JURISDICTION:

FAMILY COURT OF WESTERN AUSTRALIA

ACT: FAMILY LAW ACT 1975

LOCATION: PERTH

CITATION: M and M [2007] FCWA 47

CORAM: THACKRAY CJ

HEARD: 15 FEBRUARY 2007

DELIVERED: 13 APRIL 2007

FILE NO/S: PT 218 of 2005

BETWEEN: M

Applicant/Mother

AND

M

Respondent/Father

Catchwords:

RELOCATION - application to remove child inter-state; CHILDREN - substantial and significant time; relocation to occur at defined time in the future

Legislation:

Family Law Amendment (Shared Parental Responsibility) Act 2006,

Family Law Act 1975, Div 12A

Family Law Act 1975, s 60B

Family Law Act 1975, s 60CA

Family Law Act 1975, s 60CC

Family Law Act 1975, s 65DAA

Category: Not Reportable

Representation:

Counsel:

Applicant:	Ms P Giles
Respondent:	Mr M Rynne

Solicitors:

Applicant:	Kim Wilson & Co
Respondent:	Anthony R Clarke & Associates

Case(s) referred to in judgment(s):

AMS v AIF (1999) 199 CLR 160

B & B Family Law Reform Act 1995 (1997) FLC 92-755

C and G [2006] FCWA 57

U v U (2002) 211 CLR 238

1 These proceedings concern the two young children of [Mr M] and [Mrs M]. [Mrs M] wants to take them to live in [the Eastern states], where her fiancé is based, whereas [Mr M] wants them to remain in Perth, where they have lived all their lives.

Brief background

2 [Mrs M] is a 38-year-old [secretary]. She was born [overseas], but has lived is Perth for the last 18 years.

3 [Mr M] is a 48-year-old [manager]. He was born [overseas], but has lived in Perth since he was a young boy.

4 [Mr M] and [Mrs M] were married in 1992, separated in September 2004 and divorced in May 2006. There are two children of the marriage, [T], born in October 1997 and [C], born in February 2001.

5 In January 2005, the parties entered into consent orders relating to the children, pursuant to which they were to have equal parental responsibility. It was also agreed that the children reside with [Mrs M] and have regular contact with [Mr M]. [Mrs M] has allowed [Mr M] more contact than the alternate weekend regime guaranteed by the court order. [Mr M] estimates the children have been with him for about 25% of the time. Although this may be slightly overstated, I accept [Mr M] has had a significant part to play in the care of the children.

6 Following the breakdown of the marriage, [Mrs M] commenced a relationship with [Mr B], who she has known since her schooldays. [Mr B] is a 38-year-old [actor], living in his own apartment in [the Eastern states]. They have been in a relationship since November 2004 and have been engaged to be married since May 2006. They have been flying back and forward across the country to be with each other throughout this time. This has routinely involved [Mrs M] flying to [the Eastern states] every second weekend.

7 [Mr M] has also commenced a new relationship with a woman since the separation. His friend has qualifications as [in a specific

field] and has worked in [professional] posts. Although [Mr M] does not live with this lady, I gained the impression their relationship was quite serious and there is a prospect they might live together in the future.

Orders sought

8 The orders sought by [Mrs M] were set out in her application filed in August 2006. She proposes that after she relocates to [the Eastern states], the children spend time with their father in Perth during school holidays and on one weekend each school term. The intention is that the children would see their father every six weeks. [Mrs M] otherwise proposed that the children remain in contact with their father by telephone, webcam, email and letter. She proposed that all of the child support payments she receives be put towards the costs of the airfares which would be involved in [Mr M] having regular contact. She is also prepared to meet half of any shortfall. [Mrs M] also sought a large number of other orders, none of which were controversial.

9 The orders sought by [Mr M] were set out in his response filed in September 2006. He seeks an injunction restraining [Mrs M] from relocating the children outside the Perth area and he seeks specific orders in relation to contact. In lieu of these orders, [Mr M] proposed that the January 2005 order for residence be discharged and that the children live with him.

Applicable law

10 These proceedings were started after the commencement of the *Family Law Amendment (Shared Parental Responsibility) Act* 2006. The provisions of Division 12A of Part VII of the *Family Law Act* 1975 ("the Act") therefore applied. With the substantial assistance of the solicitors and counsel, the provisions of Division 12A were put to good effect, as a result of which the trial was able to be concluded in just one day.

11 Although the manner in which the proceedings were conducted departed from the traditional format, the goal remained the search for the orders most likely to promote the best interests of the children. Section 60CA of the Act makes clear that I am required to treat their best interests as the paramount consideration. In doing so, I must be guided by the objects of Part VII of the Act and the principles underlying those objects.

12 The objects of Part VII are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

13 These objects are somewhat more comprehensive than the previously stated single object of Part VII. Prior to the 2006 amendments, s 60B(1) provided:

> "The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children."

