HIGH COURT OF AUSTRALIA

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

Matter No P29/1998

AMS APPELLANT

AND

AIF RESPONDENT

Matter No P31/1998

AIF APPELLANT

AND

AMS RESPONDENT

AMS v AIF and *AIF v AMS* [1999] HCA 26
17 June 1999
P29/1998 and P31/1998

ORDER

In both matters:

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Supreme Court of Western Australia made on 19 June 1997 and in lieu order:*

   (a) *Appeal allowed.*

   (b) *Set aside the orders of the Family Court of Western Australia made on 24 April 1996 and remit the matter to that Court for rehearing.*

   (c) *Each party pay his or her own costs in the Family Court of Western Australia and in the Full Court of the Supreme Court of Western Australia.*

3. *Each party pay his or her own costs of the proceedings in this Court.*

On appeal from the Supreme Court of Western Australia

Representation:

Matter No P29/1998

D F Jackson QC with R S Hooper for the appellant (instructed by Lewis, Blyth & Hooper)

D Bryant QC with M M Lodge for the respondent (instructed by Ilbery Barblett)

Matter No P31/1998

D Bryant QC with M M Lodge for the appellant (instructed by Ilbery Barblett)

D F Jackson QC with R S Hooper for the respondent (instructed by Lewis, Blyth & Hooper)

Interveners in both matters:

H C Burmester QC, Acting Solicitor-General for the Commonwealth with D A Mullins SC intervening on behalf of the Attorney-General for the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with C M Caleo intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with J H Smith intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

AMS v AIF
AIF v AMS

Constitutional law – Inconsistency between Commonwealth and State laws – Family law – Guardianship and custody of child – Whether *Family Law Act* 1975 (Cth), s 63F(1) inconsistent with *Family Court Act* 1975 (WA), s 35.

Constitutional law – Powers of the Commonwealth Parliament – Territories – Whether sufficient nexus with Commonwealth law concerning guardianship and custody of children born in Territory to parents then residing there.

Constitutional law – Interpretation – Whether implications arise from international law.

Constitutional law – Freedom of interstate intercourse – Movement of persons – Whether *Northern Territory (Self-Government) Act* 1978 (Cth), s 49 inconsistent with exercise of judicial discretion under *Family Court Act* 1975 (WA), s 36A – Guardianship and custody orders – Whether necessary to determine whether requirement of orders that parent not change child's principal place of residence greater than reasonably required to achieve legislative object.

Federal jurisdiction – Family law – Guardianship and custody application – Parents resident in the Northern Territory at birth of ex-nuptial child – Whether Family Court of Western Australia exercising federal jurisdiction under *Family Law Act* 1975 (Cth), s 63F(1).

Federal jurisdiction – Inconsistency between Commonwealth and State laws – Matter arising under s 76(i) of the Constitution – Whether jurisdiction invested by *Judiciary Act* 1903 (Cth), s 39(2).

Federal jurisdiction – Appeals – Family law – Whether appeal to Supreme Court of Western Australia an exercise of federal jurisdiction.

Family law – Guardianship and custody orders – Variation – Exercise of discretion by trial judge – Best interests of child – Whether requirement that custodial parent provide "compelling reasons" to justify relocation within Australia an error of law – Whether order that custodial parent may relocate is an order "with respect to" welfare or custody.

Words and phrases – "compelling reasons".

The Constitution, ss 76(i), 76(ii), 77(iii), 109, 122.
Family Court Act 1975 (WA), ss 27(5), 28, 28A, 34, 35, 36, 36A.
Family Court Act 1997 (WA), ss 68, 69, 246.
Family Law Act 1975 (Cth), ss 60E(3), 61C, 63F(1), Pt VII, 94, 94AA.

Judiciary Act 1903 (Cth), s 39(2).
Northern Territory (Self-Government) Act 1978 (Cth), s 49.

1 GLEESON CJ, McHUGH AND GUMMOW JJ. These two appeals, one brought by the mother ("AIF") of a child and the other by the father ("AMS"), arise out of orders made by the Full Court of the Supreme Court of Western Australia in allowing the mother's appeal in part, and dismissing the father's cross-appeal, against orders made in a custody and guardianship dispute in the Family Court of Western Australia ("the State Family Court").

2 On 24 April 1996, the State Family Court ordered that the parents have joint guardianship of the child and that the mother have sole custody with "liberal access" by the father. On 19 June 1997, the Full Court of the Supreme Court dismissed the father's cross-appeal seeking joint custody and allowed the mother's appeal against the order for joint guardianship. The mother was to be sole guardian and to retain sole custody. However, she was restrained from changing the child's principal place of residence.

3 We would reject the application to revoke the grant of special leave in the father's appeal and allow each appeal. We would order that the appeals from the State Family Court to the Full Court of the Supreme Court be allowed, that the orders of the State Family Court be set aside and that the matter be remitted to that Court for re-hearing. We turn to give our reasons for so concluding, beginning with the appeal by the father against the decision of the Full Court.

The appeal by the father

4 The parents of the child have never married. They met in Perth while they were university students. However, they were living in the Northern Territory when the child was born on 2 March 1990. In February 1994, they separated. After a brief visit to Perth, they returned to the Northern Territory. The mother and the child lived in Darwin while the father lived at a mining site about 160 kilometres away. In April 1994, the parents agreed to return to Perth at the end of the year. Until the father returned to Perth in October 1994, he continued to see the child, making the 320 kilometre round trip on most weekends to do so. Regular contact between the father and the child resumed after the mother returned to Perth in December of that year.

5 Towards the end of 1995, the mother told the father that she wished to return to Darwin to study at the Northern Territory University if she did not obtain a place at Murdoch University in Perth. On 21 December 1995, she was informed that she had obtained a place at that University. However, on the same day, she told the father that she had decided to return to Darwin during the following January. In evidence, the mother said that she had made up her mind to return to Darwin "independent of my acceptance into Murdoch because I sincerely wanted to return to Darwin".

6 On 11 January 1996, the father filed an application to restrain the mother from removing the child from Western Australia. He also applied for orders for joint guardianship and sole custody of the child and for reasonable access to the child for the mother. On 16 January 1996, the mother gave an undertaking not to remove the child from the State. Subsequently, she filed a response seeking orders for the sole guardianship and custody of the child, for reasonable access for the father and for her to "be free to leave the Perth Metropolitan area and the State of Western Australia".

7 Later, the father amended his application to seek orders for the joint guardianship and joint custody of the child, for the child to reside with the father, for "liberal access" for the mother and for both parents to be prevented from removing the child "without the prior written consent of both parties". The mother also amended her response, the principal amendments being that she be released from her undertaking given on 16 January 1996 and that the father "pay 75% of the child's airfares for access".

8 The State Family Court made the following orders:

"IT IS ORDERED THAT:-

1. The [father] and the [mother] have the joint guardianship of the child … born on the 2nd day of March 1990 with sole custody of the said child to the [mother] and liberal access to the [father] defined to include:-

   (a) during the school term, for two out of every three weekends commencing from Friday after school until Sunday evening;

   (b) for one half of all school holiday periods;

   (c) further access on important days including Christmas Day, the child's birthday, the father's birthday and Father's Day;

   (d) such further or other access as may be agreed between the parties.

2. The [mother] be restrained and an injunction is hereby granted restraining her from changing the child's principal place of residence from the Perth metropolitan area as defined in the Town Planning and Development Act 1928.

3. By consent, the parties attend post trial counselling on a date and time to be fixed by the Director of Court Counselling."

9 On appeal, the Full Court varied these orders in the following manner:

"THE COURT ORDERS THAT:

1. The Appeal be allowed in part by varying the order of the Chief Judge of the Family Court made 24 April 1996, so that the application by the [father] for an order that the parties have joint guardianship of the Child, … born 2 March 1990, be dismissed and that the [mother] remain the sole guardian of and have sole custody of the said child with liberal access to the [father] defined to include;

   a) during the school term for two out of every three weekends commencing from Friday after school until Sunday evening;

   b) for one half of all school holiday periods;

   c) further access on important days including Christmas Day, the child's birthday, the father's birthday and Father's Day; and

   d) such further or other access as may be agreed between the parties.

2. The [mother] be restrained from changing the Child's [principal] place of residence from the Perth metropolitan area as defined in the Town Planning and Development Act 1928.

3. The Cross Appeal be and is hereby dismissed.

4. There be no order as to costs."

The custody of ex-nuptial children

10 Under the general law in England (which represented an uneasy accommodation at various times between the ecclesiastical courts, the common law courts and the Court of Chancery), there eventually prevailed the Chancery doctrine that the desire of the mother of an illegitimate infant as to its custody was primarily to be considered, if to do so would not be detrimental to the interest of the child[1].

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1 *Barnardo v McHugh* [1891] AC 388 at 398-399. See also *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 585.

11 Chancery asserted its authority with respect to infants upon various grounds. These included (a) the ordinary residence of the child within the territorial jurisdiction; (b) allegiance to the Crown and (c) physical presence, even falling short of residence, if protection of the Court were needed[2]. Further, as Mason J put it in *Carseldine v Director of Department of Children's Services*[3]:

> "The courts have always been prepared, when the welfare of the child requires it, to divorce custody from guardianship; the existence of guardianship in one person is not a bar to the making of an order for custody in favour of another."

12 In Australia, statute intervenes at federal and State level and, at the time of the litigation in the State Family Court, did so in different terms. The meaning of the terms "guardianship" and "custody" in the *Family Court Act* 1975 (WA) ("the 1975 WA Act") were dealt with in s 34. Section 34(2) provided as follows with respect to custody:

> "A person who has or is granted custody of a child under this Act has–
>
> (a) the right to have the daily care and control of the child; and
>
> (b) the right and responsibility to make decisions concerning the daily care and control of the child."

Section 34(1) imposed upon a guardian responsibility for the long-term welfare of the child and conferred in relation to the child all the powers, rights and duties that are, apart from the 1975 WA Act, vested by law or custom in the guardian of a child, other than those matters dealt with in pars (a) and (b) of s 34(2) as incidents of a grant of custody. Section 34 appeared in Div 3 (ss 34-53) of Pt III of the 1975 WA Act. Division 3 was headed "Custody, Guardianship, Access and Welfare". The 1975 WA Act has now been repealed by s 246 of the *Family Court Act* 1997 (WA) ("the 1997 WA Act").

13 The starting point in the reasoning of the Full Court was that the mother of the child had both custody and guardianship by virtue of s 35 of the 1975 WA Act. Section 35 stated:

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2 *Holden v Holden* [1968] VR 334; *McM v C (No 2)* [1980] 1 NSWLR 27; *In re D (an Infant)* [1943] Ch 305.

3 (1974) 133 CLR 345 at 366.

> "Subject to the *Adoption of Children Act 1896* and any order made pursuant to this Division, where the parents of a child who has not attained the age of 18 years were not married at the time of the birth of the child or subsequently, the mother of the child has the custody and guardianship of the child."

Malcolm CJ, who gave the judgment of the Full Court, stated[4]:

> "Where the parents of a child were not married at the time of the birth of the child or subsequently, the mother of the child has both custody and guardianship of the child by virtue of s 35 of the [1975 WA Act]."

The Chief Justice concluded that[5]:

> "no valid reason had been put before the learned Chief Judge [of the State Family Court] to disturb the status quo so far as guardianship was concerned."

However, the status quo was supplied not by s 35 of the 1975 WA Act but by the *Family Law Act* 1975 (Cth) ("the Family Law Act").

14 In 1990, at the time of the birth of the child in Darwin, both parents were resident in the Northern Territory. Section 63F(1) of the Family Law Act appeared in Pt VII and then stated[6]:

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4 (1997) 139 FLR 216 at 222.

5 (1997) 139 FLR 216 at 235.

6 Part VII was repealed with effect from 11 June 1996 by s 31 of the *Family Law Reform Act* 1995 (Cth) ("the 1995 Act"). Section 31 thereof substituted a new Pt VII (ss 60A-70Q). Section 61C states:

> "(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, by the parents becoming separated or by either or both of them marrying or re-marrying.

(Footnote continues on next page)

"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), each of the parents of a child who has not attained 18 years of age is a guardian of the child, and the parents have the joint custody of the child."

15 Several questions of construction are presented by the general terms of s 63F(1), not all of which are readily answered by reference to the statutory context. Section 63B applies only to proceedings in relation to a child which are instituted under the Family Law Act. It requires that, on the day the application is filed or otherwise instituted, the child or a parent or a party to the proceedings be present or ordinarily resident in or a citizen of Australia, or the exercise of jurisdiction would be in accordance with the common law rules of private international law or with a treaty or other international arrangement.

16 The term "child" includes an adopted child and a stillborn child (s 60) but is not otherwise defined for the purposes of Pt VII. Division 5 thereof (ss 63E-66) is headed "Custody and guardianship of children" and has effect as if, by express provision, each reference to a child were confined to a child of a marriage and each reference to the parents of a child were confined to the parties to the marriage (s 60F(2)). That would not apply s 63F(1) to the present case. Part VII also "extends" the language of the reference of power provision in s 51(xxxvii) of the Constitution, to certain States (s 60E) but these do not include Western Australia.

17 In none of these operations of Pt VII would s 63F(1) apply to the child of the appellant and the respondent. However, s 60E(3) provided that Pt VII "applies in and in relation to the Territories". The power of the Parliament to make laws with respect to the government of the Northern Territory supported a law replacing or altering the common law with respect to the guardianship and custody of children born in that Territory to parents then residing there. These circumstances supplied "a sufficient nexus or connection" between the Northern Territory and s 63F(1) of

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(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)."

Section 61B defines the term "parental responsibility" as meaning, in relation to a child, "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children". Section 69ZG provides that Pt VII "applies in and in relation to the Territories". That expression identifies the Territories referred to in s 122 of the Constitution (*Acts Interpretation Act* 1901 (Cth), s 17(p)) but, by reason of the definition of "Territory" in s 4(1) of the Family Law Act, does not include all external territories.

the Family Law Act[7]. It is unnecessary to determine whether some lesser connection would support the validity of s 63F under s 122 of the Constitution.

