TAYLOR v BARKER

FAMILY COURT OF AUSTRALIA

BRYANT CJ, FAULKS DCJ and FINN J

6 March, 19 October 2007 — Canberra

[2007] FamCA 1246

Parents and children — Relocation — Federal Magistrate making orders allowing mother to relocate with child from Canberra to North Queensland — Appeal by father — Whether magistrate erred in approach to issues relating to relocation proposal and in application of 2006 amendments to Family Law Act 1975 (Cth) — Whether magistrate erred in dealing with issue of relocation and mother's reasons for wishing to relocate as separate issue — Whether magistrate erred in failing to consider whether child spending "equal time" or "substantial and significant time" with each parent was "reasonably practicable" — Whether magistrate failed to consider likely effects of separation on child and paternal relatives — Whether magistrate gave excessive weight to mother's reasons for relocation and consequence of her not being permitted to do so — (CTH) Family Law Act 1975 ss 60B, 60CA, 60CC, 61DA, 65DAA.

This was an appeal by the father (F) of a child, now aged 10 years, against orders made by Brewster FM on 16 January 2007 which allowed the child's mother (M) to relocate the child's residence from Canberra to North Queensland, and which provided for the child to spend time during the school holidays and other periods with F who lived in Canberra.

The parties commenced living together in Townsville in July 1994, moved to Canberra in 1994 and had lived there ever since. Their only child (T) was born in June 1997. The parties married in April 1995 and separated in April 1999. Following their divorce in June 2003, T remained with his mother spending six nights a fortnight with F and eight nights with M.

On 17 March 2006, F filed an application for orders that T live half time with each parent.

On 26 April 2006, M, who had re-partnered with a Mr B, by whom she had a daughter born in October 2006, and whom she wished to marry, filed a response seeking orders that F's application be dismissed, that T reside with her and that she be allowed to relocate the child's residence from Canberra to North Queensland.

On 30 June 2006, F filed an amended application seeking orders that if M remained in Canberra that T should live "equally with his parents", or if M relocated to North Queensland that T should live with F and spend defined school holidays with M. F also sought an order that "the parents have equal shared parental responsibility for the child".

On 26 July 2006, M filed draft orders seeking relocation, that T live with F during certain school holiday periods and that he live with M at all other times, with "equal shared parental responsibility in relation to the care, welfare and development" of T, with certain defined exceptions.

On 22 December 2006, Brewster FM delivered his judgment, in which he concluded that it would be in T's best interests if M was permitted to relocate with him to Queensland. Brewster FM made orders that T was to live with M and that the parties were to have equal shared parental responsibility. Other orders dealt with arrangements for T to spend time with F. There was however no order made which stipulated the place where M or T were to reside.

F appealed from the orders of Brewster FM. Counsel for F argued that the magistrate had misapplied the relevant provisions of the Family Law Act 1975 (Cth) (the Act),

including those contained in the 2006 amendments to the Act (Family Law (Shared Parental Responsibility) Act 2006 (Cth)). In particular, it was suggested that the magistrate had erred in dealing with the issue of relocation, and M's reasons for wanting to relocate, as a separate issue, and also in failing to consider whether the child spending equal time with each of his parents was reasonably practicable. It was also argued that the magistrate had erred in giving too little or excessive weight to certain matters raised in evidence. Among these matters were the importance given to M's reasons for relocating, and the speculative inferences drawn (in F's submission unsupported by the evidence) as to the consequences of M's not being permitted to do so.

Held, per Bryant CJ and Finn J (Faulks DCJ dissenting), dismissing the appeal:

Per Bryant CJ and Finn J:

(i) When dealing with a case concerning the future living arrangements for a child, and involving a significant change in the geographical place where the child is to live, the preferred approach according to established principle has been not to deal with that change, or relocation, as a separate or discrete issue, but rather as just one of the proposals for the child's future living arrangements, at least in so far as that approach is possible: at [53].

> *U v U* (2002) 211 CLR 238; 191 ALR 289; 29 Fam LR 74; (2002) FLC 93-112; [2002] HCA 36; *Bolitho v Cohen* (2005) 33 Fam LR 471; (2005) FLC 93-224; [2005] FamCA 458, applied.

(ii) There was no substance in the argument that the magistrate had erred in dealing with the issue of relocation and the reasons for it as a separate and determinative issue. A relocation proposal should continue to be considered and evaluated, so far as possible, in the context of the making of the necessary findings in relation to the relevant s 60CC matters; however, such a proposal now also needs to be considered in the context of s 65DAA. Given that the concept of the child's best interests is the determinative factor in the application of so many of the provisions of Part VII, and given that s 60CC(1) provides that in determining what is in the child's best interests, the court must consider the matters set out in subs (2) (primary considerations) and subs (3) (additional considerations) of that section, it would seem only logical that the court make findings regarding the matters contained in those subsections (so far as they are relevant in a particular case) before attempting to apply any other provision in Part VII in which the determinative factor is the subject child's best interests: at [60] and [62].

(iii) A failure to follow the logical approach however would not lead to appealable error unless such error arose from a failure to give adequate reasons or to have regard to the matters which the legislation requires must be considered: at [63].

(iv) Nor could it be accepted that the magistrate did not give reasons for rejecting the option of the child spending "equal time" with each parent. The common sense constructions of s 65DAA(1)(c), and also of s 65DAA(2)(d), must be that it is only necessary for a court to consider whether it would be "reasonably practicable" for the child to spend "equal time" with each parent, or "substantial and significant time" as the case may be, if the court has already concluded that it would be in the child's best interests to spend "equal time" with each parent, or "substantial and significant" time (as the case may be). The magistrate adopted the proper approach to the application of s 65DAA in a case which involved a relocation proposal: at [72], [74] and [76].

(v) The legislation gives no guidance as to the stage at which a court should commence a consideration of the relocation proposal, but if having found advantages in "substantial and significant time" (or for that matter in "equal time"), the magistrate had then turned to consider the "reasonable practicability" of such an arrangement, some assistance would have been gained from s 65DAA(5). A consideration of these matters would have required the magistrate to evaluate the differing proposals of the mother and father and to consider whether "substantial and significant time" would be "reasonably practicable" if the mother were to relocate to Queensland. This would seem to be a logical path to follow but as the

legislation does not prescribe an order in which the relocation proposals are to be considered, it was not possible to conclude that the magistrate's decision was incorrectly reached: at [78]–[79].

(vi) The options of the child spending "equal time" or "substantial and significant time" with each parent must now be given separate and real consideration, notwithstanding that a relocation proposal may also have to be given subsequent consideration, with the advantages and disadvantages of that proposal then being balanced against the advantages and disadvantages of an "equal time" or "substantial and significant time" arrangement. Not to approach a case involving a relocation proposal in this way would devalue the imperative imposed by the Act to consider whether it is in the best interests of a child in a case to spend "equal time" or "substantial and significant time" with each parent: at [83].

Goode v Goode (2006) 36 Fam LR 422; (2006) FLC 93-286; [2006] FamCA 1346, applied.

(vii) While there is authority for the proposition that a court in determining a so-called relocation case might do so on the basis of a possible relocation to the place of the proposed relocation by the parent who opposes the relocation of the child, it had not yet been suggested that such cases could, or should, be determined on the basis of what might be the likely response of the partner of the parent proposing relocation in the event that the court does not permit relocation: at [100].

U v U (2002) 211 CLR 238; 191 ALR 289; 29 Fam LR 74; (2002) FLC 93-112; [2002] HCA 36, considered.

(viii) The complaint to the effect that the magistrate's conclusions regarding M's happiness or unhappiness lacked any evidentiary foundation was without substance. This was a difficult and finely balanced decision. In such a case one factor will usually become decisive. Here the magistrate determined that that factor was M's happiness and contentment. In such a case where, as the magistrate noted, M wanted to marry and be with the father of her second child, it could not be said that the magistrate was wrong in elevating this factor, together with the impact on M and on the subject child of her not being permitted to relocate to join the man she wanted to marry, to be the decisive factors in this case: at [111] and [113].