14 The first of the new objects of Part VII is far from novel. It echoes two of the guiding principles which were previously to be found in s 60B(2) of the Act, namely:

> "(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development…"

15 The Full Court of the Family Court of Australia has previously considered the impact of statutory amendments dealing with the stated objects of the law relating to children. When considering the impact

of the 1995 amendments, the Full Court said this in *B & B: Family Law Reform Act 1995* (1997) FLC 92-755 ("*B & B*") at [9.2]:

> "It is clear that many of the aims of the Reform Act are long-term, educative and normative. That is, they are directed towards changing the ethos where parents separate in the ways in which they think and act in their role as parents, in their approaches to resolving disputes about their children, in the ways in which lawyers act for the parents (and the children), in the approach by the Court in the adjudication of disputes and, more broadly, in the attitudes of society generally."

16 Notwithstanding the changes of emphasis and terminology brought about by the 1995 amendments, the Full Court in *B & B* was in no doubt about the core task of Judges entrusted with responsibility for making decisions about the welfare of children. The Full Court said at [9.51] to [9.60] (my emphasis added):

> "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 Part VII of the type to which we have referred, starts from that essential premise and it remains the final determinant.
>
> The legislature has also made it clear that in that process the Court is required to have regard to both the provisions contained in s 68F(2) and those contained in s 60B.
>
> The wording of s 68F(2) makes that clear — the Court "*must* consider" the various matters set out in (a)-(l) of that sub-section. That sub-section sets out a list of matters which the Court is required to consider to the extent that they are relevant to the particular case. The weight which is attached to any one consideration will depend upon the circumstances of the individual case and is a discretionary exercise by the trial Judge. The list is similar to the list contained in previous legislation but with the additions previously referred to. The list is not intended to be exhaustive. That is made clear by par (1) "any other fact or circumstance that the court thinks is relevant". **This simply underlines the circumstance that the facts in individual cases may vary almost infinitely, that the inquiry is a positive one tailored to the best interests of the particular children and**

not children in general, and that the Court is required to take into account all factors which it perceives to be of importance in determining that issue.

Section 60B is important in this exercise as it represents a deliberate statement by the legislature of the object and principles which the Court is to apply in proceedings under Part VII. The section is subject to s 65E. Nor does it purport to define or limit the full scope of what is ordinarily encompassed by the concept of best interests. **The object contained in sub-section (1) can be regarded as an optimum outcome but is unlikely to be of great value in the adjudication of individual cases.** The principles contained in sub-section (2) are more specific but not exhaustive and their importance will vary from case to case. They provide guidance to the Court's consideration of the matters in s 68F(2) and to the overall requirement of s 65E. The matters in s 68F(2) are to be considered in the context of the matters in s 60B which are relevant in that case. **But s 65E defines the essential issue.**

Ultimately it is a question of applying in a commonsense way the individual sections so as to achieve the best interests of the children in the particular case. Although the Attorney-General submitted that the inter-relationship between the three sections was as much about procedure as it was about substantive law, we think it would be a mistake for this essential exercise to be clouded by procedural or semantic issues.

The Court now, as previously, is required to determine what is in the best interests of the particular children (s 65E). It will direct attention to both of the other sections, but the weight to be attached to individual components of those sections may vary significantly from case to case.

This approach, which emphasises the essential importance of the exercise of the discretion in each case, accords with the approach otherwise adopted by courts to the discretionary provisions in the Family Law Act see for example the decision of the High Court in *Mallett v Mallet* (1984) FLC 91-507; (1984) 156 CLR 605, and *ZP v PS* (1994) FLC 92-480; (1994) 181 CLR 630. For many years in child related cases the legislature and the courts have consistently emphasised that the welfare or best interests of the

particular child in the particular circumstances of that case is the determinant, and have eschewed the application of fixed or general rules as the solution. That continues to be the case; the Reform Act should not be understood as suggesting otherwise.

As a matter of proper practice and to ensure that this essential task is performed, a judge in the adjudication of such a case would be expected in the judgment to clearly identify s 65E as the paramount consideration, and then identify and go through each of the paragraphs in s 68F(2) which appear to be relevant and discuss their significance and weight, and perform the same task in relation to the matters in s 60B which appear relevant or which may guide that exercise. The trial Judge will then evaluate all the relevant issues in order to reach a conclusion which is in that child's best interests. In this approach no question of a presumption or onus arises. The analysis by McLachlin J in *Gordon v Goertz*, *supra*, is compelling. **The Act contemplates individual justice. Any question of presumption or onus has the potential to impair the inquiry as to what is in the best interests of the particular children**. It may render the case more technical and adversarial, and may divert the inquiry from the facts relating to the children's best interests to legal issues relating to burdens of proof. **The task is not "to be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary"**. See the judgment of Brennan J (as he then was) in *Brown and Pederson*, *supra*.

