents after the appellant father was imprisoned for stabbing his wife to death. The applicant appealed on the basis that he would be denied contact with the child. In rejecting the appeal, the Court adopted a more lenient attitude to the ability of a parent to remove a child from his or her place of residence. According to the Court, if it was not unreasonable for the party having custody of the child to move abroad, the Court should only refuse custody if it could be shown that the interest of the child was incompatible with the desire of the parent to live abroad. The test which was adopted by the Court was outlined at page 508 of the judgement where the Court held that:

> It is the reasonableness of the party having custody to want to take the child out of jurisdiction which will be determinative, and always keeping in mind that the paramount consideration is the welfare of the child. If the motive of the party seeking to take the child out of jurisdiction was to end contact between the child and the other parent, then that would be a very strong factor to refuse the application. Therefore if it is show that the move abroad by the person or parent having custody is not unreasonable or done in bad faith, then the court should only disallow the child to be taken out of jurisdiction if it is shown that the interest of the child is incompatible with the desire of such a person or parent living abroad.[83]

This raises the interesting issue that the approach taken by the Court of Appeal may, in fact, reflect too great a concern with the interests of the parent wishing to move aboard and too little focus on the rights and interests of the child. The Court in *Re C.*, indeed, shifted the focus from the best interests of the child to one involving whether it was unreasonable for the parent to take the child out of the jurisdiction.

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79 [1987] 1 S.L.R. 549 at 621. (Sing. H.C.)

80 *Supra* note 5.

81 *Supra* note 5 at 507.

82 *Ibid.*

83 *Ibid.* at 508.

This different emphasis is particularly reflected in *Re C.* when the Court cited dicta by Ormrod L.J. in *Chamberlain v. de la Mare* declaring that:

> The question therefore in each case is, is the proposed move a reasonable one from the point of view of the adults involved? If the answer is yes, then leave should only be refused if it clearly shown beyond any doubt that the interests of the children and the interests of the custodial parent are incompatible. One might postulate a situation where a boy or girl is well settled in a boarding school, or something of that kind, and it could be said to be very disadvantageous to upset the situation and move the child into a very different educational system. I merely take that as an example. Short of something like that, the court in principle should not interfere with the reasonable decision of the custodial parent.[84]

The Court held that it was reasonable for the grandparents in Australia to be granted custody over the child. This was because the appellant father would be in prison and would, therefore, be in no position to act as a care-giver. However, it is arguable that the best interests of the child may not have been served by depriving the child of all contact with his father. The Court, indeed, adopted an approach which was concerned with the reasonableness of the relocating parent's decision to move abroad. In this respect, the Court of Appeal has adopted a markedly different approach to the issue of "relocation" than the Australian High Court which has placed an overriding importance on the best interests of the child.

IV. Conclusion

It has been suggested that the competing rights and interests of the parties in Australian "relocation" disputes are more complex than what might first appear. For example, a focus on the best interests of the child may not adequately take account of the rights of the parent with primary responsibility for the child. The recent controversial decisions involving these types of disputes may therefore reflect the need for an active and interventionist judicial role in the Australian family law process as envisaged by Chief Justice Nicholson. As Nicholson argues, the adversarial nature of the Family Court process mitigates against a detailed examination of all the issues and rights involved. The Court is limited to considering the facts and issues in dispute. This process has therefore prevented a detailed focus on such complex issues as the underlying gendered and discriminatory nature of care-giving. It may be the case, for example, that a wider focus than one exclusively devoted to the "best interests" of the child is required in order to consider such concerns and human rights issues as the freedom of primary carers to relocate in order to pursue employment and earn their livelihood. The recent decision in *Re C.* (*an infant*) would indicate that the Court of Appeal in Singapore is facing a converse problem. The parent appears to be able to take the child out of the jurisdiction without a great deal of judicial scrutiny. In this respect, the position in Singapore may reflect a concern which is quite the opposite to the one which has been levelled at the Australian Family Court—that is, that the Court is affording preference to the relocating parent at the expense of the interests of the residential parent.

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[84] *Ibid.* at 509.