

# FROM GOOD INTENTIONS TO ETHICAL OUTCOMES: THE PARAMOUNTCY OF CHILDREN'S INTERESTS IN THE FAMILY LAW ACT

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*[The notion of the 'best interests of the child' plays a central role in Australian family law. Section 60CA of the Family Law Act 1975 (Cth), as amended in 2006, reiterates the longstanding principle that, in making a parenting order, 'a court must regard the best interests of the child as the paramount consideration'. The Australian judiciary has adopted a strong interpretation of the paramountcy principle, according to which the interests of children prevail absolutely over the interests of all other parties. The authors argue that such a strong emphasis on children's interests cannot be ethically justified; only a weak view of the paramountcy principle can be supported on ethical grounds.]*

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## I INTRODUCTION

Section 60CA of the *Family Law Act 1975 (Cth)* ('*Family Law Act*') states that, 'in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.'<sup>1</sup> This standard is often called the 'paramountcy principle'. The provision, introduced in 2006,<sup>2</sup> superseded s 65E, which was phrased in identical

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<sup>1</sup> The content of the current s 60CA is explicitly reiterated in s 65AA.

<sup>2</sup> *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* sch 1 item 9, inserting *Family Law Act* s 60CA.

terms.<sup>3</sup> This strong emphasis on the interests of children has been enshrined in Australian family law since at least 1976, when the *Family Law Act* first came into force. The original Act stipulated in s 64(1)(a) that in a range of proceedings concerning children ‘the court shall regard the welfare of the child as the paramount consideration’.<sup>4</sup> Despite a number of subsequent amendments to the *Family Law Act*, this basic principle has remained intact.<sup>5</sup>

This article undertakes an ethical assessment of the paramouncy principle as interpreted by the Australian courts. Our focus is not on the meaning of the term ‘best interests of the child’, which has been extensively discussed elsewhere.<sup>6</sup> Rather, we focus on the requirement that the child’s interests should be the *paramount* consideration in parenting matters — an issue that has received remarkably little attention in its own right. We argue that only a relatively weak interpretation of the requirement can be supported on ethical grounds.

It is important to emphasise at the outset that we wholly agree with the general motivations behind the wording of s 60CA. The strong focus on the interests of the child in that provision reflects the special vulnerability of children as moral persons as well as the distinctive ethical duties owed by parents to their offspring. After all, parents make virtually all the significant decisions about a child’s life, so they have an obligation to consider the child’s interests in making those decisions. In practical terms, the paramouncy principle aspires to discourage an excessively adversarial approach to parenting agreements, thereby alleviating some of the harm that children suffer as a result of parental conflict.<sup>7</sup>

The requirement that the best interests of the child be paramount in parenting matters is grounded in the legitimate claim of children to have their ethical interests taken into account. Nonetheless, in purporting to give the best interests of the child absolute priority over the interests of all other parties, the prevailing interpretation of the paramouncy principle goes further than is ethically warranted. Our aim in this article is therefore to consider how the good intentions reflected in the principle can best be translated into ethical outcomes.

The article begins in Part II by distinguishing two possible approaches to interpreting the paramouncy principle, which we call the ‘strong’ and ‘weak’

<sup>3</sup> *Family Law Act* s 65E, repealed by *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) sch 1 item 32.

<sup>4</sup> *Family Law Act* s 64(1)(a), repealed by *Family Law Amendment Act 1987* (Cth) s 26(b).

<sup>5</sup> See, eg, *Family Law Act* ss 63H(2), 65L(2), 67L, 67V. See also Richard Chisholm, ‘“The Paramount Consideration”: Children’s Interests in Family Law’ (2002) 16 *Australian Journal of Family Law* 87, 109.

<sup>6</sup> See, eg, Vicky Kordouli, ‘Relocation — Balancing the Judicial Tightrope’ (2006) 20 *Australian Journal of Family Law* 89; Patrick Parkinson, ‘Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers’ (2006) 20 *Australian Journal of Family Law* 179; Donald M Thomson, ‘Beyond the Rhetoric of Best Interests of the Child’ (2005) 7 *Australian Journal of Professional and Applied Ethics* 58; Frank Bates, ‘Children’s Best Interests in Australia: Camouflage, Persiflage or What?’ [2005] *International Family Law Journal* 138; Juliet Behrens, ‘*U v U*: The High Court on Relocation’ (2003) 27 *Melbourne University Law Review* 572, 572–82.

<sup>7</sup> For a recent study on the impact of parental conflict on children, see Jennifer McIntosh and Caroline Long, ‘Current Findings on Australian Children in Postseparation Disputes: Outer Conflict, Inner Discord’ (2005) 11 *Journal of Family Studies* 99.

views respectively.<sup>8</sup> In Part III, we then argue that the Australian courts have preferred the strong view, according to which the interests of children prevail over the interests of all other parties. We support this analysis by reference to recent cases, both before and after the 2006 amendments to the *Family Law Act*.

Part IV examines the ethical basis for the prevailing judicial approach. The strong view of the paramountcy principle not only dominates recent judicial decisions in this area but also appears to influence prevailing approaches to family dispute resolution. Its ethical status therefore warrants close examination. The starting point for our analysis is provided by the ethical ‘principle of equal consideration’. This principle holds that, absent special reasons, the like interests of all individuals should be given equal weight for the purposes of ethical reasoning.<sup>9</sup> Ethically speaking, there is something remarkable about a legal principle that explicitly places the interests of one group of people — in this case, children — above the interests of all others affected by a decision. Any departure from the principle of equal consideration requires robust justification.

A possible justification for a strong view of the paramountcy principle is provided by the notion of parental duties. It is widely accepted that children make distinctive ethical claims on their parents. This could be seen as obliging parents always to place the interests of their children ahead of their own. However, we argue that, while parents may reasonably be required to compromise their interests in favour of their offspring, any reasonable understanding of this duty fails to support a strong view of the paramountcy principle. We conclude that a weak view of the principle is preferable, since it places children’s interests first while also extending appropriate ethical consideration to parents and other parties.

Finally, Part V considers the practical implications of adopting a weak interpretation of the paramountcy principle. In particular, we consider ways in which judicial application of the principle might be reconfigured to give due ethical weight to the interests of parties other than the child who is the subject of the order. At the same time, our proposed framework would minimise the need for judges to engage in complex normative determinations that go beyond the evidence available to the court. It would therefore go some way towards realising the ethical aspirations implicit in the paramountcy standard.

## II THE PARAMOUNTCY PRINCIPLE

We have seen that the paramountcy principle is currently grounded in s 60CA of the *Family Law Act*. The language of s 60CA — ‘a court must regard the best interests of the child as the paramount consideration’ — is inherently vague. This provision, like many other areas of family law,<sup>10</sup> leaves considerable space for judicial discretion, although recent amendments to the legislation have increased

<sup>8</sup> The basic distinction between weak and strong interpretations of the paramountcy principle is drawn from Chisholm, above n 5, 88–94.

<sup>9</sup> Peter Singer, *Practical Ethics* (2<sup>nd</sup> ed, 1993) 21.

<sup>10</sup> Examples include the broad discretion to make child maintenance orders (under *Family Law Act* s 66G) and to alter property interests in settlement proceedings (under s 79).

the specificity of some aspects of the process.<sup>11</sup> In particular, judges must decide both what is meant by the ‘best interests of the child’ and what it means for that to be treated as the ‘paramount consideration’. The interpretive leeways afforded by the paramountcy principle mean that judicial understandings of the standard are crucial in determining its practical implications.