In cases where there are no countervailing factors the s 60B principles may be decisive, not only because they are contained in s 60B but because they accord with what is in the best interests of the particular children. Where there are no countervailing factors, the Court may normally be expected to conclude that it is in the best interests of the children to have as much contact with each parent as is practicable. However, to attempt to impose that approach in cases where the best interests of the children may not indicate that conclusion as appropriate is contrary to the legislation and contrary to the long established views of this and other courts which deal daily with the welfare or best interests of children."

17 It will be noted that the Full Court made many references to s 65E in the above citation. Section 65E has now been repealed, but

only for the purpose of advancing it to a position of earlier prominence in Part VII. In my view, most, if not all, of the remarks made by the Full Court about the 1995 amendments hold true for the 2006 amendments. In particular, it remains the case that s 60CA, the successor of s 65E, "defines the essential issue".

18 In enacting the 2006 amendments, Parliament has provided more guidance to the Court about the matters to be taken into account in discharging its fundamental task of establishing what is in the best interests of children. It has also directed the Court to **consider** certain possible outcomes before determining the outcome that best suits the needs of the individual children who are the subject of the proceedings. Had Parliament wanted to go further, it could have done so. Instead, it left the ultimate determination to the Judge hearing each case on its unique merits. To borrow the phrase of the Full Court in *B & B*, the Act still contemplates **individual justice.** Accordingly, my objective is to ensure I treat the best interests of [T] and [C] as the paramount consideration – i.e. what is best for them will be the final determinant.

19 Section 60CC sets out the matters I must take into account in determining what is in the children's best interests. Section 60CC(2) details what are described as the "primary considerations" and s 60CC(3) details "additional considerations" to be taken into account in determining what is in the children's best interests. This dichotomy between "primary" and "additional" considerations was also introduced into the legislation by the 2006 amendments.

20 In preparing my reasons, I have had the benefit of reading a paper prepared by the Honourable Richard Chisholm, following his retirement from judicial office. The paper, entitled 'The Family Law Amendment (Shared Parental Responsibility) Act 2006: An Overview', was delivered in May 2006. I do not propose to set out here what I respectfully regard as being the learned author's compelling analysis of the appropriate treatment of the division between "primary" and "additional" considerations. I adopt his summary of the significance of some of the considerations being characterised as "primary".

> "Those matters should be considered first among relevant considerations, and should be treated as being of particular

importance in assessing what orders are likely to promote the best interests of the child.

…[T]he primary considerations should not be regarded as necessarily outweighing or "trumping" other considerations, nor is it appropriate to attempt a mathematical or quantitative approach. The primary considerations, especially paragraph (a), cannot in fact be determined without reference to the additional considerations. A holistic approach is not only desirable, but logically *necessary*.

If all this is correct, the legislation will have been followed, in spirit and in the letter, if the court treats the primary considerations in subsection (2) as the first matters to be considered, and as matters of particular importance, as it engages in the task of determining, on the basis of the evidence and the provisions of Part VII, what orders are most likely to serve the best interests of the children who are the subject of the proceedings."

21 It is also worth observing, as Professor Chisholm did in his presentation at the 12th National Family Law Conference in Perth, that Parliament must surely have made a considered decision when electing to describe the second raft of factors to be taken into account as "additional", rather than "secondary". The latter word might have been expected to be employed to describe the factors appearing in the Act immediately after the "primary" factors. The use of the word "secondary" would have made clear that these factors were "next below" or "depending on or supplementing what is primary", but this was not the word chosen. Parliament elected instead to use "additional" – which means precisely that – something that is to be added to what has already been stated.

Credibility

22 As I said at the conclusion of the trial, this was a particularly refreshing matter. Both parents impressed me, not only as rational, pleasant and loving parents but also truthful individuals who endeavoured to assist me as best they could in the thoughtful way they gave their evidence. The same could be said of each of the witnesses called on their behalf.

23 The upshot was that there were very few real areas of disagreement between the parents on factual matters. Each of them

wanted the best outcome for the children although each of them, understandably, had quite different views about what orders would best achieve that outcome.

Joint parental responsibility and the consequences

24 There is already an order for [Mr M] and [Mrs M] to share parental responsibility. The provisions of s 65DAA therefore apply. I am accordingly obliged to consider whether or not an order for the children to spend equal time with each parent would be in their best interests and "reasonably practicable". If I decide not to make such an order, I must consider whether or not it would be in their children's best interests to spend "substantial and significant time" with each parent and, if so, whether such an order would be "reasonably practicable".

25 Section 65DAA(3) makes clear that a child only spends "substantial and significant time" with a parent if that time includes days that do not fall on weekends or holidays and the time is such as to:

- allow that parent to be involved in the child's daily routine;
- allow that parent to be involved in occasions and events that are of particular significance to the child; and
- allow the child to be involved in occasions and events that are of special significance to the parent.