Per Faulks DCJ (dissenting):

(ix) The Act does not prescribe parental "happiness" as such, as a factor in determining the best interests of a child. It could be said that the point is so obvious that it does not need legislative prescription. However, the happiness of one parent is not necessarily the happiness of the other and in relocation cases it would be rare for the two to coincide. It is possibly reasonable to infer that the unhappiness of one parent may impact on a child who is with that parent and even more so if the child is more closely associated with that parent or perhaps more closely attached to him or her. It may be that evidence in the form of an expert opinion based on observation and fact rather than conjecture may establish the veracity of such an inference in an appropriate case. It is another thing to elevate an inference, not directly supported by evidence, to the conclusive factor in preferring the new family of the parent proposing to relocate to the relationship between the child and his or her other parent. The magistrate was not entitled to reach the conclusion he did on the evidence before him, and accordingly the appeal should be allowed and the matter remitted for rehearing: at [127]–[129].

Mr Millar instructed by *McGuinness Eley* for the appellant.

Mr Kearney instructed by *Farrar Gesini and Dunn* for the respondent.

Bryant CJ and Finn J.

Introduction and background

[1] This is an appeal by the father of a child, now aged ten, against orders made by Brewster FM on 16 January 2007 which in effect allowed the child's mother to relocate the child's residence from Canberra to North Queensland and which

provided for the child to spend time during the school holidays and other periods with the father who resides in Canberra.

[2] The father and the mother commenced living together in Townsville in July 1994. They moved to Canberra in October 1994 and have remained there ever since. They married in April 1995. Their only child, T, was born in June 1997. They separated in April 1999, with the child remaining with the mother and the father moving to live with his own parents.

[3] Initially the child spent each alternate weekend with the father, but in January 2000 the parties agreed that he would spend six nights a fortnight with the father and eight nights with the mother. That arrangement has continued to date.

[4] The parties were divorced in June 2003.

[5] On 17 March 2006, the father filed an application seeking that the child live "half of the time with each parent".

[6] On 26 April 2006, the mother, who had re-partnered with a Mr B (by whom she has a daughter born in October 2006 and whom she wishes to marry), filed a response seeking that the father's application be dismissed, that the child reside with her, and that she "be at liberty to relocate the child's residence from Canberra to the Atherton/Mareeba region of Queensland".

[7] On 30 June 2006, the father filed an amended application seeking orders that "in the event the mother remains in Canberra" the child live "equally with his parents", or that "in the event the mother relocates to North Queensland" the child live with the father and spend defined school holiday times with the mother.

[8] Relevantly for present purposes, the father also sought an order that "the parents have equal shared parental responsibility for the child".

[9] On 26 July 2006, the mother filed a minute of orders sought in which she continued to seek an order that she "be permitted to relocate the residence of the child" to Queensland. She also sought orders that the child "live with" the father during certain defined school holiday periods and that he live with the mother at all other times.

[10] In relation to parental responsibility, the mother sought that both parents should have "equal shared parental responsibility in relation to the care, welfare and development of a long term nature" in relation to the child's education and health, and in relation to any change in his living arrangements. However the mother sought that she should have "sole responsibility" for making decisions about the child's "religious upbringing".

[11] In addition the mother sought orders whereby each parent would have "sole responsibility" regarding the child's day-to-day care, welfare and development during any period when the child was living with or spending time with that parent.

[12] Brewster FM heard the parties' cross applications on 1 and 2 August and on 6 December 2006.

[13] On 22 December 2006, his Honour delivered reasons for judgment in which he concluded for reasons which we will later explain, that it would be in the child's best interests if the mother was permitted to relocate with him to North Queensland.

[14] His Honour's orders to give effect to his reasons for judgment were then made on 16 January 2007 (although subsequently on 23 January 2007 they were stayed presumably because of this appeal).

[15] Order 3 of the orders of 16 January 2007 provided that the child was to live with the mother, and O 10 provided that the parties were to have equal shared parental responsibility in relation to the child. The remainder of the 15 orders were for the most part directed to the arrangements for the child to spend school holidays and some other times with the father. There was, however, no order which stipulated the place where the mother or the child was to reside.

[16] The father now appeals all orders made by his Honour on 16 January 2007 except for O 10 which, as mentioned, provided that the parties were to have equal shared parental responsibility.

The issues raised by the appeal

[17] Apart from the last ground of appeal (ground 7) which challenges the adequacy of his Honour's reasons for the orders which he made, the father's grounds of appeal can be divided into two broad categories.

[18] First, there are two grounds which can be seen as having general application in the sense that they assert that his Honour erred in his application of the provisions of the Family Law Act 1975 (Cth) (the Act) as amended by the Family Law (Shared Parental Responsibility) Act 2006 (Cth) (grounds 5 and 6). By these grounds his Honour is asserted to have erred:

> (5) … in dealing with the issue of relocation, and the reasons for it, as a separate and determinative issue, contrary to paragraph 12(c) of the Judgment, instead of following the course referred to in [65] of the judgment in *Goode v Goode* [2006] FamCA 1346 and dealing with the relocation and its consequences as part of the evaluation of the proposals of the parties against the relevant considerations in ss 60CC and 65DAA of the Act.
>
> (6) … in failing to consider, as required by s 65DAA of the Act, whether the child spending equal time with each of his parents was reasonably practicable.

[19] Then there are four grounds which can be seen as having application only to this case in that they assert that his Honour either failed to consider or evaluate, or erred in the weight which he gave to, a particular matter: grounds 1–4.

[20] The particular matters which his Honour is asserted to have failed to consider and/or to adequately evaluate are (as drafted in the notice of appeal):

- "the likely effect on the child of the separation from his father and from his paternal grandparents of the change in his circumstances brought about by the child's relocation to North Queensland": ground 1;
- "the likelihood of [the mother's partner, Mr B] relocating himself to live with the mother in Canberra in the event that the orders in the proceedings required that the child remain living in Canberra": ground 3; and
- "the nature and strength of the relationship between the child and his father and between the child and his paternal grandparents and the effect upon those relationships of the residence proposal of the mother": ground 4.

[21] The matter to which his Honour is asserted to have given excessive weight is "the mother's reasons for and desire to relocate to North Queensland and erred in speculating as to the consequences of the mother not being permitted to do so in the absence of evidence from her as to that matter": ground 2.

[22] Before considering his Honour's reasons for judgment against the background of the complaints or challenges contained in the grounds of appeal, it will be useful to set out the provisions of the Act to which his Honour referred in his judgment, all which were referred to in argument before us.

Relevant statutory provisions

[23] As his Honour explained early in his reasons, he was required in making his decision in this case, to regard the child's best interests as the paramount consideration by virtue of the provisions of s 60CA which are as follows:

> 60CA *Child's best interests paramount consideration in making a parenting order*
> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

[24] As his Honour then went on to explain, the "backdrop" to the "exercise" which he had to perform is s 60B which, in his Honour's words, "sets out the objects of the Act in so far as it deals with children and the principles underlying those objects", and which is in the following terms:

> 60B *Objects of Part and principles underlying it*
> (1) The objects of this Part 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.
> (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
> (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 to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
> (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
> (d) parents should agree about the future parenting of their children; and
> (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).
> (3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
> (a) to maintain a connection with that culture; and
> (b) to have the support, opportunity and encouragement necessary:
> (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
> (ii) to develop a positive appreciation of that culture.

[25] As his Honour then further explained, s 60CC sets out matters to which he had to have regard in determining what was in the child's best interests; the presently relevant sub-sections of that section are follows:

> 60CC *How a court determines what is in a child's best interests*
> Determining child's best interests
> (1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

(2) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

(3) Additional considerations are:

(a) 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;

(b) 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);

(c) 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;

(d) 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;

(e) 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;

(f) 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;

(g) 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;

(h) if the child is an Aboriginal child or a Torres Strait Islander child:

(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and

(ii) the likely impact any proposed parenting order under this Part will have on that right;

(i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(j) any family violence involving the child or a member of the child's family;

(k) any family violence order that applies to the child or a member of the child's family, if:

(i) the order is a final order; or

(ii) the making of the order was contested by a person;

(l) 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;

(m) any other fact or circumstance that the court thinks is relevant.

(4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her

responsibilities as a parent and, in particular, the extent to which each of the child's parents:

(a) has taken, or failed to take, the opportunity:
  (i) to participate in making decisions about major long-term issues in relation to the child; and
  (ii) to spend time with the child; and
  (iii) to communicate with the child; and
(b) has facilitated, or failed to facilitate, the other parent:
  (i) participating in making decisions about major long-term issues in relation to the child; and
  (ii) spending time with the child; and
  (iii) communicating with the child; and
(c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

(4A) If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

[26] Later in his reasons his Honour impliedly referred to s 61DA and later expressly to s 65DAA. Those provisions are as follows:

61DA *Presumption of equal shared parental responsibility when making parenting orders*

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

(2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

(a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
(b) family violence.

