was liable to pay only $7.90 per fortnight, which had been a recent change from the father being liable. An application by the mother for the father to pay half the school fees was dismissed on appeal as the father was no longer the liable parent.

Where the *Child Support Assessment Act* 1989 does not apply, for example, where the child has reached the age of 18, there is still an option to use the Family Law Act 1975. Bridges & Bridges in 2011 was an application by an adult daughter completing her tertiary studies. Previous orders had included periodic payments until the end of her tertiary studies, however the father had not been complying with the orders. An order was granted for a lump sum payment in lieu of the periodic payments, partly to avoid any further issues of non-compliance.

NICHOLES
Family Lawyers

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

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Relocation Cases: Has Anything Changed?

The Federal Circuit Court of Australia Relocation List

In March 2012 the Federal Circuit Court commenced a specialist Relocation List. The Relocation List has been established as a pilot project for the hearing of certain family law proceedings in Melbourne involving applications to vary existing orders or parenting arrangements primarily as a result of a proposed change of residence of a person with primary, majority, or shared care of a child or children . The purpose of the Relocation List is to promote better outcomes for children by providing a specialist list whereby matters can be heard expeditiously.

Relocation pursuant to the *Family Law Act* 1975

The issue of whether a child should be allowed to relocate with one parent is governed by Part VII of the *Family Law Act* 1975 ("the Act") which specifically deals with parenting matters. As there is no separate

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a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

set of legislative guidelines that deal with the issue of relocation, it is necessary to look at the judicial decisions of the Full Court of the Family Court and the High Court of Australia on how to approach this issue.

The "best interests of the child" remains the paramount consideration, although it is not the sole consideration in determining the issue of relocation. In determining what is in the best interests of the child the Court have regard to the factors set out in section 60CC of the Act.

Considerations in determining Relocation

A Judge is required to have regard to the two primary considerations of protecting a child's meaningful relationship with both parents and protecting children from harm. Pursuant to section 60CC(2A), the Court is now required to give greater weight to the need to protect children from harm than the need to protect a meaningful relationship with both parents.

The relevant additional considerations of section 60CC(3) must also be considered in determining the issue of relocation and what is in the child's best interests.

Relevant Case Law

The Full Court of the Family Court in *A v A: Relocation Approach* (2000) FLC, formulated a guideline judgment to be applied when determining relocation cases:

1. The Court cannot proceed to determine the issues in a way that separates the issue of relocation from that of residence and the best interests of the child.
2. Compelling reasons for, or indeed against, the relocation need not be shown.
3. The best interests of the child are to be evaluated taking into account considerations including the legitimate interests of both the residence and non-residence parent.
4. Neither the applicant or respondent bears an onus.
5. Treating the welfare or best interests of the child as the paramount consideration does not oblige a court to ignore the legitimate interests and desires of the parents. If there is a conflict between these considerations, priority must be accorded to the child's welfare rights.
6. If a parent seeks to change arrangements affecting the residence of, or contact with the child, he or she must demonstrate that the proposed new arrangement, even if that new arrangement involves a

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

human rights and bodily autonomy of intersex people in Australia and provides support, education and information - http://oii.org.au/.

Child Support as a Lump Sum

Child Support is normally provided in the form of regular payments from the liable parent to the carer of a child. However some circumstances may require payment to be made other than as a periodic amount, or in other words as a lump sum. Such a need may also be satisfied through the transfer of property.

These circumstances typically include: where parents are asset rich and income poor, such as farming families; where there are particular expenses to be met such as school fees or health insurance; or where the liable parent has a history of not meeting their obligations.

Where the child is under 18 and normally lives in Australia, an application must be made under the *Child Support Assessment Act* 1989. As an application for a lump sum is considered a departure from an administrative assessment, such an assessment must already have been made, even if it resulted in a zero liability.

The application can be for a lump sum in lieu of the regular payments in addition to them. Where the lump sum is in lieu of regular payments then the amount sought must at least be equal to the total paid in a single year.

For an application to be successful there must be special circumstances of the case, meaning that *the facts of the case must establish something which is … out of the ordinary (Gyselman & Gyselman).* The Court must also be satisfied that the order is just and equitable to all parties including the child and otherwise proper.

In *Zabarac & Zabarac* in 2012, it was considered well settled law that where parents have agreed to a child attending a private school, then a parent is liable to contribute to those fees, so long as they have financial capacity to do so. However this is subject to the just and equitable requirement. In *James & James* in 2013, an application by the mother for school fees was denied on the basis that the father's current salary level could not sustain such an order and as such would be unjust to the father.

An application can be made by either the carer or the liable parent. However the application can only seek that a payment be made by the liable parent. In *Reeds & Albelo* in 2012 the two children lived week about with each parent in a shared care arrangement. The mother

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

to the fact that all of the evidence indicated that the child was in "very good hands".

However, this area of the law is still quite precarious given the issues outlined above and the complex legal, medical and other issues surrounding surrogacy arrangements. If you are considering entering into a surrogacy arrangement, it is strongly suggested that you seek legal advice.

