HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

U APPELLANT

AND

U RESPONDENT

U v U
[2002] HCA 36
5 September 2002
S256/2001

ORDER

Appeal dismissed.

On appeal from the Family Court of Australia

Representation:

M D Broun QC for the appellant (instructed by Russell McLelland Brown)

P L G Brereton SC with E T Boyle for the respondent (instructed by James Richardson)

CATCHWORDS

U v U

Family law – Children – Parenting orders – Residence orders – Contact orders – Place of residence of child when one parent wishes to relocate to another country – Proposals of parents about residence of child of marriage and contact with child – Wife's wish to return to country of origin – Wife applies for permission to leave Australia with child – Whether wife should be permitted to remove child from Australia – Wife acknowledged that she would remain in Australia if her return to her place of origin would result in order for child to reside with father – Best interests of child paramount consideration.

Family Court – Practice and Procedure – Children – Parenting orders – Residence orders – Contact orders – Proposals of parents – Whether powers or discretion of Court confined by proposals of parents.

Family Law Act 1975 (Cth), s 65E.

1 GLEESON CJ. I agree that the appeal should be dismissed for the reasons given by Gummow and Callinan JJ. I also agree with the observations of Hayne J.

2 GAUDRON J. The appellant is the mother of young daughter, N, who was born in Australia in March 1994 and who is an Australian citizen. The respondent is N's father. Both parents were born in Mumbai, India, where they married in August 1989. At the date of their marriage, the father was an Australian citizen resident in this country. He returned to Australia shortly after the marriage and the mother came to Australia a few months later. The mother is not an Australian citizen, but has permanent resident status.

3 In July 1995, the mother left the matrimonial home and took her daughter to Mumbai without prior notice to her husband. However, she left a note for him informing him of her actions and made contact with him after her arrival. N's father travelled to Mumbai in August of that year and commenced proceedings for her custody. Subsequently, on 8 March 1996, the following consent orders were made by the Family Court at Bandra, Mumbai:

> "2 Agreed and ordered that custody of minor daughter '[N]' to remain with the Respondent, till decree for divorce is granted.
>
> 3 Agreed and ordered that the Respondent will retain the Australian citizenship of minor '[N]' till decree for divorce is granted.
>
> 4 Agreed that parties hereto will have liberty to move Court for further orders in respect of clauses 2 and 3 above."

Between August 1995 and January 1998, the husband travelled to Mumbai on five occasions during which he had unrestricted access to N. On at least three of those visits he stayed at the home of the wife's mother where his wife and child were living.

4 The mother and N remained in Mumbai until January 1998 when they returned to Australia, the mother having then decided to attempt a reconciliation with her husband. The attempted reconciliation failed and, on 31 August 1998, the mother again tried to take N to Mumbai without informing her husband. Apparently, the husband had some reason for thinking that such an attempt might be made for, without notice to the mother, he had, on 29 June of that year, commenced proceedings in which he sought an order restraining her from removing N from Australia and organised to have N's name placed on the "watch list". Because his daughter's name was on that list, his wife and child were unable to leave Australia.

5 The mother and N did not return to the matrimonial home on 31 August 1998 but went, instead, to Wollongong where they still reside. Various proceedings were instituted by the mother and father. For present purposes, those proceedings culminated in an application by the mother to the Family Court of Australia for, amongst other orders, a parenting order which would enable N to reside permanently with her in Mumbai and a cross-application by

N's father primarily seeking a parenting order pursuant to which she would reside with him in Australia. It will later be necessary to refer in greater detail to that application and cross-application.

6 The mother's application and the father's cross-application resulted in a parenting order in favour of the mother, but the order requires her to reside in the Sydney-Wollongong area. She appealed unsuccessfully from that order to the Full Court of the Family Court and now appeals to this Court.

Relevant legislative provisions

7 By s 65C(a) of the *Family Law Act* 1975 (Cth) ("the Act"), "either or both of the child's parents" may apply for "a parenting order" which, by s 64B(2), may deal with one or more of the following:

> "(a) the person or persons with whom a child is to live;
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> (b) contact between a child and another person or other persons;
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> (c) maintenance of a child;
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> (d) any other aspect of parental responsibility for a child."

8 Section 65D(1), which is in Div 6 of Pt VII of the Act provides that:

> "In proceedings for a parenting order, the court may, subject to this Division, make such parenting order as it thinks proper."

A number of provisions in Div 6 of Pt VII of the Act are relevant to these proceedings. In particular, s 65E states:

> " 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."

9 Section 68F(2) specifies various matters which the court must take into consideration in determining what is in the child's best interests, including:

> "(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
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> (i) either of his or her parents; or
>
> (ii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; [and]

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs".

10 Two other provisions of Div 6 of Pt VII of the Act should be noted. Section 65Z makes it an offence for a party to proceedings for a residence, contact or care order to take or send or to attempt to take or send a child who is the subject of those proceedings from Australia save with the consent of the other party or in accordance with a court order. Section 65Y creates a similar offence where a residence, contact or care order has been made.

The application and cross-application

11 So far as is presently relevant, the mother made application for orders that N reside with her, that she and N reside in India on a permanent basis and that N have contact with her father as follows:

"(a) Unlimited contact in India at the wife's residence and supervised at all times by the wife.

(b) For a continuous period of two months every year in Australia, such contact to be supervised by the wife and the wife to pay for the travel cost associated with every second period of contact.

(c) At other times by agreement between the parties."

12 The husband's cross-application relevantly sought orders that, should his wife reside within the Sydney-Wollongong area, N should reside with him except for specified periods on weekends, during school holidays and on special occasions including birthdays, Mother's Day and Christmas Day during which she should reside with her mother. His application also sought consequential orders in the event that a residence order was made in favour of the mother. In that event, he sought orders that the mother be required to live in the Sydney-Wollongong area and that N reside with him at times which substantially mirrored those which he proposed in relation to her mother in the event that a residence order was made in his favour.

The mother's desire to return to India

13 The mother's circumstances in Australia are far from ideal. She is an educated woman who, before marriage, worked in responsible positions in the shipping industry in London where she trained as a shipbroker for deep sea and short sea chartering. On her return to India, she worked as an imports co-

ordinator, in which capacity she was responsible for, amongst other things, the preparation of shipping documents and the arranging of shipments. She has not been able to obtain similar employment in Australia. In the main, she has had only casual employment in this country, performing clerical duties and data entry work. She has not worked since shortly prior to N's birth and is presently in receipt of social security payments. It was accepted at first instance that her "economic future may be enhanced or improved by relocating to India".

14 It was also accepted at first instance that the mother "is unhappy in Australia and misses her family and friends in India". In this regard, the trial judge noted that she has no "family in Australia and apart from three or four friends she [has no] other support in Australia." On the other hand, she gave uncontested evidence that she has "a wide and established circle of friends, family members, extended family and past business contacts in Mumbai." Her parents both live in Mumbai, as do members of her husband's extended family.

15 The mother gave evidence when the application and cross-application came on for hearing that, if allowed to return to India, she and N would live with her mother who, apparently, lives in comfortable circumstances in Mumbai. And although she had been offered employment in Mumbai, she indicated that she proposed, instead, to undertake legal studies with a view to starting her own business when N is older.

The father's circumstances

16 The father came to Australia in 1973, when he was 18 years old. He graduated from Macquarie University and is a qualified accountant. His mother, father and sister reside in Australia but, as already indicated, other members of his extended family live in Mumbai. No evidence was given by the father as to whether he could or would move to Mumbai if N and her mother were to live there permanently. However, he stated in his evidence that, if he had to travel to India to have contact with N, he would. And as already noted, he did travel to Mumbai on five occasions between 1995 and 1998 for that purpose.

The counsellor's report

17 A counselling report was obtained in accordance with s 65F of the Act. By the time of that report, the mother's proposals for contact between N and her father, in the event that she and N were to live in India, had changed somewhat. In particular, she then proposed contact for "five block periods per year" which would involve her bringing N to Australia three times a year and the father visiting N in India twice annually. However, it seems that, by the time of the hearing, the proposal was for four visits, two in Australia and two in India.

18 The counsellor noted in his report that N was attached to both parents and stated that "[i]deally, [her] best interests would be served by her having frequent

and liberal contact with both parents." However, he did not recommend that course. Rather, he noted:

> "Should Ms [U] be ordered to remain in Australia with [N] to facilitate contact between [N] and her father, it is unclear how Ms [U's] distress might manifest itself, and what the implications of this might be for [N]. It does appear, however, that the degree of distress may be quite debilitating, as evidenced by her current preoccupation with returning to India."

19 The counsellor also noted that the mother's proposal to reside in India would severely curtail contact between N and her father "and consequently affect the development of [their] relationship". And if the mother were to return to India and N were to stay in Australia, the counsellor anticipated that N "would suffer considerable anxiety and distress". The counsellor concluded:

> "The situation is thus not one where any clear recommendation is possible. Unless the mother is able to deal with her own distress, regarding her separation from her own parents, sufficiently to be able to accept that, in her child's best interests, she needs to stay in Australia, then the child will either be subjected to that distress, or will have her relationship with her father severely curtailed. Should the child remain in Australia with her father then it is anticipated she will be greatly distressed by the separation from her mother."

The decision at first instance

20 As already indicated, the mother's proposals for contact between N and her father, in the event that she and her daughter were to live in India, changed somewhat between the filing of her application and the date of the hearing. By the time of the hearing, she was no longer asking that contact between N and her father be supervised and her proposal was that she bring N to Australia twice each year and that N's father visit her in Mumbai twice a year. She offered to lodge a cash bond in Australia and to consent to counterpart court orders in India to ensure compliance with whatever contact orders were finally made in Australia. She proposed that she bear the costs of her travel to Australia, that her husband bear his costs of travelling to India and that they share the costs of N's air tickets. Moreover, she offered to agree to a reduction in child maintenance to enable her husband to meet the extra cost involved in travelling to India.

21 In the course of her cross-examination, the mother stated that, if she and N were not permitted to reside in India, she would stay in Australia with her daughter. The trial judge (O'Ryan J) regarded this as "[a]n alternative proposal of the [mother] that [N] reside with her in Australia" and proceeded on the basis that there were three proposals to be considered.

22 After making findings that N was bonded to both parents, but primarily to her mother, the trial judge stated, incorrectly, that "[t]he Counsellor ... said that it is important that the child have frequent and liberal contact with both parents" and then noted that "[t]he proposals that the child reside in Australia would allow this to happen". A number of findings were then made with respect to the disadvantages and difficulties inherent in the mother's proposal that she and N should live in India.

23 The critical disadvantage which the trial judge perceived in the mother's proposal that she and N should live in India related to future contact between N and her father. His Honour expressed his concerns as to the mother's sincerity with respect to future contact, which concerns were, seemingly, based on her taking N to India in 1995, her attempting to do so again in 1998, her then going "to Wollongong with the child again without the knowledge or consent of the husband" and the circumstances in which she obtained "under State law, an order for care of the child" after the father obtained an ex parte order for her custody. His Honour concluded:

> "I am not satisfied that the contact regime proposed by the wife will ensure that there is a proper and meaningful relationship between the husband and the child, given the importance of this relationship, which is acknowledged by the wife. Further, I am not satisfied that the wife would do all that was necessary to ensure that it was maintained."

24 The trial judge accepted that "if the wife did not reside in India this would impose pressures upon her and may diminish her capacity to cope and so diminish the quality of the lifestyle in ... her home". His Honour then noted that it had been held in *B and B: Family Law Reform Act 1995*[1] that "the long-term unhappiness of a residence parent is likely to impinge in a negative way upon the happiness and therefore the best interests of the child".

25 The trial judge made no evaluation of the likely impact of the mother's unhappiness on N in the event that they were to stay in Australia. Rather, his Honour adverted to the possibility that an unhappy parent may allow "his or her emotional well being to override the interests of the child" and, in view of the counsellor's report that the mother's distress "appear[ed] to override the need of the child to have a relationship with the husband", expressed doubt as to her ability to provide for N's emotional needs.