(3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

65DAA *Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances*

Equal time

(1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:

(a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
(b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
(c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

Substantial and significant time

(2) If:

(a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and

(b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and

the court must:

(c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and

(d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and

(e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

(3) For the purposes of subsection (2), a child will be taken to spend *substantial and significant time* with a parent only if:

(a) the time the child spends with the parent includes both:

(i) days that fall on weekends and holidays; and

(ii) days that do not fall on weekends or holidays; and

(b) the time the child spends with the parent allows the parent to be involved in:

(i) the child's daily routine; and

(ii) occasions and events that are of particular significance to the child; and

(c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

(5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:

(a) how far apart the parents live from each other; and

(b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and

(c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

(d) the impact that an arrangement of that kind would have on the child; and

(e) such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

(a) 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 (paragraph 60CC(3)(c)); and

(b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity — the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

The federal magistrate's reasons for judgment considered with reference to the grounds of appeal

[27] We now turn to consider the federal magistrate's reasons for the orders which he made, with particular reference to those matters in his reasons which are the subject of the grounds of appeal.

[28] In the first paragraph of his reasons for judgment his Honour identified (correctly, in our view, given the applications of the parties which were before him and which we have earlier described) the parties' dispute as being concerned with "the residential arrangements for the child … [a]ssociated with … a proposal by the mother to relocate with [the child] to [North] Queensland". A little later (in [9]) his Honour provided more details of each party's proposal.

[29] At the commencement of his reasons, his Honour also provided a brief background history of the case (in terms similar to that provided earlier in these reasons) before referring in summary terms to s 60CA and s 60CC of the Act and setting out in full s 60B which, as earlier mentioned, he described as the "backdrop" to the "exercise" which he had to perform: compare the observations of the Full Court in *Goode v Goode* (2006) 36 Fam LR 422; (2006) FLC 93-286; [2006] FamCA 1346 at [10].

[30] In this context of his explanation of the principles which were to govern his decision, his Honour observed that given that the case involved "a relocation proposal", he had also to bear in mind the guidelines set out by the Full Court of this court in *A v A; Relocation Approach* (2000) 26 Fam LR 382; (2000) FLC 93-035; [2000] FamCA 751, and he summarised (at [12]) those guidelines which he considered applied to this case, in the following terms:

(a) The best interests of the child are the paramount consideration but are not the sole consideration. In particular, rights of freedom of movement are not to be ignored.
(b) An applicant for orders permitting relocation need not show compelling reasons before such an order will be made. Indeed, neither party bears an onus; that is to say neither parent has the onus to establish that a change in current contact arrangements or a continuation of those arrangements will best promote the interests of a child.
(c) The reasons for a parent wishing to relocate with a child is only one of the matters to be considered and it should not be dealt with as a separate issue.
(d) I must identify the competing proposals and evaluate how each proposal will hold advantages and disadvantages in so far as the best interests of the child are concerned.
(e) I am to indicate which matters are of greater weight and explain how matters balance out.

[31] His Honour then turned to the primary considerations contained in s 60CC and he noted that the second of those considerations (being the need to protect the child from being subjected to or exposed to abuse, neglect or family violence) did not apply in this case. As to the first primary consideration, being the benefit to the child of having a meaningful relationship with both parents, his Honour said (at [14]):

> [14] … In relation to the first were [the child] a very young child it could be cogently argued that contact of the type proposed by the mother would not be conducive to his having a meaningful relationship with his father. However [the child] is some nine and a-half years of age and, in my opinion, he will continue to have a meaningful relationship with his father even if face to face contact is confined to school holiday periods.

[32] Then turning to the additional considerations in s 60CC, his Honour first considered the child's views. As the child's views are not an issue in this appeal, it need only be said that his Honour concluded (at [18]) that he would take the child's views into account to the extent that the child had not expressed any objection to moving to North Queensland and viewed "with equanimity the prospect of his contact with his father and with his father's family being confined to school holidays".

[33] As to the second of the additional considerations, being the nature of the child's relationship with each of his parents and other persons including grandparents or other relatives, it is necessary to set out his Honour's exact findings as they are significant in this appeal at least in so far as the child's father and paternal grandparents are concerned (ground 4) and we will need to consider them further in due course (at [20]–[21]):

> [20] It is clear from all the evidence and from Ms [D's] [family] report that [the child] has a strong relationship with both his parents. I infer from Ms [D's] report however that she believes that his primary attachment is with the mother. This is scarcely surprising as the mother has been the parent most involved in his upbringing since his infancy. [21] The father's mother, father and sister live in Canberra and it is clear that there is a close relationship between [the child] and these people. This is again not surprising as he sees a great deal of them when he is with his father.

[34] As to the third additional consideration, being the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent, his Honour regarded as "somewhat harsh" the criticism of the mother made on behalf of the father, that she did not demonstrate such a willingness or ability because of her proposal to move to North Queensland. Rather his Honour found (at [24]):

> [24] … Since separation she has encouraged contact between [the child] and his father and has agreed to significant extensions to the original contact arrangement. I am satisfied that she has a willingness and ability to facilitate and encourage a close and continuing relationship between [the child] and his father.

[35] This finding was not challenged before us.

[36] His Honour then came to the fourth additional consideration, which can be summarised for present purposes as being the likely effect on the child of a separation from his father and paternal grandparents. At this point in his reasons, his Honour simply said that this was "a very significant aspect of the case" and that he would return to it later. We note at this point that it is the father's first ground of appeal that his Honour failed to consider this matter. It will therefore be necessary for us to later return to this matter.

[37] His Honour then proceeded to canvass the remaining eight specific additional considerations. Apart from recognising that if the mother did relocate to North Queensland, there would be "significant difficulty and significant expense in effecting contact between [the child] and his father", his Honour made no other finding in relation to those remaining considerations which was of

significance either for his decision, or for this appeal. It is however important to note that in relation to s 60CC(3)(m) his Honour said (at [35]):

> [35] Paragraph (m) requires me to consider any other fact or circumstance that I think relevant. Such facts or circumstances will emerge in the balance of this judgment.

[38] As to the requirement in s 60CC(4) that the court consider the extent to which each of the parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent, his Honour said that he had no criticism of either parent in that regard.

[39] In [37] of his reasons his Honour indicated that he would now deal with what he described as "the issue of relocation by persons other than the mother", saying in the following paragraph (at [38]):

> [38] There are two ways in which the mother and [Mr B] could live together, but [the child] spend half the time or a substantial amount of time with his father. They would be if his father were to relocate to North Queensland or if [Mr B] were to relocate to Canberra.

[40] His Honour then immediately concluded that it would be "unreasonable" to expect the father to relocate to North Queensland because of the nature of his work as a self-employed builder and the presence of his family in Canberra. As might be expected, the father does not challenge that conclusion.

[41] The father does, however, challenge his Honour's conclusion that Mr B also had "sound reasons for not relocating" from Queensland to Canberra, with the father's challenge being that his Honour failed to consider and evaluate the likelihood of Mr B relocating to Canberra in the event that the court required the child to remain living in Canberra. We will therefore return in due course to consider his Honour's reasoning in relation to a possible relocation by Mr B.

[42] Having concluded that both the father and Mr B had "sound reasons for not relocating" and that he therefore did not propose to resolve the case on the basis of that matter, his Honour set out (in [43]) the choices with which he was faced:

(a) Making orders for a week about arrangement as sought by the father.
(b) Making orders which maintain the status quo whereby [the child] spends eight nights with the mother and six with the father each fortnight.
(c) Making orders that [the child] live with the mother and have contact with the father during school holidays. This would, of course, permit her to relocate to North Queensland.

[43] Immediately thereafter his Honour said that he proposed to make an order that the parties would have equal shared parental responsibility. Thus although his Honour did not make express reference to s 61DA, he can be seen as applying that provision, and in particular, the presumption of equal shared parental responsibility contained in the first sub-section of that section.

[44] His Honour then explained that making an order that the child's parents are to have equal shared parental responsibility for the child "brings into play s 65DAA", and that that section required him to consider whether the child spending "equal time" with each of the parents would be in the child's best interests, and if not, whether the child spending "substantial and significant time" with each parent would be in his best interests.

