

Relocation Decisions in Canberra and Perth: A Blurry Snapshot — (2000)* 14 AJFL 234

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Patricia Easteal, Juliet Behrens and Lisa Young

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This paper discusses the results and implications of a study of 46 relocation decisions made over an 18 month period (July 1997–December 1998) in the Canberra and Perth registries of the Family Court of Australia. This period follows the significant relocation decision of the full court of the family court in B and B (1997) but precedes the High Court decision in *AMS v AIF*. The project, carried out by three feminist researchers, involved both the collection of information about the outcomes in these cases and quantitative analysis to identify possible impacts on outcomes of particular variables. Those variables included socio-demographic factors, children's wishes, aspects of the relevant relationships, reasons for the move and process/application factors. A major finding was that there were differences in outcome between the Canberra and Perth registries, with decisions in Perth more likely to result in a favourable outcome for the person proposing the move. The findings of the project are critiqued using three themes: shared parenting, violence and 'happy families'.

Background: the conception of the project

Changes of family residence involving relocation within a state/territory, to another state/territory, and overseas, are not uncommon in Australia.¹ Where the parents of a child live together, decisions about any change of residence are essentially for the family unit and depend upon the power dynamics within that unit. Where the parents of a child are living separately, and cannot come to an agreement, the issue will be resolved either by unilateral action by one parent, or through the use of individuals and/or institutions external to the parents. A factor affecting the outcome will be advice given on 'what the law is' on relocation.

As with much of family law, there is a dearth of evidence, and a great deal of mythology and anecdote on this question. This would be reason enough to try to find out more about the issue. As feminist researchers we had additional reasons to be interested in relocation decision-making. Any decision on relocation will have significant consequences for all the parties concerned. However, feminist commentators have pointed to the differential impacts on women of restrictions on mobility as they are the substantial majority of residence parents and relocation may be particularly important for them after the breakdown of a relationship.² Feminists have also pointed out that contact parents (usually fathers) cannot (or at least will not) be restricted in their movement.³ In addition, international human rights law recognises a right to freedom of movement, and decisions to (in effect) restrict where a parent can live, are obviously serious.⁴

For some traditional scholars, the question of 'what is family law?' is adequately answered by looking at the formal sources of law — particularly legislation and case law. For us, these sources merely provide the backdrop for examining the question. The Family Court of Australia (the family court) has a long history of decision-making in this area.⁵ While the child's best interests have always been the paramount consideration when the family court makes a parenting order, case law in the area highlighted the factors particularly relevant to relocation. These included: the parent's reason for moving (including whether the reason is genuine or simply a ploy to spite the other parent); the impact of the move on the child's contact with the other parent and any family members; the relocating parent's freedom to order their life without undue interference from the court or the other parent; and whether the relocating parent will comply with any resultant contact orders. In addition, there were the obvious concerns about removing the child from its current environment and the amenity, or otherwise, of the new environment.⁶

The status of these decisions was brought into doubt by the enactment of the Family Law Reform Act 1995 (Cth) (the Reform Act) which came into effect in June 1996. This Act replaced that part of the FLA which deals with decision-making about children (Pt VII). Although there was no clear reform agenda on the issue of relocation, three aspects of the amendments had the potential to impact on relocation decisions. First, a new objects section was inserted which provides that, subject to a child's best interests, 'children have the right to know and be cared for by both their parents'⁷ and 'a right of contact, on a regular basis, with both their parents ...'.⁸ Second, the reforms, in abolishing the terms 'guardianship', 'custody' and 'access', and providing for continuing joint parental responsibility, were based in part on the promotion of shared parenting post-separation.⁹ Finally, the amendments provided that, in determining the best interests of children, the court must have regard to 'the practical difficulty and expense of a child having contact with a parent ...'.¹⁰ These provisions led to speculation that the court would be less willing to allow residence parents to relocate.¹¹ Others argued that the reforms would not affect the previous law.¹²

The question of the reforms' effects on relocation decisions came before the full court of the family court in the heavily publicised decision of *B v B*. In this case, the trial judge had varied contact orders to enable the residence mother to move from Cairns to Bendigo. On appeal, the father argued that the reforms shifted the onus from one weighted in favour of the freedom of movement of residence parents, to one that would preserve the integrity of the relationship between the child and the contact parent. He proposed that relocation should only be permitted where the residence parent could prove that continuing the existing relationship would be contrary to the child's best interests.

The full court affirmed the pre-amendment position, namely, that each case has to be determined on its own merits, with the best interests of the child as the paramount consideration. In making this decision the court eschewed approaches involving presumptions, either that contact should not usually be disturbed, or that the residence parent's decision should not be lightly interfered with. The court did, however, recognise that the happiness and well-being of the residence parent will impact on the child(ren). The full court suggested some guidelines in ascertaining best interests:

- The degree and quality of the existing relationship between the child and the residence parent;
- The degree and quality of the existing contact between the child and the contact parent;
- The reason for relocating;
- The distance and permanency of the proposed change;
- The effects on the child, both positive and negative, of the proposed relocation.

We were interested in the ramifications of *B v B* and therefore chose to examine cases over the 18 months (July 1997–December 1998) in the ACT and Perth registries following the handing down of this important decision.

The timing proved to be fortuitous. The period during which our study was undertaken precedes the more recent High Court decision in *AMS v AIF and AIF v AMS (AMS v AIF)*¹³ and the subsequent attempt by the full court of the family court to clarify the law on relocation in *A and A*.¹⁴ These cases see a renewed emphasis on rights of relocation, with the full court interpreting *AMS* as authority that the best interests of the child are the paramount, but not the sole, consideration in decisions about relocation. They also see a reduction in emphasis on the reasons for relocating. In *AMS* a majority of the High Court held the relocation issue must not be addressed using a two part approach that first identifies who should have residence, and then considers whether there are compelling reasons why that party should be permitted to move.¹⁵ The proper approach is to look at the parties' competing cases, one of which will necessarily involve residence in a new location. The full court in *A* interpreted *AMS* as meaning that: '[a]s one, but only one, of the matters considered under s 68F(2), the reasons for the proposed relocation as they bear upon the child's best interests will be weighed with the other matters that are raised in the case, rather than treated as a separate issue' (at para 89). Our study covers a period when a party's reasons for moving were, by and large, a major focus for the decision-maker. It may be that future decision makers will weight these reasons differently. It may also be the case that simply moving away from the traditional two step process causes a change in the way evidence is presented, and decisions are made. To assess what change, if any, there is as a result of the High Court's decision, one must start with a picture of what historically influenced the family court's decision

making process in relocation cases. Although we did not begin this project as a benchmark against which later decision making could be considered, it may serve that purpose.

Although empirical research will never provide a definitive answer to the ‘what is family law?’ question, it can provide a snapshot (or, in some cases, a moving picture) from a particular perspective, of family law. It may, for example, be able to provide us with a clearer idea of what is going on in a particular registry. Parker and Drahos have postulated that, ‘to the extent that there is predictability or determinacy [in family law], it is through conventions constructed and adopted by rule users’.¹⁶ They go on to note that these conventions may be very localised. In fact, one of our aims in using two registries was to attempt to identify whether there are differences between them that are identifiable.

Aims and methodology: the pregnancy (of the project)

The aims of the project were:

- To obtain data on numbers of cases and outcomes in relocation cases post-*B and B* and to determine if there are any localised differences on outcomes.
- To determine the correlations (if any) of particular variables with outcomes in relocation decisions, and whether there are any significant localised differences.