26 Notwithstanding these are matters the Court is now expressly required to **consider** as a result of the 2006 amendments, I repeat that the fundamental quest is for the orders most likely to promote the best interests of the children. If the relocation of one parent is the outcome most likely to promote the best interests of the children, then it would ordinarily not be "reasonably practicable" for the children to spend equal time or substantial and significant time with both parents – unless the parent who would otherwise be left behind decides to move as well, or is ordered to do so.

27 I am unaware of any case where a Court has made an order requiring the non-resident parent to move with the resident parent, so as to ensure the children remained in close proximity to both parents. (See the review in McConvill, J; Mills, E, 'A Theory of Injustice: the Flip Side of the Relocation Coin in Australia', (2004) *International Family Law*, 99.) On the other hand, I am unaware of any case where

a Court has been asked to make such an order. The possibility of making such an order was not canvassed before me, and it is therefore inappropriate to do more than note there are likely to be impediments to such orders being made, including constitutional concerns. (See for example various dicta of members of the High Court in *AMS v AIF* (1999) 199 CLR 160 at [45], [48], [87], [88], [103], [104], [191], and [213]. See also remarks made by the Full Court of the Family Court of Australia in *B & B* (*supra)* at [10.62] and [10.64].)

28 The inability (or reluctance) of courts to make an order requiring the non-resident parent to relocate with the resident parent should not be allowed to obscure the fact that there is more than one way children can continue to live in close proximity to both parents. By the very nature of relocation disputes, the strong desire of one parent to stay in the current locality is matched by the strong desire of the other parent to move away. The desires of one must inevitably give way to the desires of the other. There is nothing in the legislation which indicates there should be any presumption in favour of both parents residing in the current location. The clear thrust of the legislation is that it is ordinarily desirable for both parents to retain meaningful involvement in their children's lives and for each parent to spend as much time with their children as is reasonably practicable. This can usually be achieved wherever the children happen to be living, especially when the relocation is within Australia. (See in this regard the remarks of Gaudron J in *U v U* (2002) 211 CLR 238 at [35] and Hayne J in the same case at [175].)

29 In making these observations, I accept that in the "typical" case, there may be strong reasons to require one parent to remain in the area in which they have previously been living. However, this is not because there is any presumption in favour of the current geographical location, but rather because it will often be in the best interests of a child not to disturb their existing living arrangements – for example, because the children are well settled in a local community and happy in their school. In other cases, there may be countervailing factors, or these types of factors may not apply at all – for example, in *C and G* [2006] FCWA 57, I was required to deal with a relocation application that was filed within a matter of days of the arrival of both parents in Perth.

30 The purpose of this discussion is to indicate that when **considering** making orders that will allow the parents to spend equal

or “substantial and significant” time with the children, I am not bound to do so in the context of a mindset that this can only occur in Perth. It could just as easily occur if both parents moved to [the Eastern states]. If it were in the children’s best interests, I could make an order that permits [Mrs M] to move to [the Eastern states], but at the same time make an order for [Mr M] to have equal or “substantial and significant” time with the children. It will then be a matter for him to decide if he wants to avail himself of the benefit of the order by moving to [the Eastern states].

The primary considerations

31 I turn now to the primary considerations to be taken into account in determining which order would be most likely to promote the children’s best interests.

The benefit to the child of having a meaningful relationship with both of the child’s parents

32 It was properly conceded that [T] and [C] have a very close and loving relationship with both parents. Each of the parents is to be commended for the way in which they have behaved following the separation with a view to ensuring that the children continue to have the benefit of an ongoing and meaningful relationship with them.

33 I found [Mr M] to be a decent individual and a very good father. I am of the view that it would be in the interests of the children to have an ongoing and meaningful relationship with him, as well as with [Mrs M], who has been their primary carer throughout their lives.

34 Parliament has indicated that this must be a “primary consideration” in reaching my decision. I would, in any event, have placed much weight on this factor.

The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence

35 I am quite satisfied neither of the parents would expose the children to physical or psychological harm of any nature.

Additional considerations

36 I now turn to discuss the “additional considerations” which I must also take into account.

Any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views

37 Both parents acknowledged that they had been discussing the possible move to [the Eastern states] with the children. [Mrs M] said that they "seemed to be comfortable with the idea of moving" and did not "have a problem with living with [Mr B]". She acknowledged that the children had said that if they moved to [the Eastern states] they would miss their school friends and they would miss their father. She went on to say that she explained to them how she proposed they would be able to keep in touch with [Mr M] if he remained in Perth while they were in [the Eastern states].

38 The children have only been to [the Eastern states] with [Mrs M] for two short visits. I doubt that either of them, but particularly [C], would have any real appreciation of what would be involved in the event they ended up living on the other side of the country from their father.

39 [Mr M] gave evidence that both of the children had told him that they did not want to go to [the Eastern states]. He conceded it was possible that the children were influenced by their affection for him and their knowledge that he would wish them to remain living in Perth. He gave no evidence to suggest that the children, in any circumstances, would prefer to live with him rather than with their mother.