18 The regime established by s 63F(1) was subject to displacement or variation by "any order of a court for the time being in force … whether or not made under [the Family Law] Act". The term "court" is defined in s 4(1) as meaning, subject to any contrary intention and "in relation to any proceedings", the court which is exercising jurisdiction therein "by virtue of this Act". However, the reference in s 63F(1) itself to orders made other than under the Family Law Act indicates that the term "court" in s 63F(1) is not limited in its application to those courts in respect of which jurisdiction is conferred or invested under that statute[8]. Those courts were specified in s 63 and included the Family Court of Australia (which may sit at any place in Australia[9]), each State Family Court and the Supreme Court of the Northern Territory but, in the last case, subject to at least one of the parties satisfying a residence requirement (s 63(7)). Upon these courts s 63(1) conferred and invested "federal jurisdiction in relation to matters arising under [Pt VII]".

19 The operation of the regime established by s 63F(1) with respect to the parties to the present litigation was not confined to the geographical area of the Northern Territory. It operated as a binding law of the Commonwealth wherever territorially the power of the Commonwealth ran, and by virtue of s 109 of the Constitution it prevailed over any inconsistent State law. These propositions follow from *Lamshed v Lake*[10].

20 The result was that the question in the State Family Court turned upon the operation of s 109. In so far as s 35 of the 1975 WA Act applied to the child and his parents, whether by reference to their presence or residence in the State or the commencement of proceedings in a court of the State or by reason of some other sufficient connection, the State law and the law of the Commonwealth made contradictory provision as to the custody and guardianship of the child. To the extent of that inconsistency s 35 was rendered invalid by s 109 of the

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7 See *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607; *Davis v The Commonwealth* (1988) 166 CLR 79 at 97.

8 cf *Vitzdamm-Jones v Vitzdamm-Jones* (1981) 148 CLR 383 at 397.

9 Family Law Act, s 27(1).

10 (1958) 99 CLR 132 at 141.

Constitution[11] and did not supply a proper starting point for the reasoning in the Full Court.

21 A further result was that the proceeding in the State Family Court (and the appeal to the Full Court) was a matter arising under the Constitution, or involving its interpretation, within the meaning of s 76(i) of the Constitution[12]. Jurisdiction in respect of that matter was invested in the State courts by s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

22 This makes it unnecessary to determine whether the proceeding also had the character of a matter arising under a law of the Commonwealth within the meaning of s 76(ii) of the Constitution. The issue would be whether to seek to displace or vary the regime established by s 63F(1), by a court order founded in State law and establishing other rights and duties, would be to call in question the anterior right or duty which owed its existence to federal law, namely s 63F(1). The federal right or duty would be called into question for the purpose of compromising its further subsistence. If so, federal jurisdiction would be attracted[13], and the character of s 63F(1) as a law made by the Parliament in exercise of its power under s 122 would not deny the operation of ss 76(ii) and 77 of the Constitution and the existence of federal jurisdiction[14]. Federal jurisdiction, upon this hypothesis, would have been invested in the State Family Court by s 63(1) of the Family Law Act.

23 The father submits that s 109 was engaged in this case also by s 49 of the *Northern Territory (Self-Government) Act* 1978 (Cth) ("the Self-Government Act"). In her appeal, the mother also relies upon s 49. The father's appeal will be determined on the ground already indicated and his reliance upon s 49 then does not fall for determination. It will be necessary to consider further the operation of s 49 when dealing with the appeal by the mother. It is sufficient at this stage to indicate that reliance upon s 49 supplies a further basis for the attraction of federal jurisdiction, invested in the State courts by s 39(2) of the Judiciary Act.

24 The Full Court approached the appeal on the footing that the State Family Court had been exercising "non-federal jurisdiction" within the meaning of s 27 of the 1975 WA Act. Section 27(1) stated that the State Family Court had "throughout the State" the federal jurisdiction with which it was invested by the

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11 *Fountain v Alexander* (1982) 150 CLR 615 at 643-644.

12 *Ex parte McLean* (1930) 43 CLR 472 at 482.

13 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

14 *Northern Territory v GPAO* (1999) 73 ALJR 470; 161 ALR 318.

Family Law Act and any other law of the Commonwealth and any regulations and proclamations in force thereunder. This provision, given the operation of s 77(iii) of the Constitution and the laws made by the Parliament thereunder, including s 39(2) of the Judiciary Act and s 63(1) of the Family Law Act, was only declaratory of what already was the situation established by force of federal law.

25 In respect of the exercise of non-federal jurisdiction by the State Family Court, an appeal lay to the Full Court. Section 81(2)(a) of the 1975 WA Act so provided and upon this the Full Court relied. With respect to the exercise of federal jurisdiction by the State Family Court, s 80 of the 1975 WA Act provided that the appeal provisions of the Family Law Act applied. This State legislation also could be no more than declaratory of what already was the operation of federal law. The effect of s 94 and s 94AA of the Family Law Act is to direct to the Full Court of the Family Court an appeal from decrees (which include judgments and orders[15]) of the State Family Court exercising jurisdiction under the Family Court Act.

26 However, s 63(9) of the Family Law Act provided:

> "The jurisdiction conferred on or invested in a court by this section is in addition to any jurisdiction conferred on or invested in the court apart from this section."

In *R v Ward*, this Court held that the grant of jurisdiction to State courts by the generally expressed and ambulatory terms of s 39(2) of the Judiciary Act, "will only be displaced in whole or in part by another statute when that statute evinces an intention to exclude or otherwise limit the jurisdiction conferred by s 39"[16].

27 This appeal should be disposed of on the basis that s 39(2) invested the State Family Court with federal jurisdiction and invested the Full Court of the Supreme Court with appellate federal jurisdiction so as to render competent the appeal to the Full Court. No contrary submission was made. Nor was it contended that the appeal to the Full Court had been incompetent.

28 It is unnecessary to consider what, if any, significance is to be attached in a consideration of the above matters to the circumstance that the mother's appeal to

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15 This follows from the definition of "decree" in s 4(1) of the Family Law Act.

16 (1978) 140 CLR 584 at 589.

the Full Court was instituted on 11 June 1996, that by the father on 19 June 1996, while the new Pt VII of the Family Law Act commenced on 11 June 1996.

29 It is sufficient to determine the father's appeal on the footing that the Full Court, in varying the order made by the State Family Court so that the mother be both sole guardian and have sole custody of the child, proceeded upon an error of law. This was that the "status quo", which the Full Court decided had been wrongly disturbed by the State Family Court, was that established by s 35 of the 1975 WA Act.

30 However, given the intervening repeal of the 1975 WA Act and the commencement of new State legislation, the 1997 WA Act, it is inappropriate simply to restore Order 1 of the orders of the State Family Court that the parents have joint guardianship and the mother sole custody with liberal access to the father. Further, the status quo which provides the starting point is now s 61C of the substituted Pt VII of the Family Law Act. This means that, as before, the State Family Court will be exercising federal jurisdiction but by reference to a changed Family Law Act. As it happens, s 61C (and the definition of "parental responsibility" in s 61B) are mirrored, in all relevant aspects, by the terms of ss 69 and 68 respectively of the 1997 WA Act.

The appeal by the mother

31 It was said in the judgment of Holden J in the State Family Court:

> "For all of the child's life he has had the benefit of considerable contact with each of his parents. Each of them has had considerable input into the child's upbringing. Although the child has always enjoyed a relationship with members of the extended families, since the mother has moved to Perth he has been brought up in an environment of close interaction with members of both extended families. From the point of view of the welfare of the child it seems to me that he has been in as an ideal situation as he could possibly be in given that his parents do not live together. It is my opinion that the welfare of the child would be better promoted by him continuing in that situation *in the absence of any compelling reasons to the contrary*. Accordingly, the mother's application for a release from her undertaking will be dismissed and an injunction will be made restraining her from removing the child from the Perth Metropolitan area." (emphasis added)

32 As we have pointed out, Order 2 of the orders made by that Court was in the following terms:

> "The [mother] be restrained and an injunction is hereby granted restraining her from changing the child's principal place of residence from the Perth

metropolitan area as defined in the Town Planning and Development Act 1928."

Order 2 of the orders of the Full Court was to the same effect and in this Court the mother contends that the Full Court erred in refusing to set aside the restraint upon her changing the principal place of residence of the child.

33 By the time the proceedings reached trial, the father was still seeking an injunction in the terms originally sought whilst the mother was seeking release from her undertaking and an order "that she be free to reside in Darwin". The judgment of the State Family Court gave detailed consideration to the question whether the mother "ought to be permitted to relocate to Darwin as is her wish". The primary judge decided to grant the injunction in the terms reflected in the final order after giving detailed consideration to the mother's reasons for wishing to move to Darwin. His Honour's reasons indicate that he approached the case by treating as a central issue whether the mother should be "permitted to move to the Territory".

34 The injunction is to be read with the reasons for judgment it was designed to implement. It is true that, in terms, the order does not restrain any freedom of movement of the mother. She is free to move as she wishes subject to the restraint upon her so doing in a fashion which results in a change to the principal place of residence of the child from the Perth metropolitan area. However, the orders both of the State Family Court and of the Full Court entrusted the mother with sole custody of the child, as understood in s 34(2) of the 1975 WA Act, to which reference has been made earlier in these reasons and it is implicit in the structure of the orders that the child is to reside with the mother. The mother is not enjoined from departing from the Perth metropolitan area and, in particular, from establishing residence in Darwin. However, she is not at liberty to do so accompanied by the child who, at the date of the orders, was six years of age. Since *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*[17], it has been settled doctrine that, where a claim is made that a law interferes with the freedom guaranteed by s 92 of the Constitution, "[t]he Court looks to the practical operation of the law in order to determine its validity"[18]. In those circumstances, to invite the Court to determine this appeal on the footing that, in substance, if not necessarily in legal form, the orders do not place a significant restraint upon the

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17 (1975) 134 CLR 559.

18 *Cole v Whitfield* (1988) 165 CLR 360 at 399-400.

freedom of movement of the mother is to seek a contemporary judgment of Solomon.

35 It is in this setting that there arises the constitutional issue put forward by the mother. Section 49 of the Self-Government Act states:

> "Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

This reproduces, but with reference to the Territory, the terms of s 92 of the Constitution. It replaces what was s 10 of the *Northern Territory (Administration) Act* 1910 (Cth), inserted by s 6 of the *Northern Territory (Administration) Act* 1931 (Cth).

36 It was submitted that s 49 was to be interpreted in accordance with the body of doctrine construing s 92 as it had developed at the time of the commencement of the Self-Government Act on 1 July 1978[19]. The contrary submission, that the section is to be given an ambulatory interpretation to follow the course of decisions construing s 92, should be preferred. That is what was done in *Lamshed v Lake*[20]. Dixon CJ there construed the predecessor of s 49 not in accordance with the state of authority as it stood in 1931 but in accordance with the judicial decisions which, as it then seemed, had given some settled definition to the meaning and effect of s 92.

37 *Lamshed v Lake* also establishes that provisions such as s 49 of the Self-Government Act are laws of the Commonwealth which attract the operation of s 109 of the Constitution[21]. As a species of what is often identified as "operational inconsistency"[22], this supremacy of Commonwealth law operates to exclude, in relation to the matters to which it applies, the operation of the laws of a State, such as the 1975 WA Act, under which the jurisdiction of a court of that State may otherwise be exercised and orders made[23]. Where the law in question

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19 s 2(2).

20 (1958) 99 CLR 132 at 147.

21 (1958) 99 CLR 132 at 148.

22 *The Commonwealth v Western Australia* (1999) 73 ALJR 345 at 356-357, 369-371, 394; 160 ALR 638 at 653-654, 671-672, 705.

23 See *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 472, 479; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*

(Footnote continues on next page)

confers jurisdiction entailing the exercise of judicial discretion, that discretion will effectively be confined so that an attempt to exercise it inconsistently with s 49 of the Self-Government Act involves, at least, an error of law which is liable to appellate correction. On that footing, the State law itself retains its validity. These conclusions follow by parity of reasoning with that of Brennan J, concerning the operation of s 92 itself upon discretionary licensing schemes, in *Miller v TCN Channel Nine Pty Ltd*[24].

38 It was in this way that the effect of s 109 of the Constitution was to render invalid the provisions of the 1975 WA Act to the extent to which they otherwise would have empowered the State Family Court to make, in the exercise of a discretion conferred by the 1975 WA Act, orders which impermissibly burdened or prohibited the absolute freedom of intercourse between the Northern Territory and the State of Western Australia, for which provision was made by s 49 of the Self-Government Act.

39 Section 36 of the 1975 WA Act authorised either parent to apply to the State Family Court for an order with respect to the custody or guardianship of, access to, or welfare of the child. In making an order upon such an application, s 36A empowered that Court to make orders of various descriptions and directed the Court to make the order that, in its opinion, would be least likely to lead to the institution of further proceedings with respect to custody or guardianship of the child. In the present case, the State Family Court thus was exercising discretionary powers and its decisions in so doing were subject to appellate review according to settled principles.

40 In *Cole v Whitfield*, the Court said[25]:

> "A constitutional guarantee of freedom of interstate intercourse, if it is to have substantial content, extends to a guarantee of personal freedom 'to pass to and fro among the States without burden, hindrance or restriction': *Gratwick v Johnson*[26]."

(1996) 189 CLR 253 at 284-285; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 463.

24 (1986) 161 CLR 556 at 596-597, 614-615.

25 (1988) 165 CLR 360 at 393.

26 (1945) 70 CLR 1 at 17.