26 As already noted, the trial judge expressed a lack of satisfaction with the contact regime proposed if the mother and N were to return to India. Without specifically identifying the consequences or likely impact of the other proposals,

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1 (1997) 21 Fam LR 676; (1997) FLC §92-755.

his Honour concluded that "[i]n all the circumstances ... taking into account all relevant considerations, including, and importantly, the wife's right to choose where she resides, and her unhappiness and it's [sic] impact on the child if the wife and the child resided in Australia ... the preferred option [was] that the child continue to reside in Australia with the wife".

The decision of the Full Court

27 The Full Court recognised that the trial judge was in error in thinking that the counsellor had said it was important for N to have frequent and liberal contact with both parents without recording the counsellor's view that that "result could only be obtained by imposing it against the will of [her mother] and that of itself had significant negative connotations for the child". However, the Full Court was of the view that the "error was not of a sufficient magnitude to otherwise vitiate an unimpeachable judgment."

Disposition of relocation cases

28 Contrary to what was held by the Full Court, the trial judge's error with respect to the counsellor's report, although not, itself, fundamental, led to what was a fundamental error in his Honour's approach to the issues to be determined. That error is comprehended in the mother's first ground of appeal to this Court, namely:

> "The trial judge and the Full Court on Appeal erred in their approach by failing to focus on and to analyse and to reach a conclusion on the separate proposals of the husband and wife and instead ultimately addressing the issue of whether the mother should be permitted to remove the child from the Commonwealth of Australia."

29 A number of arguments were made by reference to the first ground of appeal. In particular, it was put that the mother should not have been asked whether, if N were not permitted to reside in India, she would stay in Australia and that, upon her stating that she would, the trial judge erred in approaching the matter on the basis that three different proposals had to be considered.

30 As already pointed out, s 65D(1) of the Act enables a court, subject to Div 6 of Pt VII, to make such parenting order as it thinks proper. That power is not restricted solely by the provisions of Div 6 of Pt VII of the Act. More fundamentally, it is restricted by the requirements of procedural fairness – which requirements are an indispensable feature of the exercise of judicial power[2]. It

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2 See, for example, *Harris v Caladine* (1991) 172 CLR 84; *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501; *Leeth v The Commonwealth* (1992) 174 CLR 455.

may well be that the conversion of the mother's acceptance that she would stay in Australia if N were not permitted to live with her in India into a separate proposal that the child live with her in Australia would give rise to a question whether there had been a denial of procedural fairness if there had been no other basis for that proposal.

31 In the present case, however, the question of procedural fairness falls to be considered not simply by reference to the mother's acceptance that, if necessary, she would stay in Australia but, also, by reference to the different orders sought in her application and in the father's cross-application. By his cross-application, the father sought alternative orders on the basis that the mother remained in Australia and a parenting order was made in her favour. The mother's acknowledgment in cross-examination that, if necessary, she would remain in Australia constituted an acknowledgment that the father's alternative claim had to be considered. And as that alternative claim had been made known by his cross-application, there can be no basis for concluding that there was a want of procedural fairness in its being considered along with the mother's proposal that N should live with her in India and the father's that N should live with him in Australia.

32 It should be emphasised that the proposal that N live with her mother in Australia was the father's alternative proposal and not, as the trial judge stated, the mother's. That being so, it hardly seems appropriate that the mother should have been criticised by the trial judge, as she was, for not having given thought to the arrangements she would make for N's care in the result that a parenting order was made in her favour on terms that she and N live in Australia.

33 Another aspect of the argument put with respect to the first ground of appeal, was that the trial judge should have first decided between the mother's proposal that N reside with her in India and the husband's counter-proposal that N live with him in Australia and, only if it was decided that, as between those proposals, N's interests were better served by living with her father, should consideration have been given to his alternative proposal that N live with her mother in Australia.

34 There may well be cases where, because of the way the issues have been framed or the case conducted, procedural fairness requires that a particular proposal should be considered only if another is positively rejected. So, too, it may be that the issues are such that it is only necessary to consider a particular proposal if others are positively rejected. However, as will later appear, the present case was one in which all three proposals had to be separately evaluated and a choice made between them or, pursuant to s 65D(1) of the Act, a modified version of one or other of them.

35 Where, as in the present case, the paramount consideration is the child's best interests, it is not always appropriate that the issues be explored and the

evidence revealed strictly in accordance with the adversarial procedures that apply in party-party litigation. That being so, it is noteworthy that in this case there was no consideration of the possibility that the father could return to India permanently to avail himself of frequent and regular contact with his daughter. The failure to explore that possibility, particularly given the father's origins, his professional qualifications and family contacts in India, seems to me to be explicable only on the basis of an assumption, inherently sexist, that a father's choice as to where he lives is beyond challenge in a way that a mother's is not.

36 Further, it must be accepted that, regrettably, stereotypical views as to the proper role of a mother are still pervasive and render the question whether a mother would prefer to move to another state or country or to maintain a close bond with her child one that will, almost inevitably, disadvantage her forensically. A mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child runs the risk of not having her reasons for relocating treated with the seriousness they deserve.

37 It must be acknowledged that it is likely that, in very many relocation cases, a mother will concede that, if she has to choose between relocation and having her child live with her, she will choose to have her child live with her. That being so, she runs the risk that her interests will not be properly taken into account. To avoid that possibility, it is essential that, in relocation cases, each competing proposal be separately evaluated. That is so whether it is the mother or the father who wishes to relocate. So much was made clear in *AMS v AIF*[3].

38 In the present case, the need to give proper consideration to the wishes of the parent was not the only reason why each of the proposals had to be separately evaluated. Rather, in a context in which each of the proposals involved some disadvantage for N, as the trial judge acknowledged, a determination could only be made as to what was in her best interests by separately evaluating each of them.

39 Although the trial judge acknowledged that it was necessary to determine which of the three proposals was preferable and that, in that exercise, the best interests of N were the paramount but not the only consideration, the proposals were not separately evaluated. There was no evaluation of the father's proposal that N live with him in Australia and, notwithstanding that it was ultimately held to be preferable, there was little, if any, evaluation of his alternative proposal that N reside with her mother in Australia.

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3 (1999) 199 CLR 160 at 191 [95] per Gaudron J, 226 [196] per Kirby J, 232 [218]-[219] per Hayne J.

40 So far as concerns the father's alternative proposal that N reside with her mother in Australia, it was clear from the counsellor's report that the mother was distressed at not being able to live in India and that there was a real risk that, in consequence, N would be adversely affected. The trial judge acknowledged that distress and, on that account, expressed doubts as to the mother's "ability to provide for the emotional needs of the child". However, no findings were made as to the depth of her distress. Nor was any consideration given to whether, in the future, her distress would abate or, as would seem likely given that she had limited employment prospects, few friends and no family support in Australia, intensify. More significantly, no findings were made as to the likely impact of such distress on N, on her social and emotional development or on her relationship with her parents, all of which were of critical importance in determining what was in her best interests.

41 The trial judge's failure to separately evaluate the three proposals and, hence, to properly determine what was in N's best interests was almost certainly the result of his Honour's erroneous understanding of the counsellor's statement that "[i]deally, [N's] best interests would be served by her having frequent and liberal contact with both parents". Clearly, his Honour understood the statement to mean that such contact was more important than any other consideration. It may be that a finding that frequent contact with both parents was more important than any other matter could properly have been made by the trial judge but, if so, it could only be made by separately evaluating each of the proposals.

Conclusion and orders

42 The trial judge fell into error in not separately evaluating the proposals of each parent. That was a fundamental error of the kind that, in other fields of jurisprudence, is identified as a constructive failure to exercise jurisdiction. The Full Court was in error in failing to so find.

43 The appeal should be allowed. The order of the Full Court dismissing the mother's appeal to that Court should be set aside and, in lieu thereof, the appeal to that Court should be allowed, the parenting orders of O'Ryan J set aside and the matter remitted to a single judge for further hearing and determination.

44 McHUGH J. This appeal should be dismissed for the reasons given by Gummow and Callinan JJ. I also agree with the additional comments made by Hayne J.

45 GUMMOW AND CALLINAN JJ. The main issue which this appeal raises is whether the Family Court failed to consider and decide in a principled way, the place of residence of a child whose mother wished to relocate, with the child, in another country.

Facts

46 The female child, N, the subject of these proceedings was born in Sydney on 2 March 1994. The parties, her parents, were born in Mumbai in India, the appellant wife in 1957 and the respondent husband in 1954. Although the respondent had lived in Australia since 1973, the appellant and he were married in Mumbai in August 1989. The appellant joined the respondent in Sydney shortly after.

47 From time to time the child has resided in India with the appellant. Between 1995 and 1998, when the parties were living apart, the respondent visited the child in India and spent time with her on five occasions.

48 In January 1998 the parties sought to be reconciled. The respondent provided the appellant with return airfare tickets to India so that the wife could subsequently holiday there with the child if she wished. At the same time, the respondent commenced proceedings to restrain the removal of N from Australia. The appellant was given no notice of the proceedings.

49 Both parents are graduates. The respondent is in full time employment in Australia. The appellant has had difficulty in obtaining suitable full time employment in this country. She would be unlikely to encounter the same difficulty in India.

50 Within eight months of January 1998 the marriage again foundered. The respondent had caused the child to be placed on the "watch list", using the PASS system. This is an acronym for the system of preventing the unauthorised removal of children from Australia. Subdivision C (ss 67H-67Y) of Div 8 of Pt VII of the *Family Law Act* 1975 (Cth) ("the Family Law Act") makes provision for that system. The responsible officials restrained the departure of the child. The appellant remained in Australia with her. She did not however resume cohabitation with the respondent.

51 The husband obtained an ex parte order from the Local Court on 4 September 1998 that the child reside with him. On 11 September 1998, the order was discharged and orders were made for the child to reside with the appellant and for the respondent to have contact.

52 At least since January 1999 the respondent has had regular contact with N. The appellant seems, to some extent at least, to have co-operated in allowing that

contact to take place. The appellant regards the respondent as a "great father": he cares for the child and his relationship with her is beneficial.

The proceedings in the Family Court

53 Where and with whom the child should reside, and such other arrangements as should be made for her upbringing and contact with both parents, fell to be decided by the Family Court (O'Ryan J). Part VII (ss 60A-70Q) of the Family Law Act is headed "Children". Various provisions of Pt VII confer relevant jurisdiction and powers upon the Family Court. The term "parenting order" has the meaning given by s 64B. The matters with which such an order may deal include the person or persons with whom the child is to live (identified as a "residence order") and contact between the child and others (a "contact order"). In deciding whether to make a particular parenting order, the Court "must regard the best interests of the child as the paramount consideration" (s 65E).

54 Sections 65M and 65N respectively spell out the obligations created by a residence order and a contact order. Section 68B confers power, in proceedings instituted in a court having jurisdiction under Pt VII for an injunction in relation to a child to "make such order or grant such injunction as it considers appropriate for the welfare of the child" (s 68B(1)), including by interlocutory order (s 68B(2)). Further, orders may be made for the delivery up of the passport of the child (s 67ZD). The taking or sending from Australia of a child by a party to proceedings in which a residence order or a contact order was made, is rendered by s 65Y a criminal offence, if the act be done without the consent of the party in whose favour the order was made or without a court order allowing it to be done. It will be convenient to refer in fuller detail to some of these provisions and to other provisions of Pt VII later in these reasons.

55 Section 69H(1) confers jurisdiction on the Family Court in relation to matters arising under Pt VII. The litigation before O'Ryan J included property matters which arose under other provisions and with which this Court is not concerned. The matters arising under Pt VII included both residence and contact orders and an application by the appellant under s 65Y to leave Australia with the child to travel to India to reside.