[45] His Honour can then be seen as endeavouring to consider the possibilities of the child spending either "equal time" or "substantial and significant time" with each parent. As it is one of the father's grounds of appeal that his Honour

erred in failing to consider, as required by s 65DAA, whether the child spending equal time with each of his parents was "reasonably practicable", we will later, when considering that ground, set out his Honour's reasoning in relation to the requirements under that section.

[46] His Honour's discussion of the requirements of s 65DAA led him to a discussion of the advantages and disadvantages of the child and the mother remaining in Canberra or of their moving to North Queensland. In the course of that discussion his Honour made the following observations concerning the mother's position (at [50]):

> [50] By far the most significant matter in the mother's case however concerns her happiness and contentment. She is in love with [Mr B] and wants to marry him. She wants to share her life with him. She has a child by him and wants to share the joys of parenthood with him. I imagine she sees this as her chance of future happiness. The corollary of this is that I infer that, were she forced to remain in Canberra without [Mr B], she would be unhappy and resentful. To a significant degree the happiness and contentment of [the child] depends on the happiness and contentment of his mother.

[47] Ultimately his Honour concluded that the issue of the mother's happiness and the corollary of her unhappiness, if she was prevented from relocating to North Queensland "was of more significance in all the circumstances" than the child continuing to see "a great deal" of his father and extended family and the other matters to which he had averted. Again given the challenge to the weight which his Honour clearly accorded to the mother's position, it will be necessary to return to this matter. But in order to complete this overview of his Honour's reasons, we now set out the precise words of his Honour's conclusion (at [52]):

> [52] In the end [I] have decided that the benefits to [the child] in permitting his mother to relocate with him to North Queensland outweigh the detriments involved. That is, I regard the issue of her happiness and contentment, and the corollary of her being unhappy, discontented and resentful if she were prevented from relocating, as being of more significance in all the circumstances than [the child's] continuing to see a great deal of his father and extended family and the other matters to which I have averted. I am satisfied that it is in [the child's] best interests that his mother be permitted to relocate to North Queensland. I take into account, in coming to this conclusion, [the child's] age and the views expressed by him, as discussed in para 18.

The challenge to the federal magistrate's application of s 60CC and s 65DAA

[48] It will be recalled that by ground 5 the father asserts that his Honour "erred in dealing with the issue of relocation, and the reasons for it as a separate and determinative issue contrary to [12](c) of the judgment, instead of following the course referred to in at [65] of the judgment in *Goode v Goode* and dealing with the relocation and its consequences as part of the evaluation of the proposals of the parties against the relevant considerations in s 60CC and s 65DAA of the Act".

[49] It may assist in an understanding of this ground if we here repeat what his Honour said in [12](c) of his judgment, and if we also set out at [65] of the Full Court judgment in *Goode*.

[50] In his summary of the guidelines contained in the Full Court judgment in *A v A; Relocation Approach* which he considered had application in this case, his Honour included the following as subpara (c):

> The reasons for a parent wishing to relocate with a child is only one of the matters to be considered and it should not be dealt with as a separate issue.

[51] Paragraph [65] of the Full Court judgment in *Goode* is as follows:

[65] In summary, the amendments to Part VII have the following effect:

1. Unless the court makes an order changing the statutory conferral of joint parental responsibility, s 61C(1) provides that until a child turns 18, each of the child's parents has parental responsibility for the child. "Parental responsibility" means all the duties, powers, and authority which by law parents have in relation to children and parental responsibility is not displaced except by order of the court or the provisions of a parenting plan made between the parties.
2. The making of a parenting order triggers the application of a presumption that it is in the best interests of the child for each of the child's parents to have equal shared parental responsibility. That presumption must be applied unless there are reasonable grounds to believe that a parent or a person who lives with a parent has engaged in abuse of the child or family violence (s 61DA(1) and s 61DA(2)).
3. If it is appropriate to apply the presumption, it is to be applied in relation to both final and interim orders unless, in the case of the making of an interim order, the court considers it would not be appropriate in the circumstances to apply it (s 61DA(1) and s 61DA(3)).
4. The presumption may be rebutted where the court is satisfied that the application of a presumption of equal shared parental responsibility would conflict with the best interests of the child (s 61DA(4)).
5. When the presumption is applied, the first thing the Court must do is to consider making an order if it is consistent with the best interests of the child and reasonably practicable for the child to spend equal time with each of the parents. If equal time is not in the interests of the child or reasonably practicable the court must go on to consider making an order if it is consistent with the best interests of the child and reasonably practicable for the child to spend substantial and significant time with each of the parents (s 65DAA(1) and (2)).
6. The Act provides guidance as to the meaning of "substantial and significant time" (ss 65DAA(3) and (4)) and as to the meaning of "reasonable practicability" (s 65DAA(5)).
7. The concept of "substantial and significant" time is defined in s 65DAA to mean:
   (a) the time the child spends with the parent includes both:
      (i) days that fall on weekends and holidays; and
      (ii) days that do not fall on weekends and holidays; and
   (b) the time the child spends with the parent allows the parent to be involved in:
      (i) the child's daily routine; and
      (ii) occasions and events that are of particular significance to the child; and
   (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.
8. Where neither concept of equal time nor substantial and significant time delivers an outcome that promotes the child's best interests, then the issue is at large and to be determined in accordance with the child's best interests.
9. The child's best interests are ascertained by a consideration of the objects and principles in s 60B and the primary and additional considerations in s 60CC.
10. When the presumption of equal shared parental responsibility is not applied, the court is at large to consider what arrangements will best promote the child's best interests, including, if the court considers it appropriate, an order that the child spend equal or substantial and significant time with each of the

parents. These considerations would particularly be so if one or other of the parties was seeking an order for equal or substantial and significant time but, as the best interests of the child are the paramount consideration, the court may consider making such orders whenever it would be in the best interests of the child to do so after affording procedural fairness to the parties.

11. The child's best interests remain the overriding consideration.

[52] The first submission made in the appellant's written summary of argument in support of ground 5 was that having dealt with the primary and additional considerations contained in s 60CC(2) and (3), his Honour then (in [37] of his reasons) commenced to deal with the issue of relocation as a separate issue by considering the possibility of either the father relocating to Cairns or Mr B relocating to Canberra.

[53] We agree that when dealing with a case concerning the future living arrangements for a child, and involving a significant change in the geographical place where the child is to live, the preferred approach according to established principle has been not to deal with that change, or relocation, as a separate or discrete issue, but rather as just one of the proposals for the child's future living arrangements, at least in so far as that approach is possible: see *U v U* (2002) 211 CLR 238; 191 ALR 289; 29 Fam LR 74; (2002) FLC 93-112; [2002] HCA 36 and *Bolitho v Cohen* (2005) 33 Fam LR 471; (2005) FLC 93-224; [2005] FamCA 458.

[54] However in the present case his Honour had, again in accordance with established principle, to consider the possibility of a relocation by the father to North Queensland: again, see *U v U* and *Bolitho v Cohen*. He also had to consider, apparently because of the manner in which the father's case was conducted before him, the possibility of a relocation by Mr B to Canberra. Put another way, his Honour had to consider what alternatives there were to the proposed relocation.

[55] It is clear to us from a reading of [35] and [37] of his reasons (which we have referred to earlier), that his Honour considered the possibility of "relocation" by either the father or Mr B under s 60CC(3)(m) as "[an]other fact or circumstance that [he thought was] relevant". In our view, that approach was entirely appropriate — indeed we have difficulty in seeing in what other context within the applicable statutory framework his Honour could have considered those matters.

[56] We would point out in this context also, that in his consideration of the earlier paragraphs of s 60CC(2) and (3), his Honour had wherever possible taken into account the mother's proposal to relocate the child to Queensland.

[57] It was further submitted in support of ground 5, that his Honour had after his consideration of s 65DAA in [45] (which we will shortly set out), then returned in [48] to the issue of "relocation" and discussed it (through to [52]) as a separate issue. In that discussion, as will be later seen, his Honour canvassed the advantages and disadvantages to the child of the parties' proposals (as his Honour considered he was required to do following the Full Court decision in *A v A; Relocation Approach*).

[58] As we will later discuss in the context of ground 6, the provisions of s 65DAA must have particular significance in a case involving a proposal that there be a significant change in the place where a child lives. We therefore

consider that it was an entirely appropriate approach for his Honour to canvass in his application of s 65DAA, the advantages and disadvantages of the mother's relocation proposal.