The principal researchers are based in Canberra and Perth, and those two registries were chosen mainly for that reason. Because we are interested in regional differences, having two registries which are distinct from each other in a number of ways is useful. In addition, it was important to study registries where there were likely to be a significant number of relocation decisions. We thought this would be the case for Canberra (because the population tends to be quite mobile for work-related reasons) and for Perth (which is geographically isolated). There was, however, a potential complication with using these two jurisdictions: the courts and legislation applied differ between the two. In all states/territories except Western Australia, decisions on relocation would usually be made by the Family Court of Australia. In Western Australia decisions are made by the Family Court of Western Australia. The relevant law to be applied is the FLA or, for children who are not children of the marriage and where both parents live in Western Australia, the Family Court Act 1975 (WA) (the FCA).¹⁷ In fact though, the vast majority of cases in our study were decided under the FLA, with only two of the 20 cases from Perth involving decisions under the FCA prior to amendment. We have built this legislative difference into the discussion of our findings.

Research assistants in both jurisdictions liaised with the court and worked on identifying relevant judgments for the research period — some retrospectively and others as they took place.¹⁸ The court personnel were extremely cooperative with a number of judges providing active assistance. However, identification of cases involving relocation was difficult given that no category for relocation existed in the courts' computer taxonomy. In addition, because relocation issues are frequently attached to other applications (such as residence) all files involving children's matters over the project period had to be examined in order to identify relevant cases.

Indeed, even the classification of a decision as a relocation decision can be problematic. In some cases a party will already have moved, in others a party will be proposing a move.¹⁹ The ‘mover’ may or may not have the children currently with them. For our purposes a relocation case is one where it is the proposal of one party that the party move with the children or that the children move to that party from the general geographic area (and not just the specific residence) where they are living at the time of the decision. This would include cases where one party has already moved from the previous place where they and the children lived. The ‘mover’ is the person who has actually moved themselves or who proposes to move. They will be ‘successful’ where they are given permission to keep the children in that other place, to move the children to that other place, or to move with the children to that other place.

Twenty-six relevant cases were identified in the ACT (eight resolved by consent and 18 judgments) and 20 judgments in Perth (all judgments).²⁰

A rather lengthy recording instrument was developed for the research assistants to report file and judgment data.²¹ It included:

- *socio-demographic factors* (eg gender, ethnicity, occupation, number and ages of children, alcohol/drug abuse)
- *children's wishes*
- *aspects of the relevant relationships* (eg amount of contact with the child, payment of child support, repartnering, violence)
- *reasons for the move* (eg higher paid employment, extended family, repartnering, conflict reduction and safety)
- *the process* (eg already relocated pre-process; type of application, decision by court or settled by mediation, previous litigation, legal representation).

These variables were used for a variety of reasons. Our reading of reported and unreported decisions, our interaction with participants in the legal process, and our understandings of our respective jurisdictions (Canberra and Perth) led us to anticipate that the most important factors in decision making in relocation decisions would be: the relocating parent's reasons for moving; the possibility for contact after the move (eg distance, economic resources); whether the 'mover' had repartnered. Of course, we looked at many factors besides these. Some (eg the relevance of children's wishes) were taken from the statutory list of factors required to be taken into account in decisions about parenting; others were sociodemographic traits that we speculated may have an impact. We hoped the factors included tested our assumptions and any other important indicators. In retrospect there were some variables that we should have included or defined more clearly. As an example, we asked about the income of the non-mover (which will impact on the ease with which contact can take place), but the judgment rarely provided a clear figure and so information on that variable was rarely recorded.

Inevitably the variables we chose for the instrument were factors which are fairly easily identifiable and measurable in numerical terms. This is an obvious limitation of quantitative ('number-crunching') research. It would have been very difficult to build in measures for more intangible factors — for example, the judge's perception of the quality of the parenting. Following the quantitative analysis, however, where it appeared useful, some judgments were examined for these more indefinable elements and some findings and comments on these have been built integrated the paper.

A single individual translated the recording forms into numerical variables; this ensured that there would be no inter-coder variation. These numerals were then converted into a file that was analysed using SPSS. First, the entire data set (n=46) was cross-tabulated looking at ultimate decision. Then, the 38 judgments data set was cross-tabulated twice: by jurisdiction and by ultimate decision. Most results are from this data set. The eight ACT cases settled by mediation/conciliation were compared against all variables with the judgment cases.

The number of judgment cases is small but we are hopeful that they represent the entire relevant data set and are not merely a representative sample.²² The results are not, of course, generalisable to other jurisdictions, nor can they be used as predictors of outcomes in cases within the jurisdictions we have dealt with.

The birth: Delivering the findings

Part 1: The judgment group

Of the 38 cases in this group (18 in the Canberra registry and 20 in the Perth registry), 26 (68%) of movers were successful. We deal with local differences in Pt 3. In this part of the paper we examine the relationship or lack thereof between outcome and socio-demographic factors, reasons offered for the move, aspects of the relevant relationships, children's wishes and procedural and other variables.

Socio-demographic variables

Gender

As we suspected, all but two of those wanting to relocate were women. Of the 36 women 'movers', 25 (69%) were permitted to move.

One of the two male 'movers' (in Western Australia) was allowed to relocate. The other (in the ACT) was not. In fact, the decision changed residence from him to the mother.²³ Faulks J refers to two of that father's actions which 'do not devolve to his credit and which cause me serious concern'. Both involved the man assuming an all-powerful role with his wife at separation. He had provided her with no alternative but to return to her native land, India. (As a consequence, he had gained custody.) Further, the judge felt the husband's correspondence with his wife showed 'a patronising, controlling and condescending approach to the sharing of parenthood that, in my opinion, is totally inappropriate'.

Employment

Almost half of the 'movers' (n 18) were not in paid employment at the time of the application. Movers who were in paid employment (whether in unskilled, skilled or professional occupations) had an increased chance of being successful while movers not in paid employment at the time of the decision seemed to have a slightly reduced chance of success. Outcome was not significantly affected by the type of employment (professional, skilled, unskilled).

Table 1: Employment of 'mover' at time of application, in judgment cases.

	Allowed to move (%)	Not allowed to move (%)	Total (%)
Unskilled (n=5)	80	20	100
Skilled (n=4)	75	25	100
Professional (n=8)	75	25	100
Not in Paid Employment (n=18)	61	39	100

What might be the reason for this apparent effect? One obvious significance of employment is the financial impact it has on enabling (or curtailing) contact after the move. As we discussed earlier, unfortunately full information about the extent to which the non-mover could afford to pay for contact costs was not available. The income of the mover is also relevant to the question of ease of contact. While this may explain the slightly lower figure for those who are not in paid employment, one might also have expected a higher figure for those in professional, as

opposed to unskilled occupations.

Distance

Distance is another factor that might influence a decision, due to the impact it may have on continuing contact. Also, the family court has repeatedly said²⁴ that it may be appropriate to adopt a different (more stringent?) approach where overseas, as opposed to interstate, travel is contemplated. However, distance did not seem to be a mitigator since about an equal proportion of those going long distances (67%) or overseas (67%) were allowed to leave as those wanting to relocate only a short distance (75%).