#### A ‘Best Interests of the Child’

The discretion enlivened by the term ‘best interests of the child’ is limited to some extent by the current ss 60CC–60CG, which set out in greater detail how the court is to determine what is in a child’s best interests. Section 60CC, in particular, lists two primary considerations and a number of additional considerations that the court must have regard to. However, the wording of that provision creates its own range of discretions, requiring the judge to determine both how the various factors relate to the case at hand and what weight should be given to each factor. Section 61DA, inserted in 2006,<sup>12</sup> creates a presumption that equal shared parental responsibility is in the best interests of the child. However, that presumption can be rebutted in particular cases.<sup>13</sup>

A useful distinction when considering the interpretation of ‘best interests of the child’, introduced by Vicky Kordouli, is that between ‘narrow’ and ‘wide’ approaches.<sup>14</sup> The narrow view confines itself to a limited range of issues that impact directly on the child’s wellbeing.<sup>15</sup> The wide approach, by contrast, recognises that the wellbeing of the parents may impact on the child and therefore takes parental interests into account insofar as they affect the child’s welfare.<sup>16</sup> Kordouli argues that the narrow approach has been preferred in recent times by the High Court of Australia, while the Family Court of Australia has generally adopted the wide interpretation.<sup>17</sup>

It bears noting that the above distinction, while certainly significant, does not address the question of whether the interests of the child should always prevail over those of the parents and other parties. Rather, it considers whether the interests of the parents should be *taken into account* when seeking to determine what is in the child’s best interests. In other words, the distinction concerns the interpretation of ‘best interests of the child’, rather than the interpretation of ‘paramount’. Once the child’s best interests have been determined, using either a narrow or a wide approach as defined by Kordouli, it may still be necessary for the court to determine whether those interests should prevail over other factors.

<sup>11</sup> See *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) sch 1 item 9. See also Parkinson, ‘Decision-Making about the Best Interests of the Child’, above n 6, 180–2, 191–2.

<sup>12</sup> *Family Law Act* s 61DA, inserted by *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) sch 1 item 13.

<sup>13</sup> *Family Law Act* s 61DA(4).

<sup>14</sup> Kordouli, above n 6, 90.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

## B 'Paramount Consideration'

It is the issue of whether and to what extent the best interests of the child should be weighed against other considerations in making parenting orders which will concern us in the rest of this article. The term 'paramount' in s 60CA, unlike the expression 'best interests of the child', has generated no real legislative guidance. Its prevailing meaning is therefore largely a product of judicial interpretation. A useful theoretical framework for categorising different possible approaches to the paramountcy principle is provided by the distinction, suggested by Richard Chisholm,<sup>18</sup> between 'strong' and 'weak' views of the principle.

The strong view of the paramountcy principle can be straightforwardly expressed. According to Chisholm, this approach calls for two steps on the part of the court.<sup>19</sup> The first step is to 'identify what orders will be most likely to promote the child's best interests'.<sup>20</sup> The second and final step is simply 'to make those orders'.<sup>21</sup> In other words, the strong view assumes that the best interests of the child is the *only* factor that may be considered in making a determination; it effectively overrides any other interests that may be affected. We might encapsulate this view of the paramountcy principle as follows:

Strong View — The best interests of the child is the only factor to be considered in making a determination. It overrides any other relevant considerations or interests (no matter how significant).

Chisholm regards the weak view of the paramountcy principle as more difficult to summarise.<sup>22</sup> His preferred statement of the weak view is a negative one: it 'does *not* necessarily require the court to make whatever order it thinks best for the child, regardless of other things'.<sup>23</sup> According to this approach, the best interests of the child may sometimes give way to other factors. We might summarise this conception of the paramountcy principle as follows:

Weak View — The best interests of the child is the primary factor to be considered in making a determination. However, it may sometimes be overridden by other relevant considerations or interests.

The difficulty in stipulating the exact content of the weak approach to the paramountcy principle arises in relation to two matters: first, *what* competing considerations or interests may be taken into account; and, secondly, *to what extent* these competing factors may be considered.<sup>24</sup> Are there any limits on the competing factors that may be countenanced? How strong do these factors have to be to outweigh the best interests of the child? We will return to these issues in

<sup>18</sup> Chisholm, above n 5, 88–95.

<sup>19</sup> *Ibid* 89.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid* 93.

<sup>23</sup> *Ibid* (emphasis in original).

<sup>24</sup> *Ibid* 93–4.

Part V below. In the following Parts, however, we will be concerned mainly with the strong approach to the principle. With a few exceptions, it has been the view adopted by the Australian courts. However, as we will see later on, it encounters serious difficulties from an ethical perspective.

It bears noting that, on the face of it, both of the views outlined above are consistent with the plain meaning of s 60CA. The term 'paramount' is defined by the *Oxford English Dictionary* as '[s]uperlative, best; superior to or taking precedence over all others; of supreme or overriding importance; imperative.'<sup>25</sup> Taken this way, the use of the term in s 60CA might mean, as the strong view suggests, that the child's best interests are always to prevail over all other factors; however, it might equally mean, as the weak view has it, that the child's best interests are to be the *most important* or *primary* consideration, but may nevertheless be overridden in particular cases.<sup>26</sup> In resolving the ambiguity, it seems reasonable to have regard to the ethical basis for the different approaches.

It is arguable that the current s 65DAA of the *Family Law Act*, which requires the court to consider the reasonable practicality of a child spending either equal time or substantial and significant time with each of the parents, undermines a strong view of the paramountcy principle by introducing additional considerations that do not fall within the notion of the best interests of the child.<sup>27</sup> However, this potential tension does not appear to have come to the attention of the courts. As we explain in the following Part, the weight of judicial opinion on the paramountcy standard clearly favours a strong interpretation.

### III JUDICIAL INTERPRETATIONS

The strong and weak approaches to the paramountcy principle outlined above represent two possible interpretations of s 60CA. Our aim in this Part is to explore which of these approaches most closely matches that currently employed by the Australian courts. We will look, in particular, at decisions in this area by the High Court and the Family Court since the passage of the *Family Law Reform Act 1995* (Cth), which significantly narrowed the paramountcy principle's scope of application.<sup>28</sup> Since many of the older cases in this category have been discussed elsewhere,<sup>29</sup> we will focus most heavily on cases decided since the last major round of amendments to the *Family Law Act* in 2006.

The conclusion we will draw is that the Australian jurisprudence on the paramountcy principle since 1995 has generally favoured a strong interpretation. There seems to be no significant divergence on this issue between the different

<sup>25</sup> John Simpson (ed), *Oxford English Dictionary: The Definitive Record of the English Language* (draft revision, September 2009) <<http://www.oed.com>>.

<sup>26</sup> Chisholm, above n 5, 97–9.

<sup>27</sup> Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (2008) 272.

<sup>28</sup> Chisholm, above n 5, 109. The original provision, s 64(1)(a), applying to 'proceedings in relation to the custody, guardianship, or welfare of, or access to, a child', was replaced with s 65E (inserted by *Family Law Reform Act 1995* (Cth) s 31), applying to decisions as to 'whether to make a particular parenting order in relation to a child'.

<sup>29</sup> See, eg, Chisholm, above n 5; Kordouli, above n 6.

courts. While judicial statements in a few cases indicate a weak view of the principle, these passages run against the general tenor of decisions in this area. The preference by the Australian judiciary for a strong interpretation makes it all the more pressing to consider whether that view can be ethically supported.

Our discussion of cases in this Part focuses particularly on relocation matters, where the residential parent seeks permission to relocate with the children. These types of cases dominate recent judicial decisions on the paramountcy principle. They also provide a particularly stark illustration of the different outlooks represented by the strong and weak approaches to the paramountcy principle, since they directly raise the issue of whether the residential parent's freedom of movement may be considered in its own right or merely as an aspect of the child's welfare. However, the ethical arguments advanced later in this paper have implications that extend beyond relocation scenarios. The full practical implications of our proposed framework will be examined more closely in Part V below.