40 I would not have been prepared to place a great deal of weight on the children's expressed views, given they are relatively young and given that the only evidence of their wishes were comments they have made directly to their parents. I nevertheless consider it likely that the children would have a preference to remain where they are. I say this, not only because it would be fairly natural for children to want to continue to live in familiar surroundings near friends and relatives, but I have also noted that the highest [Mrs M] put her case in relation to the children's wishes was that they were "comfortable" with moving to [the Eastern states].

The nature of the relationship of the child with:

(i) each of the child's parents; and

(ii) other persons (including any grandparent or other relative of the child)

41 I have already indicated that the children have an excellent relationship with each of their parents.

42 [Mr B] has no children and has never lived in a relationship with someone who had children. The children do not know him particularly well at present, but they have spent time with him on a number of occasions and they talk with him on the telephone. I am satisfied they have a good relationship. I am also satisfied that [Mrs M] would not consider her relationship with [Mr B] to be of more importance than her relationship with the children.

43 The children also have extended family, both in Perth and [overseas]. They have no family in or around [the Eastern states]. [Mr M]'s parents and other relatives live in Perth and the children see them from time to time. There is no reason to believe that they have anything other than a good relationship with these relatives. There is also no reason to believe the children do not have a good relationship with their relatives [overseas]; however, because they have seen so little of them, their relationship with them would be of different quality to their relationship with their father's family.

The willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent

44 I have no doubt that both parents can be relied upon to facilitate and encourage a close and continuing relationship between the children and the other parent.

45 In the event [Mrs M] were to move to [the Eastern states], I would be confident she would encourage the children to remain in regular contact with [Mr M] by telephone and other means, and she would do her utmost to honour the promises she made in relation to funding regular return trips for the children from [the Eastern states] to Perth.

The likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living

46 If [Mrs M] and the children moved to [the Eastern states], and [Mr M] remained in Perth, the children would end up seeing him much less frequently than they do at present. Given that they are still quite young, this would be likely to have a negative impact on their relationship with him.

47 On the other hand, [Mrs M]'s proposals would ensure the children saw their father every six weeks or so. It would also be likely, in my view, that they would end up spending more of their school holidays with him than they have until now. [Mr M] has not been accustomed to having the children for half of the holidays because of his work commitments. If [Mrs M] were to move to [the Eastern states], I would expect [Mr M] would ensure that they spent more of the holidays with him, since he would not be having as much weekend contact. He could do this either by changing his work schedule (which his evidence suggested would be practicable) or by enlisting the help of his family.

48 A further consequence of the move to [the Eastern states] would be that the children would see less of their relatives and friends in Perth. Whilst children of this age are likely to develop a new network of friends fairly quickly, they will have no relatives living nearby in [the Eastern states]. It is true that the relatives [overseas] will be much closer, but the distance and expense are still such that it would be unlikely that they would see very much more of those relatives than they presently do. They would nevertheless be able to continue to see their close relatives in Perth every six weeks and spend a lot of time with them in school holidays. Many children see their relatives only this frequently and yet maintain a close and loving relationship with them.

The practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis

49 There would be significant practical difficulty and expense associated with contact arrangements if the children move to [the

Eastern states] and [Mr M] decides to stay in Perth, even though [Mrs M] now has considerable experience in arranging cheap interstate flights.

50 [Mrs M]'s evidence about the cost of travel was not disputed. The off-peak airfares would be about $676 return and the peak fares would range from $916 to $1,236 return (in total for both children). Although this will involve a great deal of expense for the numerous trips [Mrs M] is proposing, the child support she will receive would go a very long way towards meeting the expense.

51 It is important to consider also the impact on the children of the tripping back and forward between Perth and [the Eastern states]. It is not just a matter of the five hour flight from [the Eastern states] to Perth and the four hour flight on the return journey, there is also the travelling to and from airports and waiting around. Whilst this is not a major issue during school holiday times, it is somewhat more problematic during term when the children would have to be ready for school on the day following what will be a fairly rushed trip. Although I am satisfied the children could cope with this amount of travel, they would be better able to cope if they were a little older.

The capacity of:

(i) each of the child's parents; and

(ii) any other person (including any grandparent or other relative of the child);

to provide for the needs of the child, including emotional and intellectual needs

52 There is no doubt both [Mrs M] and [Mr M] have the capacity to provide fully for the children's emotional and intellectual needs. Whilst neither parent is wealthy, I am satisfied they also each have sufficient means to provide adequately for the children wherever they are living.

53 [Mrs M] plans initially to live in her own accommodation in [the Eastern states] before moving into accommodation with [Mr B]. She considers this will assist the children to adapt to their changed environment, and I believe it is an indication of the fact she can be relied upon to put the interests of the children before her relationship with [Mr B].