In one situation a mother was not allowed to move to the USA to study but was permitted to relocate a lengthy distance across the State of Western Australia.²⁵ The judge's concern about the physical distance between father and children did not seem to be the major factor considered (he described the father as 'domineering, forceful, unbending and could only see his point of view' plus 'not in tune with the children's emotional and financial needs'). The refusal of the overseas move seemed to reflect what the judge perceived as the potential economic hardship for the woman and her children in the US. None of her extended kin were able to assist her financially over the number of years she would need to study. These economic constraints could limit the children's lifestyle and their contact with the father. So, as we might have expected, distance could become an important variable in a particular case *if* coupled with economic hardship and diminished contact. This makes some sense, but does not seem to justify 'special' consideration being given to long distance moves, as judges have advocated — the same factors need to be considered, but they may have differential impacts (eg on contact) when a longer move is contemplated.

Alcohol and addiction

Few allegations of alcohol and drug addiction were reported, with only three made against movers and four against non-movers.

In one Perth case allegations of addiction were made about both parties; the father acknowledged his drinking habits and the mother her prior use of amphetamines and present occasional use of marijuana.²⁶ Barlow J in essence concluded that neither parent demonstrated any more responsibility than the other in this regard — the abuses were dealt with in one paragraph that almost intimated that, while true, they cancelled each other out as decision making factors.

It may be that in this case the mother's relocation to a small, isolated coastal town actually helped her case. One of the father's contentions was that the mother had some criminal connections arising out of her prior relationship with an acknowledged heroin addict. Apart from the fact that this man had been murdered, there was no record in the judgment of how this supposed connection was established. Nonetheless, the judge found that by virtue of this relationship it was:

... (P)robably inevitable that she would come into contact with a criminal element. At the very least, she was at risk of doing so. However, the evidence ... leads me to conclude that since [his] death, and since the [mother's] move to D..., the position has changed.

In another Perth case, the mother was allowed to move to Queensland. The judge noted the husband's alcohol problem and that:

(T)he husband's mother acknowledged that alcohol was a problem in her marriage and a cause of its breakdown. One can assume, therefore, that that there were problems in the family in which the husband was brought up ...²⁷

This is one example of a case where addiction may have played a role when the individual's substance abuse is seen in a larger context as affecting his or her parenting ability and 'the best interests' of the child(ren).

Repartnering

We had suspected that those who had repartnered at the time of the decision might be more likely to be allowed to move; in these cases there are two adults who are directly affected by any decision to restrict movement. Of the 31 cases in which the information was available, 16 of the movers had repartnered. However, the data did not support a conclusion that repartnering of the mover was a significant variable with only a slight difference in permission to move: 68.8% of those repartnered as compared to 60% of those who had not.

Number/Ages/Gender of children

None of these factors had a particular influence upon decision-making. A hypothetical woman with more than two male children and the youngest aged either under four or 11 and older had the highest probability of getting the green light for relocation. These findings are counter-intuitive. For younger children more frequent contact for shorter periods of time is generally seen as preferable. Also, there are particular difficulties with interstate travel for very young children and there is increased expense associated with contact in cases where there are more children.

Reasons offered by movers for relocation

Given the emphasis in the decision of *B v B* and prior case law on the reasons offered for relocation, we would have expected certain such reasons to correlate positively with permission to move. That is, where the 'mover' had what the family court had said were 'good' or compelling reasons, then a move was more likely to be permitted (as the law stood at the relevant time). In constructing the form for use in analysing decisions we identified a number of reasons that we thought would be most likely to be used in applications. In fact, as it turns out, our identification of those reasons was not as complete as it could have been, and this explains the high number of cases (n=22) in the 'other reasons' category. (See Fig 1.) The 'other reasons' that were offered included: for nine, to resolve on-going conflict (78% successful), six who wanted to maintain their culture (three successful); four who sought a return to their previous home (two successful) and two who justified relocation on the grounds of study (one successful). As will be evident from Fig 1, in many cases more than one reason was given for the move.

The findings are very interesting both in terms of the small number of cases in certain of the categories we had nominated (lifestyle change, escape child abuse) and also in terms of which reasons seemed to correlate with increased chance of success for the mover. Of course, decisions about what to present as the bases for a move are partly strategic, and it may be that (whether as a result of legal advice or for other motives), reasons that were operative were not put that way in a particular case. Legal advice would have impacts on the number of cases in each category in other ways. For example, if lawyers perceive (as anecdotal evidence suggests they do), that employment reasons are likely to help a client's case they may advise a client to get a job offer before applying for permission to move. Also, lawyers may advise clients who do not have what lawyers perceive as a 'good reason' not to proceed with their case.

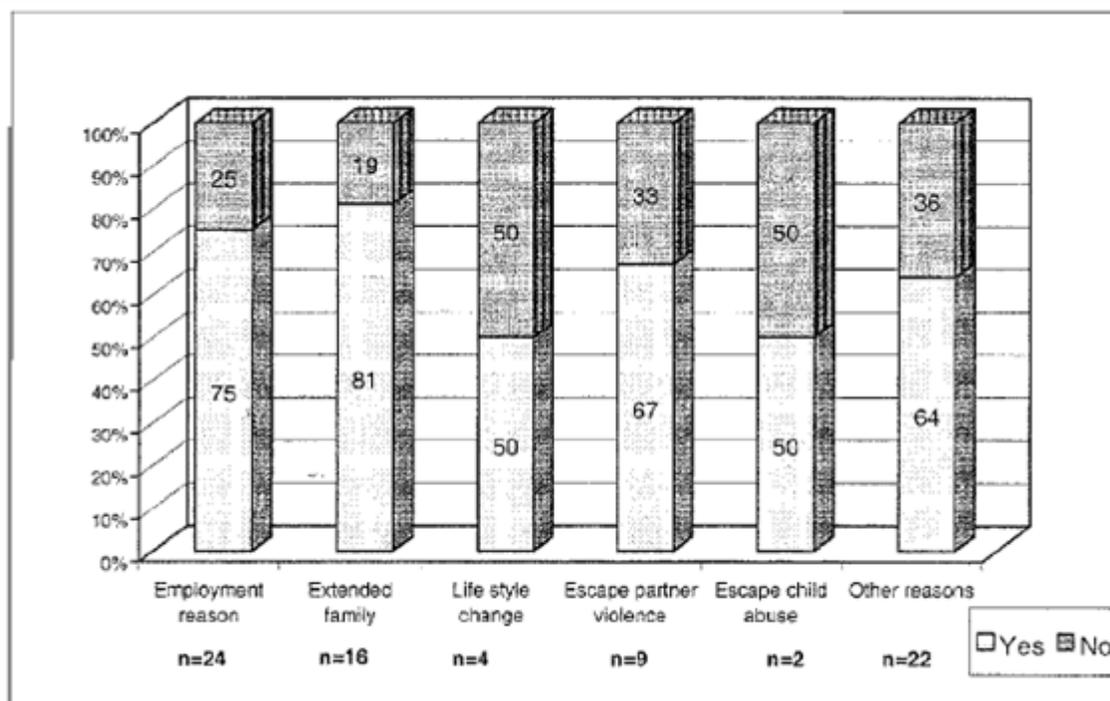


Figure 1: Reasons offered for relocation, by judges' decisions

The grounds that seem to correspond most highly with success for movers are, as Fig 1 shows, employment and the desire to reunite with extended family.