#### A Pre-2006 Cases

Chisholm argues in his article on the paramountcy principle that Australian decisions since the early 1980s have clearly favoured a strong interpretation.<sup>30</sup> This trend appears to have continued since that article was published in 2002. It is worthwhile, before moving on to more recent decisions, to revisit some of the cases that Chisholm considered. This is because, in our view, some of the passages that he reads as ambiguous or favouring a weak approach to the paramountcy principle are, in fact, consistent with a strong interpretation and have been interpreted as such in subsequent cases. This further bolsters Chisholm's conclusion that Australian jurisprudence tends to favour a strong approach.

It is useful to begin with the decision of the Full Court of the Family Court in the leading case of *B and B: Family Law Reform Act 1995 ('B and B')*.<sup>31</sup> This decision, which has often been cited, seems to evince a clear preference by the Family Court for a strong view of the paramountcy principle. The Court describes the best interests of the child as the 'paramount or pre-eminent consideration';<sup>32</sup> it is the 'final determinant' of what orders the court must make.<sup>33</sup> Later in the judgment, when considering the specific issues that arise in relocation cases, the Court affirmed that, while 'a general right of freedom of movement is a right recognised by Australian law', nonetheless 'in proceedings under Pt VII [of the *Family Law Act*] it is a right that cannot prevail over what is considered to be in the best interests of the children in a particular case.'<sup>34</sup> This

<sup>30</sup> Chisholm, above n 5, 89.

<sup>31</sup> (1997) 21 Fam LR 676.

<sup>32</sup> Ibid 730 (Nicholson CJ, Fogarty and Lindenmayer JJ).

<sup>33</sup> Ibid 733.

<sup>34</sup> Ibid 747.

refusal to weigh the child's best interests against the rights of other parties clearly indicates a strong view of the paramouncy requirement.

The High Court then had occasion to consider its approach to the paramouncy principle in *AMS v AIF*.<sup>35</sup> This case, like *B and B*, required the court to decide whether to permit the residential parent to relocate with her child. The leading judgment in the case, which again has been widely cited, was delivered by Kirby J. A number of comments in that judgment advert to the strength that should be attributed to the paramouncy principle. At first glance, however, the remarks do not all lead in the same direction, which has led to some subsequent confusion in interpreting the relevant principles.<sup>36</sup>

To begin with, Kirby J remarks that, while the best interests of the child is the paramount consideration in parenting matters, 'it is not ... the "sole" or "only" consideration.'<sup>37</sup> His Honour then states that 'a statutory instruction to treat the ... best interests of the child as the paramount consideration does not oblige a court ... to ignore the legitimate interests and desires of the parents.'<sup>38</sup> These comments, so far, may seem to indicate a sympathy for a weak view of the paramouncy principle. In the very next sentence, however, Kirby J goes on to say that, if there is a conflict between the interests of the child and those of the parents, 'priority must be accorded to the child's welfare and rights.'<sup>39</sup> This seems an unequivocal endorsement of the strong interpretation, an impression bolstered by the later comment that 'the touchstone for the ultimate decision must remain the ... best interests of the child and not, as such, the wishes and interests of the parents.'<sup>40</sup>

Kirby J's insistence that the best interests of the child are not the sole consideration in parenting matters, coupled with his later comment that the child's interests must always prevail over other factors, has caused some confusion in later decisions.<sup>41</sup> Chisholm suggests that some passages in the judgment support a strong view of the paramouncy principle, while others suggest a weak interpretation.<sup>42</sup> The better view, in our opinion, is that Kirby J's comments are all consistent with a strong approach to the principle, although his choice of words is somewhat confusing. It will be helpful to briefly explain this interpretation.

The question that Kirby J's comments raise is as follows. How could it be the case that the best interests of the child are not the sole consideration, when they

<sup>35</sup> (1999) 199 CLR 160.

<sup>36</sup> For example, Behrens comments that *AMS v AIF* 'may be said to have lacked a clear ratio decidendi' and suggests it was unclear whether the High Court in that case supported a strong or a weak view of the paramouncy principle: Behrens, '*U v U: The High Court on Relocation*', above n 6, 575, 582. Chisholm takes a similarly equivocal view of the case: see Chisholm, above n 5, 107.

<sup>37</sup> *AMS v AIF* (1999) 199 CLR 160, 207. A similar comment is made by Gaudron J at 191–2.

<sup>38</sup> *Ibid* 207.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid* 208 (Kirby J).

<sup>41</sup> See, eg, *A v A: Relocation Approach* (2000) 26 Fam LR 382, 399, 404 (Nicholson CJ, Ellis and Coleman JJ).

<sup>42</sup> Chisholm, above n 5, 107.



must nonetheless always prevail over all other factors? The answer, we think, is twofold. First, where the interests of the child and the interests of the parents all point to the same conclusion, they may all be taken into account without displacing the priority of the child's welfare. This allows the best interests of the child to prevail, even though it is not the only factor in the decision.

Secondly, and related to this, Kirby J seems to take what Kordouli calls a wide approach to the notion of the child's best interests, according to which the welfare of the parents is one factor that falls to be considered when deciding what is best for the child. This view allows the parents' interests to be taken into account, albeit only insofar as they may be regarded as impacting on the child's welfare. As Kirby J puts it, the paramountcy principle 'does not expel every other relevant interest from receiving its due weight', since 'the enjoyment by parents of their freedoms necessarily impinges on the happiness of the child.'<sup>43</sup>

The High Court's decision in *AMS v AIF* was followed by the Full Court of the Family Court in *A v A: Relocation Approach* ('*A v A*'), where the Family Court took the opportunity to set out some general guidelines for dealing with issues of parental relocation.<sup>44</sup> The apparent tensions in Kirby J's comments reappear in those guidelines. The Family Court begins by endorsing the general principle that 'the welfare or best interests of the child as the case may be under the relevant legislation, remains the paramount consideration but it is not the sole consideration.'<sup>45</sup> Later, however, it is stated that 'the ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges upon those interests then it must give way.'<sup>46</sup> This clearly represents a strong approach.

The situation is made more confusing by the subsequent comment that, '[i]n determining a parenting case that involves a proposal to relocate the residence of a child, the process of evaluating the proposals must have regard to ... [t]he importance of a party's right to freedom of movement'.<sup>47</sup> The significance of this injunction is somewhat undermined by the subsequent discussion, which makes it clear that the parent's freedom of movement will never be permitted to prevail over the best interests of the child.<sup>48</sup> The sense in which this is to be treated as a factor of 'importance' is therefore rather unclear.

Once again, the best interpretation of the guidelines in *A v A* seems to be that the interests of parents and other parties may be taken into account *as long as* they point to the same conclusion as the best interests of the child, construed in accordance with the wide approach outlined by Kordouli. In cases of conflict, however, the interests of the child must prevail. Although this interpretation shows the guidelines to be logically consistent, it makes the continuing use of the 'paramount but not sole' formulation seem somewhat tenuous, since the child's

<sup>43</sup> *AMS v AIF* (1999) 199 CLR 160, 225 (citations omitted).

<sup>44</sup> (2000) 26 Fam LR 382.

<sup>45</sup> *Ibid* 399 (Nicholson CJ, Ellis and Coleman JJ).

<sup>46</sup> *Ibid* 404.

<sup>47</sup> *Ibid* 405.

<sup>48</sup> See *ibid* 406–7, 409.

best interests are elevated to a position where no other factor can compete with them.

Subsequent decisions that make use of the guidelines outlined in *A v A* tend to confirm the strong interpretation of the paramountcy principle. In the much discussed High Court case of *U v U*, concerning a mother who wished to relocate to India with her daughter, Gummow and Callinan JJ, with whom Gleeson CJ, McHugh and Hayne JJ agreed, observed that, ‘whatever weight should be accorded to a right of freedom of mobility of a parent, it must defer to the expressed paramount consideration, the welfare of the child’.<sup>49</sup> This comment seems an unequivocal endorsement of the strong interpretation.