[59] A further submission made in support of ground 5 was that it was an erroneous approach for his Honour to consider as a separate issue (towards the conclusion of his judgment), the mother's reasons for wishing to move to North Queensland and the consequences for her of not being able to move. These are matters which it will be necessary for us to consider in the context of a separate ground of appeal which challenges the weight which his Honour accorded to those matters. But we can say at this point that we see no error in his Honour having considered these matters in the way in which he did towards the conclusion of his judgment. They were certainly matters which he was required to consider, and it is difficult to see in what other context in his judgment, they might have been more appropriately considered.

[60] For these reasons we conclude that there is no substance in ground 5. In our view, his Honour dealt with the relocation proposed in the context of his consideration of s 60CC and s 65DAA, at least in so far as it was possible to do so. It should be implicit in our conclusion in relation to this ground, that a relocation proposal should continue to be considered and evaluated, so far as possible, in the context of the making of the necessary findings in relation to the relevant s 60CC matters; however, as we will shortly explain, such a proposal now also needs to be considered in the context of s 65DAA.

[61] It is also apposite to say in connection with ground 5, that there was considerable discussion before us as to the appropriate order in which the presently relevant provisions of Pt VII of the Act (notably s 60CC and s 65DAA) should be considered by a court in determining a case such as the present.

[62] The legislation gives no express direction or guidance on this issue. However given that the concept of the child's best interests is the determinative factor in the application of so many of the provisions of Pt VII, and given that s 60CC(1) provides that in determining what is in the child's best interests, the court must consider the matters set out in subs (2) (primary consideration) and subs (3) (additional considerations) of that section, it would seem only logical that the court make findings regarding the matters contained in those subsections (so far as they are relevant in a particular case) before attempting to apply any other provision in Pt VII in which the determinative factor is the subject child's best interests.

[63] We make it clear, however, that a failure to follow what we see as the logical approach would not lead to appealable error unless such error arose from a failure to give adequate reasons or to have regard to the matters which the legislation requires must be considered.

[64] Ground 6 asserts that his Honour erred "in failing to consider as required by [s 65DAA] whether the child spending equal time with each of his parents was reasonably practicable".

[65] The submissions in support of this ground focused particularly on what his Honour said in [46] and [47] of his reasons for judgment, and in so doing, might be seen as straying beyond the limited matter encompassed in ground 6 as drafted. But however that may be, we now set out [46] and [47], although in order to put their contents in context, it is necessary to set out part of [44] and also [45]–[48]:

> [44] I propose to make an order in this case that the parties have equal shared parental responsibility for the child. In the end I did not understand this to be opposed by the mother …
>
> [45] Making such an order brings into play s 65DAA of the Act. To paraphrase this section, it provides that if I am to make an order for equal shared parental responsibility, I am to consider whether the child spending equal time with each of the child's parents would be in his best interests. It goes on to provide that if I were to decline to make such an order I must consider whether the child spending substantial and significant time with each of his parents would be in his best interests. I need not explain what "substantial and significant time" means except to say that the regimen which presently applies fits within its definition.
>
> [46] Given that the father has made an application for shared residence I would be considering whether that is in [the child's] best interests, irrespective of s 65DAA. Also, in the context of this case, I would be considering whether I should make an order providing that [the child] spend substantial and significant time with the father, irrespective of that section. However it appears from the recent Full Court case of *Goode* that this section is not merely stating the obvious and that a consideration of shared residence is a consideration "tending to a result", that is tending to the result of making such an order. For present purpose I will assume that the Full Court intended that shared residence be the preferred result unless countervailing matters indicate that it is not in the best interests of a child. However *Goode* was not a relocation case. As I have indicated, I am faced with three possible types of orders, and my task is to determine which of those orders it is appropriate to make. Section 65DAA has to be seen in this context and the consideration as to whether an order for shared residence or for substantial "contact" is in the best interests of the child has to be made in this context.
>
> [47] Were it a choice between retaining the status quo and advancing to a week about arrangement I would have retained the status quo. For this purpose I am prepared to accept that Ms [D] has made it clear that [the child] needs his mother. While there is not much difference between an 8/6 arrangement and a 7/7 regimen I do not believe that extending the period he spends with his father to week about would be in his best interests. Absent the relocation proposal I would be satisfied that his best interests would be served by retaining the status quo.
>
> [48] The advantages of maintaining the status quo as opposed to making orders as sought by the mother are obvious and very significant. Throughout his life [the child] has had a significant involvement with his father and with his extended paternal family. For some time now he has spent a substantial part of his time with these people. Moreover the advantages of his remaining in Canberra go beyond a simple consideration of the time he can spend with his father and extended family. Being in Canberra also enables his father to continue his involvement with [the child's] school, in that he can attend sporting events, school functions, and parent teacher evenings. He can be involved in the homework that [the child] is set and would continue to have a complete involvement in [the child's] life. Confining his time with [the child] to holidays is obviously a substantial and detrimental change to [the child's] life. Furthermore [the child] is well established in Canberra. He has lived there all his life. He is established in his school and all his friends are here. I have little doubt that he would adapt to the change to Queensland but nevertheless these are relevant considerations.

[66] It was submitted in support of ground 6 that his Honour had rejected "out of hand" the proposal that the child should spend "equal time" with both parents (as sought by the father) with no reasons being provided. In particular, it was submitted his Honour had given no consideration to the requirement in s 65DAA(1) for the court to consider whether the child spending "equal time" with each parent was "reasonably practicable".

[67] Similarly, it was submitted that his Honour had not considered the "reasonably practicable" requirement in connection with the possibility of the child spending "substantial and significant time" with each of the parents as required by s 65DAA(2).

[68] It was also submitted that his Honour appeared to proceed on the basis that the obligations imposed on the court by s 65DAA to consider first "equal time" and then "substantial and significant time" were in some way qualified in a case where the proposals of one of the parties involved relocating the child to another place.

[69] As we indicated during the hearing of the appeal, we do not think that these submissions made on behalf of the father, represent a fair reading of his Honour's reasons.

[70] On our reading of his reasons, his Honour clearly understood that he had to consider both "equal time" and "substantial and significant time" not only because of the orders which he would make for equal shared parental responsibility (thus bringing "into play" s 65DAA), but also because of the father's application for shared residence.

[71] Notwithstanding his Honour's reference in [46] to the three choices with which he was faced (and which he had set out in [43] of his reasons and we have set out at [42] above) and which included the relocation to Queensland, we read his Honour as initially addressing (in [46] and [47]) without regard to the relocation proposal, the issues of "equal time" and then "substantial and significant time" (which was the regimen which his Honour considered currently applied to the child). Once he had concluded (in the last sentence of [47]) that the child's best interests required the "status quo" of "substantial and significant time" rather than "equal time", he had of course to go on (as he did in [48]) to consider and balance that option of "substantial and significant time" against the mother's proposal of the move to Queensland.

[72] Further, we do not accept that his Honour did not give reasons for rejecting the option of the child spending "equal time" with each parent. His reasons (albeit shortly stated) are to be found in [47], and they were that, given the opinion of the family consultant (counsellor) that the child "needs his mother", and that while there is "not much difference" between an "8/6" and "7/7" day arrangement, a change to a week about arrangement would not be in the child's best interests. In other words, given the expert opinion that the child needed his mother, it was, in his Honour's opinion, preferable that he spend slightly more time with her (as he had been doing to date). This was a conclusion clearly open to his Honour and well within a proper exercise of the discretion.

[73] Having concluded that it would not be in the child's best interests to spend "equal time" with each parent, it was, in our view, unnecessary that his Honour consider whether such an option was "reasonably practicable".

[74] In our view, the common sense construction of s 65DAA(1)(c), and also of s 65DAA(2)(d), must be that it is only necessary for a court to consider whether it would be "reasonably practicable" for the child to spend "equal time" with each parent, or "substantial and significant time" as the case may be, if the court has already concluded that it would be in the child's best interests to spend "equal time" with each parent, or "substantial and significant time" (as the case may be).

[75] With regard to the possibility of the child spending "substantial and significant time" with the father, it is true that in the first sentence of [48] his Honour acknowledged that the advantages of maintaining the "status quo" of "substantial and significant time" as opposed to accepting the mother's relocation proposal, were "obvious and very significant". However his Honour had before him her application to be permitted to relocate, and he was obliged to consider it. Such consideration would clearly require a weighing up of the advantages and disadvantages of her proposal to relocate against the advantages and disadvantages of the maintenance of the status quo of substantial and significant time. This is what his Honour then proceeded to do.