Those applying to relocate gave a variety of employment reasons: higher paying job (86% could go), currently unemployed with a job at the other end (40% allowed), a different job (80%) and employment for a new partner (86%). Judges found most employment reasons to be genuine. In one case the judge accepted that the very nature of the mother's employment required regular relocation:

I am satisfied that the reasons for locating advanced by the wife are reasonable and appropriate, and that it is to the benefit of her future career should she accept the relocation. It is then a matter of balancing that against the best interests of the child. While, it is, clearly, in the best interests of the child that the child should have contact with both parents, the fact is that they are both in the services and relocation is inevitable on the part of either of them ... I should not restrict the wife's freedom of movement.²⁸

In some cases, judges explicitly recognise the importance of financial security for carer parents to the child's best interests.

The proposals for the children to live in England while necessarily depriving him of time with the children, at least to some extent, represents the only secure financial foundation for the mother and hence in this case for the children.²⁹

As pointed out by Faulks J, an increased income (in this case double) might allow greater and more flexibility in contact.³⁰

The finding that only 40% of those who were not in paid employment and who were proposing to move to paid employment were allowed to go is surprising, given the emphasis on financial security. The numbers of cases where this was the situation are very small, however. We can speculate that a move to employment from a situation of unemployment may well involve low levels of income and this is likely to make contact more difficult.

Eleven of the 13 movers who said that they wanted to be in the same city or area as extended family were regarded by the judges as offering a sincere, and obviously compelling, motive. In *D v M*, the woman felt isolated in Western Australia and wanted to move back to New South Wales to be closer to family (despite reduced job possibilities there). Perhaps since she was proposing to live with her parents, they gave evidence and:

I found them to be responsible grandparents, in tune with the needs of their grandchildren and who were supportive of the wife.

I was satisfied that they would provide whatever support necessary for the wife and children whether it be in New South Wales or Western Australia.³¹

Even when the grandparents in 'extended family' cases did not give evidence, the judges usually made some comments about the relative merits (in the context of the child(ren)'s interests) of the relatives in the proposed location as opposed to any in the current area.

Unlike the trial Judge in *AMS v A/F*, lifestyle was conceded by at least one of the judges to being relevant in allowing relocation.

I am satisfied that the lifestyle of the family ... will be enhanced by the move. An inability of the wife to relocate would, in my view, impose significant pressures upon her, and diminish her capacity to cope and diminish the quality of the lifestyle in her family.³²

One third of those who specifically cited violence as a reason for relocation were not permitted to leave.³³ Yet of these nine cases, the judges found violence had occurred in seven (78%). Our further findings on violence are reported next.

Aspects of the relevant relationships

Presence or absence of relationship-related variables, such as the amount of time the couple had cohabited or the length of their separation, did not correlate with particular outcomes.

Violence

As Table 2 shows, a higher proportion of movers who had made allegations of partner violence pre-separation, *after* separation, and towards the children were successful. However, in a substantial minority of such cases, the mover was not successful.

Table 2: Mobility decisions, by allegations of violence.

Violence alleged to have taken place	Allowed to move (%)	Not allowed to move (%)	Total (%)
To mover by non-mover (before	77	23	100

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separation) (n=13)			
To mover by non-mover			
(after separation) (n=10)	80	20	100
Children witnessed			
(n=7)	10	90	100
Physical to children			
by non- mover (n=7)	71	29	100
Sexual to children			
by non- mover (n=3)	33	67	100
Abuse to children			
by mover (n=5)	80	20	100
To mover by new			
partner (n=3)	33	67	100
Partner violence by			
the mover (n=7)	71	29	100

Part of the reason that violence does not necessarily produce a decision in the favour of the 'mover' may be the fairly low frequency of judges' 'finding' that violence had taken place: less than half of those who had alleged past violence had it officially affirmed by the judge; less than a third with post-separation violence; and none of the alleged child abuse by the non-mover. Other reasons for these findings are discussed in our conclusion.

Extent of contact of child(ren) with non-mover

There were five cases where it was clear from the judgment that a substantial amount of regular contact with the non-mover was taking place immediately prior to the proceedings. These were cases where the non-mover had contact with the child(ren) for more than 2 nights per week or where there was an arrangement for care based on alternating substantial blocks of time (for example week and week about arrangements). Two of these cases were in Canberra and neither of the movers in these cases were successful. In the three Perth cases two movers were successful and one was not.

Compliance with contact orders

Table 3 indicates that there was only a slightly higher chance of success for the mover where court-ordered contact was being complied with as where it was not. This is interesting in the context of *B v B*, which stated that the relationship with contact parent should be one issue in determining the best interests of the children.

Table 3: Relocation decision, by ex-partner's adherence to contact orders.

Ex-Partner's contact	Allowed to move	Not allowed to move	Total (%)
according to court conditions?	(%)	(%)	
Yes (n=14)	57	43	100
No (n=8)	63	38	100

Total may not be 100% due to rounding error.

Of the four whose ex-partners were only allowed supervised contact, two were not permitted to move.

Wishes of the child

There were mixed results concerning children's wishes. First, there were only 14 cases where children's wishes were evident from material noted on the file. When children were asked, their wishes seemed to make little difference to the outcome.³⁴ One such situation was *S v M*.³⁵ The mother/mover, the child and a psychologist alleged that the father was sexually abusive to his daughter. A fairly typical 'battle of the experts' took place as recounted by the judge, with several other health practitioners disbelieving the child, preferring a view of the mother as neurotically over-anxious and imposing her perceptions onto the child. More of the 'experts' were on the 'no abuse' side. Finn J held that the child was at no risk of sexual abuse and ...:

... (T)hat the importance in the child's long-term interests of attempting to establish 'trauma-free' contact with the father, must outweigh at this point in time those benefits which a move would be likely to bring to the mother ...

The child here was eight and had consistently expressed her desire to move to Queensland with her mother. The judge relied very heavily on one expert's view who had a long association with the child. Finn J's conclusions were not unusual in cases involving sexual abuse allegations: that the child didn't really know what she wanted; that even if she did, her wishes weren't in her own best interests; that she would suffer later guilt if she felt herself responsible for breaking ties with her father, and; that she really enjoyed, and benefited from, being with her father.

Interestingly, despite the fact that the reason for the move was accepted to be partly to improve employment opportunities, and where the child strongly expressed a wish to move, the fact of an abuse allegation possibly reduced the mother's chance of success. The perceived need to facilitate the relationship with the father, *particularly in light of the child's opposing wishes*, appeared to weigh heavily on the judge's mind in restraining the relocation.

The weight given to a child's voice might be affected by an individual judge's definition of 'maturity' and perception of the child's ability to determine their own best interests. This was mentioned several times. For instance:

There was a lack of evidence that S had other than the expected maturity of an 11 year old. There was no evidence which would lead me to conclude that at 11 years of age S is too young to have the capacity to develop feelings as to where she wants to live. I would not suggest for one moment that at 11 years of age S would have sufficient maturity to determine what was in her best interests for the future. That is not the same, however, as saying that she is not sufficiently mature to have a view as to what she wants to happen to her.³⁶

The judge ruled in accordance with S's wishes.

Procedural/Application variables

In addition to the traits mentioned above, we also recorded some aspects of procedure in the case timing, type of application and process. A few of these factors did seem to correlate slightly with particular outcomes.

Temporary or permanent move?

We recorded whether the proposed move was a temporary or a permanent one. There were only three cases where the proposed move was temporary, and in each of these the mover was successful.