56 The appellant summarized her case at first instance in this way. Her proposal was that the child reside with her in Mumbai, and that she have the sole responsibility for her day to day care, control and development. She also asked the Court to make orders as to the contact the respondent might have, being, she suggested, unlimited contact in India and an uninterrupted period of two months every year in Australia. She also asked that she be permitted to leave Australia with the child to travel to India to live in Mumbai on a permanent basis. The appellant proposed the sharing of the costs of the respondent's contact. She was

also prepared to accept a reduction in the respondent's contribution towards the maintenance of the child.

57 The respondent's proposal was that the child reside with him in Australia for most of the time, and with the appellant for various periods, such as, for some parts of her school holidays, second weekends and various other days. In the alternative he asked that in the event the Court order that the child live with the appellant for most of the time "the Wife [be] restrained from removing her residence out of the Sydney/Wollongong area".

The findings at first instance

58 The findings of the primary judge included these matters. The appellant has no family and few friends and no other support in Australia. She had become unhappy in this country. If she did not reside in India there would be pressures upon her that would reduce her capacity to cope and diminish the quality of her life. Long-term unhappiness would be likely to impinge in a negative way upon the happiness, and therefore the best interests of the child. No matter where the child might reside the appellant would make appropriate provision for her physical and educational needs.

59 The respondent equally would make satisfactory provision for the physical and educational needs of the child. He would however, be dependent upon his parents for assistance.

60 N has a very close relationship with the appellant and is primarily bonded to her. The father too has always had a very good relationship with the child. There is a similarly good relationship between the child and the maternal grandmother and the paternal grandparents. At all times when the respondent was in India, the appellant's family and friends welcomed him and treated him with respect.

61 The appellant's primary focus is on her own emotional needs and not those of the child, whereas the respondent is more "child-focused".

62 The mother is a highly intelligent and articulate woman. During the relationship she was assertive.

63 N's physical and educational needs would be appropriately met in India. While living in India between May 1995 and January 1998, N was exposed to, and enjoyed appropriate social activities, including significant contact with friends and relatives. If she remained in Australia she would continue to be exposed to, and enjoy such activities.

64 The appellant was lonely and felt isolated. The appellant has for some time been at odds in various ways with the respondent's family and has involved N in the conflict between her and the respondent. Both parties would ensure that the child maintain a connexion with the culture and traditions of each country. The appellant is bona fide in her desire to return to India.

65 His Honour stated his conclusions about the future of N in four paragraphs:

> "In this case, as in all parenting cases, the ultimate determinant is the best interests of the child.
>
> I agree with what the counsellor said in oral evidence namely that the child will 'lose' no matter what happens. It would be detrimental to the child if the child lived with an unhappy parent. On the other hand it would be detrimental to the child if the child lived in India and thus could not have regular contact with the husband. The counsellor said that, for this child, frequent contact is most suitable. The counsellor said that even if there was block contact, and the wife sent or caused to be sent to the husband cards, presents and other items the role of the husband would still be significantly diminished. The relationship between the husband and the child would become a very different relationship and the husband would not have an impact on a day to day basis.
>
> In all the circumstances of this case, taking into account all relevant considerations, including, and importantly, the wife's right to chose where she resides, and her unhappiness and its impact on the child if the wife and the child resided in Australia, I am of the opinion that the preferred option is that the child continue to reside in Australia with the wife. It is a case which is finely balanced. However, in my view, this is the option that is in the best interests of the child. I am of the opinion that the child should reside with the wife for the majority of time because the child has always lived with the wife, the child's bond with the wife is stronger than the bond between the husband and the child, and the wife had always been the primary carer. However, the child has a very close and important relationship with the husband and this should not be curtailed.
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> I am of the opinion, that this child should spend as much time, as is possible, with each parent. However, it may be that the period of time I propose the child reside with the husband during the school term period had to be reviewed when the wife commences paid employment."

66 Relevantly the Court made orders as follows:

> "5. That the child of the marriage born on 2 March 1994 reside with the husband as follows:

5.1 Each alternate weekend from 7.00 pm on the Friday evening until 7.00 pm on the following Sunday evening.

5.2 On each other weekend on the Sunday between the hours of 9.00 am and 5.00 pm.

5.3 For one half of each New South Wales Gazetted School holiday period being for the first half in 2000 and in each alternate year thereafter and for the second half in 2001 and in each alternate year thereafter.

6. That the child of the marriage reside with each party as follows:

6.1 On the child's birthday in each year if the child is in the care of the husband for three hours with the wife and if the child is in the care of the wife for three hours with the husband.

6.2 On the wife's birthday in each year for a period of three hours with the wife if the child is in the care of the husband and on the husband's birthday for a period of three hours with the husband if the child is in the care of the wife.

6.3 On Father's Day between the hours of 9.00 am and 5.00 pm in each year with the husband if the child is in the care of the wife.

6.4 On Mother's Day between the hours of 9.00 am and 5.00 pm in each year with the wife if the child is in the care of the husband.

7. That subject to Orders 5 and 6 hereof the child of the marriage reside at all other times with the wife.

8. That parties have joint responsibility for the long term care, welfare and development of the child of the marriage.

9. That each party have responsibility for the day to day care, welfare and development of the child of the marriage during the periods that the child resides with each party.

10. That for the purpose of conveying the child between the household of each party the wife shall be responsible for delivering the child to the husband at the commencement of each period that the child is to reside with the husband and the husband shall be responsible for returning the child to the wife at the conclusion of each such period.

11. That both parties be and are restrained from changing the place of residence of the child from the Sydney Metropolitan and Wollongong/Illawarra areas.

12. That each party disclose to the other the address and telephone number of the residence at which the child resides with each party and shall provide to the other not less than seven days notice of any proposed change of address or telephone number.

13. That each party notify the other in the event that the child is required to undertake any emergency medical treatment.

14. That the wife provide to the husband or authorise the provision to the husband of any school reports and notice of any school and sporting activities.

15. That the husband pay to the wife for a period of twelve months from the date of these orders spousal maintenance of $200 per week the first payment to be made within seven days of the date of these orders and thereafter weekly in advance."

The appeal to the Full Court of the Family Court

67 The appellant appealed to the Full Court of the Family Court (Kay, Holden and Carter JJ) against the orders made at first instance with respect both to matters of property and maintenance, and the care and residence of N. The Full Court unanimously rejected the appeal in respect of the child's care and residence because their Honours could discern no error of approach or principle by the primary judge.

The appeal to this Court

68 The appellant appeals to this Court on six grounds. The first that the appellant argued is that the trial judge and the Full Court erred in their approach by failing to focus on, analyse and reach a conclusion on the separate proposals of the respondent and appellant, but instead, concentrated their minds on the issue whether the appellant should be permitted to remove the child from Australia. The second ground was that the trial judge, and the Full Court, directed their attention primarily to the short-term welfare of the child and thereby neglected consideration of her long-term welfare. Thirdly, the appellant contended that the courts below failed to apply, or to give any consideration to Australia's international treaty obligations, particularly Art 12 of the International Covenant on Civil and Political Rights. Fourthly, it was put, the courts below had misapplied the principles in relation to the relocation of the child to another country, and in doing so had reached an untenable conclusion. Fifthly, the appellant argued, the courts below had failed to maintain a proper proportion or balance between the desirability, in the child's interests, of optimising contact so far as practicable, on the one hand, with the desirability on the other of providing the child with a stress-free environment which could best be provided by the appellant in India, the country in which she would be happy. Finally, the

appellant argued that the Full Court failed to review the trial judge's decision and effectively deprived her of the review to which her right of appeal entitled her.

69 We will deal with each of these in turn.

70 There is, in our opinion, an air of artificiality about the appellant's argument on the first ground. No doubt there will be cases, perhaps many cases, in which a court can and should adopt, with few changes or additions, the arrangements proposed by one of the parties for the future of the child or children whose welfare is paramount, in preference to the other. As was said in *AMS v AIF*[4]:

> "It will generally not be possible for a trial judge to construct a framework and environment for the upbringing of a child. What happens in practice is that those competing for the care and custody of a child will present proposals to the Court to advance the welfare of the child. Judges frequently will be able to mould or adopt such proposals in making orders but rarely will they be able to invent or construct substantially different arrangements for children from those proposed by the parties." (footnote omitted)

There will, however also be cases, and not a few of them we suspect, in which it will simply not be possible for a judge to adopt exclusively or perhaps even substantially, a proposal of either party. In such a case the final order will evolve out of the evidence as it emerges, and submissions as they are developed. Indeed, almost in terms the appellant herself acknowledged this to be so in the following exchange in cross-examination:

> "Is it the case, ma'am, that you have deliberately avoided dealing with the possibility that you won't be able to go [to India]? --- No sir, I haven't. But I would like to think that we will be able to go.
>
> Let's deal with what I asked you before. Have you thought [about] the possibility that you won't be able to move to India? --- I haven't given it much thought yet, sir.
>
> Don't you think you should? --- *I think I would like to give it much more weight as the case proceeds and as the judgment* – I get the judgment, sir.
>
> What, when you're finished in the witness box you will give it some thought, is that right? --- No, no, I wouldn't – not that.

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4 (1999) 199 CLR 160 at 251 [284] per Callinan J.

> I will ask you [to] think about it now. Assume that his Honour says you can go to India any time you like but you can't take your daughter. Assume that's the situation. What could you do then to make life as good as it can be for your daughter here in Australia? --- I have to think about it, sir.
>
> You don't have the capacity if you sit in the witness box to think about that, is that what you're saying to his Honour? --- I'm sure I have the capacity.
>
> Or is it that you won't do it, you won't think about it? --- I will think about it but –
>
> I'm asking you to think about it. What can you do – what could you do to make life for your daughter as good as possible here in Australia? --- I would be doing the things that I'm doing now, sir, but it would be –
>
> Don't say you would continue to ensure she has a good and full activity session at school and out of school? --- That's right, but I would rather that she be brought up in a more loving atmosphere in Bombay." (emphasis added)

71 In cross-examination of the respondent the following questions were put and these answers were given:

> "Did you read in your wife's affidavit of a regime of contact which she proposes if [N] goes to live in Bombay? --- I did.
>
> She proposes that on a number of times during the year for holidays [N] would come to Australia with your wife? --- Yes.
>
> For several weeks, and at other times you could have access to [N] in India? --- Yes.
>
> Would you be prepared to travel to India for that purpose? --- Well, in the event that she did go to live in India I would have to.
>
> Well you would want to, wouldn't you? --- To keep up my continuing association with her, yes.
>
> Yes, and you would anticipate, wouldn't you, that your wife would keep sending you the things I asked you about earlier from [N], cards and presents and the like? --- I would hope so, yes.
>
> To keep you up to date as to what she is doing and what is going on in her life? --- Correct."

72 It was clearly therefore within the contemplation of the parties that each might need to adapt her or his situation and wishes to the residence of the child in a different country from the one of choice. The parties in cases concerning the welfare of children do not define the issues. It is Div 4 (ss 63A-63H) of Pt VII, headed "Parenting plans", which does that. For example parties may not even make or vary an enforceable parenting plan without the approval, that is to say the intervention, of the Court (ss 63B-63H).

73 Detailed prescription for determining the best interests of the child (the paramount consideration stipulated by s 65E with respect to parenting orders) is made by Subdiv B (ss 68E-68K) of Div 10 of Pt VII. Section 68F is especially important. It relevantly provides as follows:

> "**68F How a court determines what is in a child's best interests**
>
> (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).
>
> (2) The court must consider:
>
> (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
>
> (b) the nature of the relationship of the child with each of the child's parents and with other persons;
>
> (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
>
> (i) either of his or her parents; or
>
> (ii) any other child, or other person, with whom he or she has been living;
>
> (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

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

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

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

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

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2)."

74 That the Court's role may go beyond the mere choice between two or more proposals by the parties, appears expressly, for example, from the provisions of s 68L which empower the Court to make an order for separate representation of a

child on the Court's own initiative[5]. Other sections of the Family Law Act which also, if in some instances rather broadly, define the issues, should be noted.