[76] Again it should be implicit in what we have said regarding this ground (ground 6), that not only do we find no merit in it, but that we also endorse his Honour's approach to the application of s 65DAA in a case which involved a relocation proposal.

[77] His Honour, correctly in our view, endeavoured first to consider without regard to the relocation proposal, whether it was in the child's best interests to spend "equal time" with each parent. When he concluded that it was not, he did not need to consider whether "equal time" was "reasonably practicable".

[78] But he did have to move to consider, the option of "substantial and significant time" which he regarded as having "obvious and very significant" advantages. The legislation gives no guidance as to the stage at which a court should commence a consideration of the relocation proposal, but if having found advantages in "substantial and significant time" (or for that matter in "equal time"), his Honour had then turned to consider the "reasonable practicability" of such an arrangement, some assistance would have been gained from s 65DAA (5) which provides:

> (5) In determining for the purposes of subs (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:
>
> (a) how far apart the parents live from each other; and
>
> (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents, and
>
> (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind: and
>
> (d) the impact that an arrangement of that kind would have on the child; and
>
> (e) such other matters as the court considers relevant.

[79] A consideration of these matters would have required his Honour to evaluate the differing proposals of the mother and father and to consider whether "substantial and significant time" would be "reasonably practicable" if the mother were to relocate to Queensland. This would seem to be a logical path to follow but as the legislation does not prescribe an order in which the relocation proposals are to be considered, we are not prepared to find that his Honour's decision was incorrectly reached.

[80] His Honour did not specifically find that the mother's proposal for the child to spend time with the father did not come within the definition of "substantial and significant time" as arguably it might have. However, he clearly recognised that the mother's proposal was very different from the existing arrangements which he had found to have advantages for the child, so nothing

ultimately turns on whether the time which the child was to spend with the father under his Honour's orders did amount to "substantial and significant time". Ultimately the advantages of the mother's proposal outweighed, in his Honour's opinion, the advantages of the existing arrangements, which would have been "reasonably practicable" if the mother remained in Canberra, but was not if she moved to Queensland.

[81] We acknowledge that his Honour's approach to the application of s 65DAA, which we have endorsed, does require that the matters which the court has to consider under that section (being "equal time" or "substantial and significant time"), must initially be considered without regard to any relocation proposal which might also be before the court. However any relocation proposal will then have to be balanced against the option of "equal time" or of "substantial and significant time" if either of those options has been found to be in the child's best interests, with the outcome normally emerging from a consideration of whether such an arrangement was "reasonably practicable".

[82] We also acknowledge that this approach involves, at least initially, treating the relocation proposal as a separate and discrete matter, and that at least prior to the 2006 legislative amendments, the preferred approach was not to consider a relocation proposal separately from other proposals in relation to the child's living arrangements.

[83] However consistently with what the Full Court said in *Goode*, the options of the child spending "equal time" or "substantial and significant time" with each parent must now be given separate and real consideration, notwithstanding that a relocation proposal may also have to be given subsequent consideration, with the advantages and disadvantages of that proposal then being balanced against the advantages and disadvantages of an "equal time" or "substantial and significant time" arrangement. Not to approach a case involving a relocation proposal in this way, would devalue the imperative imposed by the Act to consider whether it is in the best interests of a child in a case to spend "equal time" or "substantial and significant time" with each parent.

The matters asserted not to have been adequately considered by the federal magistrate

[84] We come then to consider the grounds of appeal which assert that his Honour did not consider, or if he did consider, did not adequately evaluate, certain factual matters. In this regard it will be convenient first to discuss together grounds 1 and 4 as these grounds are directed to the child's relationship with, and the consequent effect on him of separation from, his father and his paternal grandparents. The grounds as drafted are that his Honour failed:

> (1) … to consider the likely effect on the child of the separation from his father and from his paternal grandparents of the change in his circumstances brought about by the child's relocation to North Queensland.
>
> …
>
> (4) … to adequately evaluate the nature and strength of the relationship between the child and his father and between the child and his paternal grandparents and the effect upon those relationships of the residence proposal of the mother.

[85] Although counsel for the father argued the ground directed to the effect on the child of separation from his father and paternal grandparents ahead of the ground directed to the strength of the child's relationships with his father and

paternal grandparents, we think it more useful to consider first the ground relating to the child's relationship with his father and his family and then the ground relating to the effects on the child of separation from those persons.

[86] It will be recalled from our earlier consideration of his Honour's reasons for judgment that when making his findings regarding the child's relationships (s 60CC(3)(b)), his Honour found that the child had "a strong relationship with both his parents" (at [20]) and that he had "a close relationship with the father's mother, father and sister" and that he "sees a great deal of them": at [21].

[87] It was submitted on behalf of the father that given the evidence which was before his Honour regarding the child's relationship with his father and paternal grandparents, this was an inadequate evaluation of the nature and strength of those relationships, and that it was this inadequate evaluation of these relationships that then caused his Honour to fail to consider adequately, if at all, the likely effect on the child of separation from his father and paternal grandparents.

[88] We are not, however, persuaded given his Honour's economy with the use of words (which his judgment reveals) that he needed to say more than he did when making his findings in the context of the s 60CC matters, in order to convey the strengths of the child's relationship with his father and the closeness of his relationship with his paternal grandparents.

[89] As can be seen from [48] of his reasons (which we will shortly again set out) the importance or significance of these relationships for the child was clearly a matter which his Honour took into account when he weighed up the benefits and detriments to the child of the mother's proposal to relocate and when he arrived at his ultimate conclusion.

[90] As to his Honour's asserted failure to consider the likely effect on the child of a separation from his father and paternal grandparents, it will be recalled that when considering that matter in the context of s 60CC matters, his Honour said that this was "a very significant aspect of the case" and that he would return to it later in his judgment: at [26].

[91] It is now asserted in support of the father's first ground of appeal, that at no stage later in his judgment did his Honour in fact consider the matter of the likely effect on the child of separation from his father and grandparents.

[92] It is true that at no stage in his judgment did his Honour make an express finding as to any likely effect on the child of the separation from his father and paternal grandparents that would be caused if he was to move to North Queensland, at least in the sense of a finding that, for example, the child would be "likely to be devastated" by such a separation (if indeed the evidence would have permitted a finding in such, or similar, terms). However it is clear that his Honour did take into account, and indeed regarded very seriously, the practical effects on the child's relationship with his father and his family of the move proposed by the mother as can be seen from [48] of his reasons, which we here repeat (with emphasis added):

> [48] *The advantages of maintaining the status quo* as opposed to making orders as sought by the mother *are obvious and very significant. Throughout his life [the child] has had a significant involvement with his father and with his extended paternal family.* For some time now *he has spent a substantial part of his time with these people.* Moreover the advantages of his remaining in Canberra go beyond a simple consideration of the time he can spend with his father and extended family. *Being in Canberra also enables his father to continue his involvement with [the child's] school,*

in that he can attend sporting events, school functions, and parent teacher evenings. He can be involved in the homework that [the child] is set and would continue to have a complete involvement in [the child's] life. Confining his time with [the child] to holidays is obviously a substantial and detrimental change to [the child's] life. Furthermore [the child] is well established in Canberra. He has lived there all his life. He is established in his school and all his friends are here. I have little doubt that he would adapt to the change to Queensland but nevertheless *these are relevant considerations.*

[93] But given the mother's application which was before him, his Honour had to balance these "relevant considerations" or "obvious and very significant" advantages of "maintaining the status quo" against the considerations which favoured granting the mother's application. In the end his Honour concluded that the benefits for the child in permitting the mother to relocate outweighed the detriments involved.

[94] It is important to remember, however, when considering the present complaints, that when his Honour reached his conclusion in [52] of his reasons (see [47] above) that the benefits of the move outweighed the detriments for the child, he made specific reference to the significance of the child's "continuing to see a great deal of his father and extended family", although he ultimately attached more significance to the mother's happiness or unhappiness.

[95] We have thus also not been persuaded that the father's first or fourth grounds of appeal have substance.

[96] It will be convenient to next consider the complaint contained in ground 3, being that his Honour failed to consider and evaluate the likelihood of the mother's new partner, Mr B, moving to Canberra in the event that the court was to order that the child remain living in Canberra.

[97] His Honour's discussion of the position of Mr B and the likelihood of his moving to Canberra was as follows (at [40]–[42]):

[40] [Mr B's] position is not quite so clear cut. He has, so far as I am aware, lived in the Atherton Tablelands area all his life, and indeed he and the mother met there some years ago prior to them forming a romantic relationship. He has two children of his former marriage aged 9 and 7, living in the area, and is engaged in litigation in the Federal Magistrates Court in Cairns in which he is seeking orders that these children live with him and their mother on a week about arrangement. He is employed in the Atherton Tablelands […] and has worked there for 17 years. However in 2005 he left the Atherton Tablelands area for some months. This involved his not seeing his children for some considerable time. He spent part of this time in Canberra. At that stage he was contemplating relocating to Canberra. Ultimately he decided this was not what he wished to do.

[41] Counsel for the father submitted that I could, and should, resolve the matter on the basis that [Mr B] could relocate to Canberra. Essentially, as I understand it, his argument was that, whilst [Mr B's] children might be adversely affected by his contact with them being confined to school holidays, their best interests are no concern of mine. Further it is apparent that his peregrinations in 2005 showed a somewhat casual attitude towards his children.

[42] I do not see it in such simple terms however. I do not think it would be appropriate of me to engage in some form of "social engineering" and attempt to force [Mr B] to come to Canberra by denying the wife the opportunity to relocate to where he lives. There are good reasons why he wishes to remain in the Atherton Tablelands area. He has secure employment there and may not be able to obtain comparable employment in Canberra. That is where his children live. Whilst it appears, on the material that I have available to me, that [Mr B's] application for shared residence may be somewhat ambitious nevertheless I infer that he, like [the father], is understandably reluctant to be

> in a situation whereby there is a substantial distance between him and his children. Notwithstanding his actions in 2005 I accept that he loves his children. In the end all I can say is both [the father] and [Mr B] have sound reasons for not relocating and I do not propose to resolve the case on this basis.

[98] The focus of the submissions in support of this ground, was that his Honour had been asked to make a clear finding as to whether or not in the event that the mother was unsuccessful in her application to relocate, Mr B would then move to Canberra, and that his Honour erred in failing to make such a finding.

[99] It appears from the first sentence of [41] of his reasons, that his Honour well understood that this he was being asked to make such a finding, and it also appears from the last sentence of [42] that his Honour was not prepared to do so. We consider that it was well open to his Honour, to decide that he would not "resolve" the case on the basis of what Mr B might choose to do in the event that the mother was required to stay in Canberra, notwithstanding that one of the parties may have asked him to resolve the case on that basis.

[100] While there is authority (notably, *U v U*) for the proposition that a court in determining a so-called relocation case might do so on the basis of a possible relocation to the place of the proposed relocation by the parent who opposes the relocation of the child, we do not understand it to have yet been suggested that such cases could, or should, be determined on the basis of what might be the likely response of the partner of the parent proposing relocation in the event that the court does not permit relocation. We assume that his Honour had such a situation in mind when he referred to "social engineering".

[101] We are thus not persuaded that there is merit in ground 3.

[102] Finally in this group of grounds, we come to ground 2 which as drafted contains two complaints. The first is that his Honour "gave excessive weight to the mother's reasons for and desire to relocate to North Queensland". The second is that his Honour "erred in speculating as to the consequences of the mother not being permitted [to relocate] in the absence of evidence from her as to that matter".

[103] In the outline of argument on behalf of the appellant father, a third complaint is raised under this ground, being that no notice was given to the father that his Honour might reach the conclusions which he did regarding the mother's position, and thus the father was denied procedural fairness in that he was unable to cross examine the mother or make submissions on the issue.

[104] In his reasons for judgment after setting out in [48] (which we have earlier set out) the advantages of the child remaining in Canberra, his Honour turned in [49] and [50] to the advantages for the child and the mother of a move to Queensland, saying:

> [49] The advantages of the mother and [the child] living in Queensland are that he would see a good deal more of his maternal family and perhaps in time his relationship with these people would be as close as his relationship with his father's family. Another advantage is the mother would have the support of her mother and sister. She does have a sister in Canberra who is able to provide support to some degree, but that sister has a child with emotional difficulties and this affects the extent to which she can be involved in the mother's life. The mother's mother can and has travelled to Canberra from time to time to help her daughter out, but again this is not the same as living in the same area.
>
> [50] By far the most significant matter in the mother's case however concerns her happiness and contentment. She is in love with [Mr B] and wants to marry him. She

> wants to share her life with him. She has a child by him and wants to share the joys of parenthood with him. I imagine she sees this as her chance of future happiness. The corollary of this is that I infer that, were she forced to remain in Canberra without [Mr B], she would be unhappy and resentful. To a significant degree the happiness and contentment of [the child] depends on the happiness and contentment of his mother.

[105] His Honour then returned to the possible risks involved in permitting the relocation saying (at [51]):

> [51] It was urged on me that I should have regard to the risks involved in permitting the mother to relocate. It was pointed out that an arrangement whereby [the child] lived in a family consisting of him, his half sister and [Mr B] is untried. This is true. It was also pointed out that were [Mr B] to succeed in his application for shared parenting of his children, the impact of their introduction into the household would be an unknown. This is also true. However I do not propose to take these matters into account. Whilst there are risks that the dynamic might not work out, there are also prospects that [the child] would be able to settle into a happy and contented family or perhaps a blended family, which would be to his benefit. Overall I am unable to determine that the risks involved are greater than the potential benefits involved.

[106] In relation to the procedural fairness complaint, and leaving aside the point that that complaint is not apparent on the face of the ground as drafted, it should have been clear, in our view, to those representing the father at trial, that the issue of the mother's happiness or unhappiness was regarded by his Honour as an important issue in the case from the following observations made by him during the questioning of the family consultant (counsellor) by counsel for the mother:

> [Counsel for the mother]: It was put to you that there was no positive changes in the proposed relocation. Of course, one positive would be that [the mother] has the opportunity of being in a family unit again? — Yes.
> And hopefully happier in that family unit than being on her own in Canberra? — Yes.
> And of course the other thing that was put —
> Federal Magistrate: That is just the obvious point that I put that —
> [Counsel for the mother]: It is, your Honour.
> Federal Magistrate: — if she was in Canberra she would be very unhappy.
> [Counsel for the mother]: Yes. Well, it's a very important point.
> Federal Magistrate: Yes, I know. Yes, I don't need to be reminded about that.
> (Transcript 6/12/06, Appeal Book p 357, lines 1–20).

[107] We thus see no merit in the procedural fairness complaint.

[108] As to the second complaint contained in the ground as drafted, being that his Honour's conclusions in relation to the mother's happiness or unhappiness were based on speculation rather than evidence, his Honour himself can be seen as acknowledging that he was engaging in some degree of speculation when he said in [50] of his reasons (emphasis added):

> [50] … I *imagine* she sees this as her chance of future happiness … I *infer* that were she forced to remain in Canberra without Mr B, she would be unhappy and resentful.

[109] Happiness is a state of mind to be inferred from evidence. The terms "happiness" and "contentment" were his Honour's conclusions as to the mother's state of mind, being reasonable inferences which could be drawn from the findings which he made in [50] of his reasons for judgment:

- She is in love with Mr B and wants to marry him.
- She wants to share her life with him.

- She has a child by him and wants to share the joys of parenthood with him.