The point in the relocation process when the hearing takes place

Of the 13 'movers' who had already moved, six were in the ACT and seven in Perth. Eleven of the 13 were successful as opposed to only 60% of the 25 'movers' who had not yet relocated. The circumstances of the move, including whether or not the decision was unilateral, may have an impact on the outcome. For instance, in discussing one woman's move to Sydney from Canberra, Faulks J, in an interim judgment, referred to the fact that the relocation had been discussed by the couple before she left with a recognition that the two would live in different cities since her extended family resided in Sydney. Further, he stated that:

It follows that I cannot and do not find that I am persuaded in accordance with the tests laid down in *Briginshaw v Briginshaw*, that the mother moved or stayed for *improper* reasons, that is, to frustrate the father's contact contact or to obtain some sort of procedural advantage. These are factors which are referred to in *B v B*, Family Law Reform Act 1995 in supporting generally the principles enunciated in *Holmes v Holmes* in relocation cases.³⁷

Acting unilaterally will not necessarily be fatal to the mover's application, however. In another ACT case, the mother had relocated because of alleged violence by her ex-partner and:

... The basis for her doing so [going to Queensland] it would appear is the fact that she says that she was in constant fear of Louis's father and would be, in her words, 'always looking over her shoulder' if they were in the same vicinity.³⁸

She was allowed to remain in Queensland with the child.

Violence is not always accepted as a legitimate basis for moving prior to court approval. In *W v B*, the judge indicated his knowledge that domestic violence proceedings in the Magistrates Court had taken place twice but

stated that:

Although when she fled to Melbourne, the mother did so she said to preserve her own safety and that of the children, I do not accept that the children were at any risk.

... her departure was 'in defiance of her undertaking' and in the judge's view'... her flight to Melbourne was essentially a flight to [her boy friend].³⁹

The child(ren)'s best interests are often seen as resulting from the least disruption in their lives. It may well be that this factor explains what seems to be an increased likelihood of success in some sorts of cases where the mover has already moved.

Previous litigation

A factor which appears to impact on relocation outcome is the basis on which contact is determined. As table 4 points out, cases in which contact was by consent were far more likely to correlate with positive relocation decisions.

Table 4: Relocation judgments, by process of contact establishment.

Contact established by:	Allowed to move (%)	Not allowed to move (%)	Total (%)
Consent (n=17)	77	24	100
Order (n=13)	46	54	100

Total may not be 100% due to rounding error.

Type of process/resolution

We analysed outcomes in three categories: consent arrangements, interim judgments and final judgments. Movers at final hearings were moderately less successful in their relocation (see Table 5) than those at interim hearings.

Table 5: Relocation decision, by type of resolution.

	Allowed to move (%)	Not allowed to move (%)	Total (%)
Consent (n=8)	75	25	100
Interim judgment	75	25	100

(n=8)

Final judgment (n=30)	67	33	100
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This finding is not what one would expect, given the generally accepted approach in interim matters. This is referred to in one ACT case:

In addition, this being an interim application, the court has to also consider the principles set in *Cilento*, and the cases which have followed that decision. In very simple terms, the full court has said that in interim cases, unless there is some very good reason to change a working status quo, the interests of a child will usually be advanced by minimising the number of changes faced by a child.⁴⁰

Other empirical studies have found that relocation is less likely to be allowed at interim stage than at final.⁴¹ Our study only involved eight decisions at interim stage and the results may be explained on the basis that these cases were likely to have been exceptional.

Other

Whether the case involved a direct relocation application (13) or was one where relocation was part of another application (24), almost the same percentage for each group (69%, 67% respectively) were allowed to relocate.

If both had legal counsel decision (n=30) relocation was the outcome in 67%; of the six where only the mover had legal representation, 83% and in the only one where just the non-mover had a lawyer, the mover was not permitted to move.

Part 2: The consent cases

Of the eight ACT cases that culminated in consent orders, half were straight relocation applications in contrast to only 35% of the judgment cases. All eight movers were represented by counsel and in seven (88%), the outcome was relocation.

Only one of the eight had already moved and there were no differences in numbers or ages of children between this group and the judgment sample. A slightly higher proportion (50%) had repartnered in contrast to 42% of the latter. Five of the eight were moving a medium to far distance, one overseas and two nearby — about the same or slightly farther than in the court sample; so, consent orders were not a result of shorter moves.

All of the non-residence parents were meeting the conditions of their contact orders and there were no instances among these eight of supervised contact, with seven having establishing contact by consent. Thus, not surprisingly, this group appears to have less litigious histories. Having said that, the frequency of alleged domestic violence (and the witnessing of it by children) pre-separation was about the same although post-separation violence was alleged by only two of the seven for whom this information was known, as compared to 10 of 27 in the court sample. Child abuse by the non-mover was alleged for only one of the eight (seven of 38 in judgments). There were no allegations of abuse perpetrated by the mover toward either her ex-partner or her children although two of the current partners were allegedly violent. Reasons provided for moving were roughly similar although only one of the eight claimed to be escaping violence in comparison to nine of the 38 judgment cases.

Therefore there is little variation between the sub-set of non-judgments and the judgment cases in most of the socio-demographic and relationship background variables. The only difference identified at this stage is not surprising — the relative lack of adjudication required in other, potentially contentious, family law issues. In other

words, if the couple has been able, through mediation or conciliation, to achieve agreement on residence, contact and support, then there was an increased likelihood that relocation would be resolved in the same way.

Part 3: Local conventions (in relocation midwifery)

Significant variation between jurisdictions was evident in the judgment cases. Of the 18 Canberra cases, in 10 the mover was successful (56%); of the 20 Perth cases, in 16 the mover was successful (80%). How can we explain this difference?

It could, of course, be an anomaly due to the small sample size. However, these judgments do represent all or the vast majority of the relocation cases that went to the courts in the two jurisdictions over an 18 month period. Therefore, one would expect the results to be representative of relocation cases in those two courts during that period.

As indicated earlier, we were concerned that the differences in the applicable legislative provisions had an impact on outcomes; that is, that relocation was more likely under the unamended provisions of the Family Court Act. Two of the Perth cases involved decisions under these provisions and, in both, relocation with the children was allowed. When we remove these two cases though from the data set we find that positive outcomes for movers are still much more likely in Perth (78%) than in Canberra (56%).

The next answer is that a variable that tends to lead to positive relocation judgments takes place more frequently in Perth cases than among the ACT sample. However, the few process or temporal factors that led to increased chance of a positive relocation decision are either the same or just slightly more common in Perth than in the ACT:

- Already moved (about one third in each jurisdiction),
- Temporary move (two of the three were in Perth),
- Contact was decided by consent (53% in the ACT, 62% in Perth).

Those social background traits that we thought might make it more likely that the move would be constructed as in the child's best interests were more likely to be present in ACT cases (despite a lower frequency of relocation orders). For example, more 'movers' in the ACT offered employment (eg moving to a higher paid job: five in ACT, two in Perth) and violence issues as rationales for their move. The one factor supporting this difference, which may result from the geographical isolation of WA, was that many more in WA offered moving to extended family as a reason for moving.

Actual domestic violence histories were similar in the two jurisdictions with seven of the 18 ACT women alleging pre-separation violence and six of the 20 'movers' from Perth. But, the Perth judges were more apt to find that violence had taken place. For instance, of the five Western Australian women who specifically named violence as a reason for relocation, all judges found it genuine compared with only half in the relevant ACT cases.

Six ACT women claimed post-separation violence, more than the one fifth in Perth. Again, somewhat counter-intuitively given the final decisions, more children in the ACT had witnessed the violence (five) as compared to only two in Western Australia. In addition, more in Canberra alleged that child abuse by the non-mover had taken place (5:2).

More ACT women had repartnered — one half in contrast to one third in Perth. Fewer ACT women were proposing to move either overseas or a medium to far distance.