75 Section 60B which provides as follows is one of these:

"**60B Object of Part and principles underlying it**

(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children."

76 Section 61C is in the form:

"**61C Each parent has parental responsibility (subject to court orders)**

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example,

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5 *DP v Commonwealth Central Authority* (2001) 75 ALJR 1257 at 1288 [186]; 180 ALR 402 at 446.

by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section)."

77 Section 61D provides as follows:

"**61D Parenting orders and parental responsibility**

(1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

(a) expressly provided for in the order; or

(b) necessary to give effect to the order."

78 And s 65Y is of particular relevance. It provides as follows:

"**65Y Obligations if residence order, contact order or care order has been made**

(1) If a residence order, a contact order or a care order (the ***Part VII order***) is in force, a person who was a party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of, a party, must not take or send the child concerned from Australia to a place outside Australia except as permitted by subsection (2).

Penalty: Imprisonment for 3 years.

(2) Subsection (1) does not prohibit taking or sending the child from Australia to a place outside Australia if:

(a) it is done with the consent in writing (authenticated as prescribed) of each person in whose favour the Part VII order was made; or

(b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the Part VII order."

79 The appellant's argument on the first ground comes down to this: the primary judge failed to identify and give consideration to the case of each of the parties. Instead his Honour made an order that was quite different from the proposals of each of the parties. This was, it was submitted, an impermissible departure from the first step in the three stage process[6] which the Full Court of the Family Court held to be mandated by the Family Law Act in *A v A*[7] that:

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6 The process was stated in *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,552-87,553 to be as follows:

"1. A court will identify the relevant competing proposals;

2. For *each* relevant s 68F(2) factor, a court will set out the relevant evidence and the submissions with particular attention to how each proposal is said to have advantages and/or disadvantages for that factor and make findings on each factor as the Court thinks fit having regard to s 60B;

- As 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. Paragraph 9.63 of *B and B: Family Law Reform Act 1995* is no longer an accurate statement of the law.

- 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.

- Even where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves, despite the inevitable implications they have for the child's contact with, and access to, the other parent.

3. On the basis of the prior steps of analysis, a court will determine and explain why one of the proposals is to be preferred, having regard to the principle that the child's best interests are the paramount but not sole consideration.

- The process of evaluating the proposals must have regard to the following issues:

  a) None of the parties bears an onus:

(Footnote continues on next page)

"In determining a parenting case that involves a proposal to relocate the residence of a child, it is necessary for a court to evaluate each of the proposals advanced by the parties."

80 We do not doubt that the Family Court is obliged to give careful consideration to the proposed arrangements of the parties. Whether the Court is obliged, or will be able in every case to treat each of the three steps as discrete and in the suggested order may be another question. But the Court is not, on any view, bound by the proposals of the parties. The Court has to look to the matters stated in s 68F and elsewhere in the Family Law Act in coming to a decision about the residence of a child, and the objective is always to achieve the child's best interests.

81 It is to that overarching issue that the primary judge applied his mind. In doing so he did not overlook the appellant's entirely reasonable desire, to return to Mumbai. Nor did the primary judge invent, as the appellant's submissions imply, all of the arrangements for the child's residence with the appellant in Australia, as opposed to India. That such an outcome was a real possibility could not have escaped the attention of the parties from the inception of the proceedings. How could it be otherwise when the respondent's repeatedly expressed intention and desire were to remain in Australia, and those of the appellant to return to, and live in India with the child. These were at the heart of the litigation, as was the even more fundamental matter, that each of the parent's preference with respect to the national residence of the child was sincerely based. If there were any doubts about these matters it must have been dispelled by the respondent's stated position with respect to contact with N if she were to live

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- In determining a parenting case that involves a proposal to relocate the residence of a child, neither the applicant nor the respondent bear the onus to establish that a proposed change to an existing situation or continuation of an existing situation will best promote the best interests of the child. That decision must be made having regard to the whole of the evidence relevant to the best interests of the child.

  b) The importance of a party's right to freedom of movement:

  …

  c) Matters of weight should be explained.

  …"

7 (2000) FLC ¶93-035 at 87,545.

with the appellant in India, and by the exchange in cross-examination of the appellant which we have quoted.

82 Nor, as contended by the appellant, did the primary judge fall into the error that this Court identified in *AMS*[8], of requiring the demonstration by the mother of "compelling reasons", to the contrary of the proposition that the welfare of the child would be better promoted by her residence in the place from which the mother wished to relocate. The trial judge and the Full Court were sensitive, and rightly so, to the wish and right of the appellant to live and work wherever she desired. Rather, in a finely balanced case, the primary judge concluded that the paramount interests of the child would be best served by the arrangements for which his orders made provision.

83 It is convenient to deal next with the fourth ground of appeal. In support of it the appellant sought to place weight on aspects of the evidence of the counsellor who was a witness at the trial. Some, but not all of that evidence was supportive of the appellant's case. Even so the counsellor was unable to make a recommendation either way. In any event a trial judge is not bound by such a recommendation, or to accept or reject the whole, or any part of the evidence of a counsellor.

84 The fourth ground of appeal therefore fails.

85 The appellant's argument on the third ground began with the submission, derived from what was said by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh*[9] that:

> "unless there is a re-enactment of the term in domestic law … international treaty obligations can only give assistance in the interpretation of existing domestic law and in determining its proper application so as to avoid where possible conflict with … treaty and international obligations."

86 It is unnecessary to explore the limits or otherwise of the proposition contained within the latter part of the appellant's submission for the reason that this case is governed by an explicit provision designed to deal precisely with the sort of situation which arises here.

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8 *AMS v AIF* (1999) 199 CLR 160.

9 (1995) 183 CLR 273 at 286-288.

87 Article 13 of the Universal Declaration of Human Rights, now Art 12 of the International Covenant on Civil and Political Rights relevantly states as follows:

> "…
>
> 2 Everyone shall be free to leave any country, including his own.
>
> 3 The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

88 The appellant argues that the proper interpretation and application of the Family Law Act in this case required that the trial judge make an order as to the relocation of the child to India with the appellant, because to do otherwise, would be to place an unacceptable restriction upon the appellant's freedom to leave Australia.

89 There are two answers to the appellant's argument. The first is 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 if that were to be adversely affected by a movement of a parent. The second answer is that the primary judge did weigh up and treat as a relevant, important consideration, the appellant's wish to return to India.

90 The remaining grounds are the second, fifth and sixth ones. We would accept the respondent's argument on the second ground. The appellant's submission is that the trial judge gave too much weight to the child's short term welfare, and commensurately too little to her long term welfare, and that the Full Court erred in failing so to hold. That is, as the respondent submits, no more than a complaint about the weight which the trial judge attached to admittedly relevant considerations. Just how far ahead it is possible for a trial judge to look, and how reliable long term predictions about domestic, marital and social arrangements in modern times can be, are matters upon which minds will inevitably differ. The exercise, of looking to, and making orders for the future, is peculiarly a discretionary one. The exercise of the discretion in this case has not been demonstrated to be erroneous.

91 The fifth ground raises questions of proportion or balance. That such terms as proportion and balance are used, immediately suggests, again, that a discretionary exercise is called for. "Contact" with both parents is desirable and important. So too is the presence of a "stress-free environment" for the child, to the extent of course, that it is possible for it to exist in a fractured emotional

relationship. It is unlikely that many of such situations will admit of perfect solutions.

92 The appellant submitted that *Payne v Payne*[10] and the authorities collected there rightly emphasise the dangers of underestimating the impact upon a child of a refusal by a court to make an order allowing the child to reside with a parent who wishes to, and will relocate. The appellant submits that the primary judge and the Full Court failed to recognize and guard against these dangers. The appellant said that in this case, relocation would not, unlike some of the cases discussed in *Payne*, even involve an experimental exercise of an untried relocation in a new country. Nor, it was added, is the relocation proposed in this case a relocation to the other side of the world (UK to New Zealand) as occurred in some of the English cases. The appellant further complains that despite reference in submissions, both written and oral, to *Payne*, the Full Court here should have, but did not refer to them. The emphasis given to the desirability of a stress-free environment in *Payne* is not, with respect, misplaced. However, it is still one only of a multiplicity of considerations to be weighed in parenting cases. The reality is that maternity and paternity always have an impact upon the wishes and mobility of parents: obligations both legal and moral, the latter sometimes lasting a lifetime, restrictive of personal choice and movement have been incurred.

93 The submissions of the appellant do not do justice to his Honour's, the primary judge's lengthy consideration of the effects of various arrangements upon the child, and of the counsellor's views upon them. That consideration was adequate, indeed ample, and resulted in the discretionary judgment that was given. It has not been shown to have been affected by any errors of principle or otherwise, and the Full Court was right therefore not to disturb it.

94 What we have said in relation to the earlier ground largely answers the appellant's argument on the sixth ground that "the appeal processes before the Full Court failed to review the trial judge's decision and effectively deprived the Appellant of the review to which her right of appeal entitled her." All of the relevant statutory considerations were properly weighed at first instance and on appeal. The case turned on those considerations and the weight that the primary judge in his discretion thought should be given respectively to them. The fact that neither the respondent nor the appellant devised or put, as the appellant submits one or other of them should have, the actual arrangements which the judge decided should be ordered for the child, does not vitiate the judgment and orders. Precision on the part of the parties in this respect was neither required,

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10 [2001] 2 WLR 1826.

nor would have been possible in the circumstances. The arguments on ground six should be rejected.

95 We would dismiss the appeal.

96 KIRBY J. This appeal from the Full Court of the Family Court of Australia[11] concerns parenting orders made in respect of the infant daughter born to the marriage of the parties which has broken down. The appeal also concerns the refusal of the Family Court to permit the appellant ("the wife"), the mother of the child and wife of the respondent husband, to relocate her residence with the child from Australia to India. The detailed facts and the relevant legislative provisions are set out in the reasons of my colleagues[12].

Parenting decisions

97 Contests over such questions oblige courts, with the applicable responsibility, to make difficult decisions[13]. Because many marriages and other parental relationships break down every year in Australia[14], the problems of determining parenting orders and of deciding the residence arrangements for the children of failed relationships are among the heaviest responsibilities of the Family Court, performing its duties under Pt VII ("Children") of the *Family Law Act* 1975 (Cth) ("the Act").

98 A large and still growing cohort of the Australian population of parenting age are immigrants. Many cases therefore arise involving the proposed relocation to another country of the parent with whom the child ordinarily resides. Inescapably, any such relocation has implications for the maintenance of physical contact between the child and the other parent (and, where applicable, with that other parent's family).

99 In *AMS v AIF*[15], in the context of the *Family Court Act* 1975 (WA), this Court considered issues of custody, access and relocation that were in some ways analogous to those presented by the present appeal. However, there was a vital difference. In *AMS* the proposal of the mother, who had sole custody and guardianship of the child, was to relocate with the child from Perth to Darwin where the child had been born. In my reasons for joining in the orders of the majority in that case, I suggested that generally[16]:

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11 *U v U* unreported, Full Court of the Family Court of Australia, 13 September 2000 per Kay, Holden and Carter JJ ("Decision of the Full Court").

12 Reasons of Gaudron J at [2]-[10], reasons of Gummow and Callinan JJ at [46]-[55], [73], [75]-[78].

13 *Belton v Belton* [1987] 2 FLR (UK) 343 at 344.

14 *AMS v AIF* (1999) 199 CLR 160 at 205 [138].

15 (1999) 199 CLR 160.

16 (1999) 199 CLR 160 at 209-210 [147] (footnotes omitted).

> "a more relaxed attitude should be adopted to relocation within Australia than relocation overseas. This approach is connected with the ready availability of reliable transport and telecommunications, social and cultural factors, the absence of many dangers which exist in other parts of the world and notions of national community."

However, I went on in words that anticipated the problem in this appeal[17]:

> "But even where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves, despite the inevitable implications they have for the child's contact with, and access to, the other parent. Proof that the custodial (or residence) parent has remarried and wishes to join a new spouse overseas; wishes to return to a supportive family in the land of origin, or has a well thought out and reasonable plan of migration may suffice to convince the court having jurisdiction over the child, that the best interests of the child favour continuance of the custodial (or residence) arrangement in another jurisdiction but with different orders as to access and contact."

The decisions of the Family Court of Australia

100 This appeal requires this Court to address the issues foreshadowed in *AMS*. It must do so in the context of the evidence and findings in this case. It must do so in an appeal from a judgment of the Full Court of the Family Court, which in turn dismissed an appeal from the decision of the primary judge[18]. The primary judge (in effect) refused to permit the wife to relocate with the child, as she wished, to Mumbai in India. This he did by not lifting the prohibition on the wife taking or sending the child from Australia to a place outside Australia[19]. Instead, the orders of the primary judge required that the child reside at all times, other than those specified, with the wife; that the husband and wife should have day to day care of the child during the periods that the child resided with him or her; and that "both parties be and are restrained from changing the place of residence of the child from the Sydney Metropolitan and Wollongong/Illawarra areas".

101 The Full Court allowed the appeal from the primary judge's orders "in part". However, the only orders that were varied by the Full Court were those relating to the financial arrangements between, and costs of, the parties.

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17 (1999) 199 CLR 160 at 210 [147].

18 *U v U* unreported, Family Court of Australia, 6 March 2000 per O'Ryan J ("Decision of the primary judge").

19 Pursuant to the Act, s 65Z(2).

Although there was no formal order of the Full Court confirming the residence orders and the injunction, it must be inferred that such was the intention of the Full Court. Certainly, the reasons of the judges constituting the Full Court left no doubt that, on the "child issues", the Full Court rejected the appeal. The Full Court said[20]:

> "Whilst other Judges may have reached a different conclusion, the task of this Court is to ascertain whether there was an appealable error as described above.
>
> For the reasons given above, we are of the opinion that it has not been demonstrated by the wife that his Honour erred in fact or law insofar as the [child] issues are concerned."

The reference to the other judges' views appears to be borne out by analysis of patterns of judicial determinations on such questions, contained in a review of relocation decisions in Australian courts[21].

102 Both the primary judge and the Full Court had available to them, and severally considered, the decision of this Court in *AMS*, delivered shortly before the commencement of the trial. Both also accepted that "as in all parenting cases, the ultimate determinant is the best interests of the child"[22]. Both accepted that the wife's desire to relocate to India was motivated by bona fide reasons. This was not a case, for example, where the proposal was motivated by spite or out of a desire to harm the other parent[23]. Both acknowledged the importance of the wife's right to choose where she resided and the impact that her personal happiness would necessarily have on the child[24]. Both took into account the child's close and important relationship with the husband and the acknowledgment by the wife (by no means universal in such cases) that the husband was a "great" father to the child[25]. The matter proceeded on the basis of the primary judge's acceptance of the court counsellor's report. That counsellor

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20 Decision of the Full Court at [77]-[78].

21 Easteal, Behrens and Young, "Relocation Decisions in Canberra and Perth: A Blurry Snapshot" (2000) 14 *Australian Family Law Journal* 234 at 252.

22 Decision of the primary judge at [246]; decision of the Full Court at [39].

23 Decision of the Full Court at [48]; cf *AMS* (1999) 199 CLR 160 at 224 [189].

24 Decision of the primary judge at [175]; decision of the Full Court at [48].

25 Decision of the primary judge at [160] quoted in the decision of the Full Court at [25].

concluded that the child had a close and loving relationship with both parents; was strongly bonded to both; appeared to have a stronger bond to the wife than to the husband; and was preoccupied with the wife's well-being[26].

103 Nevertheless, the counsellor, in a report quoted by the primary judge, also emphasised the importance of the child "having frequent and liberal contact with both parents". The report went on[27]:

> "For this to happen, both parents would need to live in close proximity, and be willing to give the child's relationship with the other parent a high priority. Such a situation would allow [the child's] emotional development to proceed appropriately, while also enhancing her relationships with both parents."

104 In an attempt to meet the acknowledged needs for contact between the child and the husband, whilst allowing her to relocate with the child to India, the wife proposed a contact regime permitting the child to proceed to Australia to be with her father during the December/January school vacation; during the March school vacation for two weeks in Mumbai, India; during the Indian summer vacation from the last week of April to the first week of June in Australia; during the October/November school vacation for a period of two weeks in Mumbai and "[l]iberal daytime telephone contact subject to [the child's] school commitments"[28].

The competing arguments of the parents

105 *Contentions of the husband*: Naturally enough, the husband invoked the general restraint that the law imposes upon appellate courts in considering appeals against discretionary decisions and the specific restraint that is proper to a case (as here) where the ultimate decision depended, in part, on a great mass of conflicting testimony and, in part, on the judge's assessment of witnesses.

106 The husband also laid emphasis upon the desirability of frequent contact between himself and his daughter, especially having regard to her age, which was six years at the trial. The primary judge, and the Full Court, would have been aware of the substantial body of writing concerning the importance in most cases of regular contact with both parents[29].

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26 Decision of the primary judge at [159].

27 Decision of the primary judge at [164] quoting the family counsellor.

28 Decision of the primary judge at [168].

29 Fabricius and Hall, "Young Adults' Perspectives on Divorce: Living Arrangements", (2000) 38 *Family and Conciliation Courts Review* 446; Cochran,

(Footnote continues on next page)

107 The husband argued that the desires of the parents for their personal well-being had to be subordinated to the needs of the child so as to further the child's best interests. Necessarily, this put practical limits on the wife's entitlement to relocate, which would significantly interrupt the established regime of regular face to face contact between the child and the husband.

108 At the trial the husband eventually accepted that it was preferable that the wife should have the primary residence responsibilities for the child. But, having regard to the fact that the wife had once taken the child to India without his consent, the husband expressed concern that, were she now permitted to return to India, she would resist the continuation of his contact with the child.

109 The husband laid emphasis on the obligation to consider both the residence and relocation issues together, as contemplated by the provisions of the Act governing the exercise of the relevant discretions reposed in the Family Court. He pointed to the two substantial grounds on which the decisions of the Family Court had concluded that the scales had been tipped in his favour. These were: the close and important relationship of the child with the husband which should not be curtailed, but required frequent liberal contact with both parents and the "grave doubts" which the primary judge held concerning whether the wife would carry out the contact regime proposed by her and promote the continuation of the relationship between the husband and the child[30].

110 *Contentions of the wife*: The wife stressed the conclusion of the primary judge that she had always been, and should remain, the primary carer of the child[31] and that, having regard to the means of the parties, the wife would appropriately provide for the child's physical and educational needs, whether the child resided in Australia or India[32]. The wife complained that the primary judge had seriously under-valued the burden placed on her by refusing permission to relocate and effectively requiring her to live in the Sydney/Wollongong area in Australia, so as to be available to the husband for his contact with the child. She pointed to what she said was the ill-balance of inconvenience that this arrangement imposed. She had the primary care of the child but in this country

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"Reconciling the Primary Caretaker Preference, the Joint Custody Preference, and the Case-by-Case Rule" in Folberg (ed), *Joint Custody and Shared Parenting*, 2nd ed (1991) 218; Australia, Family Law Council, *Patterns of Parenting After Separation: Discussion Paper* (1991).

30 Decision of the Full Court at [56].

31 Decision of the primary judge at [248].

32 Decision of the primary judge at [218].

was denied the support of her family, her circle of friends and her culture (all in India). Moreover, as her attempts to get employment in Australia had shown, she was denied the pursuit of her professional aspirations in Australia that would, by inference, be available to her were she to resume her life in India.

111 The wife, like the husband, is a university graduate. She had trained in Mumbai and London for the profession of deep sea and short sea ship chartering. Whilst in India, before her marriage, she had been employed in responsible positions in charge of the management of bulk carriers, arbitration of charter party disputes and consultation in respect of marine, legal and insurance claims. Living in Wollongong, with her child and normally without family and other support available to her, the wife had been confined substantially to casual junior clerical employment. At the time of the trial the wife was in receipt of social security payments paid in respect of the child who, having been born in Australia, is a citizen of this country.

112 The wife's life in Mumbai involved an utterly different lifestyle from the one she described in Australia. Here, the wife felt "trapped" in a country where she had "no sense of home or belonging" and in an environment where, she claimed, apart from her child, there was no "love or respect for her"[33]. Although the wife did not rely on this, the prospect of her forming a new and lasting personal relationship would seem, on the findings, greater in Mumbai than in Wollongong. The wife was 43 years of age at the time of the trial.

113 The wife challenged, as unsustained by the evidence, the conclusion that she would resist contact between the husband and their daughter if she relocated to India with the child. She pointed to her repeated acknowledgment of the husband's qualities as a father and to the objective facts of the ample arrangements that had been made when the husband had visited her and the child while they were living in Mumbai. She complained that she had not received any credit from the Family Court for these considerations. She pointed to her mother's family's substantial property and other connections with Mumbai and the existence in India of independent courts, similar to those in Australia. An Indian court had already provided, and could do so in the future, orders for the husband's right of access to the child in India should that prove necessary. These would be enforced in the event of a dispute[34].

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33 Decision of the primary judge at [241].

34 cf Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children done at The Hague on 19 October 1996, [1996] ATSD 4416, to be adopted into Australian law: Family Law Amendment (Child Protection Convention) Bill 2002 (Cth). India is not yet a signatory to the Convention.

114 The wife complained that the orders of the primary judge necessarily weighed heavily against her, as they would any woman in her position. They confined her, effectively, to living in a place and in circumstances for the convenience of the husband, who did not, for his part, offer to relocate his home and work to India but expected his life to go on uninterrupted whilst the wife continued to be hostage to his contact requirements. Effectively, this imposed on the wife not only the primary responsibilities of providing residence and most of the obligations of care for the child but also serious economic, personal and emotional burdens.

115 The wife suggested that, in coming to his conclusion, the primary judge had ignored, or manifestly under-valued, the importance of her human right to move from Australia[35] to rejoin the loving and supportive environment of her family in India. Although the judge had mentioned these considerations, and their relevance to the happiness and best interests of the child whilst the child lived primarily with the wife, the wife suggested that he had only given them lip service. She said that this was evident in his description of her as "very independent", "highly intelligent and articulate" but "assertive" during the relationship with the husband[36] and his suggestion that the husband was "extremely child focussed" whilst she was "more preoccupied with her own emotional state"[37]. Given their respective family positions, employment fulfilment, income and day to day responsibilities for the child, this conclusion, and others in the primary judge's reasons, were said to be insufficiently attentive to the principles that govern decisions in cases of this kind. The wife submitted that, conformably with those principles, the Full Court should have set aside the orders of the primary judge. Because it had failed to do so, the wife submitted this Court should now intervene.

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35 Provided in the International Covenant on Civil and Political Rights done at New York on 19 December 1966, ATS 1980 No 23, Art 12. The terms of this article are set out in the reasons of Gummow and Callinan JJ at [87]; cf discussion of the analogous provision in the European Convention on Human Rights done at Rome on 4 November 1950, Protocol 4 Protecting certain Additional Rights done at Strasbourg on 16 September 1963, Art 2: *Payne v Payne* [2001] 2 WLR 1826 at 1838-1840 [36]-[40].

36 Decision of the primary judge at [189].

37 Decision of the primary judge at [174].

Appellate intervention: the primary judge's error

116 *The principle of appellate restraint*: The foregoing arguments of the parties indicate the difficulty with which the primary judge was confronted. A reflection on the facts, as set out in the reasons of Gummow and Callinan JJ[38], reinforces an appreciation of the dilemma that his Honour had to resolve. He was obliged to exercise discretions reposed in him by the Act. As is usually the case (at least in matters that reach this Court) the considerations relevant to the exercise of the discretions were not all on one side. On the contrary, each party had substantial arguments. Each advanced them with relevant supporting evidence and competent submissions.

117 Short of abduction or other unilateral solutions that are unlawful and intolerable, the only peaceful means by which such dilemmas can be resolved in a civilised society is by trusting a trained decision-maker with the painful task of reaching a conclusion according to statutory criteria[39] and judicial guidance[40]. Given the disputable nature of all such decisions, the cost and emotional burden of litigation, the persuasive arguments that both sides can typically muster and the need for finality of disputation, courts in this country[41] and overseas[42] have long recognised the need for appellate courts to exhibit restraint in disturbing such conclusions. An appellate court will refuse to intervene unless a material error of principle is demonstrated[43]. In considering suggestions that such an error has occurred, the appellate court will "avoid an overly critical, or pernickety, analysis of the primary judge's reasons, given the large element of judgment, discretion and intuition which is involved"[44].

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38 Reasons of Gummow and Callinan JJ at [46]-[52].

39 As in the Act, s 68F(2).

40 *AMS* (1999) 199 CLR 160; *A v A: Relocation approach* (2000) FLC ¶93-035.

41 eg *House v The King* (1936) 55 CLR 499 at 504-505; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176-178.

42 *Poel v Poel* [1970] 1 WLR 1469; sub nom *P v P* [1970] 3 All ER 659; *Moge v Moge* [1992] 3 SCR 813 at 817.

43 *Gronow v Gronow* (1979) 144 CLR 513 at 519; cf *Skeates-Udy and Skeates* (1995) FLC ¶92-626 at 82,294-82,296.

44 eg *AMS* (1999) 199 CLR 160 at 211 [150] (footnote omitted).

118 Caution in disturbing such evaluative decisions, reached at first instance by a judge who has undeniable advantages over appellate courts[45], is reinforced still further where (as in this case) the primary judge's reasons have been scrutinised by the specialist appellate court, which has found no error of principle, approach or outcome to warrant its intervention.

119 The primary judge had a difficult decision to make. He had a mass of conflicting material pointing in different directions. He made reference to the correct statutory provisions and to the recent exposition of principle by this Court in *AMS*. He acknowledged that the issue was finely balanced. But he came down on the side of maintaining arrangements that sustained contact with both parents that must, on the face of things, be in the best interests of the child. Faced with such a case, and with the Full Court's refusal to intervene, there is a proper reluctance in this Court to do the same.

120 *Errors of principle and approach*: However, I have concluded that an error of principle on the part of the primary judge has undermined the acceptability of his conclusions. As well, the conclusions rest on an analysis that is, in my respectful opinion, flawed. The error of principle and flaw in analysis, although argued before the Full Court, were not corrected by it. They justify, and require, the intervention of this Court. They were:

(1) The mistaken interpretation by the primary judge in treating as an "alternative proposal of the wife" the proposition that the child should "reside with her in Australia and that the husband have contact [here]"[46]; and

(2) The significance of the mistaken analysis regarding the "alternative proposal" for the exercise of the discretion involved in the wife's application to relocate with the child to India.

121 The first of these considerations constitutes, in my opinion, a material error. In the result, the discretions at first instance miscarried. This conclusion obliges this Court to intervene so that the discretions should be exercised correctly, in accordance with law.

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45 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 330-332 [89]-[93]; 160 ALR 588 at 619-622.

46 Decision of the primary judge at [152].

The erroneous suggestion of an "alternative proposal of the wife"

122 *The primary judge's determination*: There is no doubt that the primary judge considered that he had before him an "alternative proposal of the wife". He said so at the beginning of his statement about the relevant considerations that he had to take into account in resolving the contest between the parties. He mentioned the "alternative proposal" after having stated that he did not intend to "set out the orders sought by each party"[47].

123 With respect, it would have been preferable if the primary judge had expressly directed his mind to those proposed orders. They would have made it clear to him there were not three proposals. In the wife's application, which was the document that initiated the proceedings, she sought (in par 1) that the child "reside with the wife and the wife shall have sole responsibility of the day to day care, control and development of the said child". In par 2, the wife sought to be "permitted to leave Australia along with the said child to travel in India and live in Bombay, India, on a permanent basis". She then proposed a regime of contact with the husband. The application contained other requests for relief but they do not need to be noticed.

124 The husband's response was that the wife's application should be dismissed. The husband sought orders that the wife should reside in the Sydney/Wollongong area, the child reside with the wife, subject to specified contact, at which time the child reside with the husband. Alternatively, in the event that the wife resides outside the Sydney/Wollongong area, the husband sought orders that the child reside with him and that the wife have reasonable contact. The husband sought orders that both parents be responsible for the child's day to day care, welfare and development whilst the child lived with each of them respectively.

125 The husband's application specifically addressed the wife's claim for permission to leave Australia with the child to live in India on a permanent basis. The husband sought injunctions directed to the child and to each of the parties to prevent removal of the child from the Sydney/Wollongong area; to require safe-keeping of the child's passports; and to restrain the parties from making applications for visas, passports or other documents relating to international travel by the child.

126 *Accuracy in definition of the issues for decision*: The foregoing applications presented a contest in relation to which parent should have the primary responsibility for the residence of the child (and thus responsibility for her general care, welfare and development) and the related question of the

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47 Decision of the primary judge at [152].

prohibition against the wife's relocating with the child to India and an order restraining her from taking the child from the Sydney/Wollongong area.

127 Properly analysed, the wife's application sought an order for the residence of the child with the wife and consent to her relocating permanently to India. The husband's application sought primarily the continuation of the residence of the child with the wife but with restraint on either of them proceeding outside the Sydney/Wollongong area. If the wife were to proceed outside that area, the husband sought an order that the child reside with him.

128 Ordinarily, in a superior federal court of record such as the Family Court[48], the initiating documents of both sides define the constitutional matter or controversy that the parties place before the Court for decision. The Family Court, being a court established under the Constitution, is not authorised to conduct a roving inquisition unrelated to the matters that the parties present for decision.

129 In recent times, some of the rigidities of pleading and procedure that marked earlier approaches to the powers of courts have been abandoned in favour of a greater measure of informality and flexibility[49]. Issues can sometimes appear and disappear in the course of litigation. Occasionally, by acquiescence of the parties, issues may be refined or re-stated during a hearing. Sometimes, they may be altered without adequate attention being paid to the state of the record and the initiating process[50]. Yet it remains a prudent and sometimes necessary obligation, at least in a superior court of record, to address the issues defined by the parties and, where such courts are federal courts, to take care in the identification of those issues on the basis that they may define the constitutional matter that the court has the jurisdiction and power to decide.

130 At no time did the wife seek to amend the statement of relief claimed in her application. There was an interlocutory application by the wife for maintenance and a response by the husband to that application. The response by the husband to the application for final orders was unaltered during the trial. Measured against the wife's application, that response defined the issues for trial to which, on the face of things, the primary judge was obliged to address his attention.

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48 The Act, s 21(2).

49 cf *Jackamarra v Krakouer* (1998) 195 CLR 516 at 539-543 [66].

50 cf *Gipp v The Queen* (1998) 194 CLR 106 at 150-155 [128]-[138].

131 *The applicable evidence*: In accordance with the practice of the Family Court, the wife's evidence-in-chief was substantially given by an affidavit filed in advance of the proceedings. She was then cross-examined at considerable length by the husband's counsel. Part of the questioning was designed to suggest a so-called "alternative", viz, that she would continue to live with the child in Australia but make solo visits from time to time to her family in India. The suggestion of this "alternative" came not from the wife (as the primary judge stated) but from the cross-examination of the wife on behalf of the husband:

> "I'm asking you this very purposefully. Why can't you continue to live in Australia so your daughter can have an ongoing close relationship with her father and you go back to India once or twice a year to catch up with your family and friends? … I would rather we go back to India together.
>
> You see, you know, don't you, that it's in your child's best interest to be able to have a good and close relationship with both her parents, do you accept that? … Yes.
>
> You know that the best way for that to happen is for the parents to live close to each other, isn't that right? … Not necessarily.
>
> …
>
> Have you prepared yourself for the possibility that you're not going to be able to move back to Bombay? … No, I haven't, sir.
>
> You haven't? You have not? … I haven't prepared myself because I think we would be devastated.
>
> Ma'am, you put yourself before the court as a proposed residential parent for the child? … That's right.
>
> Would you agree with me that part of being a good parent is forecasting what might happen in your life or the child's life that might affect the child's future? Being prepared? Is that a good thing for a parent to do? … I think so.
>
> …
>
> I will ask you think about it now. Assume that his Honour says you can go to India any time you like but you can't take your daughter. Assume that's the situation. What could you do then to make life as good as it can be for your daughter here in Australia? … I have to think about it, sir.
>
> You don't have the capacity if you sit in the witness box to think about that, is that what you're saying to his Honour? … I'm sure I have the capacity.

> Or is it that you won't do it, you won't think about it? … I will think about it but …
>
> I'm asking you to think about it. What can you do – what could you do to make life for your daughter as good as possible here in Australia? … I would be doing the things that I'm doing now, sir, but it would be …
>
> Don't say you would continue to ensure she has a good and full activity session at school and out of school? … That's right, but I would rather that she be brought up in a more loving atmosphere in Bombay."

132 Eventually, the cross-examiner asked:

> "Ma'am, in the event of you not being permitted to take the child to Mumbai with you, is it your intention to remain living in the Wollongong area? … Yes."

133 *The primary judge's error*: Despite the qualified expression and the context of the wife's ultimate answer to this line of cross-examination, the primary judge elevated it to a "proposal" by the wife, alternative to that stated in her application to the Family Court. For his Honour, it became an "alternative proposal … that the child reside with her in Australia and that the husband have contact"[51]. Having done this, his Honour then proceeded to criticise the wife for having failed to elaborate this "alternative proposal"[52]:

> "The wife has given no or very little consideration to the possibility that she may have to remain in Australia. The wife has given very little thought to what her proposals would be for the care of the child in Australia. The wife said that she had not given it much thought. As I have said, her sole focus appears to be on her own needs and her desire to leave this country."

134 It was a serious misreading of the wife's reluctant concession to elevate her ultimate answer to the status of an "alternative proposal", one that she was propounding for judicial decision. She had come to court seeking an order that she be designated the parent of residence and that she be relieved of the prohibition from taking the child from Australia to India. Instead, that application, acceptable or unacceptable as it might be, was sidelined by the mistaken interpretation that the wife was propounding an entirely new proposal, one that happened to coincide substantially with the husband's proposal[53]. With

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51 Decision of the primary judge at [152].

52 Decision of the primary judge at [176].

53 cf *H v R* 2001 (3) SA 623 at 626.

respect, when a court misunderstands or misstates the relief that a party is seeking, it is unsurprising that its disposition of the case will miscarry.

135 *The Full Court's error*: In her appeal to the Full Court, the wife pressed her complaint that the primary judge had failed to consider her total proposal, with its respective good and bad features, in comparison to that of the husband's. She submitted that the primary judge had "lost focus on that important basic comparison"[54]. The Full Court rejected this submission[55]. The Full Court did not analyse how the "loss of focus" had come about by which the wife's reluctant concession was turned into an "alternative proposal". In so far as that misunderstanding misdirected the attention of the Family Court to a "proposal" that the wife was not in fact advancing and inviting the comment that she had not given that proposal sufficient attention, it called for appellate correction because it became the "proposal" that the primary judge accepted. The Full Court erred in failing to correct this misunderstanding.