54 I accept it will cost [Mrs M] somewhat more to live in [the Eastern states] than it would in Perth. In particular, I am satisfied that rents are much higher in [the Eastern states] than they are in Perth; however, I also consider there is substance in [Mrs M]'s prediction that rents in Perth will increase following the recent rapid increase in property values.

55 I am satisfied [Mrs M] will have no difficulty in obtaining work as a [secretary] in [the Eastern states], where she is likely to be paid somewhat more than she is paid in Perth. I am satisfied she will be able to manage on her own income, even if she cannot afford accommodation in the more salubrious areas in which she is currently hoping to live. Should her relationship with [Mr B] continue, I consider it likely [Mrs M] will ultimately be better off than if she remained as a single parent in Perth.

The maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant

56 The only matter I consider of relevance under this heading is the maturity of the children. This is a significant factor since, in my view, older children are better equipped to cope with relocation and enforced absences from parents than are very young children.

The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents

57 Both parents have an excellent attitude to the responsibilities of parenthood.

Any family violence involving the child or a member of the child's family

58 There was no suggestion of any family violence.

Whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child

59 [Mrs M] and [Mr M] have been able to resolve all issues between them following their marital breakdown without the necessity for court proceedings, other than the relocation issue. It is understandable why they could not resolve the current very difficult disagreement, but

once it is out of the way, I am fairly confident they will be able to resolve all other matters between themselves. The one exception to this proposition is that if I were to refuse [Mrs M]'s application now on the basis that the children are too young, there would be a strong probability that at some stage she would return to endeavour to persuade the court that the children have matured sufficiently for it to be appropriate for the matter to be looked at again.

Any other fact or circumstance that the court thinks is relevant

60 One of the most contentious issues in the proceedings related to the employment prospects of [Mr M] and [Mr B], both of whom are involved in different sectors of the [same] industry.

61 [Mr B] is one of Australia's leading [performers in his industry]. He has a high profile, particularly in [the Eastern states], where he is routinely engaged to perform [with other top performers]. I accept that there are very good reasons why [Mr B] would not wish to move from [the Eastern states] to Perth. If he were to do so, I find he would no longer be engaged regularly [in this level of performance] I also find that he would have far fewer opportunities to be involved in [associated industry work]. It would be much more likely that he would have to endeavour to earn an income [working for different audiences].

62 It is nevertheless important to recognise that whilst [Mr B] has a fairly prestigious, stimulating and fulfilling career, it does not earn him a great deal of income. The evidence suggests that his net income is less than $50,000 per annum (after what must be very hefty deductions). However, I accept that in [the Eastern states] there is at least the prospect that he could secure work that might result in him earning a significantly greater income. If he came to Perth, it would seem much more unlikely that such opportunities would come his way.

63 [Mr B]'s ability and high profile are such that I anticipate he would obtain more work than an "average" [performer] his age would be likely to obtain in Perth. I would nevertheless anticipate, however, that it would take time for him to make the necessary contacts and secure engagements. I also consider his age would be some impediment in him in breaking into what will be effectively a new "scene". As a consequence, I would expect that he would have a

significantly reduced income for at least the first year of his time in Perth. In the longer term, I would expect he would earn an income in [the industry] sufficient at least to meet a good proportion of his reasonable living costs, which he could supplement from other work if needed.

64 The bottom line, however, is that regardless of what I might think are [Mr B]'s prospects in Perth, there is almost no prospect he will in fact move here, even if [Mrs M] is required to remain in Perth with the children. Instead, I anticipate that he and [Mrs M] would endeavour, at least for a while, to continue their long-distance relationship. In my assessment this would ultimately prove exceedingly difficult, if not impossible.

65 It is more difficult to assess what [Mr M] would do in the event I made an order permitting [Mrs M] to take the children to [the Eastern states]. He has been employed by the same business in Perth for a long time. He acknowledged that he had, during the course of the relationship with [Mrs M], complained about his job and made noises about wanting to work somewhere else. Nevertheless, he has remained with the same employer and has a position as a manager dealing with corporate clients which he finds satisfying.

66 [Mr M] has, understandably enough, been very resistant to the thought of moving to [the Eastern states]. He has therefore made only the most basic enquiries about the availability of work there, notwithstanding the encouragement I gave him at an earlier stage of the proceedings to look carefully into the option. Whilst he expressed pessimism about being able to obtain appropriate employment in [the Eastern states], I would anticipate that with his background and experience (and his personal skills) he would be likely to obtain satisfactory employment if he put his mind to it. I am not necessarily satisfied, however, that he would be able to earn as much as he is presently earning, but he would earn enough to support himself at a decent standard of living. He also has very substantial equity in his home in Perth. He could liquidate that property and use the funds to assist to set himself up in [the Eastern states].