The Court went on to emphasise that this was not meant to suggest[27]:

> "that every form of intercourse must be left without any restriction or regulation in order to satisfy the guarantee of freedom. For example, although personal movement across a border cannot, generally speaking, be impeded, it is legitimate to restrict a pedestrian's use of a highway for the purpose of his crossing or to authorize the arrest of a fugitive offender from one State at the moment of his departure into another State. It is not necessary now to consider the content of the guarantee of freedom of various forms of interstate intercourse. Much will depend on the form and circumstance of the intercourse involved."

The matter was taken further in *Cunliffe v The Commonwealth*[28]. Mason CJ considered that, whilst a law which in terms applied to movement across a border and imposed a burden or restriction would be invalid, a law which imposes an incidental burden or restriction on interstate intercourse in the course of regulating a subject-matter other than interstate intercourse would not necessarily fail and it would be a matter of weighing the competing public interests[29]. Brennan J repeated his view expressed in *Nationwide News Pty Ltd v Wills*[30] that s 92 does not immunise interstate intercourse from the operation of laws of general application which are not aimed at that activity[31]. Deane J took a different stance. His Honour said[32]:

> "The freedom of intercourse which the section demands is freedom within an ordered community and a law which incidentally and non-discriminately affects interstate intercourse in the course of regulating some general activity, such as the carrying on of a profession, business or commercial activity, will not contravene s 92 if its incidental effect on interstate intercourse does not go beyond what is necessary or appropriate and adapted for the preservation

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27 (1988) 165 CLR 360 at 393. See as to the United States Constitution, *Edwards v California* 314 US 160 at 174, 181 (1941); *United States v Guest* 383 US 745 at 758-760 (1966); *Shapiro v Thompson* 394 US 618 at 629-631, 642-643 (1969); *Saenz v Roe* 67 USLW 4291 (1999).

28 (1994) 182 CLR 272.

29 (1994) 182 CLR 272 at 307-308.

30 (1992) 177 CLR 1 at 58-59.

31 (1994) 182 CLR 272 at 333.

32 (1994) 182 CLR 272 at 346.

of an ordered society or the protection or vindication of the legitimate claims of individuals in such a society."

41 Dawson J treated s 92 as not striking at laws which place an impediment upon freedom of interstate intercourse if the impediment was no greater than was reasonably required to achieve the object of a legislation which otherwise was within power[33]. Toohey J considered the law in question in *Cunliffe v The Commonwealth* did not impose any undue restriction on the communication of information and ideas and did not restrict movement across State borders with the result that s 92 had nothing to say about that legislation[34]. Gaudron J favoured the approach taken by Deane J[35].

42 McHugh J emphasised that the freedom of interstate intercourse guaranteed by s 92 is not confined to freedom against laws that are discriminatory in any protectionist sense, as is now the case with freedom of interstate trade and commerce[36]. His Honour concluded that the freedom of intercourse spoken of in s 92 was limited, even in the case of laws imposing indirect restrictions or burdens, only by the need to accommodate laws reasonably necessary for the government of a free society regulated by the rule of law[37].

43 The formulations of principle by the members of the Court in *Cunliffe v The Commonwealth* differ, but those by Mason CJ, Deane J, Dawson J, McHugh J and, perhaps, Toohey J, reflect reasoning akin to that adopted by the Privy Council in the *Bank Nationalisation Case*[38], with respect to what came to be known under the former dispensation respecting s 92 as "reasonable regulation". In the working out of the measure of freedom from legislative, executive or curial interference which s 92 now is to be taken to provide in respect of interstate intercourse, each case

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33 (1994) 182 CLR 272 at 366.

34 (1994) 182 CLR 272 at 384.

35 (1994) 182 CLR 272 at 392.

36 (1994) 182 CLR 272 at 395.

37 (1994) 182 CLR 272 at 396.

38 *The Commonwealth v Bank of NSW* (1949) 79 CLR 497 at 639-641.

should be decided "so far as may be, on the specific considerations or features which it presents"[39].

44 In addition to the immunity involved in the freedom of intercourse among the States protected by s 92, there is implicit in the Constitution at least an immunity from State interference, as Dixon CJ put it[40], "with all that is involved in [the] existence [of the Australian Capital Territory] as the centre of national government", which "means an absence of State legislative power to forbid restrain or impede access to it". However, that is not this case. It turns on an aspect of s 92 doctrine which is being developed from case to case[41].

45 The 1975 WA Act did not in terms apply to impose a burden or restriction upon movement across the borders of Western Australia. Rather, subject to the operation of s 109 of the Constitution, the 1975 WA Act empowered the State Family Court to impose a burden or restriction upon movement by orders made in exercise of its discretionary powers with respect to the custody and guardianship of children. In the present case, the order of which the mother complains does not enjoin movement as such from the State to the Northern Territory. However, its practical operation is to hinder or restrict such movement by the mother by reason of the requirement that she not change the principal place of residence of the child. This, of itself, would not be fatal to validity. The question becomes whether the impediment so imposed is greater than that reasonably required to achieve the objects of the 1975 WA Act. If the order in question does answer that description, it would, as indicated above, be liable to appellate correction as having been made in an exercise of discretion which was tainted by an error of law.

46 The question of the operation by this medium of s 49 of the Self-Government Act and s 109 of the Constitution will not arise for decision in a given case where, upon appellate review, the orders in question are, on other grounds, liable to be set aside. That is the position in the present case. In deciding the mother's appeal on this narrower footing, we would not wish to be understood as denying the proposition that, in the case of legislation, State or federal, of the nature of the custody and guardianship provisions of the 1975 WA Act, s 92 may not put

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39 *Gratwick v Johnson* (1945) 70 CLR 1 at 19.

40 *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 549-550. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 73-74; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 213-214; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 45, 68-70, 88-93, 116, 142-144, 156-157; *Higgins v Commonwealth* (1998) 79 FCR 528 at 534-536.

41 See, for example, *Higgins v Commonwealth* (1998) 79 FCR 528 at 531-533.

beyond the relevant statutory power the making of orders which have a practical effect of imposing upon the freedom of intercourse protected by s 92 an impediment greater than that reasonably required to achieve the object of the legislation.

47 With respect to the present appeal by the mother, we agree with Kirby J that the State Family Court erroneously exercised its discretion by 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 him continuing to reside in the metropolitan area of Perth. The Full Court should have intervened on this ground and, for that reason, the mother's appeal to this Court should be allowed.

48 When the matter is heard again, it will be for the State Family Court to take into account, upon the evidence then before it and in framing any orders it may make, the need not to impose upon the freedom of intercourse of either party between Western Australia and the Northern Territory, or between that State and any other State, an impediment greater than that reasonably required to achieve the objects of the applicable legislation. This will be the 1997 WA Act but with the status quo supplied by s 61C of the substituted Pt VII of the Family Law Act.

49 We should add that the reliance by the mother upon several international instruments to which this country is a party did not advance her arguments either with respect to the construction of the 1975 WA Act or the operation of s 92 of the Constitution through the medium of s 49 of the Self-Government Act and s 109 of the Constitution.

50 As to the Constitution, its provisions are not to be construed as subject to an implication said to be derived from international law[42]. As to the legislation itself, it has been accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, so far as its language permits, so that it is in conformity and not in conflict with established rules of international law. However, the instruments referred to in the present case are, as to some of their provisions, aspirational rather than normative and, overall, reveal but do not resolve the

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42 *Polites v The Commonwealth. Kandiliotes v The Commonwealth* (1945) 70 CLR 60 at 69, 74, 75, 77, 79, 80-81; *Fishwick v Cleland* (1960) 106 CLR 186 at 196-197; *Horta v The Commonwealth* (1994) 181 CLR 183 at 195; *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 745-746; 152 ALR 540 at 571-572; *Joosse v Australian Securities & Investment Commission* (1998) 73 ALJR 232 at 236; 159 ALR 260 at 265.

conflicting interests which, as a matter of municipal law, attend a case such as the present.

Orders

51 The appeals should be allowed. The order of the Full Court of the Supreme Court of Western Australia should be set aside. In lieu thereof, it should be ordered that the appeals from the State Family Court should be allowed, the orders of that Court set aside and the matters remitted to that Court for further hearing. Each party should pay his or her costs in the State Family Court, in the Full Court of the Supreme Court and in this Court.

52 GAUDRON J. The facts relevant to these appeals are set out in the judgments of other members of the Court. I shall repeat them only to the extent necessary to make clear my reasons for concluding that both appeals should be allowed. At this stage, it is sufficient to note that the parties to the appeals, who were never married, are the parents of a young child, "J". The father is the appellant in the first matter and the mother in the second. They will be referred to as "the father" and "the mother" respectively.

The father's appeal

53 The father's appeal is from that part of an order of the Full Court of the Supreme Court of Western Australia which varied an order for joint guardianship made by Holden J, as he then was, in the Family Court of Western Australia on 24 April 1996. The Full Court ordered that the mother "remain the sole guardian". The word "remain" is significant. It reflects the Full Court's view that that was the position prior to the order made at first instance, a view which is explicit in the statement by Malcolm CJ (with whom Franklyn and Walsh JJ agreed), that the order for joint guardianship should be set aside because "no valid reason had been put [at first instance] to disturb the status quo so far as guardianship was concerned"[43].

54 Seemingly, the Full Court proceeded on the basis that guardianship was governed by s 35 of the *Family Court Act* 1975 (WA) ("the 1975 WA Act") which, until its repeal in 1998, provided[44]:

> " Subject to the *Adoption of Children Act 1896* and any order made pursuant to [Div 3 of Pt III], where the parents of a child who has not attained the age of 18 years were not married at the time of the birth of the child or subsequently, the mother of the child has the custody and guardianship of the child."

55 J was born in 1990 in Darwin. His parents were both then resident in the Northern Territory. When proceedings were commenced in the Family Court of Western Australia, he resided with his mother in Western Australia. His father also resided in Western Australia.

56 The father's primary argument in this Court was that guardianship was not regulated by s 35 of the 1975 WA Act but by s 63F(1) of the *Family Law Act* 1975

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43 (1997) 139 FLR 216 at 235.

44 The 1975 WA Act was repealed by the *Family Court Act* 1997 (WA) which took effect on 26 September 1998. Section 69 of the latter Act now provides, in terms substantially identical to those of s 61C of the *Family Law Act* 1975 (Cth), that parents have joint parental responsibility for a child under 18 years of age.

(Cth) ("the Commonwealth Act"). In consequence of that provision, it was argued, the father and mother had been joint guardians of their son at all times prior to the institution of proceedings in the Family Court of Western Australia and the Full Court erred in thinking otherwise.

57 By s 60E(3) of the Commonwealth Act, Pt VII of that Act, dealing with "Children", applied "in and in relation to the Territories". And s 63F(1) provided, as it did until 11 June 1996[45]:

> " 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), each of the parents of a child who has not attained 18 years of age is a guardian of the child, and the parents have the joint custody of the child."

58 When the order of the Full Court, which is the subject of these appeals, was made on 19 June 1997, s 61C of the Commonwealth Act provided, as it does now, that:

> "(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, 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)."

"Parental responsibility" is relevantly defined in s 61B to mean "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children". And by s 69ZG, Pt VII of the Commonwealth Act, which includes ss 61B and 61C, applies in the Territories[46].

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45 Part VII of the Commonwealth Act (including s 63F) was repealed by s 31 of the *Family Law Reform Act* 1995 (Cth). That section commenced operation on 11 June 1996. Section 31 substituted a new Pt VII of the Commonwealth Act relating to "Children". Parental responsibility for children is now dealt with in the new s 61C.

46 This provision replaces the former s 60E(3), which was repealed by the *Family Law Reform Act*.

59 It is not in doubt that, pursuant to s 122 of the Constitution, the Parliament has power to legislate with respect to the custody and guardianship of, or parental responsibility for, a child resident in a Territory, whether or not the parents are married[47]. And in my view, the power extends to the making of a law in that regard that operates after the child has ceased to reside in the Territory[48], provided it allows for alteration of parental rights and duties in accordance with the law of the place where the child then resides. Were there no provision allowing for alteration of those rights, a question would arise whether, in its application to an ex-nuptial child who no longer resided in the Territory, s 63F(1) of the Commonwealth Act could properly be characterised as a law "for the government of [a] territory"[49].

60 The question in this case is whether, in respect of a child who had earlier been resident in a Territory, s 63F(1) of the Commonwealth Act operated, as its terms would indicate, until an order was made to the contrary. It was submitted on behalf of the mother and of the Attorneys-General for the Commonwealth and Western Australia, who intervened in these appeals, that, for present purposes, s 63F(1) ceased to operate when the parties and J became residents of Western Australia.

61 If s 63F(1) of the Commonwealth Act operated until an order was made to the contrary, then to the extent that s 35 of the 1975 WA Act provided otherwise, it was inconsistent with that sub-section and, hence, invalid by reason of s 109 of the Constitution[50]. On the other hand, if s 63F(1) ceased to operate when the parties and J became resident in Western Australia, then, subject to a further

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47 See *Gazzo v Comptroller of Stamps (Vict)* (1981) 149 CLR 227 at 266 per Aickin J; *In the Marriage of Cormick* (1984) 156 CLR 170 at 182 per Murphy J; *Northern Territory of Australia v GPAO* (1999) 73 ALJR 470 at 476 per Gleeson CJ and Gummow J (with whom Hayne J agreed), 488-489 per Gaudron J, 498 per McHugh and Callinan JJ; 161 ALR 318 at 325-326, 343-344, 356.

48 It has been accepted since *Lamshed v Lake* (1958) 99 CLR 132 that laws made by the Parliament under s 122 may also operate elsewhere in the Commonwealth. In that case, Dixon CJ relevantly stated (at 145) that rights acquired under the *Matrimonial Causes Act* 1945 (Cth), on the basis that the place of domicile was a territory, would also be enforceable elsewhere in the Commonwealth. See also *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607 per Mason J (with whom Barwick CJ, McTiernan, Jacobs and Murphy JJ agreed); *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 513 per Stephen J, 526 per Mason J, 531 per Murphy J.

49 Section 122 of the Constitution.

50 See with respect to inconsistency between a State law and law under s 122 of the Constitution, *Lamshed v Lake* (1958) 99 CLR 132 at 148 per Dixon CJ, with whom Webb, Kitto and Taylor JJ agreed.

argument on behalf of the father as to its validity, s 35 of the 1975 WA Act then applied and continued to apply until its repeal on 26 September 1998.

62 The only express limitation to which s 63F(1) of the Commonwealth Act was subject was an order of a court to the contrary, whether such order was made under that or another Act. To read it as subject to any other limitation would be to read words into that sub-section that were not there. It is, of course, permissible to read down a statutory provision so that it operates within constitutional limits. At least that is so if its operation within those limits is not thereby altered[51]. However, if s 63F(1) of the Commonwealth Act is read, as I think it must be, as allowing for some other legal regime to be brought into operation when a child ceases to reside in a Territory, it was within constitutional limits and no occasion arises for its reading down.

63 Questions of constitutionality aside, the circumstances in which a court may construe a statutory provision by reading into it words that are not there are extremely limited. More particularly is that so where, as here, the words of the provision are clear and unambiguous. In general terms, clear words can only be read as subject to some unexpressed limitation if that is necessary to avoid absurdity, some conflict with another provision of the statute in question or a result which cannot reasonably be supposed to have been intended by the legislature[52].

64 None of the above considerations direct that s 63F(1) of the Commonwealth Act be read in the manner for which the mother and the Commonwealth and Western Australian Attorneys-General contended. On the contrary, if the operation of s 63F(1) were confined by reference to residence in a Territory, it might be productive of uncertainty and disruptive of settled arrangements, particularly in circumstances of the kind that occurred in this case. It cannot be supposed that Parliament intended that possibility. Accordingly, it follows that s 63F(1) of the Commonwealth Act regulated the guardianship of J at the time proceedings were instituted in the Family Court of Western Australia and, to that extent, s 35 of the 1975 WA Act was inoperative.

65 It also follows that the mother and father had joint guardianship of J when proceedings were commenced in the Family Court of Western Australia and the Full Court erred in proceeding on the basis that the mother was his sole guardian.

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51 See generally with respect to the reading down of a statute to confine its operation within constitutional limits, s 15A of the *Acts Interpretation Act* 1901 (Cth); *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 501-503 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ and the cases there cited.

52 See *Thompson v Judge Byrne* (1999) 73 ALJR 642 at 653 per Gaudron J; 161 ALR 632 at 645 and the cases there cited.

Ordinarily, that would result in the father's appeal being allowed. However, it was submitted on behalf of the mother that instead of taking that course, the Court should revoke the father's grant of special leave to appeal.

66 The argument for the revocation of special leave was based on the repeal of the 1975 WA Act and the enactment of the *Family Court Act* 1997 (WA) ("the 1997 WA Act") with effect from 26 September 1998. Section 69 of the 1997 WA Act is in substantially similar terms to s 61C of the Commonwealth Act with the consequence that, subject to any order of a court to the contrary, both parents have parental responsibility for children under the age of 18, whether or not they are or were married.

67 It was put that, given the terms of s 69 of the 1997 WA Act, there is no longer any question of general importance to be decided by this Court. Were the order for special leave revoked, however, J's guardianship would be governed by an order which was made in disregard of what was then the correct legal position and which takes no account of the present legal position. In these circumstances, it is contrary to the interests of justice to revoke leave.

Further grounds of the father's appeal

68 Given that s 35 of the 1975 WA Act did not apply and, given also that, in my view, special leave should not be revoked, it is unnecessary to consider the further argument made on behalf of the father, namely, that, in making an order that the mother be the sole guardian, the Full Court erred in the exercise of its discretion. It is, however, convenient to note one other argument, namely, that, if s 35 of the 1975 WA Act otherwise operated to grant the mother sole guardianship of J, then it was inconsistent with s 49 of the *Northern Territory (Self-Government) Act* 1978 (Cth) ("the NT Self-Government Act") and, hence, invalid. The latter section provides, in terms which mirror those of s 92 of the Constitution, that "[t]rade, commerce and intercourse between the ... States ... shall be absolutely free."

69 It was put on behalf of the father that intercourse "is not in any sense 'free' if a person must give up a right ... in consequence of having [left a Territory and] entered into a State". In the view I take as to the operation of s 63F(1) of the Commonwealth Act, that precise question does not arise. However, were there a right of the kind which the argument seems to assume, the same could be said with respect to s 69(3) of the 1997 WA Act in so far as it allows for an order making provision contrary to the situation for which s 61C of the Commonwealth Act now provides.

70 Assuming guardianship and parental responsibilities are correctly described as rights, s 63F(1) of the Commonwealth Act did not and s 61C does not now confer any absolute right. Rather s 63F(1) provided and s 61C now provides for a regime which is, in terms, susceptible of change. Moreover, so far as concerns a

child no longer resident in a Territory, it would, in my view, exceed constitutional validity if it did not permit of that possibility.

71 For present purposes, what is significant is that the regime established by s 63F(1) was, and the regime now established by s 61C of the Commonwealth Act is, susceptible of change regardless of whether the persons affected move from a Territory to a State. That being so, it cannot be concluded that intercourse is impeded if that regime is changed in circumstances that happen to involve movement from a Territory to a State.

Background to the mother's appeal

72 The mother's appeal is brought from that part of the order of the Full Court dismissing her cross-appeal from the orders made by Holden J. Essentially, her appeal is concerned with order 2 of those orders, which is in these terms:

> "The respondent be restrained and an injunction is hereby granted restraining her from changing the child's principal place of residence from the Perth metropolitan area as defined in the Town Planning and Development Act 1928."

In order to understand how that order ("the residence order") came to be made, it is necessary to give some account of the nature of the proceedings in the Family Court of Western Australia and the course that they took.

73 The proceedings were commenced by the father on learning of the mother's intention to return with J to the Northern Territory and to take up residence in Darwin. He filed an application seeking joint guardianship and also seeking custody of the child with reasonable access to the mother. Additionally, he sought an injunction restraining the mother from removing J from Western Australia. In context, it seems that the injunction then sought was an interim injunction to preserve the status quo pending the hearing and determination of his application. However, at the hearing, the father sought a further order that both he and the mother be restrained from removing J from Western Australia without the written consent of both.

74 Shortly after the proceedings were commenced, the mother gave an undertaking that she would not remove J from the Perth metropolitan area without the father's consent. Later, she filed a response seeking sole guardianship and custody of J with access to the father at times which varied according to whether or not the parties lived within reasonable proximity to each other. She also sought

an order that she "be free to leave the Perth Metropolitan area and the State of Western Australia"[53].

75 The issue presented by the father's application and the mother's response can be simply stated: what orders should be made with respect to guardianship, custody and access in the light of the mother's proposed return to Darwin? However, Holden J saw the matter somewhat differently. In his Honour's view, it was necessary to first decide whether the mother or father should have custody and, then, "whether or not [the mother] ought to be permitted to remove the child from the jurisdiction". According to his Honour, that was because it was the mother's case that if "not permitted to change her place of residence to the Northern Territory then she [would] remain in Perth as the custodian of the child".

76 It will later be necessary to say something about the approach adopted by Holden J and the manner in which the mother's case was conducted. At the moment, it is sufficient to note that his Honour decided that "the best interests of the child ... would be best served by him remaining in the custody of his mother", without having any regard to where she might live or the access arrangements that might be made. And he decided that "the welfare of [J] would be better promoted by him continuing [to live in Perth] in the absence of any compelling reasons to the contrary". And on that basis, the residence order was made in the terms set out above.

77 In the view of the trial judge, the question "whether or not [the mother] ought to be permitted to relocate to Darwin" was to be answered on the basis that "the welfare of the child ... is the paramount consideration", with regard being had to whether "the application to remove ... [is] bona fide", whether "access and other orders made to ensure the continuance of the relationship ... [with] the non-custodian" are likely to be complied with and "[t]he general effect upon the [child's] welfare ... in granting or refusing the application"[54].

78 In the Full Court, Malcolm CJ reviewed various authorities concerned with a custodial parent's desire to relocate and said that they indicated that "the wishes of the custodial parent should have priority, unless it can be shown that the removal of the child would not be in the interests of the child as the paramount

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53 On 27 March 1996, the mother amended the order sought to an order that she "be free to leave the State of Western Australia with [J]." In the Minute of Proposed Orders dated 16 April 1996, the mother sought an order in terms different again, namely, that she "be free to reside in Darwin."

54 These factors are taken from *In the Marriage of Holmes* [1988] FLC ¶91-918 at 76,663.

consideration."[55] Although this does not seem to be the manner in which Holden J approached the issue, it was nevertheless held that "his Honour's decision was clearly right and consistent with the requirement to regard the welfare of the child as the paramount consideration"[56].

Legislative provisions relevant to the mother's appeal

79 The proceedings were conducted at first instance as proceedings in what the 1975 WA Act referred to as "non-federal jurisdictions ... under this ... Act"[57]. As will later appear, that does not necessarily mean that the Family Court of Western Australia was exercising non-federal jurisdiction as that term is usually understood.

80 Subject to conditions which are not presently relevant, s 27(5) of the 1975 WA Act conferred "non-federal jurisdiction under [that] Act" on the Family Court of Western Australia "to make an order containing a provision for the custody of, guardianship of, access to, or welfare of, a child". And s 36(a) provided that either parent might apply "for an order with respect to the custody or guardianship of, access to, or welfare of, a child".

81 The powers of the Family Court of Western Australia when exercising its "non-federal jurisdiction under [the] Act" were set out in ss 28(3) and 28A(1) of the 1975 WA Act. By s 28(3) it was provided:

> " Subject to this Act, in exercising its non-federal jurisdictions with respect to a child the Court may-
> (a) make such order in respect of those matters as it thinks proper;
> (b) make an order until further order;
> (c) discharge or vary an order or suspend any part of an order and may revive the operation of any part of an order so suspended."

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55 (1997) 139 FLR 216 at 234.

56 (1997) 139 FLR 216 at 234.

57 See s 27(2).

Section 28A(1) provided:

> " The court in exercising its non-federal jurisdictions under this Act may grant an injunction, either unconditionally or upon such terms and conditions as the Court thinks appropriate, by interlocutory order or otherwise (including an injunction in aid of the enforcement of an order), in any case in which it appears to the court, having regard to the principles set out in section 28, to be just or convenient to do so."

82 In the exercise of its non-federal jurisdiction, the Family Court of Western Australia was required by s 28(1) of the 1975 WA Act to have regard to certain principles which are of no immediate relevance[58]. However, s 28(2) provided:

> " In the exercise of its non-federal jurisdictions with respect to a child the Court shall have regard to the welfare of the child as the paramount consideration."

83 Reference should also be made to s 34 of the 1975 WA Act which, so far as is presently relevant, provided:

> "(1) A person who is the guardian of a child under this Act has responsibility for the long-term welfare of the child and has, in relation to that child, all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of a child, other than-
> (a) the right to have the daily care and control of the child; and
> (b) the right and responsibility to make decisions concerning the daily care and control of the child.

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58 The principles set out in s 28(1) were:

> "(a) the need to preserve and protect the institution of marriage as the union of man and woman to the exclusion of all others voluntarily entered into for life;
>
> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of children;
>
> (c) the need to protect the rights of children and to promote their welfare;
>
> (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage; and
>
> (e) the effect of any order on the stability of the marriage and the welfare of the children of the marriage."

(2) A person who has or is granted custody of a child under this Act has-
(a) the right to have the daily care and control of the child; and
(b) the right and responsibility to make decisions concerning the daily care and control of the child.

(3)The operation of subsection (1) or (2) in relation to a child may be varied by any order made by the Court in relation to the child."

84 The applications before the Family Court of Western Australia for custody, guardianship and access were clearly referable to ss 27(5) and 36(a) of the 1975 WA Act. However, it is not entirely clear that the same can be said for the mother's application to "be free to leave the State of Western Australia". It was, however, contended on behalf of the father that the residence order was an order with respect to J's welfare and made in exercise of the welfare jurisdiction of the Court.

Welfare jurisdiction

85 It may be taken that the jurisdiction conferred by s 27(5) of the 1975 WA Act "to make an order containing a provision for the ... welfare of, a child" is a jurisdiction similar to the parens patriae jurisdiction exercised by the Court of Chancery "without the formal incidents of one of the aspects of that jurisdiction, [namely] the jurisdiction to make a child a ward of court"[59]. It has been said that the parens patriae jurisdiction is "an unrestricted jurisdiction to do whatever is considered necessary for the welfare of a [child]"[60] and that "[i]ts limits ... have not, and cannot, be defined"[61]. However, the jurisdiction is not in principle supervisory[62]. Rather, it is a jurisdiction which, in general terms, is exercised when there is some risk to a child's welfare.

86 If there is a risk to the welfare of a child, the parens patriae jurisdiction will support a great variety of orders and orders of great width. It has been said that it will support orders related to "categories of cases ... such as custody, care and

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59 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 256 per Mason CJ, Dawson, Toohey and Gaudron JJ. See also *P v P* (1994) 181 CLR 583 at 598 per Mason CJ, Deane, Toohey and Gaudron JJ, 615 per Brennan J, 627 per Dawson J and 632 per McHugh J; *ZP v PS* (1994) 181 CLR 639 at 646-647 per Mason CJ, Toohey and McHugh JJ.

60 *In re X (A Minor)* [1975] Fam 47 at 61 per Sir John Pennycuick.

61 *E (Mrs) v Eve* [1986] 2 SCR 388 at 410 per La Forest J.

62 *Marion's Case* (1992) 175 CLR 218 at 258-259 per Mason CJ, Dawson, Toohey and Gaudron JJ.

control, protection of property, health problems, religious upbringing, and protection against harmful associations" and that "[t]hat list is not exhaustive ... [for] the powers of [a] court in this particular jurisdiction have always been described as being of the widest nature."[63]

87 Notwithstanding that the welfare jurisdiction is similar to the parens patriae jurisdiction and that that jurisdiction will support a wide variety of orders and orders of great width, it would be reading too much into a statute simply conferring jurisdiction with respect to the welfare of a child to read it as authorising any order that would promote the child's welfare. That would be to convert a jurisdiction designed to protect against risk into a jurisdiction to supervise parents and guardians in the exercise of their rights and responsibilities.

88 Moreover, it is impossible to read ss 27(5) and 36(a) of the 1975 WA Act as conferring a supervisory jurisdiction in a context in which the right and responsibility to make decisions as to the daily care and control of children is, by s 34, expressly conferred on a custodial parent. Were ss 27(5) and 36(a) construed to extend to any order that would promote the welfare of a child, those provisions would allow for the curtailment of a parent's rights not only as a parent, but as an individual, regardless of any risk to the child's welfare. In my view, neither s 27(5) nor s 36(a) of the 1975 WA Act can be read as authorising that course. Rather, they are to be read as authorising "orders" which, in the words of Sir John Pennycuick in *In re X (A Minor)* are "necessary for the welfare of a [child]"[64], or, perhaps, more accurately, orders which are appropriate and adapted to avert a risk to the child's wellbeing.

89 There was no suggestion that, in this case, the mother's proposed move to Darwin posed any risk to her son's wellbeing. Accordingly, the residence order cannot be said to be an order with respect to his welfare for the purposes of s 36(a) of the 1975 WA Act. Thus, if the order is to be supported, it must be supported as an order with respect to custody.

Orders with respect to custody

90 A custody order which is expressed to operate only so long as the custodial parent resides in a particular place is, as to that part concerned with residence, an order with respect to custody. The words "with respect to" are words of wide

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63 *In re X (A Minor)* [1975] Fam 47 at 50-51 per Latey J. See also *E (Mrs) v Eve* [1986] 2 SCR 388 at 426 where La Forest J stated "[t]he situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense."

64 *In re X (A Minor)* [1975] Fam 47 at 61.

import[65] and an order will be an order with respect to custody so long as there is some discernible nexus between it and the custody of a child.

91 As already indicated, the question of custody was approached at first instance as the primary issue to be determined on the basis of the competing claims of the mother and father without regard to where either might live. And the question of the mother's proposed place of residence was approached as a discrete issue, which was sometimes identified as "whether or not [the mother] ought to be permitted to relocate to Darwin" or "permitted to change her place of residence to the Northern Territory" and, at other times, as whether she should be "permitted to remove the child from the Perth Metropolitan area". In these circumstances, it is not possible to view the residence order as having any nexus with the custody order. It is, thus, not an order with respect to custody.

Error in approach at first instance

92 There was, in my view, a fundamental error in the approach taken at first instance. That error can be described in various ways. It can be described as an error in dissecting the case into two discrete issues, namely, a primary issue as to who should have custody and a further issue as to whether the mother should be permitted to change J's place of residence. It can also be described as an error in treating that latter issue as equivalent to the question whether the mother should be permitted to relocate to Darwin, as the trial judge frequently did. So, too, it can be described as an error in determining that issue as one which raised the question whether "the welfare of the child would be better promoted by him continuing in [an ideal] situation" involving close interaction with members of both extended families. It can also be described as an error in proceeding on the basis that the mother had to show "compelling reasons" why she should be permitted to remove J from the Perth Metropolitan area. However, they are but aspects or consequences of a more fundamental error, namely, a failure to determine the issues in the case. Before explaining why that is so, it is convenient to say something further as to the way in which the mother's case was conducted.

93 It is true that, by her application, the mother sought an order that "she be free to reside in Darwin". And it is also true, as Holden J noted, that, early in the proceedings, her counsel indicated, in answer to a question as to what the mother proposed if it were decided that it was "in the child's best interest ... [to] remain in Perth", that, in that event, she would remain in Perth. It may be that both that

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65 See, for example, *New South Wales v The Commonwealth (The Incorporation Case)* (1990) 169 CLR 482 at 498 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ. See also *Bank of NSW v The Commonwealth* ("the *Bank Nationalization Case*") (1948) 76 CLR 1 at 186 per Latham CJ, quoted with approval in *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 638-639 per Brennan CJ, 659 per Toohey J.

answer and her application were premised on a misunderstanding of the nature of the welfare jurisdiction of the Family Court of Western Australia. Whether or not that is so, the mother's case throughout was that she should have custody of her son regardless of whether she lived in Perth or Darwin.

94 The mother's case that she should have custody regardless of where she lived was one that required a consideration of the competing claims of each parent and the arrangements that each could make for J to maintain contact with the other. In this last regard, the mother proposed that, on her return to Darwin, the father should have very considerable access during school holidays and, had those proposals been examined, it may have been ascertained that they were as much in the interests of the child, particularly as he grew older, as those which would obtain if he stayed in Perth.

95 The mother's case was one which permitted of two possible outcomes. The first was that she should have custody regardless of where she lived. The second was that she should have custody only for so long as she resided in Perth. Each of those possibilities had to be assessed against the alternative for which the father contended, namely, that the child live with him and his new family. A decision then had to be made as to which of those possibilities was preferable, the welfare of J being the paramount but not the only consideration to which regard was to be had in making that decision[66]. That is not the course that was taken. The mother's case that she should have custody regardless of her place of residence was simply not dealt with. It follows that the mother's appeal to the Full Court should have been allowed, as must her appeal to this Court.

The residence order and s 92 of the Constitution

96 Before leaving the mother's appeal, it is necessary to say something of the residence order and s 92 of the Constitution. The order operates directly to prevent the mother living with her child in any place other than the Perth Metropolitan area. It thus operates directly to restrict her freedom to reside in any other part of Australia, not simply the Northern Territory. So far as it operates to restrict her freedom to live in the Northern Territory, a question arises whether it conflicts with s 49 of the NT Self-Government Act, to which reference has already been made. So far as it has a wider operation, the question is whether it also infringes the guarantee in s 92 of the Constitution. Both questions raise the same issue, and it is, thus, convenient to proceed by reference simply to s 92 of the Constitution.

97 Section 92 guarantees that "trade, commerce, and intercourse among the States ... shall be absolutely free." The first issue that arises is whether "intercourse" includes moving one's place of residence from one State to another.

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66 *Storie v Storie* (1945) 80 CLR 597 at 611 per Dixon J, 620 per Williams J. See also *B and B: Family Law Reform Act 1995* [1997] FLC 92-755 at 84,198.

It is not in doubt that, in s 92, "intercourse" includes passage across State borders[67]. There is no reason, in point of principle, to distinguish between passage for limited or temporary purposes and passage for more permanent reasons, including to take up residence in another State.

98 The second question that arises in relation to s 92 is whether its guarantee is infringed by a law that permits of a court order restraining a person from moving interstate. In this regard, the first matter to be noted is that the test adopted in *Cole v Whitfield* with respect to interstate trade and commerce, namely, whether a law has a discriminatory effect on interstate trade or commerce in a protectionist sense[68] does not apply to interstate intercourse[69].

99 This Court considered the circumstances in which a law infringed the implied freedom of political communication in *Nationwide News Pty Ltd v Wills*[70] and in *Australian Capital Television Pty Ltd v The Commonwealth*[71]. The test for infringement was described in various ways in those cases, with a distinction being drawn by some Justices between a law whose purpose or character was to restrict that implied freedom and a law which had some other purpose and only incidentally limited it[72].

100 For the reasons I expressed in *Kruger v The Commonwealth*, I am of the view that, so far as concerns implied freedom, there is but one test, namely, whether the purpose of the law is to restrict the freedom in question. If it is, the law is invalid. However the purpose of a law is to be determined by its subject matter, its operation and effect. Thus, as I said in *Kruger*, "a law with respect to some subject

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67 See *Cole v Whitfield* (1988) 165 CLR 360 at 393. See also *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 108-109 per Griffith CJ, 113, 117 per Isaacs J, 117-118 per Higgins J; *Gratwick v Johnson* (1945) 70 CLR 1 at 17 per Starke J.

68 (1988) 165 CLR 360 at 394.

69 *Cole v Whitfield* (1988) 165 CLR 360 at 387-388; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 54 per Brennan J, 82 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 192 per Dawson J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 307 per Mason CJ.

70 (1992) 177 CLR 1.

71 (1992) 177 CLR 106.

72 See, for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ, 169 per Deane and Toohey JJ, 234-235 per McHugh J. See also *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 337 per Deane J.

matter unconnected with [the freedom] ... which only incidentally impinges on [it] is not to be taken to be a law for the purpose of restricting that freedom if it is reasonably appropriate and adapted or, which is the same thing, proportionate to some legitimate purpose connected with that other subject matter"[73].

101 The test for infringement of the Constitution's explicit guarantee of freedom is, however, more stringent than for an implied freedom. That is because an implied freedom must be read in the context of those specific provisions of the Constitution which contemplate legislation impacting on it. No such consideration arises in relation to the freedom guaranteed by s 92. Thus I adhere to the view I expressed in *Cunliffe v The Commonwealth*[74] that the test of infringement of the freedom of intercourse guaranteed by s 92 is as stated by Deane J in that case, namely, that "a law which incidentally and non-discriminately affects interstate intercourse in the course of regulating some general activity, such as the carrying on of a profession, business or commercial activity, will not contravene s 92 if its incidental effect on interstate intercourse does not go beyond what is necessary or appropriate and adapted for the preservation of an ordered society or the protection or vindication of the legitimate claims of individuals in such a society"[75].

102 The 1975 WA Act was not concerned with interstate intercourse, as such, and the effect, if any, that it had on it was only incidental. Moreover, the welfare jurisdiction of the Family Court of Western Australia and its powers in that regard were confined, as I have already indicated, to orders necessary to avert a risk to the welfare of a child. On that basis neither s 27(5) nor s 36(a) of the 1975 WA Act infringed s 92.

103 However, were ss 27(5) and 36(a) of the 1975 WA Act to be construed more widely than indicated, they would, in my view, be invalid to the extent of that wider construction, whether by application of the test identified by Deane J in *Cunliffe* or the less stringent test applicable in the case of an implied freedom. So far as concerns the more stringent test, there is a real question whether a law which operates to permit restriction of movement on the part of a custodial parent, usually the mother, could be said to be non-discriminatory. However, it is not necessary to explore that issue. It is sufficient to note that there is a difference between what is necessary to protect the welfare of a child or, which is the same thing, to avert a risk of harm to his or her wellbeing, and an order designed to achieve what is thought to be in his or her best interests. An order necessary to protect his or her welfare would not infringe s 92, notwithstanding that it incidentally affected interstate intercourse. On the other hand, an order designed to achieve what is

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73 (1997) 190 CLR 1 at 128.

74 (1994) 182 CLR 272 at 392.

75 (1994) 182 CLR 272 at 346.

thought to be in his or her best interests cannot, in any sense, be described as necessary.

104 So far as concerns the less stringent test, it is necessary to identify the purpose of the 1975 WA Act in its operation with respect to ex-nuptial children. In this regard it is necessary to note that the jurisdiction and powers of any court with respect to children must be exercised within the limits of what is practicable, not what is desirable. That consideration directs that the purpose of the 1975 WA Act, in its operation with respect to children, be identified as that of securing their welfare, rather than promoting it. A power to restrain a parent from moving interstate, if that is necessary to avert a risk to the welfare of a child, is one that may be fairly considered appropriate and adapted to securing the child's welfare. The same cannot be said of a power to restrain a parent from exercising his or her constitutional freedom to move interstate, if that would best promote his or her welfare.

105 So far as concerns the power conferred by s 28A of the 1975 WA Act to grant injunctions, that power was expressed as a power to grant injunctions "in any case in which it appears ... just or convenient to do so". It may well be necessary for that provision to be read down in its application to orders restraining persons from leaving Western Australia if it is to be held valid. However, that is not a matter that need be decided in this case.

Other incidental matters

106 It is convenient to note two incidental matters in relation to these appeals. The first is that once a question arose in the Family Court of Western Australia as to whether the mother was to be restrained from leaving the Perth Metropolitan area, a question necessarily arose as to the operation of s 92 of the Constitution. And, so far as the restraint related to her return to Darwin, a question also arose as to the operation of s 109 of the Constitution. They were questions arising under the Constitution and, thus, the Family Court of Western Australia was thereafter exercising federal jurisdiction. And it may also be that the applications for custody and guardianship were properly to be seen, not simply as applications under the 1975 WA Act, but as matters arising under that Act and, also, under s 63F(1) of the Commonwealth Act. That is a question that may require consideration if the matter proceeds to a rehearing.

107 The second incidental matter is, as other members of the Court point out, that, if the matter proceeds to a rehearing, the issues between the parties will fall to be resolved by the law as it now stands.

Orders

108 Both appeals should be allowed and the orders of the Full Court set aside. As the residence order under-pinned the custody and access orders made at first

instance and may well have had a bearing on the order for joint guardianship, those orders must be set aside and the entire matter remitted to the Family Court of Western Australia for retrial. Each party should pay his and her own costs at first instance, in the Full Court and in this Court.

109 KIRBY J. These two appeals arise from orders of the Full Court of the Supreme Court of Western Australia[76]. They concern what the applicable legislation then called the "custody" and "guardianship" of an ex-nuptial child in the context of a proposal by the custodial parent to relocate her residence.

110 AMS (the father) appeals against the orders in so far as they disturbed a determination of the primary judge that the parties should have joint guardianship of the child, and substituted an order that AIF (the mother) should have sole guardianship as well as sole custody. By her appeal, the mother contends that the Full Court erred in refusing to set aside an injunction which restrains her from changing the child's principal place of residence from the Perth metropolitan area. In this Court, both parties raised for the first time constitutional arguments which were said to require correction of the orders made below. In addition, both parties submitted that the orders were arrived at by a misapplication of the applicable law and by the adoption of an incorrect approach to the discretions which were invoked.

111 Behind the constitutional and other legal arguments of the parties lies a difficult problem. It is one which arises in every jurisdiction where relocation cases have been considered[77]. The problem stems from important values which the law upholds and which sometimes come into conflict. On the one hand, the best interests of a child ordinarily favour its right to know, and to have regular contact with, each parent whilst it is growing up. On the other hand, such rights exist in a society whose members enjoy a high measure of freedom of movement, which is not lost by reason only of the responsibilities which go with custody and guardianship of a child.

112 This case involves the working out of these conflicting interests. It does so in a context which is complicated by bifurcated responsibilities for family law arising under the Australian Constitution and from the arrangements, peculiar to Western Australia[78], whereby federal and non-federal jurisdiction in

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76 (1997) 139 FLR 216.

77 See eg *Poel v Poel* [1970] 1 WLR 1469; *sub nom P v P* [1970] 3 All ER 659; *Gordon v Goertz* (1996) 134 DLR (4th) 321; *Stadniczenko v Stadniczenko* [1995] NZFLR 493.

78 The Parliament of Western Australia has not referred relevant legislative powers to the Parliament of the Commonwealth. See *Family Law Act* 1975 (Cth) ("FLA 1975"), s 60E(2).

family law matters are administered by the Family Court of Western Australia[79]. In that State alone, the regime of federal law, applicable to ex-nuptial children in other jurisdictions of the Commonwealth, does not apply[80].

The facts

113 Whilst living in a university college in Perth, the father and the mother (as I shall describe them, to avoid confusion from the two appeals) formed, but then broke off, a relationship. When the mother discovered that she was pregnant, the couple resumed their relationship. The father relocated his residence to the Northern Territory as a consequence of securing employment there. Two months later, the mother joined him. Their child, a son, was born in March 1990. For nearly three years the parties lived together in the Northern Territory. They never married.

114 In February 1994 the parties decided to separate. They travelled to Perth to visit their families but each returned to the Northern Territory, thereafter living apart. The mother took up accommodation with the child in Palmerston, a suburb of Darwin. The father, whose work was on a mining site inland, travelled 320 kilometres virtually each weekend to visit the child. In April 1994, the parties agreed to return to Perth at the end of the year. By this time, the father had formed a friendship with a woman who was later to become his wife. When in October 1994 the father returned to Perth he took up residence with his future wife. In December 1994 the mother also returned to Perth, bringing the child with her.

115 In February 1995, the mother informed the father that it was her wish to return to the Northern Territory. However, initially she agreed to stay in Perth. In May 1995, the father married. Throughout that year, he was given access to the child each weekend and during school holidays. Towards the end of 1995 the mother once again raised her desire to return to Darwin in order to attend the university there if her application for admission to a university in Perth was unsuccessful. In the event, in December 1995, the mother was informed that she had secured a place in the university in Perth. However, her resolve to return to the Northern Territory was unchanged. She began to make arrangements for travel, schooling and accommodation in anticipation of a move by the end of January 1996. On 21 December 1995, the mother formally notified the father that she would be returning to the Northern Territory with the child. He promptly filed an application

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79 *Family Court Act* 1975 (WA) ("FCA 1975"), s 27; cf *Family Court Act* 1997 (WA) ("FCA 1997"), s 35.

80 FLA 1975, s 60E. By s 60E(1) the Part extends to New South Wales, Victoria, South Australia and Tasmania. By s 60E(2) the Part now also extends to Queensland. By s 60E(3) it applies in and in relation to the Territories. Only Western Australia has its own legislative regime.

with the Family Court of Western Australia. Originally this sought an order that he be granted sole custody of the child and joint guardianship with the mother. He also sought an injunction to restrain the mother from removing the child from Western Australia. Subsequently, the father's application was amended to one for joint guardianship and joint custody but upon the basis that the child would reside in Perth with the father.

116 The father's application was mentioned in the Family Court on 16 January 1996. As an interim measure, the mother agreed to give an undertaking not to remove the child from the Perth metropolitan area[81] without the consent of the father or further order. Interim orders were made, by consent of both parties, under which the father would continue to have access to the child every weekend, pending final orders.

117 In February 1996, the mother filed her response to the father's application. She sought orders providing her with sole custody and sole guardianship of the child but with reasonable access for the father. The proposed access was to include, where the parties lived in proximity to one another, a continuation of the previous arrangements between them. Otherwise, it was to include access for all mid-year school holidays, four weeks during the Christmas school holidays, regular telephone contact and further access as agreed between them. The costs of travel were to be met by them "proportionately to their income". The mother sought an order that she be free "to leave the Perth metropolitan area and the State of Western Australia".

118 On 13 February 1996, the mother asked to be released from the undertaking she had previously given. This application was refused. But the trial was set down. It took place in April 1996. Judgment was given by the primary judge with commendable speed[82]. As the litigation progressed through the courts, the mother, reluctantly, remained in Perth. The father continued to have access to the child, as in the past. In September 1996, a daughter was born to the father's marriage.

119 The mother still wishes to relocate to the Northern Territory or, in any case, to be released from the constraints of the injunction. The father opposes this, to the extent that it would involve removing the child from physical proximity to him and now from the child's half-sister.

The trial and the primary decision

120 In order to understand the decision of the primary judge, and some of the language in which it is expressed, it is necessary to observe the way in which the

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81 As defined by the *Town Planning and Development Act* 1928 (WA).

82 Unreported, Family Court of Western Australia, 24 April 1996 per Holden J.

parties presented their respective cases. Each had filed proposals for final orders. The judge asked, virtually at the outset, what the mother proposed to do " ... if I decide that it is in the child's best interest that the child remain in Perth". The mother's then counsel replied:

> "Your Honour, the mother proposes to stay in Perth … [Her] preference is that, basically, … she believes that the way of life in Darwin, and the opportunities that are available to her and the child in Darwin, would suit [the child's] interests - long term interests - better."

121 Each of the parties filed affidavits expressed in terms of the Court's "allowing" the mother to return to the Northern Territory[83]. The mother's affidavit explained that she and the child had been happy in Darwin and that employment prospects in casual part-time teaching were good and that she could commence further studies there:

> "The [father] has a new life with his wife and expected child in Perth. He is doing what he wants … I am asking the Court to allow me to live with my son where I choose."

122 The primary judge treated the matter as one governed exclusively by the *Family Court Act* 1975 (WA) ("FCA 1975")[84]. By s 27(5) of that Act it was at that time provided that the Court:

> " ... has non-federal jurisdiction … to make an order containing a provision for the custody of, guardianship of, access to, or welfare of, a child -
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> (a) if the child in respect of whom the order is sought is then present in the State; and
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> (b) if the applicant or the respondent in the proceedings in which the order is sought is resident in the State".

123 After recounting the history of the matter, the duty imposed by the Act to regard the welfare of the child as the paramount consideration[85] to be taken into account in determining the orders made[86], the judge turned to his decisions on the

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83 The father's affidavit includes the statement: "In the event that [the mother] is allowed to take [the child] with her to the Northern Territory". The mother's affidavit includes the statement: "If the Court allows me to move to the Northern Territory".

84 Being a case in the "non-federal jurisdiction" of the Court. See FCA 1975, s 27(2).

85 FCA 1975, s 28(2).

86 FCA 1975, s 39A.

four matters before him, namely (1) the custody of the child; (2) guardianship; (3) the mother's proposed relocation to Darwin; and (4) access.

124 On custody, the judge found that "ever since [the child] was born the mother has been his primary caregiver". He rejected the argument that the father could provide a better environment for the child. He concluded that "the best interests of the child … would be best served by him remaining in the custody of his mother". So far as guardianship was concerned, he observed that because the parents were unmarried "the mother has sole guardianship of him". Noting that each parent had demonstrated "a commitment to a proper upbringing for the child" and had cooperated in matters affecting the child's welfare, he rejected the mother's suggestion that the litigation itself indicated the need for her to be the sole guardian:

> "[T]here is no presumption either for or against the making of a joint guardianship order …. In my opinion the facts of this case are such that a joint guardianship order ought to be made. There is nothing in the evidence that suggests that in the future issues will arise concerning the welfare of the child in respect of which the parties cannot reach agreement."

125 The primary judge then turned to the resulting question which he described to be "whether or not [the mother] ought to be permitted to relocate to Darwin as is her wish". He expressed the opinion that "the proper approach to be taken … is firstly that the welfare of the child concerned is the paramount consideration"[87]. He then addressed himself to three questions[88]: (1) is the application to remove the child made bona fide?; (2) if so, can the court be reasonably satisfied that the guardian will comply with orders for access and other orders made to ensure the continuance of the relationship with the non-custodian?; and (3) the general effect upon the welfare of the child of granting or refusing the application. He acknowledged that each case depended on its own facts[89] and that, subject to the paramount principle, a custodial parent should be free to order his or her own life without unnecessary interference from the other party or the court[90]. He observed that the case fell outside the reasons usually nominated for relocation, viz pursuit of economic advantage, return to a family or the establishment of a new relationship.

126 Over several pages of his reasons, the primary judge analysed the explanations given by the mother for her wish to return to the Northern Territory.

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87 Reference was made to FCA 1975, s 28(2).

88 Following *In the Marriage of Holmes* [1988] FLC ¶91-918.

89 *In the Marriage of I and I* [1995] FLC ¶92-604.

90 *In the Marriage of Fragomeli* [1993] FLC ¶92-393.

He was unconvinced that the university course there would be more advantageous to her than the one offered in Perth. Nor did he accept that she would have a better network of supportive family and friends there than in Perth or that schooling for the child or the lifestyle available would be preferable to Perth. He concluded that the "real motivation behind the mother's desire" to return to the Northern Territory was not the child's best interests but her own happiness. He recorded that for virtually the whole of the child's life he had enjoyed the benefit of "considerable contact with each of his parents". He went on[91]:

> "From the point of view of the welfare of the child it seems to me that he has been in as an ideal situation as he could possibly be in given that his parents do not live together. It is my opinion that the welfare of the child would be better promoted by him continuing in that situation in the absence of any compelling reasons to the contrary. Accordingly, the mother's application for a release from her undertaking will be dismissed and an injunction will be made restraining her from removing the child from the Perth Metropolitan area."

127 Having so decided the issues, the judge maintained, in substance, the access arrangements which had previously applied. He did not discuss, or expressly evaluate, the alternative access arrangements proposed by the mother on the footing that she would be "permitted to move to the Territory"[92].

128 Both parties appealed. As the appeal arose in the non-federal jurisdiction of the Family Court of Western Australia, it lay to the Full Court of the Supreme Court of that State[93]. The mother sought orders that she have sole guardianship of the child and be "at liberty to remove the child from Western Australia and to the Northern Territory". By his cross-appeal, the father sought an order that he have sole custody of the child or larger access rights.

The decision of the Full Court

129 The Full Court rejected the father's cross-appeal[94]. It dismissed the main complaint of the mother, describing as "the key issue in the appeal" whether or not "she ought to be permitted to return to the Northern Territory with her son"[95].

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91 Unreported, Family Court of Western Australia, 24 April 1996 at 24 per Holden J.

92 Unreported, Family Court of Western Australia, 24 April 1996 at 23 per Holden J.

93 FCA 1975, s 81.

94 By the time the appeal was argued it was for an order for joint custody. The issue of custody has not concerned this Court on the footing that the child remained in Perth.

95 (1997) 139 FLR 216 at 223 per Malcolm CJ.

However, the Court upheld the mother's appeal on the issue of guardianship. It set aside the primary judge's order for joint guardianship. It substituted an order that the mother "remain the sole guardian of and have sole custody of the said child …". The Full Court then granted an order of its own restraining the mother "from changing the Child's principle (sic) place of residence from the Perth metropolitan area …".

130 The reasons of the Full Court were given by Malcolm CJ[96]. His Honour accepted, as the primary judge had done, that the issue of removal of the child turned on an assessment of the "general effect upon the welfare" of the child[97]. Although the request for relocation was made bona fide and the mother could be counted on to comply with orders for access and other orders made to ensure the continuance of the child's relationship with the father, the basic reason for the proposed relocation was, in his Honour's view, the mother's happiness and not the "rights" or "welfare" of the child[98]. His Honour approved the reference by the primary judge to the absence of "any compelling reason" to disturb the "ideal situation" which the child enjoyed in Perth[99]. He recorded that "the real thrust" of the mother's argument had been the suggested under-estimation by the primary judge of the extent to which an inability to move to the Northern Territory would cause discontent and unhappiness for her "with a consequent detriment to the welfare of the child". He rejected that argument concluding that, whilst the wishes of the custodial parent "should have priority", the paramount consideration remained the interests of the child. The former had to give way to the latter in the event of a conflict between them[100].

131 Having reminded himself of the limited circumstances in which an appellate court could disturb a discretionary decision such as that in issue, Malcolm CJ concluded that no error of principle "in fact or in any other way" had been demonstrated in the conclusion reached and that the mother's appeal "should be dismissed in so far as she sought permission to remove the child"[101]. But on the question of guardianship, his Honour explained his reasons for disturbing the order

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96 Franklyn and Walsh JJ concurring.

97 (1997) 139 FLR 216 at 224 applying *In the Marriage of Holmes* [1988] FLC ¶91-918 at 76,663.

98 FCA 1975, s 28(1)(c). See also s 39A.

99 (1997) 139 FLR 216 at 232, referring to *In the Marriage of Skeates-Udy and Skeates* [1995] FLC ¶92-626 at 82,295 per Kay and Hase JJ. ["In each of those cases there was a strong and compelling reason to allow the custodial parent to leave."]

100 (1997) 139 FLR 216 at 234.

101 (1997) 139 FLR 216 at 234.

for joint guardianship made at trial and for ordering that the mother have sole guardianship[102]:

> "[T]here was no justification for a change from the mother having sole guardianship as well as sole custody of the child. The main reason why his Honour appears to have been persuaded to make an order for joint guardianship was that the parties had exhibited such a high degree of co-operation in making decisions about the child. … In my opinion, the very existence of that high degree of co-operation, as well as the mother's obvious willingness to accept and abide by whatever decision the Court made concerning where the best interests of the child lay, constituted reasons why the mother's sole guardianship should not be changed."

132 The ground which was seen as authorising interference by the Full Court in the discretionary decision at first instance appears to be stated in the following short passage[103]:

> "[W]hen one also takes into account the fact that the father had in the meantime married and that there had been a child of that marriage, this was a further reason for preserving the status quo regarding guardianship of the child in question. The sole guardianship in favour of the mother was consistent with her role as the primary caregiver throughout the life of the child to date and the person primarily 'responsible for the long-term welfare of the child'[104] … In these circumstances, I concluded that no valid reason had been put before the learned … Judge to disturb the status quo so far as guardianship was concerned."

133 From the orders made by the Full Court, the appeals now come, by special leave, to this Court.

The issues

134 A large number of questions were argued in the appeals. The emerging issues may be summarised as follows:

(1) Does the Australian Constitution render *ultra vires* the judicial orders adverse to the mother and the father, or require the reading down of the legislation pursuant to which those orders were made, to the extent that such orders or legislation would otherwise place an impermissible practical inhibition on

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102 (1997) 139 FLR 216 at 234-235.

103 (1997) 139 FLR 216 at 235.

104 FCA 1975, s 34.

the absolutely free movement of the mother and the father within Australia? (The constitutional point).

(2) Do international treaties to which Australia is a party, which support the right to freedom of movement for a custodial parent, require a construction of the relevant legislation so as to render inapplicable the approach adopted in the injunction restraining the mother, as custodial parent, from relocating to the Northern Territory? (The international treaty point).

(3) Was the correct starting point for the determination of the order for the guardianship of the child the *Family Law Act* 1975 (Cth) ("FLA 1975"), s 63F (as the father asserted) or FCA 1975, s 35 (as the mother asserted and the courts below assumed)? (The regime for guardianship point).

(4) If the applicable regime was that of FCA 1975, s 35, should the special leave to appeal granted to the father be revoked upon the basis that FCA 1975 has been repealed and replaced by the *Family Court Act* 1997 (WA) ("FCA 1997") under which "each of the parents of a child who is under 18 years of age has parental responsibility for the child"[105]? (The revocation of special leave point).

(5) If the question of guardianship is governed by FCA 1975, and if special leave is not revoked, did the decision of the Full Court miscarry in altering the order of the primary judge for joint guardianship? (The joint guardianship point).

(6) If FCA 1975 was applicable, did the decision of the primary judge in relation to the relocation of the mother miscarry? (The relocation point).

(7) If error is shown which requires the redetermination by the Family Court of Western Australia of the issues of guardianship, relocation and access, having regard to the repeal of FCA 1975 and the transitional provisions of FCA 1997, is the applicable regime that of the old or the new Act? (The applicable law point).

Common ground

135 This was not a case in which the parties would concede no merits to their opponent. Each accepted the real commitment of the other to the welfare of the child. That commitment was clearly demonstrated by the objective facts. It was recognised by the primary judge and the Full Court. There was also a measure of agreement about the approach which should be taken to the resolution of the issues:

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105 FCA 1997, s 69(1).

(1) The mother expressly disclaimed any argument that the Western Australian courts lacked jurisdiction and power to grant the injunction which she contested. She accepted that, subject to the Australian Constitution, it was within the powers of the Family Court of Western Australia to impose restrictions concerning the residence of a child, in order to protect the child's rights, including those deriving from orders granting a parent access to the child.

(2) The mother conceded that certain difficulties were presented to her attack on the exercise of discretion relating to the issue of relocation from the way her case had been conducted at trial and in the Full Court. Specifically, this included a concession made for the mother at trial that if the court decided that it was in the child's best interests that he should remain in Perth "the mother proposes to stay in Perth". In this sense, the primary judge was not faced by the wrenching choice of severing the life-long connection of the child with the mother as the primary care-giver. The mother had agreed to abide by the decision of the judge. She could not contemplate loss of custody of the child that had lasted since his birth.

(3) Although some criticisms of the terms of the injunction were raised during argument, such as the indefinite duration of the order, the mother advanced no challenge on such grounds accepting that, if the circumstances changed, she could seek variation and that the order would cease when the child reached 18 years[106] or, possibly, sufficient maturity to make decisions for himself[107].

(4) Although in his notice of cross-appeal to the Full Court the father had persisted with a contest of the order granting sole custody to the mother, in this Court the father simply sought restoration of the orders of the primary judge. But he made it clear that, if the mother were to relocate to Darwin (or anywhere else other than Perth), he would be seeking orders to the effect that the child reside with him. Although the father pointed out that the actual terms of the injunction granted did not restrain the mother from relocating herself from Perth (as distinct from changing the child's principal place of residence), it was clear enough (and not seriously disputed) that the practical

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106 FCA 1975, s 37(b).

107 cf *Gillick v West Norfolk AHA* [1986] AC 112 at 183-184; *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 at 237.

effect of the injunction was to restrain the mother's relocation to the Northern Territory, so long as the child remained in her sole custody[108].

General legal background

136 At least until the second half of the eighteenth century, a child born to unmarried parents, called "illegitimate", was regarded by the common law as *filius nullius*[109]. Consequently such a child was under the legal guardianship of nobody[110]. The applicable law was so strict that even until the end of the nineteenth century an illegitimate child was not regarded as being in the custody of anyone, even of its mother[111]. However, in *Barnardo v McHugh*[112], the House of Lords recognised the mother's legal right to the custody of her

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108 cf *B and B: Family Law Reform Act 1995* ("*B and B*") [1997] FLC ¶92-755 at 84,233.

109 ie son (or child) of nobody.

110 Dickey, *Family Law*, 3rd ed (1997) at 334; *R v Nash* (1883) 10 QBD 454 at 455-456.

111 *R v Soper* (1793) 5 T R 278; [101 ER 156 at 156-157].

112 [1891] AC 388 at 396-398.

illegitimate child[113]. The change of direction in the law was the result of an inference drawn from the *Poor Law Acts*[114] imposing statutory duties on the mother in relation to the maintenance of such a child.

137 Before and after the enactment of FLA 1975 and FCA 1975, developments occurred in Australia to occasion further quite radical changes to the applicable law. The first was an alteration in community attitudes to the status of illegitimacy and the growth of the number of relationships between couples outside marriage to whom children are born. These developments led to many legislative changes. Relevant to the present appeals was the reference to the Federal Parliament by the Parliaments of all States except Western Australia of their legislative powers in respect of children. This led, in turn, to the amendment of FLA 1975 to cover all children in those affected jurisdictions: those born to married parents (nuptial) and those born to parents who were not married (ex-nuptial)[115].

138 The second development arose out of the significant increase in the number of divorces granted annually affecting large numbers of children[116]. This fact occasioned inquiries aimed at reducing the "win/lose mentality in which parents may appear to be pitted against each other to the detriment of the children"[117]. Reports by the Family Law Council[118] and by a Joint Select Committee of the

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113 The position at common law concerning the custody of a "legitimate" child was the opposite. The father was entitled to the child, even "at its mother's breast": *R v De Manneville* (1804) 5 East 221; [102 ER 1054]; cf Dickey, *Family Law*, 3rd ed (1997) at 333.

114 See *Barnardo v McHugh* [1891] AC 388 at 396-398. The *Poor Law Amendment Act* 1834 (UK) 4 & 5 Will IV c 76, s 71 cast an obligation on the mother to maintain the child to the age of 16. See also *Chignola v Chignola* (1974) 9 SASR 479 at 483 per Bray CJ.

115 FLA 1975, s 63F(1).

116 *B and B* [1997] FLC ¶92-755 at 84,195 records statistics from the Australian Bureau of Statistics. The number of divorces granted annually in Australia is over 48,000 involving approximately 48,000 under-aged children. These figures do not include the separation of parents who were not married.

117 *B and B* [1997] FLC ¶92-755 at 84,180 (par 3.13).

118 Family Law Council Report 1982 (Watson Committee), noted in *B and B* [1997] FLC ¶92-755 at 84,180 (par 3.12). See also Family Law Council, *Access - Some Options for Reform* (1987) and Family Law Council, *Patterns of Parenting after Separation* (1992) noted in *B and B* [1997] FLC ¶92-755 at 84,180 - 84,181 (pars 3.13, 3.21).

Parliament[119] proposed changes to FLA 1975, addressed to applicable nomenclature, principles and procedures. Many of these proposals were adopted by the *Family Law Reform Act* 1995 (Cth). Those reforms were not immediately copied in the Western Australian law. However, many of them were introduced into the law of that State by FCA 1997.

139 The third development of relevance arises from the growing influence in recent years, including in this area of the law, of international law to which reference will later be made[120].

140 Relocation cases have long presented special problems for judicial decisions concerning the custody of children. But a fourth development has added to the number, variety and urgency of decisions concerning the relocation of parents having custody of a child. Two particular features of Australian society may be noted. The first is 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% of cases[121]. Accordingly, in practical terms, court orders restraining movement of a custodial (or residence) parent ordinarily exert inhibitions on the freedom of movement of women, not men[122]. 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[123].

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119 1991. See *B and B* [1997] FLC ¶92-755 at 84,180 - 84,181.

120 Especially the Convention on the Rights of the Child. The *Family Law Reform Act* 1995 (Cth), introduced s 60B(2) setting out certain principles. Section 60B(2)(a) and (b) reflect articles of the Convention. See *B and B* [1997] FLC ¶92-755 at 84,182 (par 3.30); cf Behrens and Tahmindjis, "Family Law and Human Rights" in Kinley (ed), *Human Rights in Australian Law* (1998) 169 at 176.

121 Australian Bureau of Statistics, cited in *B and B* [1997] FLC ¶92-755 at 84,195 (par 7.5).

122 See generally Behrens and Tahmindjis, "Family Law and Human Rights" in Kinley (ed), *Human Rights in Australian Law* (1998) 169 at 185-188; Young, "Are Primary Residence Parents as Free to Move as Custodial Parents Were?" (1996) 11(3) *Australian Family Lawyer* 31.

123 Such cases include *In the Marriage of I and I* [1995] FLC ¶92-604 (return to England); *In the Marriage of R* (1998) 23 Fam LR 456 (return to Scotland); *In the Marriage of Brear and Corcoles-Alfaro* [1997] FLC ¶92-768 (return to Spain).

Relocation of a child's residence - general principles

141 This Court comes to the consideration of the arguments in these appeals with the benefit of at least thirty years[124] of consideration of like problems by appellate courts in Australia[125] and other common law jurisdictions[126]. I derive the following general propositions from the authorities.

142 First, each case depends on the application of the governing legislation which, in turn, is in a constant state of amendment and re-expression. Care must therefore be observed in applying propositions advanced in particular jurisdictions where the legislative duties of the courts are relevantly different[127]. Necessarily, the facts of each case are unique[128]. Those facts call forth a "careful and delicate analysis"[129], which renders previous decisions of limited assistance, except in so far as they offer illustrations which may tend to promote a general consistency of approach[130].

143 Secondly, unless legislation provides otherwise[131], no single factor is dispositive of decisions governing the residence of a child in a context of the proposed relocation of the parent with whom the child resides[132]. It is necessary for a court, making decisions affecting the child's place of residence, to attempt a

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124 At least since *Poel v Poel* [1970] 1 WLR 1469; *P v P* [1970] 3 All ER 659 was decided by the English Court of Appeal.

125 A major review of authority was undertaken by the Full Court of the Family Court of Australia in *B and B* [1997] FLC ¶92-755.

126 See eg *Gordon v Goertz* (1996) 134 DLR (4th) 321; *Stadniczenko v Stadniczenko* [1995] NZFLR 493; *Tropea v Tropea* 1996 NY Int 048.

127 Thus in Canada, the *Divorce Act*, RSC 1985 c 3 (2nd Supp), s 16(8) provides "In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child"; *Gordon v Goertz* (1996) 134 DLR (4th) 321 at 337; cf Young, "Are Primary Residence Parents as Free to Move as Custodial Parents Were?" (1996) 11(3) *Australian Family Lawyer* 31 at 34.

128 *In the Marriage of I and I* [1995] FLC ¶92-604.

129 *B and B* [1997] FLC ¶92-755 at 84,240 (par 13.7).

130 *In the Marriage of E and E* [1979] FLC ¶90-645 at 78,395.

131 Such as the Canadian *Divorce Act*, RSC 1985 c 3 (2nd Supp), s 16(8).

132 *Tropea v Tropea* 1996 NY Int 048.

resolution of often irreconcilable considerations[133]. Statute may, and commonly does, instruct that the "welfare" (or "best interests") of the child should be the paramount consideration[134]. It may provide a list of considerations or "principles" to be applied in the exercise of the court's powers[135]. However, the "paramount" consideration is not the same as the "sole" or "only" consideration. The relevance of enumerated statutory principles will depend upon the circumstances of the particular case[136]. Preconceived notions as to the weight which must be given to particular factors are incompatible with the exercise of an individualised judicial discretion such as is mandated by Australian legislation[137].

144 Thirdly, a statutory instruction to treat the welfare or best interests of the child as the paramount consideration does not oblige a court, making the decision, to ignore the legitimate interests and desires of the parents. If there is conflict between these considerations, priority must be accorded to the child's welfare and rights. However, the latter cannot be viewed in the abstract, separate from the circumstances of the parent with whom the child resides[138]. If it were otherwise, a universal rule would be established whereby the custodial or residence parent (usually the mother) would virtually always be obliged to reside in close proximity to the other parent (usually the father) so as to facilitate contact between the latter and the child. There is no such universal rule[139].