136 In parenting cases, involving a proposal by one parent to relocate the residence of a child, the duty to evaluate each of the proposals advanced by the parties on their respective merits was emphasised by this Court in *AMS*[56] and by the Full Court of the Family Court in *A v A*[57]. In *AMS*, Hayne J (whose reasoning attracted the support of the Full Court in *A v A*[58]) pointed to the necessary interconnection between the residence decision and the relocation decision but stressed that the decision-maker must address the decisions required by the law, not other decisions derived from attempts to re-express the legal criteria in different language. His Honour said[59]:

> "[I]t is, then, not surprising that counsel for the mother told the primary judge (in effect) that if the mother's having custody of the child depended upon her staying in Perth then she would not move to Darwin. But that does *not* mean that the question for the Court is whether the mother is to be *permitted* to move to Darwin. And it does not mean that the question is

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54 Decision of the Full Court at [54].

55 Decision of the Full Court at [55].

56 *AMS* (1999) 199 CLR 160 at 191-192 [95] per Gaudron J, 232 [218] per Hayne J and my reasons at 225-226 [194].

57 *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,545 [65]. See also *Paskandy v Paskandy* (1999) FLC ¶92-878 at 86,456 [47]-[51].

58 (2000) FLC ¶93-035 at 87,545 [67], [71].

59 (1999) 199 CLR 160 at 231 [217].

> whether the mother has shown a 'good' or a 'compelling' reason for wanting to move."

137 With all respect, it is an oversimplification to say that the parties do not define the issues to be decided; the Act does[60]. Self evidently the Act governs the ultimate resolution of the issues as they concern the welfare of a child under the proposed "parenting plans". However, the Act is expressed in very broad language. Hard decisions have to be made in a case such as this. To convert an issue raised in cross-examination of a party into a "proposal", and then to attribute that different issue to that party, constitutes a serious diversion of judicial attention from the basic case propounded for resolution. The wife was entitled to have her case decided on its merits by reference to the considerations mentioned in the Act. Necessarily, that required consideration of the interests of others, most especially of the child. That is not in dispute. The fact that such consideration must be given weight does not, however, relieve a court of deciding the "matter" before it. This is the controversy tendered to the court concerned. Were it otherwise, in virtually every case the predictable line of cross-examination of the custodial parent (usually female), and the equally predictable answers, will result in an omission to consider and decide the relief that such parent brings to the court as the controversy to be resolved.

138 *Viewing the error in context*: It is not as if the issue presented by the wife's complaint to the Full Court was unusual. In fact, it is a common issue in cases such as this. In *Payne v Payne*[61], Thorpe LJ described the frequent tactic that arises in such cases[62]:

> "In very many cases the mother's application to relocate provokes a cross-application by the father for a variation of the residence order in his favour. Such cross-applications may be largely tactical to enable the strategist to cross-examine along the lines of: what will you do if your application is refused? If the mother responds by saying that she will remain with the child then the cross-examiner feels that he has demonstrated that the impact of refusal upon the mother would not be that significant. If on the other hand she says that she herself will go nevertheless then the cross-examiner feels that he has demonstrated that the mother is shallow or uncaring or self-centred. But experienced family judges are well used to tactics and will readily distinguish between the cross-application that has some pre-existing foundation and one that is purely tactical."

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60 Reasons of Gummow and Callinan JJ at [72].

61 [2001] 2 WLR 1826.

62 [2001] 2 WLR 1826 at 1840 [42].

139 In *Payne*, Thorpe LJ stated what, in my view, is the correct approach. It is the approach that the Full Court should have required in the present case[63]:

> "The judge in the end must evaluate comparatively each option for the child, one against another. Often that will mean evaluating a home with mother in this jurisdiction, against a home with mother wherever she seeks to go, against a home in this jurisdiction with father. Then in explaining his first choice the judge will inevitably be delivering judgment on both applications."

140 Once the primary judge had designated as an "alternative proposal" the proposition that the mother would continue to live in Wollongong, there was no choice for him to make. Like the *deus ex machina*, the "alternative proposal" had removed his painful dilemma. There was then no real need to choose between the parents' proposals because the "alternative proposal" constituted, in effect, a capitulation by the wife to the husband's proposal.

141 In *AMS*, reference was made to the fact that, in Australia, published statistics suggest that "overwhelmingly, women constitute the residence parent to whom, in the old nomenclature, 'custody' is granted. Of single parent families, the mother is reportedly the residence parent in approximately 84 per cent of cases"[64]. These figures led me in *AMS* to conclude[65]:

> "[I]n practical terms, court orders restraining movement of a custodial (or residence) parent ordinarily exert inhibitions on the freedom of movement of women, not men. Another feature of the Australian scene, not necessarily reflected to the same degree in other jurisdictions, is the very large proportion of the population born overseas, with family links to which a party to a marriage or relationship which has broken down may return with their child."

The present is another such case.

142 The failure of a primary judge to give separate and full consideration to the true proposal of a mother, as designated primary carer and residence parent, to discharge her assigned responsibilities overseas, following her return to her family in India, therefore constitutes a serious injustice to the proper evaluation

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63 [2001] 2 WLR 1826 at 1840 [42].

64 (1999) 199 CLR 160 at 206 [140] citing Australian Bureau of Statistics figures mentioned in *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755 at 84,195 [7.5].

65 (1999) 199 CLR 160 at 206 [140] (footnotes omitted).

of that application. The burden of such injustices will ordinarily fall, as here, on the wife. It will be she, not the husband, who will usually be confined, in effect, in her personal movements, emotional environment, employment opportunities and chances of remarriage, repartnering and reparenting. Effectively, as here, it is she who will be controlled by court orders that require her to live, and make the most of her life, in physical proximity to the husband's whereabouts. In this way, inconvenience to the husband is minimised. But the effect on the wife may be profound.

143 As has been noted by this Court[66] and courts in other jurisdictions[67], significant effects on the mother's emotional, residential, economic, employment and personal life have an inevitable impact on the happiness and best interests of the child.

The error of approach to the wife's application

144 *The implications of adopting the "alterative proposal"*: Treating the wife's refusal to abandon her child and her expression of willingness (if necessary) to stay with the child in Australia as an "alternative proposal" requires, in effect, that parent to show "good" or "compelling" reasons to relocate, given that doing so will always make it more difficult (and in some cases virtually impossible) for physical contact between the other parent and the child to be maintained. Such an approach stacks the cards unfairly against the custodial/residence parent. It is precisely the approach held to have been erroneous in *AMS*.

145 This approach also tends to constitute an unjust burden on women. It is not enough that the decision-maker avoids explicit reference to the need for such a parent to show a "good" or "compelling" reason for wanting to move. By treating the maintenance of the status quo as a third alternative "proposal", advanced by the wife when it was not, much the same result ensues. The wife never really has her application, as made, determined on its merits. How could it be if she was "proposing" an alternative, which maintained the advantage of bi-weekly face to face contact between the child and the husband?

146 Courts, exercising such discretions, should not ignore the disproportionate burden typically cast upon women by their being effectively immobilised as the custodial/residence parent. This is burden enough on a woman whose family,

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66 *AMS* (1999) 199 CLR 160 at 208 [145].

67 *Poel v Poel* [1970] 1 WLR 1469 at 1473 per Winn LJ; sub nom *P v P* [1970] 3 All ER 659 at 662; *Burns v Burns* (2000) 182 NSR (2d) 101 at 113 [36] citing *Wall v Wall* (1997) 163 NSR (2d) 81.

friends, employment and new life opportunities are all in Australia. But it is specially onerous for a woman, such as the wife in these proceedings, where all those links are with her homeland overseas.

147 *The decision in Payne*: The wife also complained that the approach of the primary judge to the discretions that she had invoked by her application to the Family Court was erroneous because his analysis did not follow that adopted in a long and consistent line of authority of the English courts dealing with identical problems. Attention was directed, in particular, to the early decision in the English Court of Appeal in *Poel v Poel*[68] and the recent survey of the case law by that Court in *Payne*.

148 This Court, and other courts of Australia, are not bound by the decisions of foreign courts on this or any other subject. However, where (as here) Australian legislation has substantially followed a precedent in English legislation, it is obviously sensible to take into account the course of judicial authority in that country dealing with the same legislation. So much was acknowledged in *AMS*, where the decision in *Poel* was examined in my reasons[69] with which, on the decisive point, Gleeson CJ, McHugh and Gummow JJ agreed[70].

149 There is a particular reason why this Court, establishing principles and approaches that will be followed by the Family Court of Australia, should take into account the way such cases are dealt with in England, quite apart from the similarity of the legislative provisions[71]. This reason is stated by Thorpe LJ in *Payne*[72]. His Lordship emphasised the value of adopting guidelines to address the extremely common factual circumstances that arise in cases where "(a) the applicant is invariably the mother and the primary carer; (b) generally the motivation for the move arises out of her remarriage or her urge to return home;

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68 [1970] 1 WLR 1469; sub nom *P v P* [1970] 3 All ER 659.

69 (1999) 199 CLR 160 at 195-196 [111], 206 [141], 208 [145], 209-210 [147], 225 [193].

70 (1999) 199 CLR 160 at 179 [47].

71 Thus the *Children Act* 1989 (UK), s 13(1)(b) requires a parent wishing to remove a child permanently from the United Kingdom to obtain either the written consent of all people with parental responsibilities to the child or the leave of the court: *Payne* [2001] 2 WLR 1826 at 1846 [67].

72 [2001] 2 WLR 1826 at 1835-1836 [27]-[28].

and (c) the father's opposition is commonly founded on a resultant reduction in contact and influence"[73].

150 Correctly in my view, Thorpe LJ said that such cases cannot be seen in a parochial perspective[74]. Cases of fractured family units having connection with two or more national jurisdictions are much more common today than in earlier times when international travel was less common, wives less willing to challenge husbands' rights and legal aid less available for such cases even than it is now. Thus, Thorpe LJ suggested the utility of providing guidance to ensure a consistency of approach within "the wider field of international family law"[75]. He went on[76]:

> "There is a clear interaction between the approach of courts in abduction cases and in relocation cases. If individual jurisdictions adopt a chauvinistic approach to applications to relocate then there is a risk that the parent affected will resort to flight. Conversely recognition of the respect due to the primary carer's reasonable proposals for relocation encourages applications in place of unilateral removal. Equally, as this case demonstrates, a return following a wrongful retention allows a careful appraisal of welfare considerations on a subsequent application to relocate. Accordingly it is very desirable that there should be conformity within the international community."

His Lordship referred to other considerations contributing to such conformity. I agree with his reasons in this regard. This Court, and the Family Court of Australia, should observe the same approach.

151 With every respect to the judges of the Family Court in the present case, I have a distinct impression, from the reading of their reasons, that their approach to the applications of the wife was inconsistent with that in *Payne* and in other English decisions stretching back to *Poel*, thirty years earlier.

152 In *Poel*, Sachs LJ, in his influential opinion, said[77]:

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73 [2001] 2 WLR 1826 at 1835 [27].

74 [2001] 2 WLR 1826 at 1839 [37]; cf *D v S* unreported, Court of Appeal of New Zealand, 4 December 2001; [2001] NZCA 374 at [50].

75 [2001] 2 WLR 1826 at 1835 [28].

76 [2001] 2 WLR 1826 at 1835-1836 [28].

77 [1970] 1 WLR 1469 at 1473; sub nom *P v P* [1970] 3 All ER 659 at 662.

> "Once … custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may … produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

153 In *Nash v Nash*[78], Davies LJ emphasised:

> "[W]hen one parent has been given custody it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody."

154 A number of later decisions were given in England by Ormrod LJ, establishing the approach that has been applied since. Thus in *A v A (Child: Removal from Jurisdiction)*[79], his Lordship recognised the special burden which cases, such as that involving the wife in the present appeal, face:

> "It is always difficult in these cases when marriages break up where a wife who, as this one is, is very isolated in this country feels the need to return to her own family and her own country; … The fundamental question is what is in the best interest of the child; and once it has been decided with so young a child as this that there really is no option so far as care and control are concerned, then one has to look realistically at the mother's position and ask oneself the question: where is she going to have the best chance of bringing up this child reasonably well? To that question the only possible answer in this case is Hong Kong. It is true that it means cutting the child off to a large extent – almost wholly perhaps – from the father; but that is one of the risks which have to be run in cases of this kind."