The Family Court returned to the issue of relocation briefly in *In the Marriage of Butterell* (*‘Butterell’*).<sup>50</sup> The decision in that case gave significant weight to the residential parent’s wish to live in a stable, happy and stress-free environment. However, the reasoning of the Court makes clear that this factor was relevant not in its own right, but only insofar as it affected the welfare of the child.<sup>51</sup>

A similar approach to the paramountcy principle can also be discerned in the unreported case of *PJ and NW*, where the Family Court again gave significant weight to the residential parent’s social, psychological and economic wellbeing, but only in light of its relevance to the welfare of the child.<sup>52</sup> According to the trial judge’s reasoning, which the Full Court endorsed, the mother was ‘entitled’ to exercise her freedom of movement, ‘subject of course to the children’s best interests.’<sup>53</sup> Once again, there can be little doubt from this reasoning that the Family Court is employing a strong view of the paramountcy requirement. The interests of the residential parent may be considered, but their relevance is clearly regarded as merely subsidiary to the decisive factor of the best interests of the child.

### B Post-2006 Cases

The preference of the Australian courts for a strong interpretation of the paramountcy principle has, if anything, become more pronounced since the 2006 amendments to the *Family Law Act*.<sup>54</sup> In *W v R*, Carmody J of the Family Court undertook an extensive survey of previous law in Australia and other jurisdictions on relocation issues, in which he had occasion to comment on the correct view of the paramountcy principle.<sup>55</sup> His assessment of the previous authorities clearly favours a strong interpretation. For instance, he noted that ‘[t]he

<sup>49</sup> (2002) 211 CLR 238, 262 (Gummow and Callinan JJ); see also at 240 (Gleeson CJ), 249 (McHugh J), 284 (Hayne J).

<sup>50</sup> (2005) 33 Fam LR 150.

<sup>51</sup> See *ibid* 157–8 (Bryant CJ, Kay and Boland JJ).

<sup>52</sup> [2005] FamCA 162 (Unreported, Bryant CJ, Holden and May JJ, 15 March 2005).

<sup>53</sup> *Ibid* [19] (Bryant CJ, Holden and May JJ), quoting *PJ and NW* [2004] FamCA 221 (Unreported, Dessau J, 18 March 2004) [79].

<sup>54</sup> See *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

<sup>55</sup> (2006) 35 Fam LR 608, 613–76.

Australian version of the paramountcy principle is child not parent focused. The wants, needs and well-being of the children should override those of the parents.<sup>56</sup>

Carmody J goes on to offer the following interpretation of the ‘paramount but not sole’ formulation appearing in previous cases:

The best interests of the child(ren) concerned, both in the short and longer term, and not the interests or needs of the parents (let alone the interests of either one of them) are the paramount consideration. However, they are not the sole factor. The general quality of life and economic, cultural and psychological welfare of both parents, but particularly the residence parent, are relevant and important. Nonetheless, the child’s best interests have statutory priority and prevail over the legitimate rights, interests and expectations of all others, including the parents, in the event of conflict.<sup>57</sup>

This passage seems to support the interpretation of *AMS v AIF* and *A v A* that we offered above in Part III(A). The welfare and interests of the parents are relevant insofar as they affect or bolster the outcome favoured by the best interests of the child, but they may never prevail over the child’s welfare.

*Taylor v Barker* was another relocation case where the Full Family Court gave attention to the relevance of the happiness and welfare of the residential parent.<sup>58</sup> The treatment of the issue in that case was along similar lines to the approach adopted in *Butterell*. The reasoning of the trial judge, which was approved by the Full Court, was that if the mother were ‘forced to remain in Canberra ... she would be unhappy and resentful.’<sup>59</sup> This was relevant because:

To a significant degree the happiness and contentment of [the child] depends on the happiness and contentment of his mother. ... I am satisfied that it is in [the child’s] best interests that his mother be permitted to relocate to North Queensland.<sup>60</sup>

Another recent case that seems to support the reading of *AMS v AIF* and *A v A* that we offered above is *Mazorski v Albright*.<sup>61</sup> The judgment of the Family Court in that case makes reference to both *AMS v AIF* and *A v A*.<sup>62</sup> It then goes on to reiterate that the approach in those cases does not mean that the parents’ interests should be ignored, but it does mean they must yield where they conflict with those of the child.<sup>63</sup> The best interests of the child are therefore not technically the sole consideration, but are nonetheless decisive.

<sup>56</sup> Ibid 671.

<sup>57</sup> Ibid 672 (citations omitted).

<sup>58</sup> (2007) 37 Fam LR 461.

<sup>59</sup> Ibid 473 (Bryant CJ and Finn J), quoting *Taylor v Barker* [2006] FMCAfam 706 (Unreported, Brewster FM, 22 December 2006) [50].

<sup>60</sup> *Taylor v Barker* (2007) 37 Fam LR 461, 473 (Bryant CJ and Finn J), quoting *Taylor v Barker* [2006] FMCAfam 706 (Unreported, Brewster FM, 22 December 2006) [50], [52].

<sup>61</sup> (2007) 37 Fam LR 518.

<sup>62</sup> Ibid 522 (Brown J).

<sup>63</sup> Ibid.

The recent Federal Magistrates Court cases of *C v B*<sup>64</sup> and *F v F*<sup>65</sup> both contain statements suggesting a strong view of the paramountcy principle. According to the former case, the welfare of the child ‘must stand above the wishes or proprietary interest[s] of the parents.’<sup>66</sup> Neville FM’s judgment in *F v F* is even more unequivocal, stating that, ‘if there is a conflict between the welfare or best interests of the child, on the one hand, and the legitimate interests and desires of the parents, on the other, priority must be given to the best interests of the child.’<sup>67</sup>

The judgment of Altobelli FM in *H v H*, another recent relocation decision, comes down clearly on the side of the strong interpretation.<sup>68</sup> The judgment is notable for its consideration of the relevance of the parents’ freedom of movement in relocation matters. In *A v A*, the Family Court called this a factor of ‘importance’, even though it could never outweigh the child’s best interests.<sup>69</sup> According to Altobelli FM in *H v H*, however:

the notion of freedom of movement defers to the paramount consideration of the best interests of a child. There is a place for considering freedom of movement in the difficult exercise of judgment that occurs in relocation cases. However, the consideration is not a weighty one.<sup>70</sup>

This seems a more consistent assessment than that offered in the earlier decision.

Altobelli FM also argues that freedom of movement in relocation cases is not properly regarded as a right, presumably because it can never be invoked to exclude the interests of the child. Referring to *U v U*, he says:

It may be unfortunate, perhaps, that the majority described freedom of mobility as a right, thus creating the expectation in some litigants that it is a right that can be enforced by the courts ... It clearly is not an enforceable right in this context.<sup>71</sup>

This remark again indicates a strong view of the paramountcy principle.

The 2008 decision of *MW v Director-General of the Department of Community Services* serves to illustrate the continuing acceptance of the strong approach by the High Court.<sup>72</sup> Gummow, Heydon and Crennan JJ, who constituted the majority in the case, describe the welfare of the child as the ‘paramount consideration, to which “all others yield”’.<sup>73</sup> The second part of this phrase clearly implies a strong interpretation of the term ‘paramount consideration’, as

<sup>64</sup> (2007) 38 Fam LR 1.

<sup>65</sup> (2007) 38 Fam LR 52.

<sup>66</sup> *C v B* (2007) 38 Fam LR 1, 26 (Altobelli FM), quoting *Chapman v Palmer* (1978) 4 Fam LR 462, 469 (Evatt CJ, Asche and Marshall SJJ).