The factors then that we could expect to lead to greater chance of success for the mover were not more common in Perth, except for extended family reasons for the move.

Perhaps the individual gatekeepers also need to be considered. However, when we look at the decisions by

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individuals in table 6, we can see a consistency within the jurisdiction, although for Canberra, one judge (Faulks J) made the large majority of the decisions.

Table 6: Relocation decisions, by individual judge

	Allowed to move (%)	Not allowed to move (%)	Total (%)
Faulks J (ACT) (n=14)	57	43	100
Other ACT judges (n=4)	50	50	100
Holden CJ (Perth) (n=4)	75	25	100
Tolcon J (Perth) (n=8)	75	25	100
Martin J (Perth) (n=4)	100	0	100
Other Perth judges (n=4)	75	25	100

The idea that there are local conventions suggests more than that a certain outcome is more or less likely at a particular registry. A local convention might incorporate the idea that particular variables may have distinct effects in a particular registry. Unfortunately the number of our cases did not permit proper analysis of whether variables correlated with outcomes to a greater extent in one place than another. We attempted to identify whether particular reasons for relocating had a greater impact in one location than another but the numbers of cases were so small that no meaningful conclusion could be drawn.⁴²

Conclusions: The baby!

This project provides us with some data about outcomes in relocation cases in Canberra and Perth in the 18 months after the *B v B* decision. Of the 38 judgments that were identified as taking place in Perth and the ACT between July 1997 and the end of December 1998, in 26 the 'mover' was permitted to relocate with the children. Thus, slightly more than two-thirds of 'movers' were able to go. It is notable that in the Canberra registry, only slightly more than half of the movers were successful. Those of us concerned about restrictions on women's mobility have cause to be concerned about these figures.

We did not have any expectations about what we would find. Certainly, we perceived that before the reforms it was felt in some quarters that relocation was easily achieved. Our suspicion is that was true only of certain cases. We have no data to compare this period with the pre-*B v B* period or the pre-reform period and so are unable to say whether it is harder to get court permission to move with children than it was before the decision was handed down (though we suspect not). We are interested in the reactions of legal practitioners to the two-thirds figure. Research by Dewar and Parker suggests that the perception amongst lawyers is that relocation is less likely to be allowed post-the reforms and post-*B and B*. If this is the case, then it may be that fewer cases are reaching the court stage than previously — in other words, that clients are being discouraged by their legal advisers from moving because of a sense that they are less likely to succeed than previously.

It may be that a two-way relationship develops between legal advice (or other forms of advice) and outcomes. Lawyers (counsellors, mediators ...) presumably base their advice on expected outcomes. These may or may not be empirically based (our study shows outcomes may be counter-intuitive). Their role as gatekeepers then means that there is a considerable amount of sifting of cases. This necessarily affects outcomes. We have noted, for example, that the distance of the move did not appear to affect outcome and that movers appeared to be slightly more successful at interim stage. It may be, however, that those planning to move long distances (for example, overseas) have received advice that this is unlikely to be allowed. Thus, only cases which are particularly 'worthy' on other factors may reach the court. Because the case for movement is otherwise strong, they are equally likely to be given permission to move. Hence the empirically reported outcome is that the distance makes no difference, but in practice it may well do so. The same may be true for interim applications; parties may be advised not to proceed with the other than very 'worthy' applications at that stage.

Another important finding was that there are noticeable differences in outcomes between the Canberra and Perth registries. As noted, a higher percentage of movers were successful in Perth than in Canberra. This is some evidence for the thesis that there are regional differences in family law — a thesis supported by empirical evidence in other areas as well.⁴³ Moreover these differences are not obviously to do with individual decision-makers. It may be, however, that the particular views and values of one, or a group, of judges in a particular registry have an impact on decision making by the others. In the absence of any measurable factor being given more emphasis in one registry than the other, this difference seems best ascribed to less tangible value judgments on matters such as the father-child relationship, women's independence, the right to freedom of movement, and so on. These are not the sorts of matters that can be assessed in a quantitative way.

It is arguable that our findings on reasons for moving support our theory that this was a critical aspect of decision making, at least during the relevant period. A judge might well expect mothers to forego lifestyle changes, study and so on to foster father-child contact. However, a carer's career and the financial security of her family and the support of extended family may be far more compelling reasons in the mind of a judge — perhaps we are seeing that among the standard set of reasons, these are the 'best' reasons. Safety from family violence is given some priority by judges, but based on our findings we have to speculate that the effects of family violence are still underestimated by the judiciary (this is discussed further below).

While it is to be expected that such an exercise of discretion will see outcomes determined by combinations of variables, and flavoured by intangibles such as personal value judgements, the inability to pinpoint more variables which appear to have an impact on outcomes is somewhat dissatisfying. But then, as critical scholars we should perhaps celebrate the confirmation of indeterminacy which is such an important part of our critique.

It was not uncommon for the judges to refer specifically to *B v B* and its principles as they applied to the case under question. In examining judgments, the decision makers fell back on the principal fulcrum: 'the best interests of the child'. Most wrote something like:

I repeat that in determining these proceedings, the best interests of the children are the paramount consideration. I assure each of the parties that it is this consideration which I have foremost in my mind when arriving at a decision in this matter. In order to determine what is in the best interests of the children, it is necessary for me to consider the various subsections of s 68F(2).⁴⁴

Each then goes on to interpret the subsections within the context of the particular case details. These usually include: the nature of the relationship between the children and each parent (the children's perceptions are included if they are old enough) and 'step' parents; the wishes expressed by the children; the potential effect of any changes on the children's circumstances; and the reason for the relocation. What emerges of course at this point is an all-pervasive indeterminacy in how those components of 'best interests' are interpreted *and* weighted. That may be a negative way of describing what *B v B* advocated in the first place — a determination of each case on its own merits.

No single factor, then, is determinative of a judge's views of children's best interests. The fact that some variables do not play a more distinct role is disturbing to us and confirms our concerns about the position of women in family law. There are three themes to which we particularly want to refer: 'shared parenting', violence and 'happy

families'.

'Shared parenting'

One of the reasons for the speculation that relocating would be more difficult under the Reform Act was the emphasis that Act placed on shared parenting. Thus, one might expect that factors which are arguably indicators of successful and genuine shared parenting would *reduce* the likelihood of a relocation order — where shared parenting seems likely, keep them close, however if it is unlikely, distance will not change that. The focus on 'shared parenting' in current family law and policy has been critiqued as unrealistic and potentially oppressive for women.⁴⁵

We had only five cases in our judgment group where it was clear from the judgment that substantial contact with the non-mover was taking place. This is interesting in itself, as indicating that the extent of shared parenting after separation was not great in this group of cases. While that might be an intuitive result in the sense that people who are successfully sharing care are presumably less likely to litigate relocation and other issues, one might also expect that where there is shared care a decision by one parent to move would be likely to be hotly contested by the other parent. Again, parents may be receiving legal advice that they are less likely to be successful where there are shared parenting arrangements, and this may partly explain the small number of the cases in this group.

There were insufficient cases involving shared care for us to draw any conclusions about whether that fact does affect the outcome in relocation decisions. As indicated, of the two such cases in Canberra, neither were allowed to move. In two of the three cases in Perth, movers were successful. If this factor is having an impact on relocation decisions, it might create a disincentive towards such arrangements for some parents who may be reluctant to commit to shared parenting if it means their relocation will be restricted.

Other factors that would seem to be indicators of successful shared parenting — for example, whether or not contact orders had been complied with — did not correlate with particular outcomes. Also, as we have seen, if there had been previous contested contact proceedings (which one might argue is an indicator of the poor sharing of parenthood) the mover was *less* likely to be successful. This may reflect a judicial attitude that shared parenting needs to be promoted amongst those who are bad at it. Again the dangers of such an approach have been a major focus of feminist critique.⁴⁶

Violence

As we have seen earlier, there were fewer women using escape from violence as a reason for relocation than claimed to have experienced abuses during or after the relationship. One might ponder why this would occur since mentioning it might strengthen their cases. There are many possible and sensible explanations: gate-keeping by lawyers who fear that if the violence is not taken seriously it may cast doubt on any other reason the woman has put forward; an acceptance of the violence by those women; embarrassment at publicly acknowledging their fear; and, perhaps even fear of citing their abuser as *the reason* for wanting to move.

Some of the cases in our study provide further evidence for critiques of the construction of spousal violence by judges. These critiques have noted that judges often construct such violence as about conflict between the spouses and as involving provocation by women.⁴⁷ For example:

The wife says that the husband hit her through the open window of the car and then starting hitting John (her current partner). ... The police were again called, and the wife says she suffered a black eye and bruised ribs. Although I consider that the wife provoked the husband on this occasion, the husband clearly over-reacted.⁴⁸

In the family law context, there is growing recognition that violence often escalates after separation. In this same case the comment was made that:

... although the parties have been prepared to resort to violence and the husband has probably been more violent than the wife, and this is of significance, there have been no incidents for several months, and I do not regard this as outweighing

the other relevant factors.⁴⁹

While there is a danger in taking a comment like this out of context, it may indicate a lack of understanding that even a 'violent' woman may fear, and be in significant danger from, a stronger and more violent man — even if he hasn't hit her for a few months.

Further, decisions sometimes highlight the judge's particular views on the impact of violence on the child(ren). Recognition of the impacts on children of living with violence against their parent has been central in recent family law reforms. But how is this being implemented by judges? The impact of violence can be treated in a fairly dismissive way:

While the applicant (non-mover) acknowledged that on a couple of occasions he had been violent to the respondent and on another occasion punched a man in the mouth, overall the evidence does not lead me to conclude that on an ongoing basis R is at significant risk of being exposed to violence while in the care of the applicant.⁵⁰

'Happy Families'

The 'best interests of the child' is universally accepted as being fostered by a happy family environment but it is fascinating to see how different judges will construct (or ignore) different variables as contributing to a happy family life and hence the best interests of the child. In the context of relocation, repartnering is often constructed as in the 'best interests' of the child(ren):

... it might be reasonably said that her movement would facilitate her continuation of a relationship which is of importance to her and hence one might say (adopting the reasoning of their Honours and extending it) to the general well-being of the children.⁵¹

When the new partner combines with an employment variable (for instance, he has a higher paying position elsewhere), protecting this relationship is also pictured as in the best interests of the child.⁵²

However, if the new partner is considered a negative influence, the child's best interests are seen as better maintained through non-relocation. Violence may be such a factor. In *W v B*,⁵³ the judge found that the new partner was abusive toward the children's father and that therefore, 'he is a person whose influence on the children is, at least in part, an unsatisfactory one'. He held that the children should spend time equally with their two parents, hopefully reducing 'any malign influence' the new partner could have upon the children.

So, repartnering can be constructed as helping to create a happy home with the underlying premise that 'a happy mother makes a happy family'. As we have seen, however, this is not a premise that is consistently given effect to. It seems that heterosexual repartnering resonates particularly with judicial interpretations of maternal happiness. This can be seen as an example of the privileging of the heterosexual nuclear family, which is a recurrent theme in critical scholarship on family law.

And for the future ...

We must acknowledge of course that the finding that a particular variable does not correlate with a particular outcome does not mean that, for example, the existence of violence played no role in a particular case. The ultimate creation of the picture of a child's best interest involves the compilation of all of the variables into a collage. What parts are emphasised in the story varies both between the judges and by an individual in different cases. How each factor is weighted to construct a vision of the child(ren)'s best interests also varies tremendously with some judges stressing a variable (eg child's expressed wishes) as crucial and others acknowledging its existence but pointing to other factors that outweigh it. It is impossible to capture this through quantitative research like that which we have carried out for this project. In this sense the research project confirmed our preference for narrative accounts (which we did not carry out here) over quantitative analysis.

We indicated earlier that our findings provide only one snap shot and, at that, a rather blurry one. When we commenced this study we expected to find that more of the variables we identified had a definite impact on outcome. That we did not is some evidence for a 'chaotic' view of family law. This view has recently been rejected by Dewar and Parker who have suggested that family law is better described as 'complex' than 'chaotic', and that:

there are observable regularities, but that these are not the product of the 'top-down' model of law and legislation that traditional jurisprudence leads us to expect.⁵⁴

As for all other areas of family law, a great deal more empirical research is needed into relocation decisions. Other methods and more studies are needed to map the complexity. We have not yet gathered data from legal practitioners, nor listened to the stories of women and men who have faced these issues, nor talked to mediators and counsellors about what they tell clients who are considering relocation, or wanting to oppose it. All these (and many more) strategies would provide a fuller picture of local conventions and we hope to engage in some of them in the future and to expand our study geographically.

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- ^ Dr Patricia Easteal, Visiting Fellow, Faculty of Law, ANU, Canberra. Dr Juliet Behrens, Senior Lecturer in Law, Faculty of Law, ANU, Canberra. Lisa Young, Senior Lecturer in Law, School of Law, Murdoch University.
- 1 This comment was made by the full court of the family court in *B v B*: Family Law Reform Act 1995 (1997) FLC 92-755, at 84,194 (hereinafter '*B v B*').
- 2 See J Behrens, 'A Feminist Perspective — B and B (The Family Court and Mobility)' (1997) 2 *Sister in Law* 63 and R Kaspiw, 'B and B and the Family Law Reform Act' (1998) 12 *Australian Journal of Family Law* 69.
- 3 See L Young, 'B and B: Family Law Reform Act 1995 — Relocating the Rights Debate', (1997) 21 *Melbourne University Law Review* 722 at 735.
- 4 Ibid at 726-7 and 736. These arguments have received some acceptance in the High Court decision on relocation, *AMS v AIF* and *AIF v AMS* [1999] HCA 26.
- 5 See *B v B*, 84, 197-84,202 for references to relevant cases.
- 6 See *Fragomeli and Fragomeli* (1993) FLC 92-393; *In the Marriage of I and I* (1995) FLC 92-604; *Skeates-Udy and Skeates* (1995) FLC 92-626.
- 7 s 60B(2)(a).
- 8 s 60B(2)(b).
- 9 See J Behrens, 'Shared Parenting: Possibilities ... and Realities' (1996) 21/5 *Alternative Law Journal* 213.
- 10 s 68F(2)(d).
- 11 J Behrens, 'Ending the Silence, But ... "Family Violence" under the Family Law Reform Act 1995' (1996) 10 *Australian Journal of Family Law* 35 at 42; M Troup, 'The Family Law Reform Bill No 2 and its Ramifications for Women and Children' (1995) 5 *Australian Feminist Law Journal* 111.
- 12 L Young, 'Are Primary Residence Parents as Free to Move as Custodial Parents Were?' (1996) 11/3 *Australian Family Lawyer* 31.
- 13 [1999] HCA 26. For a more detailed discussion of this case and its ramifications see M Otlowski, 'Relocation Case: *AMS v AIF*; *AIF v AMS*' (1999) 5 *Current Family Law* 229; L Young, '*AMS v AIF* and *AIF v AMS*' (1999) 13 *Australian Journal of Family Law* 264.
- 14 Appeal No EA 2 of 2000.
- 15 Which was the approach adopted by the trial judge in this case, and which was successfully appealed against. For a more recent confirmation of the correct approach, see *Martin v Martruglio* (1999) Fam CA 1785 and *Paskandy v Paskandy* [1999] Fam CA 1889.