155 This approach has been followed more recently in England[80]. In *Tyler v Tyler*[81], Kerr LJ summarised the position reached in that country in these terms:

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78 [1973] 2 All ER 704 at 706.

79 [1980] 1 FLR (UK) 380 at 381-382.

80 *Chamberlain v de la Mare* (1982) 4 FLR (UK) 434 at 443 cited in *Payne* [2001] 2 WLR 1826 at 1833 [20]; *Lonslow v Hennig (formerly Lonslow)* [1986] 2 FLR (UK) 378 at 381-384; *Belton v Belton* [1987] 2 FLR (UK) 343 at 347.

> "[T]his line of authority shows that where the custodial parent herself, it was the mother in all those cases, has a genuine and reasonable desire to emigrate then the court should hesitate long before refusing permission to take the children."

156 *Considerations – weighing the factors*: The hesitation referred to in *Tyler* does not rise to the level of a legal presumption[82]. Nor does it remove the court's abiding duty to exercise its discretions having regard to the terms of the applicable legislation and the findings on the evidence in the particular case.

157 In light of what was said in *A v A*[83], I want to make it clear that by referring to *Gordon v Goertz*[84] in *AMS*[85], I did not embrace the minority view stated in that case in the Supreme Court of Canada. That was to the effect that there is a presumption of law that the custodial/residence parent has a right to reside where she or he decides unless good reason, relevant to the welfare or best interests of the child, can be shown to the contrary[86]. Like the majority of the Supreme Court of Canada, I consider that such a presumption, elevated to a legal rule or invariable approach, would be incompatible with the statutory obligation to exercise the discretions involved having regard to an individualised assessment of the best interests of the child. I thought that I made this clear in *AMS*[87]. I make it clear now.

158 The "hesitation" mentioned in *Tyler* does, however, evidence a greater attention to the realities of the position of the primary carer (overwhelmingly female). It allows a proper consideration of the factors affecting the carer's life,

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81 [1989] 2 FLR (UK) 158 at 161 cited in *Payne* [2001] 2 WLR 1826 at 1834 [24].

82 In various States of the USA presumptions apply: see May, "Children on the Move: Review of relocation cases: 2001" at Annexure 1, paper delivered at the Family Court of Australia, 25th Anniversary Conference, July 2001.

83 (2000) FLC ¶93-035 at 87,550 [100].

84 [1996] 2 SCR 27.

85 (1999) 199 CLR 160 at 209 [146].

86 *Gordon v Goertz* [1996] 2 SCR 27 at 31-32.

87 (1999) 199 CLR 160 at 209 [146]. A similar view has been expressed in England: *Payne* [2001] 2 WLR 1826 at 1834-1835 [25], 1839-1840 [40].

such as their freedom of movement[88], association, employment and personal relationships. These are to be weighed against any negative impacts of relocation, such as reduced contact. However, this last factor should not dictate the result[89], any more than should the carer's desire for relocation.

159 As has been stated in this Court and in the Full Court of the Family Court, the best interests of the child are to be treated as paramount. However, they are not to be elevated to the sole factor for consideration[90]. The economic, cultural and psychological welfare of the parents is also to be considered, because they are human beings and citizens too and because it is accepted that their welfare impacts upon the welfare of the child. The general quality of life of both the parents and the child is relevant[91].

160 *The erroneous analysis*: Of course, the child in the present case, like virtually all children of her age, and many who are older, would wish to maintain regular physical face to face contact with her father who, on the evidence and findings, was most loving and attentive. But if excessive weight were to be given to this consideration (important as it is) it would be given at too high a price both in terms of the impact of its consequence on the wife and, thereby in the long term, on the child herself.

161 I consider that this conclusion is borne out not only by reference to Australian legislation and relevant judicial authority. It is reinforced by a proper analysis of this case in terms of the principles of international human rights law. Such principles may influence local law on such questions[92]. The principles are obviously concerned with the interests of a father and also of a child to have, and maintain, regular contact. Such contact can include telephonic, Internet, photographic, filmed and intermittent physical contact. Today contact does not have to be exclusively physical or face to face if the cost of insisting on such physical contact is to impose serious deprivations upon the human rights of custodial parents, who are mostly women. To take the contrary view is to entrench gendered social and economic consequences of caregiving upon women in a way that is contrary to the Convention on the Elimination of All Forms of

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88 *Van Rooyen v Van Rooyen* 1999 (4) SA 435 at 437; *D v S* [2001] NZCA 374 at [30].

89 *Burns v Burns* (2000) 182 NSR (2d) 101 at 115-116.

90 Chisholm, '"The paramount consideration': Children's interests in Family Law", (2002) 16 *Australian Journal of Family Law* 87 at 113, 114.

91 *In re Marriage of Eckert* 518 NE 2d 1041 at 1045 (1988).

92 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

Discrimination against Women[93] to which Australia is a signatory. That Convention requires that such discrimination and inequality should be eliminated from the law of this country[94].

162 With respect, I feel that the judges below have approached the application of the wife in a way insufficiently attentive to the foregoing considerations.

163 The useful and comprehensive analysis of English authority in *Payne* was not published until after the decisions of the primary judge and Full Court were delivered in the present case. Whilst the reason for my disturbance of the judgment of the Full Court of the Family Court is the material error that I have identified, and whilst that error alone affords authority to this Court to set aside the judgment and provide consequential relief, such action would permit a reconsideration of the approach of the Family Court to the wife's application in a way consistent with the approach stated in *Payne*, which I regard as correct.

164 Along with the judges of the English Court of Appeal, I am of the view that it is highly desirable that Australian judges should avoid parochial attitudes to cases of this kind. In my opinion, such parochial attitudes to the law are increasingly out of place[95]. It is also highly desirable that courts, such as this Court and the Family Court of Australia, should consider such cases in accordance with principles that are consistent, conformable to like legislation and attentive to the paramount consideration of the best interests of the child, viewed in the long term and not just the short term.

Conclusion: a need to reconsider the matter

165 My conclusion requires the reconsideration of the true proposals of the parties advanced in the Family Court, without the diverting reference to the wife's supposed "alternative proposal". The outcome might, in the end, be the same. However, the wife will at least then have had her proposal determined before the Family Court as she made it and as the law of Australia requires.

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93 Done at New York on 18 December 1979, ATS 1983 No 9.

94 cf Garkawe, "Relocation Disputes – Has Anything Changed? *In the Matter of B And B*: Family Law Reform Act 1995", (1998) 2 *Southern Cross University Law Review* 124 at 148-150.

95 cf *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551 at 583 [169], 584 [172]; 187 ALR 1 at 46, 46-47; *Oceanic Sunline Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242 at 262-263; *Voth v Manildra Flour Mills Pty Ltd* (1989) 15 NSWLR 513 at 538-539 and see *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 570-571.

166 This conclusion does not mean that the possibility of maintenance of the status quo is put out of mind by the decision-maker in a case such as this. But it does mean that the first step must be the determination of the application that the wife advanced to the Family Court. I have identified a material error that affected the exercise by the primary judge of his discretion. It is therefore unnecessary for me to address the other grounds of appeal argued in this Court. The primary judge's decision should be set aside. The Full Court erred in failing to do so.

167 This Court is not in a position to exercise afresh the discretion that miscarried at trial. The matter must be remitted to a single judge of the Family Court to exercise the discretion as to the "child issues" that miscarried, without the identified error and with the added guidance now available.

Orders

168 The appeal should be allowed. I agree in the orders proposed by Gaudron J.

169 HAYNE J. I agree that, for the reasons given by Gummow and Callinan JJ, the appeal should be dismissed.

170 What have come to be known as "relocation cases" present difficult questions. Much of that difficulty stems from the fact that to take a child from the place where one of the parents lives (and, in some cases, works) to some distant place will, if the other parent does not move, necessarily affect the way in which the child's relationship with that other parent can be maintained and allowed to develop. It follows that the needs and the wishes of *each* parent and the needs of the child (and, if of sufficient age, the child's wishes) all bear upon the question to be considered by the Family Court. In the end, as the *Family Law Act* 1975 (Cth) ("the Act") makes plain[96], the Family Court "must regard the best interests of the child as the paramount consideration", but that does not deny the fact that there are at least *three* persons who will be affected by the order that is made: two adults and the child. And very often, of course, there will be other relatives of the child whose contact with the child will be curtailed if the child lives in one place rather than another.

171 In these circumstances, it would be quite wrong to treat the decision that is to be made as confined to a choice between whatever may be the particular "proposals" that the parents may make for the residence of, and contact with, the child. So to confine the inquiry would, in this case, have required the Family Court to ignore admittedly relevant evidence that was led about what the mother would do if it were decided that the child should live in Australia rather than India. More fundamentally, it would confine the Court's inquiry to what the *parents* suggested would be in the best interests of the child, regardless of whether those suggestions were informed, even wholly dictated, by the selfish interests of one or other of the parents. To confine the inquiry in this way would, therefore, disobey the fundamental requirement of the Act that the Court regard the best interests of the child as paramount. Those interests may, or may not, coincide with what one or both of the parents put forward to the Family Court as appropriate arrangements for residence and contact.

172 That is not to say that the Family Court is to embark upon some roving inquiry about the matter, unfettered by any regard for the evidence led and the matters which the parties seek to contest. Due account must be taken of the fact that proceedings in the Family Court are conducted in a framework of adversarial procedure familiar to the common law. (I do not stay to consider how or to what extent that adversarial model has been modified by the Act or rules of court made under it.)

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96 s 65E.

173 In this case, there were only three outcomes which were raised by the parties in the proposals which they made and in the way in which the matter was conducted at trial. Put shortly, and incompletely, those three outcomes were that the child would reside with the father in Australia, with the mother in India or with the mother in Australia. All of those outcomes assumed that the father would remain in Australia.

174 There may have been some sufficient and compelling reason for the parties to make that assumption and to conduct the litigation on this premise. But neither the premise nor the reasons for adopting it were explored in evidence or in argument in the courts below and therefore these matters could not be tested or examined in this Court. The premise is not one which, in relocation cases, should be accepted as a matter of course.

175 When one parent (for whatever reason) wishes a child who is, or is to be, resident with that parent to move to a place distant from the other parent, it should not be assumed that that other parent cannot, or should not, contemplate moving to be near the child. There may be (and for all that is known, in this case there was) compelling reason for that other parent (here, the father) not to move, but it would ordinarily be expected that these reasons would be explored in evidence and the validity of any assumption that the other parent will not move would be examined. Just as, in this case, the mother was asked what she would do, if she could not have the child reside with her in India, so too it might have been expected that the father would be asked what *he* would do, if the mother were to have the child reside with her in India. Such questions should not be treated as mere forensic tests of parental devotion, to which only one answer is seen as being satisfactory proof of being a loving parent. Rather, they are no more than a prelude to a deeper inquiry about where the best interests of the child may lie and what arrangements will best serve those interests.

176 It is now recognised as self-evidently true that, apart from some cases of abusive relationships, children benefit from the development of good relationships with both their parents. The right to know and be cared for by *both* parents and the right of contact on a regular basis with *both* parents are said to be principles underlying the objects of Pt VII of the Act[97]. If effect is to be given to those principles, it must *not* be assumed that one parent (the father) cannot move and that the mother must, in every case, subordinate her ambitions and wishes, not to the needs of the child, but to the wishes of the father to pursue his life in a place of his choosing. It is the interests of the *child* which are paramount, not the interests or needs of the parents, let alone the interests of one of them.

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97 s 60B(2)(a) and (b).

177 Given the way in which the case was conducted, and given that there may be some sound reason for it being conducted as it was, the questions to which I have referred do not arise on the appeal to this Court. Nonetheless, they are issues which may well arise in other cases and I would not wish my agreement that the appeal in this case should be dismissed to be understood as tacitly denying their relevance and importance.