<sup>67</sup> (2007) 38 Fam LR 52, 57.

<sup>68</sup> (2007) 37 Fam LR 126.

<sup>69</sup> (2000) 26 Fam LR 382, 405 (Nicholson CJ, Ellis and Coleman JJ).

<sup>70</sup> (2007) 37 Fam LR 126, 143.

<sup>71</sup> *Ibid*, citing *U v U* (2002) 211 CLR 238, 262 (Gummow and Callinan JJ).

<sup>72</sup> (2008) 244 ALR 205.

<sup>73</sup> *Ibid* 218, quoting *McKee v McKee* [1951] AC 352, 365 (Lord Simonds for Lords Merriman, Simonds, Morton, Radcliffe and Tucker).

opposed to one in which the child's interests play a primary, but not overwhelming, role.

The preponderance of jurisprudence throughout the federal judiciary is firmly on the side of a strong interpretation. This is unfortunate, as we will argue below, but it is hard to reach a different reading of the recent authorities. There is one decision, however, among the recent cases dealing with this issue that seems to swim against the tide. This is the decision of Boland J of the Family Court in *Morgan v Miles*, a relocation matter concerning a mother's desire to move herself and her children between two towns on the New South Wales coast.<sup>74</sup>

Boland J's judgment in *Morgan v Miles* refers to the best interests of the child as the 'paramount but not sole consideration' in parenting matters.<sup>75</sup> As we saw above, this principle is drawn from the decisions in *AMS v AIF* and *A v A* and, when applied along the lines suggested in those cases, is compatible with a strong interpretation. However, Boland J seems to take a different view. Rather than stressing that the best interests of the child must always prevail, she goes on to say that 'the child's best interests must be weighed and balanced with the "right" of the proposed relocating parent's freedom of movement'.<sup>76</sup>

This willingness to countenance the possibility that the child's best interests might need to be weighed against the parent's freedom of movement is a significant departure from previous decisions and seems to indicate a weak approach to the paramountcy principle. We have seen that the weight of authority seems to be against Boland J's formulation of the test. However, her interpretation is equally consistent with the wording of s 60CA. It is also preferable to the strong view on ethical grounds, as we will now argue.

#### IV EQUAL CONSIDERATION AND PARENTAL DUTIES

We saw in the previous Part that the Australian courts have generally favoured a strong interpretation of the paramountcy principle. In some cases, this approach has resulted in fairly onerous outcomes for one of the child's parents. This is particularly evident in relocation cases, where the courts have frequently prevented the residential parent from changing residence or even, as in *Morgan v Miles*, required the parent to move back to her previous place of residence to comply with an interim order issued in previous proceedings.<sup>77</sup>

It is far from insignificant that, in *all* of the cases discussed above, the residential parent, whose everyday living arrangements are most at stake, has been the mother. This creates a gendered dimension to the insistence of the Australian courts that the wishes, desires and interests of parents must always

<sup>74</sup> (2007) 38 Fam LR 275, 277.

<sup>75</sup> Ibid 285, 291; see also at 289–90.

<sup>76</sup> Ibid 291.

<sup>77</sup> See *ibid* 297, 299 (Boland J). For a general survey of outcomes and judicial approaches in recent relocation decisions, see Patrick Parkinson, 'The Realities of Relocation: Messages from Judicial Decisions' (2008) 22 *Australian Journal of Family Law* 35.

yield to the best interests of their children.<sup>78</sup> There is a pervasive and powerful social discourse which holds that women must consistently be willing to sacrifice their own interests in favour of their offspring's and that to do otherwise is to be deficient as a mother.<sup>79</sup> Judicial remarks, such as the comment in *PJ and NW* that the mother's freedom of movement is 'subject of course to the children's best interests',<sup>80</sup> take on added ethical significance when considered in light of this social backdrop.

The strong view of the paramountcy principle has implications beyond the courtroom. It might appear at first glance that the references to the paramountcy standard in the *Family Law Act* are mainly directed to judges who are called upon to make the types of orders falling under s 60CA. This initial impression is bolstered by the wording of s 63B, which encourages (but does not require) parents to consider the child's best interests as paramount in the negotiation of parenting plans. However, despite the non-mandatory language of s 63B, the paramountcy principle finds specific expression in documents such as the standard form dispute resolution agreement used by Relationships Australia. According to this standard form agreement, parents must acknowledge that '[t]he best interests of the child ... are the paramount consideration in any decisions and agreements reached'.<sup>81</sup>

The heavy emphasis placed by the courts on the interests of children generates an expectation among both mediators and parents that a similar outlook should prevail in parenting negotiations. This spillover effect is apparent in both voluntary and mandated family dispute resolution<sup>82</sup> — the method by which a large proportion of parental disputes are resolved. The standard approach to resolving disputes in these contexts is described in the literature as a 'child-focused' outlook.<sup>83</sup> Under this framework, parents are encouraged to focus not on their own interests, but exclusively on what is best for their children. Feminist scholars have expressed serious concerns about the outcomes for women in family dispute resolution processes, due, for instance, to the influence of power

<sup>78</sup> See, eg, Behrens, 'U v U: The High Court on Relocation', above n 6, 584–6; Joanne Roebuck, 'U v U: A Chauvinistic Approach to Relocation?' (2003) 17 *Australian Journal of Family Law* 208, 216; Lisa Young, 'U and U: Reflections on the High Court and Family Law' (2003) 28 *Alternative Law Journal* 78, 81; Patricia Easteal, Juliet Behrens and Lisa Young, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14 *Australian Family Law Journal* 234, 235; Juliet Behrens, 'A Feminist Perspective on B and B (the Family Court and Mobility)' (1997) 2 *Sister in Law* 65, 66; Lisa Young, 'B and B: Family Law Reform Act 1995 (Cth) — Relocating the Rights Debate' (1997) 21 *Melbourne University Law Review* 722, 734–6.

<sup>79</sup> See, eg, Deborah Lupton and Virginia Schmied, "'The Right Way of Doing It All': First-Time Australian Mothers' Decisions about Paid Employment' (2002) 25 *Women's Studies International Forum* 97.

<sup>80</sup> [2005] FamCA 162 (Unreported, Bryant CJ, Holden and May JJ, 15 March 2005) [19] (Bryant CJ, Holden and May JJ), quoting *PJ and NW* [2004] FamCA 221 (Unreported, Dessau J, 18 March 2004) [79].

<sup>81</sup> Relationships Australia, 'Agreement to Participate in Family Dispute Resolution' in Linda Fisher and Mieke Brandon (eds), *Mediating with Families* (2<sup>nd</sup> ed, 2009) 337 ('Appendix 8'), 339.

<sup>82</sup> See generally *Family Law Act* ss 60I–60K.

<sup>83</sup> See, eg, Jennifer E McIntosh, Yvonne D Wells and Caroline M Long, 'Child-Focused and Child-Inclusive Family Law Dispute Resolution: One Year Findings from a Prospective Study of Outcomes' (2007) 13 *Journal of Family Studies* 8, 10.

imbalances on the structure and content of negotiations.<sup>84</sup> For the reasons discussed at the start of this Part, these concerns are likely to be exacerbated in a context that encourages parents to subordinate their own interests to those of their child.

Our argument in this Part is that the strong approach to the paramountcy principle violates the basic ethical principle of equal consideration, by placing unjustified emphasis on the interests of children while arbitrarily discounting those of other parties. This emphasis on the interests of children goes beyond that supported by the notion of parental duties. We conclude that the weak interpretation of the principle should be preferred. The fact that parental responsibilities, including those imposed by the courts, tend to fall disproportionately on women adds additional weight to the ethical issues raised by this area.