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- 16 Parker, Parkinson and Behrens, at 69, referring to S Parker and P Drahos, 'Closer to a Critical Theory of Family Law' (1990) 4 *Australian Journal of Family Law* 159. See also, J Dewar and S Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *Australian Journal of Family Law* 96 at 115.
- 17 Until the end of September 1998 (that is, for most of the study period), the substance of the law under the Family Court Act was very similar to that under the FLA *prior* to the Family Law Reform Act 1995. The Family Court Act referred to guardianship, custody and access orders, and did not contain amendments similar to those in the FLA until September 1998.
- 18 These research assistants were Tracey Summerfield in Western Australia and sequentially in the ACT Carmen Currie and Tracey Stevens. Julie Maron coded the surveys and Tanjina Mirza conducted the SPSS programming.
- 19 Occasionally it is not clear from the file or judgment what the proposal of a party is. For example in one case the mother had twice moved to Melbourne from Canberra but was living in Canberra at the time of the hearing. The judge made an order that the children live alternately week and week about with each of their parents. This decision effectively prohibited the wife from moving back to Melbourne, although it is not clear that she wanted to do this. Even the judge did not clarify in this case what the wife's proposals were. This case was clearly borderline in terms of the definition adopted, but was included in the sample and recorded as a decision that the wife could not move to Melbourne, as that was the effect of the decision.
- 20 For the last 6 months of the study period, an ACT assistant was able to set up a system of monitoring all cases as they entered the court system (through the short-term registry). This enabled the identification of cases which involved relocation issues which were resolved by consent. No such system was able to be set up in Western Australia. Therefore, we cannot generate any measurement of relative proportions that end in conciliation or mediation as opposed to judgment since it proved impossible to track all relevant cases retrospectively in both jurisdictions and prospectively in Perth. Further, given the problems in accessing judgments, we cannot assert that those identified for this project represent the total adjudicated, though it is likely they were the vast majority.
- 21 A copy of this instrument is included as Appendix A.
- 22 We are comfortable in presenting the data in percentage and tabular forms for that reason. Also, J Healy in *Statistics: A Tool for Social Research*, Wadsworth Publishing Company, California, 1993, states that if the sample is more than 20 cases, percentages can be used and presents many examples of tables with cells where n is less than five.
- 23 *N v N*, CA 1260 of 1997, Family Court of Australia, Faulks J, 10 June 1998.
- 24 And now the High Court: see *AMS v AIF* at para 147.
- 25 *L v N-L*, PT1751 of 1996, Family Court of Western Australia, Tolcon J, 27 March 1998.
- 26 *A v W*, PT 1930 of 1998, Family Court of Western Australia, Barlow J, 27 November 1998 at 15–17. As noted later, violence also featured in this case. Ultimately the decision appeared to derive from the child's expressed wishes and her belief that her relationship with her mother was the closer one. The mother was permitted to relocate to D..., Western Australia.
- 27 *H v H*, PT 3812 of 1995, Family Court of Western Australia, Anderson J, 7 November 1997, at 22.
- 28 *C v W*, Family Court of Australia at Canberra, CA665 of 1997, Frederico J, 14 October 1997, at 3.
- 29 *H v L*, CA 11241 of 1995, Family Court of Australia at Canberra, Faulks J, 13 July 1998 at 12.
- 30 *H v M*, CA 638 of 1995, Family Court of Australia at Canberra, Faulks J, 25 June 1998.
- 31 *D v M*, PT 3487 of 1997, Family Court of Western Australia, Tolcon J, 5 March 1998 at 16.
- 32 *H v H*, PT 3812 of 1995, Family Court of Western Australia, Anderson J, 7 November 1997 at 27.
- 33 It must be noted that the total number of women alleging violence as a reason for relocation was small and is only potentially indicative, requiring a larger sample for verification.
- 34 Permitted to move: child wishes to go (4:5), child doesn't wish to go (3:4), child's views mixed (4:5)
- 35 *S v M*, CA 2619 of 1993, Family Court of Australia at Canberra, Finn J, 23 December 1997 at 55.
- 36 *W v W*, PT 243 of 1996, Family Court of Western Australia, Holden CJ, 13 November 1998 at 15.
- 37 *H v F*, CA 1784 of 1997, Family Court of Australia at Canberra, Faulks J, 24 April 1998 at 5.
- 38 *F v F*, CA 2023 of 1996, Family Court of Australia at Canberra, Faulks J, 11 December 1997 at 3.
- 39 *W v B* CA 1488 of 1997, Family Court of Australia, Faulks J, 17 September 1998 at 10.
- 40 *G v M*, CA 1060 of 1996, Family Court of Australia at Canberra, Brown J, 31 March 1998, at 3.
- 41 see J Dewar and S Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *Australian Journal of Family Law* 96.

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- 42** In cases where moving to extended family was given as a reason 3 out of 4 movers were successful in Canberra, compared with 9 out of 11 in Perth (higher paying job for mover — Canberra 4:5, Perth 2:2, partner to new job — Canberra 2:3, Perth 4:4).
- 43** See, for example, the Family Law Council's discussion paper, *Spousal Maintenance*, AGPS, Canberra, 1989 which reported that statistics collected in 1988 indicated that spousal maintenance applications were dramatically higher in the Adelaide, Brisbane and Melbourne registries in contrast to other registries and that overt spousal maintenance awards were rarely made at all in all Australian registries bar two (at para 8.4).
- 44** *W v W*, PT6243 of 1996, Family Court of Western Australia, Holden CJ, 13 November 1998 at 9.
- 45** See J Behrens, 'Shared Parenting: Possibilities ... and Realities' (1996) 21 *Alternative Law Journal* 213.
- 46** *ibid.*
- 47** See for example judges' minimising of domestic violence in J Hickey and S Cumines, *Apprehended Violence Orders A Survey of Magistrates*, Judicial Commission of New South Wales, 1999; Department of Justice, *Crimes Family Violence Act 1993/94 Monitoring Report*, Caseflow Analysis Section Courts and Tribunals Division and P Easteal, 'Sentencing Those who Killed their Sexual Intimate: An Australian Study' (1993) 21 *The International Journal of the Sociology of the Law* 189.
- 48** *A v A*, PT5333 of 1996, Family Court of Western Australia, Martin J, 7 January 1998 at 8.
- 49** *Ibid* at 23.
- 50** *A v W*, PT1930 1998, Family Court of Western Australia, Barlow J, 27 November 1998 at 25.
- 51** *H v M*, CA 638 of 1995, Family Court of Australia at Canberra, Faulks J, 25 June 1998 at 12.
- 52** See for example, *H v H*, PT 3812 of 1995, Family Court of Western Australia, Anderson J, 7 November 1997. The repartner had already relocated for employment and was also the father of the woman's second child.
- 53** *W v B*, CA 1488 of 1997, Family Court of Australia, Faulks J, 17 September 1998.
- 54** *Ibid* at p 115.