Intersex Persons

We have recently reported on the High Court decision of *Norrie v NSW Registrar of Births, Deaths and Marriages* which related to one perspective on intersex people. That perspective is not common to all intersex persons.

The following additional information about the intersex community may be of interest:

- The Attorney-General's department, in its guidelines for all Australian Government departments, defines an Intersex person as someone who may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. Intersex can originate from genetic, chromosomal or hormonal variations. Environmental influences such as endocrine disruptors can also play a role in some intersex differences.
- The Office of the UN High Commissioner for Human Rights has a similar definition which also includes that intersex status is not about sexual orientation or gender identity: intersex people experience the same range of sexual orientations and gender identities as non-intersex people.
- Intersex people may or may not wish to be identified as male or female and may battle against stereotypes in relation to gender classification.
- For many intersex people sex identification may not be a primary issue. However for those individuals for whom it is important to identify as a sex different to that specified at birth, and who have no need for surgery, there is no option currently available to alter this position. Perhaps the question for the legislature is whether a less restrictive pathway will be provided for these individuals.

Further information about intersex people and the intersex community may be obtained from Intersex International Australia, a volunteer organisation which promotes the

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

move overseas, is in the best interests of the child.

Equal Shared Parental Responsibility

In determining the issue of relocation, the Court must determine whether the presumption of equal shared parental responsibility applies under section 61DA of the Act.

Where there is an order for equal shared parental responsibility, the next step under section 65DAA of the Act is to consider whether equal time, or substantial and significant time is appropriate.

Section 65DAA of the *Family Law Act* 1975

The High Court decision of *MRR v GR* [2010] HCA 4, considered section 65DAA of the Act in relation to relocation and held that section 65DAA(1) is concerned with "the reality of the situation of the parents and the child" and "not whether it is desirable that there be equal time spent by the child with each parent". The presumption in section 61DA(1) is not determinative of the questions arising under section 65DAA(1). What section 65DAA (1)(b) requires is "a practical assessment" of whether equal time parenting is feasible. Thus, "reasonable practicability" of the circumstances will be taken into consideration.

Substantial and significant time

The Court is then required to consider whether substantial and significant time spent by the child with each parent is in the child's best interests and whether that is "reasonably practicable".

While section 61DA of the Act requires a consideration of the section 60CC factors, it is clear from the relevant case authorities that the issue of "reasonable practicability", is not solely determined by a consideration of the section 60CC factors. There are a number of other factors which are relevant including, availability and desirability of housing opportunities, the ability to derive gainful income through employment opportunities, extended family support and the emotional health and wellbeing of the primary parent, including whether they have re-partnered.

Conclusion

Relocation cases are undoubtedly difficult cases for judges to determine and it is yet to be seen whether the objects of the Relocation List are being met. These sorts of cases raise important public policy issues regarding the relocating parent's right to freedom of movement with the other parent's right to spend time with their child.

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

Hague Convention for the Protection of Children

The Hague Conference on Private International Law is a global inter-governmental organisation that seeks to unify the rules of private international law. It first met in 1893 and now has 75 members (including the European Union) with over 140 countries as parties to various conventions.

Convention number 34 was the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. This was concluded on 19 October 1996.

Australia signed, ratified and brought into force the Convention in 2003. To do this it amended the *Family Law Act* 1975 by inserting specific provisions to enable applications to be made under the Convention. It also created associated regulations.

The objects of the Convention are to establish where and how a dispute should be resolved when two countries are involved. This is achieved by setting down rules to identify which country has jurisdiction to hear a matter and which law that country should apply. It also provides a method for recognising orders already in place in another country and how they should be enforced.

Disputes covered by the Convention can include parental responsibility, protection of the child or property of the child.

The primary issue to be established in all matters under the Convention is jurisdiction. The determining factor for establishing jurisdiction is the child's habitual residence. Significantly, unlike many other proceedings under the *Family Law Act*, this means that a child's best interests are not relevant to the court's decision.

While the amendments to the *Family Law Act* to implement the Convention were made in 2003, it is only recently that any issues have come before the courts, and so far there have only been 4 matters.

In August 2013 the Court heard *Cape & Cape* about a 10 year old boy whose mother wished to relocate to Germany. There was no dispute as to the boy's habitual residence being Australia. As such the Convention related issue was only about international recognition and enforcement of parenting orders. The mother was allowed to relocate providing she registered the Family Court orders with an appropriate court in Germany, and obtained a declaration from that court that the orders were enforceable.

Four months later *Bunyon & Lewis* (No. 3) was about a child resident in the Netherlands, having moved there 11 months earlier with her

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

and credible. This was in the context of Ms Benedict having consistently represented herself to Centrelink, the ATO, on the birth certificate and at their daughter's school as a single parent. The Court found while they resided together, the parties had separate accommodation under the one roof and maintained separate lives. Further, that other than family events attended together for their daughter's benefit, there was no public aspect to the relationship. While the Court found it unnecessary to make a finding prior to 2006, it found no de facto relationship existed beyond this date. As the Court's jurisdiction is limited to de facto relationships that exist on or after 1 March 2009 it lacked jurisdiction in this matter.