#### A *The Principle of Equal Consideration*

The starting point for our ethical analysis is what we will call the ‘principle of equal consideration’. This principle states simply that, absent special reasons, the like interests of all individuals should be given equal weight for the purposes of ethical reasoning.<sup>85</sup> This principle is not intended to be contentious. Indeed, we think it describes one of the fundamental presuppositions of ethics. The principle does not rule out the possibility that the interests of some individuals may sometimes legitimately be given more weight than those of others, but it does state that any distinction of this kind requires justification.

The principle of equal consideration, or something like it, plays an important role in the work of many leading moral philosophers. John Rawls, for instance, famously argues that we should evaluate different views of justice by imagining what principles actors in a hypothetical ‘original position’ would choose to govern their society.<sup>86</sup> The actors in the original position are constrained by a ‘veil of ignorance’ that prevents them from knowing the details of their own social status.<sup>87</sup> In effect, Rawls is asking us: what arrangements would you choose to govern your society, not knowing what your lot in life will be?<sup>88</sup> This approach to justice is ‘fair’, because it ‘ensures that no-one is advantaged or disadvantaged in the choice of principles by ... the contingency of social circumstances.’<sup>89</sup> One reason why Rawls favours the original position as the

<sup>84</sup> See, eg, Rachael Field and Jonathan Crowe, ‘The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis’ (2007) 27 *Australian Feminist Law Journal* 97, 98; Rachael Field, ‘Federal Family Law Reform in 2005: The Problems and Pitfalls for Women and Children of an Increased Emphasis on Post-Separation Informal Dispute Resolution’ (2005) 5 *Queensland University of Technology Law and Justice Journal* 28, 29; Renata Alexander, ‘Family Mediation: Friend or Foe for Women?’ (1997) 8 *Australian Dispute Resolution Journal* 255; Janet Rifkin, ‘Mediation from a Feminist Perspective: Promise and Problems’ (1984) 2 *Law and Inequality* 21, 22.

<sup>85</sup> Singer, above n 9, 21.

<sup>86</sup> John Rawls, *A Theory of Justice* (revised ed, 1999) 11.

<sup>87</sup> *Ibid.*

<sup>88</sup> See *ibid* 10–11.

<sup>89</sup> *Ibid* 11.

hypothetical setting for decisions about justice is because it means the parties are 'fairly situated and treated equally as moral persons.'<sup>90</sup> The parties to the original position are therefore understood to be equal; they have the same rights to vote on the principles of justice, to make proposals and give reasons, and so forth.<sup>91</sup> Furthermore, it is assumed that the principles agreed upon will apply equally to everybody.<sup>92</sup>

Rawls' use of the original position to ground his theory of justice has, of course, been widely criticised.<sup>93</sup> The principle of equal consideration, on the other hand, has won endorsement from many different quarters. Robert Nozick, perhaps Rawls' most prominent critic, does not accept the original position as the proper starting point for a theory of justice,<sup>94</sup> but he nonetheless emphasises that all individuals must be viewed as holding the same basic moral entitlements.<sup>95</sup> It is for this reason, he argues, that a government that claims the authority to direct people's behaviour must 'scrupulously ... be *neutral* between its citizens.'<sup>96</sup>

The prominent ethicist Peter Singer argues persuasively that something like the principle of equal consideration is what distinguishes ethical reasoning from the mere pursuit of self-interest. According to Singer, 'ethics carries with it the idea of something bigger than the individual';<sup>97</sup> it follows that '[i]f I am to defend my conduct on ethical grounds, I cannot point only to the benefits it brings me.'<sup>98</sup> In other words, ethics takes what might be described as a 'universal point of view',<sup>99</sup> according to which 'the fact that it is I who benefit from, say, a more equal distribution of income and you who lose by it, is irrelevant.'<sup>100</sup> In adopting the universal point of view, 'I am accepting that my own interests cannot, simply because they are my interests, count more than the interests of anyone else.'<sup>101</sup>

Singer favours a utilitarian conception of ethics. However, it is important to note that the principle of equal consideration does not presuppose consequentialism;<sup>102</sup> it is equally consistent with a deontological outlook. Utilitarianism requires that we perform the action that will produce the greatest overall increase in welfare. In this context, the principle of equal consideration would entail that

<sup>90</sup> Ibid 122.

<sup>91</sup> Ibid 17.

<sup>92</sup> See generally *ibid* 441–9.

<sup>93</sup> Discussions of Rawls' methodology are too numerous to mention, but for some well-known critiques, see Thomas Nagel, 'Rawls on Justice' in Norman Daniels (ed), *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* (1975) 1; Ronald Dworkin, 'The Original Position' in Norman Daniels (ed), *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* (1975) 16.

<sup>94</sup> Robert Nozick, *Anarchy, State, and Utopia* (1974) 196–204.

<sup>95</sup> Ibid 33.

<sup>96</sup> Ibid (emphasis in original).

<sup>97</sup> Singer, above n 9, 10.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid 11.

<sup>100</sup> Ibid 12.

<sup>101</sup> Ibid.

<sup>102</sup> Cf *ibid* 12–15.



everyone's welfare be counted equally in working out what action best promotes the good. The deontologist, on the other hand, would supplement this utilitarian framework by reference to limiting standards such as rights and duties; the principle of equal consideration would then entail that, absent special reasons, everyone's rights and duties must be given equal weight in deciding what to do.

It does not, therefore, matter greatly for present purposes whether the court's task in applying s 60CA of the *Family Law Act* is conceived in terms of maximising welfare, as the term 'best interests' might seem to suggest, or whether it also involves reference to deontic standards such as the right to freedom of movement. The basic starting point, as far as the principle of equal consideration is concerned, is that everyone's ethical interests should be taken into account.

It was mentioned above that the principle of equal consideration does not rule out drawing distinctions between different classes of individuals, but it does require that those distinctions be justified. We are commonly inclined to think that certain types of partiality are ethically permissible, if not ethically required; for instance, we are often prone to think it permissible to treat members of our family more favourably than strangers and to treat members of our community more favourably than outsiders. These types of distinctions have generated a great deal of discussion among moral philosophers; some have argued that these forms of partiality are ethically legitimate, while others have taken the contrary view.<sup>103</sup>

The question raised by the strong view of the paramountcy principle, however, is not whether it is ethically permissible for parents to treat their offspring more favourably than other people,<sup>104</sup> but rather whether it is ethically permissible for the Australian courts to treat the interests of children as prevailing *absolutely* over those of other parties. It is worth noting just how radical a departure this is from the principle of equal consideration. It is not just that the children's interests are being treated as more important than those of their parents; rather, if the courts are to be believed, then no increase in the welfare of the parents, *no matter how great*, could possibly justify compromising the interests of the child.

### B *The Scope of Parental Duties*

The most obvious justification that might be offered for preferring children's interests over those of their parents involves reference to the notion of parental duties, which is a correlative of the idea of a child's inherent vulnerability as a moral person. The basic idea here is that parents owe special ethical duties to their offspring which often require them to put aside their own interests in order

<sup>103</sup> See, eg, Mark C Murphy, *Natural Law in Jurisprudence and Politics* (2006) 168–76; Jonathan Crowe, 'Natural Law in Jurisprudence and Politics' (2007) 27 *Oxford Journal of Legal Studies* 775, 791–3; Harry Brighouse, 'Justifying Patriotism' (2006) 32 *Social Theory and Practice* 547, 550–8; Igor Primoratz, 'Patriotism: A Deflationary View' (2002) 33 *Philosophical Forum* 443, 446–56; Singer, above n 9, 232–4.

<sup>104</sup> As to which see Harry Brighouse and Adam Swift, 'Legitimate Parental Partiality' (2009) 37 *Philosophy and Public Affairs* 43, 44.

to secure the welfare of their children. The existence of such special duties is hardly controversial; most people would readily accept that, upon having a child, one comes under a special responsibility to provide for the child and place their core needs before other interests of one's own. The question that arises in the present context, however, is exactly how far this principle should be taken to extend.