67 Although it was very hard to gauge, ultimately I formed the view that it was perhaps more likely than not that [Mr M] would remain in Perth if I allowed [Mrs M] to go to [the Eastern states] with the children. Although he might be able to obtain employment in [the

Eastern states], he has lived in Perth since he was a boy; his parents and other relatives are here; he has a wide circle of friends and contacts in Perth; and his girlfriend lives here. He would understandably be loath to leave all this behind (although his girlfriend did not give evidence and she was therefore unable to be questioned about whether she would follow him to [the Eastern states]).

68 [Mrs M] was quite clear about her intentions. Whilst she would dearly love to go to [the Eastern states] with the children, she would not even countenance the possibility of going without the children. Therefore, if I do not permit the relocation, she will remain in Perth.

Section 60CC(4) factors

69 The Act in its amended form requires me to consider a variety of matters set out in s 60CC(4). The provision is lengthy and I do not intend to repeat it here. It follows from the findings that I have made above that each parent has fulfilled their responsibilities as a parent to the maximum extent of their capacity.

Discussion

70 I am required to give consideration first to the children spending equal time with each parent, even though that is not an order either of them sought. I am not satisfied this would be an appropriate arrangement. The existing arrangement was entered into with the agreement of both parents. The regime has suited both parents and has clearly been good for both children, since they are happy, healthy and contented. There would be no basis for changing the current arrangement provided both parents are living in the same city.

71 I am next required to consider whether or not it would be in the best interests of the children to spend "substantial and significant time" with their father. It follows from what I have said already that I do consider it would be in their best interests to do so. I also consider that it is reasonably practicable. It can be made practicable in one of two ways – either I can refuse [Mrs M]'s application to move to [the Eastern states] or, alternatively, I can proceed on the basis that [Mr M] could, if he chose, move to [the Eastern states] and continue the existing care arrangements in [the Eastern states].

72 In considering the latter alternative, it must be kept in mind that there is a greater likelihood that [Mr M] would not, in fact, move if I

were to give permission to [Mrs M] to relocate. On the other hand, it is important to recognise that the Act does not direct me to order "substantial and significant" time, even if such an arrangement is in the children's best interests and reasonably practicable. The Act requires me only to "consider" making an order implementing such arrangement.

73 This is perfectly logical, since there may be a number of possible outcomes that could promote the best interests of the children. Life is full of occasions when two very different scenarios present themselves, with what appear to be an equal measure of pros and cons. When faced with such alternatives, all relevant factors need to be weighed in finding those things that tip the decision one way over another. Sometimes the most important of these will be nothing more than a "gut feeling". On other occasions, it will be a matter of determining whether short-term or long-term advantages are to be preferred.

74 "Intact" families are routinely faced with such choices. In an increasingly mobile world, these choices often involve discarding all the many advantages of a familiar locale in favour of the economic or other advantages associated with a move to a strange new environment. In making these choices, parents are often faced with two proposals which they see as promoting the best interests of their children. There is not always one shining beacon advertising itself as the "best" outcome for the children.

75 In the present case, one of the major advantages of allowing [Mrs M] to move to [the Eastern states] would be that after a short settling-in period, she would in all likelihood end up living with the man she describes as the "love of her life" and her "soul-mate". My assessment is that she would be likely to end up feeling very much more fulfilled and happy with [Mr B] than she would be if she was obliged to remain living in Perth. Whilst paying proper regard to the best interests of the children, [Mrs M] has a prima facie entitlement not only to happiness but to the freedom of movement that is the right of every citizen pursuant to our Constitution. I consider that her happiness is likely to have a significant positive impact on the children, who have always looked to her as their primary carer.

76 On the other hand, I also consider it important to say that I consider [Mrs M] would do a good job in endeavouring to conceal her

unhappiness and frustration in the event she was forced to remain in Perth. In this regard, it should also be kept in mind that if [Mr M] did decide to move to [the Eastern states] to follow [Mrs M] and the children, there is a possibility he would be unhappy, having been forced to leave his home town and his family. Nevertheless, I am satisfied that he too would do a good job in ensuring that this did not unduly interfere with his capacity to care for the children during the times that they would spend with him. As [Mr M] said in his own evidence, "life is about change" and he is a person who can be innovative when the need arises.

77 [Mr M]'s counsel did endeavour to cross-examine on the basis that there was not much prospect of [Mrs M]'s relationship with [Mr B] continuing into the future. In this regard, [Mrs M] frankly acknowledged that in the event she went to [the Eastern states] and her relationship with [Mr B] failed, she would remain living in [the Eastern states]. I did not consider it productive to allow this line of questioning to proceed. It is well-known that many relationships fail and that it is often claimed a greater proportion of second relationships fail than first relationships. It is also the case that [Mr B] has never lived in what could be described as a very long-term relationship. More importantly, he has never lived in a home where there are young children. Given the nature of his work, and the sleep pattern involved, I accept that there is a prospect there will be some tension in his relationship with [Mrs M]. I therefore accept that there is at least an "average" possibility that the relationship will ultimately break down. This would be unfortunate, not only for [Mrs M], but also for the children who would have been removed from the city in which they have always lived and from the company of their extended family. Nevertheless, [Mr B] and [Mrs M] have known each other for much of their lives and they have been expending a significant amount of money and effort in re-establishing and maintaining their relationship.