What can be taken from these decisions is that each situation is considered individually and has its own special factors when the courts decide whether a relationship is a de facto relationship for the requisite period of time.

Commercial Surrogacy: Is the Child in Good Hands?

In a recent Family Court decision of *Fisher-Oakley v Kittur* [2014] FamCA 123, Justice Cronin canvassed many issues surrounding Commercial Surrogacy.

The case involved a De Facto couple bringing an application to the court for equal shared parental responsibility for a child born in India pursuant to a Commercial Surrogacy arrangement. Commercial Surrogacy arrangements are not legal in Victoria. One member of the relationship was the biological father and was named on the birth certificate.

Cronin J flagged international surrogacy as an area which raises grave concerns for the Court. The main issues of concern were:

1. The risk of selling and trafficking of babies;
2. The Court is rarely given any information about the circumstances under which the child might otherwise live if it did not move from the birth mother (surrogate); and
3. It is unclear whether the surrogacy agency was profiting from poverty and the financial circumstances that faced by many women in developing countries.

Despite these concerns, his Honour made it clear that he had to determine this case and other cases alike using the principle of the best interest of the child, which is the paramount consideration in all parenting cases. This decision from Cronin J was primarily owing

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

that is mutually acknowledged and of an emotional kind transcending the mere fact of the shared residential setting (Petersen & Gregory).

The factors the courts may, but not must, consider include: duration; common residence; sexual relationship; financial dependence or interdependence; property use and acquisition and any public aspects of the relationship.

Absent any children, a registration under state law or particular types of substantial contributions by the applicant, to make property or financial orders, the court must find that parties were in a relationship which lasted 2 years. This can be a single period or cumulative over 2 or more periods.

As mentioned above, a common residence is only one factor in finding the existence of a relationship. In *Sinclair & Whittaker* a couple had a 6 year relationship, where one party lived in a jointly owned property and the other party regularly stayed overnight, up to 3 nights a week, but continued to maintain his own residence. Significant other factors included the amount of clothing kept at the property and parties regularly travelling together to attend significant family events and holiday. Apart from the property purchase the couple maintained separate finances. These factors and others contributed to a finding that the couple had been in a relationship for over 6 years.

In contrast the parties in *Keene & Scofield* were neighbours and conducted an intimate relationship, also for about 6 years. At one stage an opening was made in the fence between the two properties to provide easier movement, however there was never any exchange of keys. While it was accepted there was indeed a relationship, going as far as regular holidays with Ms Scofield's children, it was found to go no further than boyfriend / girlfriend. Independent finances and a lack of supporting evidence of Mr Keene's claims were significant in the decision.

In *Calder & Cheffer* the parties had a relationship from 2004 until 2010, with a distinct break in 2005. The relationship included the provision of financial assistance by way of a loan between the parties at one stage, with the parties finally moving in together for 18 months in 2009-10. The court found it was only this last segment of the relationship in which they were considered de facto partners.

Benedict & Peake was handed down in NSW in April this year. The parties had a daughter in 1992 and jointly purchased and resided in a property from 1997 until 2010. Significant to the judgment was the credibility of the parties' evidence. In most issues considered, Mr Peake's evidence was preferred as the more consistent

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

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father, a Dutch national. The mother had died 2 years earlier and her cousin was taking action on behalf of the maternal family to have the child returned to Australia and seeking equal shared parental responsibility. The Court found that the child's habitual residence was the Netherlands, with particular emphasis given to the father's choice of residence, hence it had no jurisdiction to act.

However in its reasons the Court outlined a range of reasons and benefits to the matter being heard in Australia. It did this should there be an application by the maternal family in the Netherlands seeking the matter be transferred to Australia.

In 2012 there were 2 separate uncontested matters relating to overseas property of children resident in Australia. Both matters were brought by the children's mothers after the death of their fathers . In *Flemming* a property protection measure was issued, identifying the mother as the children's guardian. This was to enable an insurance company to release a life insurance payment. This provided an example of the legislation going beyond the Convention as the insurance company was present in a country yet to ratify the Convention.

In *Meroline* the paternal grandmother's estate in France was left to the children. The Court ordered that the Commonwealth Central Authority should request its corresponding French authority to assume jurisdiction of the estate on behalf of the children and enable it to distribute the estate accordingly.

De Facto Relationships

The *Family Law Act* 1975 was amended in 2009 to provide jurisdiction for the federal family law courts to hear property and financial matters arising out of the breakdown of de facto relationships.

The new Part VIIIAB is similar in many ways to the corresponding Parts VIII and VIIIA relating to marriages. However, where proof of a marriage is usually straightforward through provision of a marriage certificate, establishing a de facto relationship requires the court to consider a range of criteria, many of which will be based on the subjective evidence of the parties.

The key issue for the court to declare the existence of a relationship is a finding that a couple have lived together on a genuine domestic basis. This has also been described by the courts *as the manifestation of 'coupledom', which involves the merger of two lives (Jonah & White) and also a personal commitment*

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

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