It may be instructive, at this point, to refer to some passages in recent Australian decisions where the notion of parental duties has been relied on to support a strong reading of the paramountcy principle. One such passage comes from the case of *P v S*, where Brown FM made the following remarks about the relevance of the happiness and welfare of the child's parents:

Accordingly, a party's wish to pursue an object that will bring about his or her greater happiness, is a legitimate consideration and must not be ignored. On the other hand, the responsibilities of being a parent can last a lifetime and by their nature may curtail, to some extent or other, some aspects of a parent's freedom of choice to do absolutely as he or she wishes.<sup>105</sup>

This fairly cautious statement of the strength and relevance of parental duties is hard to dispute. In particular, few would quibble with Brown FM's statement that the responsibilities of parenthood may prevent a parent from doing 'absolutely as he or she wishes.' It is worth noting, however, that this statement of parental duties stops far short of justifying a strong reading of the paramountcy principle. As we noted above, the strong view does not just hold that parents must *sometimes* place their offspring's interests ahead of their own; rather, it entails that the interests of the child prevail *absolutely* over those of the parents.

It is interesting, in this regard, that Brown FM endorses the strong view elsewhere in his judgment, without acknowledging how much more demanding it is than his own description of parental duties. For example, he cites the remark of the Family Court in *A v A* that 'to the extent that the freedom of a parent to move impinges upon [the best interests of the child] then it must give way.'<sup>106</sup> Again, the implication of this comment is not just that parents may not do absolutely as they wish, but rather that they are not permitted to do anything that will impinge upon the child's best interests, regardless of its impact on their own wellbeing.

A broadly similar statement of the scope of parental duties can be found in the judgment of Altobelli FM in *H v H*, again in a discussion of the residential parent's putative right to freedom of movement:

The High Court identified in *AMS v AIF* that parenthood has always had an impact on the wishes and mobility of parents. It is not just freedom of mobility that is affected by parenthood — many other personal freedoms are likewise affected. Family law in its broad sense already recognises that parenthood carries with it responsibilities irrespective of the nature of the relationship between the parents of the child. For example there are obligations to financially provide for the children. Howsoever one might have perceived a person's

<sup>105</sup> [2005] FMCAfam 198 (Unreported, Brown FM, 29 April 2005) [118].

<sup>106</sup> *Ibid* [116], quoting *A v A* (2000) 26 Fam LR 382, 404 (Nicholson CJ, Ellis and Coleman JJ).

freedom to deal with their finances as they wish before parenthood, once they become a parent it is an unquestionable incident of parenthood that that very same freedom is not just curtailed, but converted into a legal obligation. Can't the same be said for freedom of mobility?<sup>107</sup>

As before, this assessment of parental responsibilities seems reasonable, so far as it goes. Few people would dispute that after becoming a parent one cannot simply deal with one's finances exactly as one did beforehand. This requirement to temper one's own interests in favour of those of one's child also unquestionably affects a range of other freedoms. Once again, however, to say that parents are obliged to compromise their personal interests is far less radical than saying that they should place their child's interests absolutely above their own. It is the latter position that is endorsed by the strong view of the paramountcy principle.

The strong view of the principle is implausible as a general ethical standard. If taken seriously, it would rule out many trade-offs that parents routinely and properly make between their own interests and those of their children. Many parents regularly leave their children with professional carers or family members in order to pursue their careers or seek relaxation. The impact of this type of arrangement on the welfare of the parties involved will obviously differ greatly from case to case. However, let us suppose that, in a particular instance, the practice brings significant personal gains for one or both parents; let us also suppose that it involves a small reduction in the welfare of the child, who would derive a greater benefit from spending the time with her or his parents than with the alternative carer.

This type of marginal compromise in the child's welfare in order to substantially increase the wellbeing of her or his parents is widely and correctly viewed as ethically permissible. The broader point raised by this example is that common-sense views of parental duties do not require parents to decide what maximises their child's welfare and then simply do that, regardless of how it affects them personally; rather, it is permissible for them to seek trade-offs between their child's best interests and their own, provided that their actions consistently take into account their child's emotional, physical and material wellbeing.

We noted above that the use of the term 'best interests' in s 60CA perhaps suggests a consequentialist mode of analysis, according to which different outcomes must be weighed up in terms of their contribution to some overall good.<sup>108</sup> However, the above discussion suggests that this may be an unhelpful way to conceptualise the parent-child relationship. Parents do not have an unconditional duty to promote the interests of their children. They do, however, have a duty to keep their children's welfare consistently in mind and not neglect it unreasonably in the pursuit of other objectives. The health and flourishing of children is a good that should, and generally does, occupy a prominent place in parents' practical reasoning. However, to conceptualise the child's welfare as an overriding good to be maximised at the expense of all other interests is both

<sup>107</sup> (2007) 37 Fam LR 126, 144.

<sup>108</sup> See above Part IV(A).

oppressive and senseless. The situation becomes even worse when such an approach is enshrined in the law.

Once again, it bears reiterating that there is a gendered dimension to this problem. The strong view is ostensibly gender-neutral. However, considered against a social backdrop where the bulk of domestic labour, including child rearing, continues to be borne by women, its practical implications are far from evenly distributed. We noted previously that in all the cases surveyed in Part III of this article the residential parent was the mother. The point is further illustrated by a study of relocation cases in the Canberra and Perth regions carried out in 1997–98.<sup>109</sup> That study recorded 38 cases where a parent was seeking to move residence with the children; in 36 of the cases, the parent seeking to move was female.<sup>110</sup>

The implications of this disparity are worth spelling out. Residential parents seeking to change living arrangements may be compelled to seek approval from the courts; contact parents, by contrast, are rarely required to do so. The empirical fact that the residential parent is usually the mother, combined with the strong view of the paramouncy principle, means that mothers in such cases are submitted to a legal process that radically subordinates their interests to those of their children; the father, by contrast, does not generally have to justify his choices in this way. The strong view is therefore socially regressive: its practical consequence, if not its intent, is that women are obliged to compromise their personal interests in favour of their children in a way that men generally are not.

## V PRACTICAL IMPLICATIONS

We argued in the previous Part that a strong view of the paramouncy principle cannot be supported on ethical grounds. The notion of parental duties, considered against the backdrop of the basic ethical principle of equal consideration, supports only a weak view of the paramouncy standard. We therefore contend that the Australian courts should adopt a weak approach to the paramouncy principle. It will be useful at this point to consider the practical implications of this change in outlook.

The key characteristic of the weak approach is that it allows the courts to consider the interests of other parties alongside those of the child. However, this framework raises an important question. How should the courts go about identifying the interests that should be considered in a particular case? One possibility would be for the court to simply ask what outcome in the case represents the best overall balance of all the interests that might potentially be affected. This would potentially require the judges to examine a wide range of normative considerations, involving a variety of different parties. The alternative would be for the court to frame the issues in play more narrowly. Rather than attempting to consider all the potential implications of a decision, the judges

<sup>109</sup> *Easteal, Behrens and Young*, above n 78.

<sup>110</sup> *Ibid* 240.

would confine themselves to weighing a limited set of factors with particular significance to the case at hand.

It is useful to illustrate this distinction by means of an example. Let us consider a case, like many of those discussed in this article, where the residential parent wishes to relocate with the child. The first approach discussed above would involve asking, 'Is it better, on balance, for all the parties who might be affected, that the residential parent is permitted to relocate?' This might involve considering not only the opportunities and support available to the child in both locations but also the impact of the move on both parents and the implications for other parties, such as grandparents and other children. The second approach, by contrast, would pose a more limited question. In a relocation case, the question might be: 'Will the child's best interests be negatively affected by the relocation to such an extent as to justify limiting the residential parent's freedom of movement?' This question focuses the court's inquiry on a specific aspect of the case by limiting the range of parties and interests under consideration.

The more extensive inquiry outlined above might appear at first to be more consistent with the principle of equal consideration, since it puts all the affected interests into play. However, it would embroil the courts in a highly complex form of normative reasoning, which they may be poorly equipped to carry out. A court determining this type of case will typically have access to a limited range of facts focusing on a particular set of issues. It is both unrealistic and undesirable to expect the judges to engage in a holistic assessment of all the normative factors that might potentially be raised by the decision.

The second possible methodology therefore presents a more realistic view of the role of the court under a weak conception of the paramountcy principle. It is also more consistent with the framework of legislation and case law within which the Australian courts currently operate. As mentioned earlier in this article, s 60CC of the *Family Law Act* sets out a list of primary and secondary considerations that the court must consider in determining what is in a child's best interests. Although this is not an exhaustive list, the courts tend to focus heavily on the matters contained in that section. This no doubt reflects the need to place reasonable limits on the range of normative factors at play.

The distinction between primary and secondary factors within s 60CC creates a further level of prioritisation. Although the two-tiered approach is open to criticism, in terms of both the need for such a distinction and the specific content of the current provision,<sup>111</sup> it clearly reflects a desire to bring greater clarity and focus to judicial deliberations. The weak approach outlined above retains this aspiration, while allowing the courts the flexibility to consider factors other than the best interests of the child where this is necessary to secure an ethical outcome.

It is also relevant in this context to consider the comments of the High Court in *U v U* about the range of proposals that courts may consider. The majority held in that case that the courts were not bound to consider only the proposals

<sup>111</sup> See, eg, Fehlberg and Behrens, above n 27, 273–7.

formally advanced by the parties.<sup>112</sup> At the same time, however, they are not obliged to look at every possible arrangement in arriving at a decision. Rather, in *U v U* the Court was entitled to consider the full range of potential residence arrangements because the issue of the child's residence was 'at the heart of the litigation'.<sup>113</sup> In other words, in deciding which proposals to entertain, the court must first determine which normative factors are central to the case at hand. The version of the weak approach suggested above would involve a similar process.

We mentioned earlier in this article that relocation cases afford a particularly clear illustration of the different outlooks represented by the strong and weak approaches to the paramountcy principle because they directly pose the question of whether the residential parent's freedom of movement may be weighed against the child's best interests.<sup>114</sup> It is for this reason that, as Chisholm aptly puts it, such cases represent the 'San Andreas Fault of children's law' — no other category of decision so clearly demonstrates the potential tension between the best interests of the child and the rights and interests of the residential parent.<sup>115</sup>

However, the implications of the weak view of the paramountcy principle are by no means confined to relocation scenarios. Its significance extends to a range of potential cases where the resolution of a parenting matter holds serious ethical consequences for someone other than the child at the centre of the dispute. A clear example is provided by cases involving children who are not formally the subject of the court's order, such as children from previous or new relationships. The strong interpretation of the paramountcy principle entails that the court may consider only factors that impact on the welfare of the child who is the subject of the order. However, from an ethical point of view, it is purely arbitrary that certain children and not others have their interests placed before the court. In contrast, the weak approach allows the interests of other children to be considered as independent factors in their own right.

The indeterminacy of the best interests principle and the associated transaction costs have been widely noted.<sup>116</sup> It is true that a weak approach to the paramountcy principle allows the court significant discretion in deciding which interests to take into account. Importantly, however, the framework advocated above is no more indeterminate than the strong outlook currently favoured by the courts. Both approaches require judges to determine which of a range of factors ought to be emphasised in the case at hand and what weight should be given to each consideration. The main difference lies in whether the factors are all subsumed under the best interests of the child or whether the interests of other parties may be given independent weight. Indeed, the weak approach to the

<sup>112</sup> *U v U* (2002) 211 CLR 238, 260 (Gummow and Callinan JJ), 284–5 (Hayne J).

<sup>113</sup> *Ibid* 261 (Gummow and Callinan JJ). For discussion of this issue in the Family Court, see *Sampson v Hartnett [No 10]* (2007) 38 Fam LR 315, 326–7 (Bryant CJ and Warnick J).

<sup>114</sup> See above Part III.

<sup>115</sup> Chisholm, above n 5, 108.

<sup>116</sup> See, eg, Stephen Parker, 'The Best Interests of the Child — Principles and Problems' (1994) 8 *International Journal of Law and the Family* 26, 29–33; Andrea Charlow, 'Awarding Custody: The Best Interests of the Child and Other Fictions' (1987) 5 *Yale Law and Policy Review* 267, 270.

paramourncy principle arguably takes a more clear-headed view of the type of reasoning already engaged in by the courts in cases such as *AMS v AIF* and *A v A*. It would give real content to the idea that the best interests of the child are the ‘paramount but not sole’ consideration in parenting matters.

If applied in the manner suggested above, the weak view of the paramourncy principle might be expected to yield similar outcomes to the current approach in many cases. In certain types of matters, however, such as relocation cases and cases involving other children, the weak approach offers a significantly greater prospect of reaching a resolution that gives appropriate weight to the ethical interests of all parties. These are areas where the courts have struggled to do justice to competing claims within the prevailing legal framework. In these types of difficult cases, the weak approach offers the best prospect of translating the good intentions of the paramourncy principle into truly ethical outcomes.

## VI CONCLUSION

Our aim in this article has been to undertake an ethical assessment of the paramourncy principle, as applied by the Australian courts. We began by distinguishing strong and weak approaches to the standard. We then argued that the Australian courts have tended to adopt the strong view — even cases such as *AMS v AIF* and *A v A*, which some commentators have viewed as ambiguous, are consistent with the strong approach and have been interpreted as such in later decisions. Finally, we considered the ethical basis for the strong view, examining it in light of the principle of equal consideration and the notion of parental duties. We concluded that it cannot be supported from an ethical point of view.

It follows from the above argument that, in ethical terms at least, many of the cases discussed in Part III of this article were, if not wrongly decided, then at least poorly reasoned. Rather than devoting all its attention to working out what is in the child’s best interests and regarding other factors as merely subsidiary, the courts should treat the best interests of the child as the primary objective to be secured, but then consider what orders best reconcile those interests with other important factors such as the parents’ freedom of movement and the interests of children of other relationships. In other words, rather than following a strong view of the paramourncy principle, the courts should adopt a weak approach. This outlook still treats the best interests of the child as the paramount concern, but it entertains the possibility that a marginal decrease in the child’s welfare may sometimes be justified by the conflicting interests of the parents or other affected parties.

The strong interpretation of the paramourncy principle is based on an ethical precept that all reasonable people accept: namely, that parents have special ethical duties to their children. However, it uses that principle to justify a position which the principle does not support and which potentially gives rise to unjust outcomes. The Australian courts should move to a model that gives greater independent weight to the interests of other parties and, in particular, which treats the residential parent’s autonomy and freedom of movement as more than a mere subsidiary factor to be considered when assessing the interests

of the child. This approach would lead to more defensible reasoning in a range of cases, including relocation matters.

A weak approach to the paramountcy principle would continue to recognise the importance of children's interests, while also extending appropriate ethical consideration to parents and other parties. It would particularly assist the courts in giving appropriate ethical consideration to the interests of mothers, who as residential parents have tended to bear the brunt of the courts' decisions in relocation disputes. Parents have interests, commitments, desires and dreams of their own, not all of which revolve solely around their offspring. They deserve our consideration as moral persons in their own right, not as subsidiary beings whose welfare is only relevant insofar as it impacts on their children.