78 I accept that the nature of their relationship is such that [Mr B] would prefer to give priority to his career rather than moving to Perth to live with [Mrs M]. I do not find this to be a determinative factor, especially as I have also concluded that it is more likely [Mr M] would give preference to his career and choose to live close to his relatives and friends in Perth rather than moving to [the Eastern states] to have more regular contact with the children. It would not be fair to judge either [Mr B] or [Mr M] (and the strength of their relationships

with others) on the basis of excruciatingly difficult decisions they have been forced to make by the current circumstances.

79 At the end of the day I found this a very difficult decision to make. The aspirations of both parents are perfectly legitimate. Regrettably, the desires of one (and perhaps both) must be dashed as a result of the decision that I am forced to make.

80 During the course of the hearing, I gave notice to the parties that I was not bound by the proposals they were each putting forward. I have power to make such orders as I consider would be in the best interests of the children. In particular, I foreshadowed that it was open to me to make an order that would require [Mrs M] to remain in Perth for some time, but on the basis that at the end of that period she would have liberty to live in [the Eastern states].

81 Having given the matter further thought, I determined that this was the outcome that would be in the best interests of the children. I did not come to this decision on the basis of it being a compromise or a way to "split the difference" in a hard case. I have come to the decision because I consider that in the medium to long-term it will be in the best interests of the children for their primary carer to be able to live with the partner of her choice. On the other hand, the children, but especially [C], are very young – and in my view, not quite ready to cope with all that the move to [the Eastern states] will entail. Hence in the short-term, I consider the mother's legitimate aspirations will need to give way. In coming to my decision, I am comforted in the knowledge that [Mr M] is a very good father and that if the enforced separation is having a deleterious impact on the children, he is able to move to [the Eastern states] to live in close proximity with them.

82 If [Mrs M]'s relationship with [Mr B] is strong enough to last the test of time, it will be strong enough to last the further (but defined) period of separation I have in mind. During this period, the children will mature to some extent and be somewhat better able to manage the regular travel and long distance communication with their father when they move over to [the Eastern states]. In coming to my decision, I have not overlooked the other connections the children have in Perth, including grandparents and other relatives. However, [Mrs M] has put forward a workable and realistic proposal to ensure the children remain in contact not only with their father, but also his family.

83 I have decided that [Mrs M] should be permitted to leave Perth at the end of the 2008 academic year. By that stage, [T] will be at the age where she would be soon expected to commence secondary education in [the Eastern states]. [C] will be just 8 years of age; however, being nearly two years older than at the time of trial, he will be better able to cope with the regular travel back and forward between Perth and [the Eastern states]. Both children will be at (or fast approaching) an age where they can keep in contact with their father not only by telephone, but also over the internet, which I consider to be an important and valuable means of modern children keeping in contact with absent loved ones.

84 I acknowledge that prior to the move being made, [Mrs M] and [Mr B]'s relationship may collapse under the pressures of distance. In this regard, I accept [Mrs M]'s contention that the nature of relationships between two adults is of a different character to the relationship children have with their parents and that there is a better prospect of children of this age maintaining a long distance relationship (with regular visits) than there is of an adult couple doing the same thing. However, if, for some reason, the relationship between [Mrs M] and [Mr B] does break down between now and when [Mrs M] is permitted to leave, I consider the balance would have shifted in favour of it being appropriate for the children to remain long-term in Perth. It will therefore be necessary for [Mrs M] to advise [Mr M] in the event that she ceases having a relationship with [Mr B]. He is likely to become aware of this in any event if [Mrs M] ceases making her regular visits to [the Eastern states].

Orders

85 There was little discussion at the trial concerning the precise form of orders that would be appropriate in the event [Mrs M] was permitted to relocate to [the Eastern states]. To a significant extent the form of orders will depend on whether or not [Mr M] now proposes to follow her and the children. Accordingly, I do not propose to formulate the precise form of orders that would be appropriate to give effect to my judgment. I would instead invite the parties to seek to agree those orders and to provide me with a Minute. In the event that agreement cannot be reached on all issues, the parties may request a special appointment and I will make any decision required.

Postscript

86 Shortly after the trial concluded, my Associate wrote to the parties to inform them that I had determined that [Mrs M] should be permitted to relocate to [the Eastern states], but not until during the holidays at the end of the 2008 academic year. I did so knowing it would take me some time to settle the reasons for judgment that I had already drafted. I also knew that [Mrs M]'s lease was about to expire and that both parties would be anxious to know the outcome of the proceedings.

I certify that the preceding [86] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate