

If you leave me, can I come too?

A recent Full Court decision has attracted significant media coverage. The decision will be reported in the near future as *B v B* (yes, another one!). It is the first decision of the Full Court which deals comprehensively with the law applicable to relocation cases since the 1996 amendments to Part VII (the children's provisions of the *Family Law Act*). The case generated much public interest because of its potential to change the law in relation to the rights of parents *vis a vis* their children.

In its decision, the court dealt not only with the case at hand but deliberately carried out a detailed review of the new Part VII in order to provide guidance to the court in future children's cases. *B v B* makes interesting reading as it includes a review of previous relocation cases, not only in Australia but also in New Zealand, England and Canada. There is also a lengthy discussion of the relevance of international conventions and treaties to these cases in general. The court was assisted in its deliberations by submissions from the Attorney-General's Department (represented by Mr Williams QC himself!) and the Human Rights and Equal Opportunity Commission.

The case involved an application by a Cairns woman to vary existing orders to enable her to relocate with her two children (aged 11 and 10) to Bendigo, where she proposed to remarry. Her former husband opposed the application on the grounds that such a move would deprive his children of the benefit of contact they had enjoyed with him over the six years since separation.

At the heart of the decision is an analysis by the Full Court of the interrelation of section 60B (which inserted new "objects" of the legislation into the Act), section 65E (which provides that the child's best interests are the paramount consideration in such cases) and section 65F (which provides a list of the

relevant matters which a court must consider in determining the child's best interest).

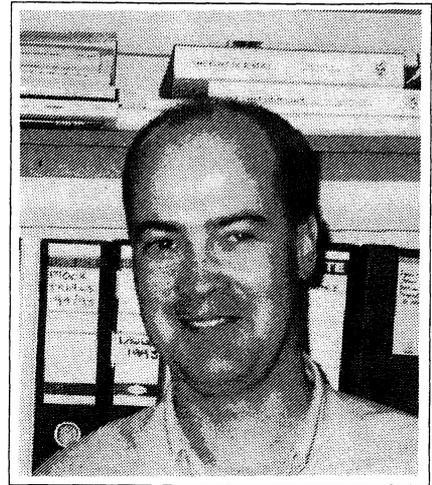
The husband argued that the amendments to Part VII (and in particular the insertion of section 60B) represent a significant change in the law and have the effect of changing the burden of proof in relocation cases. It was, the husband said, for the wife to establish that a continuation of the current arrangements was not in the best interests of the children rather than for the husband to show that the wife's proposed relocation was contrary to those best interests. The court was not persuaded.

The Full Court's assessment of section 60B is that "it represents a deliberate statement by the legislature of the object and principles which the court is to apply in proceedings under Part VII" and that the objectives "provide guidance to the court's consideration of the matters in section 68F and to the overall requirement of section 65E".

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

The Full Court gave guidance to trial judges in the following way:

"As a matter of proper practice and to ensure that this essential task is performed, a judge in the adjudication of such a case would be expected in the judgment to clearly identify section 65E as the paramount consideration, and then identify and go through each of the paragraphs in section 68F(2) which appear to be relevant and discuss their significance and weight, and perform the same task in relation to the matters in section 60B which appear



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relevant or which may guide that exercise. The trial judge will then evaluate all the relevant issues in order to reach a conclusion which is in the child's best interests."

Hence, it appears that the Full Court has determined that the objectives in section 60B should be given due consideration but in a manner not dissimilar to the way in which section 68F issues are examined by a trial judge. Although the amendments to the Family Law Act in 1996 have inserted new provisions which a trial judge is required to consider, the process by which a judge is to reach a decision in children's cases is unchanged.

Family lawyers may also be interested to note that the Full Court stated that the same principles would apply to an application by a contact parent who wishes to relocate, although the Full Court thought that it would be most unlikely that in the exercise of its discretion a court would refuse such an application.



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