[110] Furthermore the following passages from the oral evidence of the family consultant (counsellor) in addition to that quoted in [106] above clearly support the conclusions reached by his Honour:

> [Counsel for the father]: And from his point of view, I suggest to you, the proposed relocation offers no positive change at all, does it? — Possibly not, except in terms of how his mother might be and that of course is a — (Transcript 6/12/06, AB p 345, lines 15–16).
>
> …
>
> Federal Magistrate: You have got to weight the positives and the negatives in this. There are a lot of negatives in the move. There are a lot of negatives in not allowing her to move. It's the balancing. Do you have an opinion as to how that balance should be resolved? — Your Honour, I agree with you because I mean the mother has made some commitment to a different life and she has supports up there and everything. The child is very, very close to the mother.
>
> A mother will be, one would assume, will be most unhappy if she is unable to assume the life with [Mr B]? — Yes, and of course that would impact on the whole situation and she now has two children.
>
> And bringing up two children on her own and all the rest of it? — That is right.
>
> They are the negatives, but there are lots of negatives about the move itself which [counsel for the father] has outlined? — Exactly. There are. It's a very difficult one. It's not just the risks — not just the unknowns, but also the fact that he will be seeing a lot less of his father and also his extended family here. Do you have anything on how the balance should be resolved? I don't require you to have opinion? — No.
>
> But if you do? — Your Honour, this is a really difficult one because he is close to both sides. He is very attached emotionally to his mother and that is because of his age and stage and the child and how he is, but he loves his father and he is close to that family too. But I think that I said it in my report, whatever happens he should stay with his mother, whether it's here or in Queensland, I guess the court is going to decide. (Transcript 6/12/06, Appeal Book p 349, lines 6–34.)
>
> …
>
> [Counsel for the mother]: If she had to remain in Canberra without her new partner then she would need a lot of support, wouldn't she? — Yes.
>
> And if the evidence was that the relationship between her and her ex-husband has deteriorated and there is a lesser degree of co-operation and also that in addition the paternal grandmother conceded that communication has become more difficult and also consultation, then if she has no family support in Canberra, that would be a very stressful situation, wouldn't it? — I heard she does have a family.
>
> If you assume, if she didn't have any family support that would be —? — Well, it would be more — yes, more stressful that if she had been —
>
> And if the evidence before this court was that although she does have a sister in Canberra, the sister came and gave evidence that her ability to give support to [the mother] is in fact limited because she has her own health problems and a child with significant emotional health problems, then it appears that her family support is somewhat limited in Canberra? — Mm.
>
> If the mother is unhappy and stressed and depressed in Canberra and isolated, that will have a detrimental effect on [the child], won't it? — It will.
>
> Particularly [the mother] describes [the child] as being very protective of her? — Yes, I think I wrote that in my report.
>
> And you also found that [the child] was expressing interest and protection of his then unborn baby sister? — He was.
>
> …
>
> So it appears that [the child] has taken on a bit of a protective role for [the mother] who has been on her own? — Yes.

> So if she is very unhappy here in Canberra, then it's likely that [the child] will feel that he has to take on more responsibilities and protection of his mother — Yes, it will impact on him.
> It will impact on him? — Yes. (Transcript 6/12/06, Appeal Book p 355, lines 4–39).

[111] Thus the complaint to the effect that his Honour's conclusions regarding the mother's happiness or unhappiness lacked any evidentiary foundation is without substance. The factual matrix in which his Honour's conclusions were reached, namely that the mother had a child and wished to marry the father of that child and live with him and both children in a family unit, was an important background.

[112] The remaining complaint embodied in ground 3 is to the effect that his Honour gave "excessive" weight to the mother's reasons for, and desire to, relocate to North Queensland.

[113] It will be seen from the passages from his Honour's judgment which we have set out throughout these reasons, that this was a difficult and finely balanced decision. In such a case one factor will usually become decisive. In this case his Honour determined that that factor was the mother's happiness and contentment. In such a case where, as his Honour noted, the mother wanted to marry and be with the father of her second child, it could not, in our view, be said that his Honour was wrong in elevating this factor together with the impact on the mother and on the subject child of her not being permitted to relocate to join the man whom she wanted to marry, to be the decisive factor or factors in this case. Thus there is no substance in any aspect of ground 3.

The challenge to the adequacy of his Honour's reasons

[114] As earlier mentioned there was a separate ground of appeal challenging the adequacy of his Honour's reasoning. However it can be fairly said that the submissions in support of that challenge were largely made in the course of the submissions made in support of the other grounds of appeal, which either challenged his Honour's application of s 60CC and s 65DAA of the Act or challenged the adequacy of his consideration or evaluation of various factual matters.

[115] It will be apparent from our reasons so far that we have found no merit or substance in any other ground of appeal. We need only now say that although his Honour's reasoning in relation to certain of the matters which were the subject of other grounds of appeal was brief, in no instance were we, as the appeal court, "unable to ascertain the reasoning" upon which a particular conclusion reached by his Honour or indeed his overall decision, was based; nor, in our view, has justice "not seen to have been done": see *In the Marriage of Bennett* (1990) 14 Fam LR 397; (1991) FLC 92-191 citing *Sun Alliance Insurance Ltd v Massaud* (1989) VR 8.

Conclusion

[116] Accordingly we conclude that the appeal should be dismissed.

Costs of the appeal

[117] In the event that the appeal was to be dismissed, counsel for the respondent mother sought an order for costs, while counsel for the appellant father sought that in such an event, there should be no order for costs given that the appeal involved the interpretation of new legislative provisions.

[118] We see no circumstances that would justify the departure from the general rule in the Act that each party should pay his or her own costs.

[119] **Faulks DCJ.** It is with great diffidence that I dissent from the conclusion reached by their Honours the Chief Justice and Finn J (and by FM Brewster). I do not disagree with their Honours' analysis of the law or how it should be applied or with their Honours' conclusions about the grounds of appeal except one.

[120] Ground two complained that his Honour FM Brewster "gave excessive weight to the mother's reasons for and desire to relocate to North Queensland" and that he "erred in speculating as to the consequences of the mother not being permitted [to relocate] in the absence of evidence from her as to that matter".

[121] I agree with and concur in their Honours' rejection of this ground of appeal on the basis that there had been a denial of procedural fairness and I have nothing to add to what their Honours have said in their judgment on this issue.

[122] It is with [108]–[113] (inclusive) with which I have difficulty. His Honour FM Brewster appears to have ultimately regarded the question of the mother's unhappiness if she were not allowed to move and its consequential effect on the child as being determinative of what their Honours the Chief Justice and Finn J describe (I think correctly) as "a difficult and finely balanced decision": at [113].

[123] In an appropriate case with adequate evidence to support it, I do not doubt that such factors may be determinative of whether it would be in a child's best interests to relocate with a parent. It even may be that if all appropriate evidence had been given in this matter the conclusion would be justified. I would not seek to overturn the learned federal magistrate's decision if there had been (I acknowledge in my opinion and not in the opinion of their Honours the Chief Justice and Finn J) evidence to support the inference he drew in [50] of his reasons or the conclusions he drew there from.

[124] I acknowledge that their Honours the Chief Justice and Finn J draw comfort and support from the exchanges between the learned federal magistrate and the family consultant (in [106] and [110] of their Honour's judgment). Regrettably I am unable to draw such comfort. For example the question from his Honour "[i]f the mother is unhappy and stressed and depressed in Canberra and isolated that will have a detrimental effect on [the child] won't it?", perhaps unsurprisingly elicited the response from the family consultant "[i]t will".

[125] Unfortunately in my opinion the unhappiness, stress, depression and isolation upon which his Honour predicated his question were not otherwise proved.

[126] It is perhaps reasonable to infer as his Honour did that if a parent wishing to relocate has fallen in love with someone, and wants to share his or her life with that person and either shares having a child with that person or even wants to do so, that not being able to do so would make the person unhappy (indeed that is the conclusion their Honours the Chief Justice and Finn J reached). If that were enough it seems to me that there would be very few applications for relocation which would not succeed.

[127] The Act does not prescribe parental "happiness" as such, as a factor in determining the best interests of a child. It could be said that the point is so obvious that it does not need legislative prescription. However, the happiness of one parent is not necessarily the happiness of the other and in relocation cases it would be rare for the two to coincide. It is possibly reasonable to infer that the unhappiness of one parent may impact on a child who is with that parent and even

more so if the child is more closely associated with that parent or perhaps more closely attached to him or her. It may be that evidence in the form of an expert opinion based on observation and fact rather than conjecture may establish the veracity of such an inference in an appropriate case.

[128] It is another thing in my opinion to elevate an inference, not directly supported by evidence, to the conclusive factor in preferring the new family of the parent proposing to relocate to the relationship between the child and his or her other parent.

[129] In my opinion his Honour was not entitled to reach the conclusion he did on the evidence before him and accordingly I would allow the appeal and remit the matter for rehearing.

[130] If that had been the outcome of the appeal it would have been of concern to me that the parties would have been put through the emotional and financial expense of another trial for perhaps a similar result (but based that time on evidence). However, my obligation is to determine the matter according to the law as I perceive it to be.

[131] As to the costs of the appeal I agree with the majority that in view of their decision, each party should pay his or her own costs.

Orders

Appeal dismissed.

ANGELA NANSON
SOLICITOR