145 Fourthly, the applicable legislation is enacted, and the relevant discretions exercised, for a society which attaches high importance to freedom of movement and the right of adults to decide where they will live. That is doubtless why courts have expressed themselves as reluctant to make orders which interfere in the freedom of custodial (or residence) parents to reside with the child where they

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133 Butler-Sloss, "Children Crossing Frontiers - the Perspective of the English Courts", Paper for the Eleventh Commonwealth Law Conference, Vancouver, (1996) cited in *B and B* [1997] FLC ¶92-755 at 84,205.

134 FCA 1975, s 28(2).

135 FCA 1975, s 28(1).

136 *B and B* [1997] FLC ¶92-755 at 84,239; Young, "Are Primary Residence Parents as Free to Move as Custodial Parents Were?" (1996) 11(3) *Australian Family Lawyer* 31 at 35.

137 cf *Stadniczenko v Stadniczenko* [1995] NZFLR 493 at 500.

138 *B and B* [1997] FLC ¶92-755 at 84,237.

139 *In the Marriage of E and E* [1979] FLC ¶90-645 at 78,395.

wish, at least where such parent is the unchallenged custodian[140] or has been designated the sole guardian[141] of the child. One of the objects of modern family law statutes (including FLA 1975 and FCA 1975) is to enable parties to a broken relationship to start a new life for themselves[142], to control their own future destinies[143] and, where desired, to form new relationships[144], free from unnecessary interference from a former spouse or partner or from a court. Courts recognise that unwarranted interference in the life of a custodial parent may itself occasion bitterness towards the former spouse or partner which may be transmitted to the child or otherwise impinge on the happiness of the custodial (or residence) parent in a way likely to affect the welfare or best interests of the child[145]. This said, the touchstone for the ultimate decision must remain the welfare or best interests of the child and not, as such, the wishes and interests of the parents. To the extent that earlier authority may have suggested the contrary, it has now, properly, been rejected[146].

146 Fifthly, whilst legislative reform[147] sometimes reflecting international law[148], has laid increased emphasis upon the rights of the child who is separated from one

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140 *Poel v Poel* [1970] 1 WLR 1469 at 1473 per Sachs LJ; *P v P* [1970] 3 All ER 659 at 662.

141 *In the Marriage of I and I* [1995] FLC ¶92-604 at 82,025.

142 cf *In the Marriage of Cullen* [1981] FLC ¶91-113 at 76,848.

143 *In the Marriage of Craven* [1976] FLC ¶90-049; *Poel v Poel* [1970] 1 WLR 1469; *P v P* [1970] 3 All ER 659.

144 *In the Marriage of I and I* [1995] FLC ¶92-604 at 82,025.

145 *Poel v Poel* [1970] 1 WLR 1469 at 1473; *P v P* [1970] 3 All ER 659 at 662.

146 *In the Marriage of Holmes* [1988] FLC ¶91-918 at 76,664; *B and B* [1997] FLC ¶92-755 at 84,197. Most earlier authority was addressed to the correct question: see eg *Re Davis & Councillor* (1981) 7 Fam LR 619; *Thorpe v McCosker* (1983) 8 Fam LR 964.

147 See eg FLA 1975, s 60B(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".

148 Convention on the Rights of the Child, Arts 2.1, 3.1, 3.2, 7, 9.3. Article 9.3 provides: "States Parties shall respect the right of the child who is separated from one or both

(Footnote continues on next page)

or both parents to maintain personal relations and direct contact with each of them on a regular basis, the rule is not an absolute one. Courts recognise the implications of the application of that right for the custodial (or residence) parent, and particularly because most of them are women[149]. To avoid unnecessary derogations from women's equality or the "feminisation of poverty" resulting from the effective immobilisation of a custodial (or residence) parent[150], some Canadian judges have lately proposed a presumptive deference in favour of the right of the custodial (or residence) parent to reside where she or he decides unless good reason, relevant to the welfare or best interests of the child, is demonstrated to the contrary[151]. Although this presumption was supported by a minority in the Supreme Court of Canada in *Gordon v Goertz*[152], it was rejected by the majority as incompatible with the individualised assessment required by the statute, addressed as it is to the best interests of the child[153]. The objective of the minority was understandable. However, the reasoning of the majority is preferable, at least so far as the applicable Australian legislation is concerned.

147 Sixthly, in evaluating disputes concerning an expressed desire of a custodial (or residence) parent to relocate the residence at which the child will reside in circumstances which necessarily diminish the opportunities of the other parent to have access to, and contact with, the child, courts have suggested, rightly in my view, that a more relaxed attitude should be adopted to relocation within Australia than relocation overseas[154]. 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. 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

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parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." See now FCA 1997, s 114; cf Fortin, *Children's Rights and the Developing Law*, (1998) at 327-328.

149 Bodeker, "The Freedom of Movement of Residential Parents (and others) subsequent to the *Family Law Reform Act* 1995 (Cth)", unpublished thesis (1997) at 67.

150 *Moge v Moge* (1992) 43 RFL (3rd) 345.

151 *McGuyver v Richards* (1995) 11 RFL (4th) 433 at 435 per Abella J; cf *Carter v Brookes* (1990) 30 RFL (3rd) 53.

152 (1996) 134 DLR (4th) 321. See esp L'Heureux-Dubé J at 370-371.

153 *Gordon v Goertz* (1996) 134 DLR (4th) 321 at 338-340 per McLachlin J.

154 *In the Marriage of Holmes* [1988] FLC ¶91-918 at 76,663.

wishes to join a new spouse overseas[155]; wishes to return to a supportive family in the land of origin[156], or has a well thought out and reasonable plan of migration[157] 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.

148 Seventhly, just as, depending upon the legislation, conditions may be placed upon a custodial (or residence) parent as to where the child may reside according to its best interests[158], when it is proposed that residence arrangements change, the very fact of disturbing them (particularly if likely in practice to alter access to, and contact with, the other parent) will present a consideration that must be taken into account in judging whether new arrangements should be approved[159]. If a parent seeks to change arrangements affecting the residence of, access to or contact with the child, he or she must demonstrate that the proposed new arrangement is for the welfare of, or in the best interests of, the child[160]. Because the child's access to, and contact with, the other parent will necessarily be diminished to the extent that relocation of its residence disturbs a physical proximity which has hitherto existed, it will often be necessary to adjust orders as to access. This will be done to offer new and different facilities of access and contact such as longer periods of residence with the other parent during school holidays and at other times[161].

149 Eighthly, although at common law the concept of custody was indivisible[162], statute has altered this position. Joint custody and guardianship became increasingly common even before recent legislation made shared parental

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155 *In the Marriage of Fragomeli* [1993] FLC ¶92-393.

156 *In the Marriage of I and I* [1995] FLC ¶92-604.

157 *In the Marriage of Lourie and Perlstein* [1993] FLC 92-405 (relocation to Israel); cf *Poel v Poel* [1970] 1 WLR 1469; *P v P* [1970] 3 All ER 659 (relocation to New Zealand).

158 *In the Marriage of Skeates-Udy and Skeates* [1995] FLC ¶92-626.

159 FCA 1975, s 39A(b)(iii) required the Court to take into account "the desirability of, and the effect of, any change in the existing arrangements for the care of the child". See discussion *Gordon v Goertz* (1996) 134 DLR (4th) 321 at 341.

160 cf *In the Marriage of Skeates-Udy and Skeates* [1995] FLC ¶92-626.

161 cf *In the Marriage of I and I* [1995] FLC ¶92-604 at 82,028.

162 *Re W (An Infant)* [1963] 3 WLR 789; [1963] 3 All ER 459; *Jussa v Jussa* [1972] 1 WLR 881; [1972] 2 All ER 600.

responsibility for a child the modern norm[163]. Yet even now, courts necessarily retain the power to order otherwise[164]. Under the legislation, before it was changed, the determination of whether joint or sole guardianship should be ordered was within the discretion of the court[165]. Departure from the norm of shared parental responsibility is also within the court's discretion.

150 Ninthly, an appellate court, invited to review the exercise of discretion at first instance 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[166]. Only if a material error of the kind warranting disturbance of a discretionary decision is established is the appellate court authorised to set aside the primary decision, to substitute its own exercise of discretion or to require that it be re-exercised on a retrial[167].

151 Against the background of these general principles, which were applicable to the present case, I turn to the issues raised by the parties.

The constitutional arguments: freedom of movement

152 *Applicable provisions:* Both the mother and the father advanced arguments based on s 92 of the Australian Constitution[168] or, in the case of the Northern Territory, its statutory equivalent. The original form of what became s 92 spoke of "trade and intercourse throughout the Commonwealth"[169]. That reference to "throughout the Commonwealth" persisted through most of the drafts. It was at the Convention in Melbourne in 1898 that the phrase "among the States" was

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163 FLA 1975, s 61C(1). See now FCA 1997, s 69(1). The latter section was not in force when these proceedings were tried.

164 FLA 1975, s 61C(3); cf FCA 1997, s 69(3) now in force.

165 cf *In the Marriage of Cullen* [1981] FLC ¶91-113 at 76,847; *In the Marriage of McEnearney* [1980] FLC ¶90-866.

166 *In the Marriage of White* [1995] FLC ¶92-648 applying *In the Marriage of R* (1988) 23 Fam LR 456 at 471; *In the Marriage of A and J* [1995] FLC ¶92-619.

167 *Gronow v Gronow* (1979) 144 CLR 513 at 519; cf *In the Marriage of Skeates-Udy and Skeates* [1995] FLC ¶92-626 at 82,294 - 82,295; *Moge v Moge* (1992) 43 RFL (3rd) 345.

168 Section 92 states, relevantly: "… [T]rade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free".

169 Clause 8 of Ch IV of the Draft Bill adopted by the Convention in Sydney (1891).

substituted[170] and the word "commerce" inserted[171]. The terms of s 92 do not protect, relevantly, intercourse between a State and a Territory[172]. In recognition of the limitation upon the application of s 92 to the territories, federal legislation was enacted in 1926 for the Northern Territory. It provided that "trade, commerce and intercourse between the Territory and the States … shall be absolutely free"[173]. The validity of that provision was upheld by this Court[174]. It now appears as s 49 of the *Northern Territory (Self-Government) Act* 1978 (Cth) (the "Self-Government Act").

153 A question was raised during argument as to whether this legislative provision, first enacted and then re-enacted before this Court's clarification of the meaning and operation of s 92 of the Constitution in *Cole v Whitfield*[175], incorporated the previous jurisprudence within the statutory phrase. That suggestion should be rejected. The clear purpose of the Parliament, in the repeated enactment of language identical to s 92 of the Constitution, was to extend to the Northern Territory, to the fullest extent constitutionally possible, the kinds of protections which s 92 secures to "trade, commerce, and intercourse among the States". The meaning of the word "intercourse" in this context was left open in *Cole v Whitfield*[176]. However, it clearly extends to migration and movement of persons across State borders[177].

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170 Melbourne Convention Debates (1898), 1014-1020 (Cl 89).

171 La Nauze, "A Little Bit of Lawyers' Language - The History of 'Absolutely Free' 1890-1900" in Martin (ed) *Essays in Australian Federation* (1969) 57 at 60-61, 93.

172 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 61, 64, 73, 86, 113; cf *Lamshed v Lake* (1958) 99 CLR 132 at 143; *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 548, 551, 553, 564; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 514, 526; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 579, 606, 650.

173 *Northern Territory (Administration) Act* 1910 (Cth), s 10, which was inserted by the *Northern Territory (Administration) Act* 1931 (Cth), s 6.

174 *Lamshed v Lake* (1958) 99 CLR 132.

175 (1988) 165 CLR 360 at 399-400.

176 (1988) 165 CLR 360 at 393; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 307.

177 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 118; *Gratwick v Johnson* (1945) 70 CLR 1 at 17; *Cole v Whitfield* (1988) 165 CLR 360 at 393.

154 *Arguments*: The mother submitted that the injunction granted by the Family Court of Western Australia effectively restrained her from moving interstate and, to that extent, the order (or the provisions of FCA 1975 which purportedly authorised it) infringed the freedom of intercourse guaranteed by s 92 of the Constitution or s 49 of the Self-Government Act so far as the latter provided for intercourse between the States and the Northern Territory.

155 One of three consequences would follow, according to the mother's submission. The order of the Western Australian court would be *ultra vires* as contrary to the Australian Constitution or applicable federal law; the provisions of the Western Australian law (FCA 1975) which sustained the order would be invalid to the extent that they purported to authorise an order contrary to the Constitution or inconsistent with the Self-Government Act; or the Western Australian law (FCA 1975) would, in accordance with the *Interpretation Act* 1984 (WA), s 7, be read down so as to avoid any inconsistency with the Constitution or the applicable federal law[178]. As so read down, FCA 1975 would not support the injunction granted against the mother. Furthermore, in the exercise of the discretionary powers vested in the Western Australian court by FCA 1975, it would be bound to use its powers in a way conformable to the provisions of the Constitution and federal legislation providing (relevantly) that "intercourse" among the States and between the States and the Northern Territory should be "absolutely free".

156 The father's constitutional argument was defensive. It was raised in a response to the mother's reliance on constitutionally protected freedom of movement. The father's primary contention was that, because the child was born in the Northern Territory, the starting point for the consideration by the Western Australian court of the order which should be made for guardianship was the joint custodianship provided under FLA 1975[179]. However, if (contrary to this submission) upon the removal of the parties with the child to Western Australia, the status in law of the child was altered and guardianship thereafter governed by s 35 of FCA 1975 (with its presumption in favour of the guardianship rights of the mother), such an alteration constituted an impermissible burden on "intercourse". It exacted a price for the free movement of people from the Northern Territory to Western Australia. To that extent, s 35 of FCA 1975 was inconsistent with s 49 of the Self-Government Act. To the extent of such inconsistency, the State law was invalid. Alternatively, it would be read down so as to have no application to the case of a child brought from the Northern Territory into Western Australia.

157 *Application to Court orders*: In the mother's appeal, a threshold question arises as to whether s 92 of the Constitution (and s 49 of the Self-Government Act)

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178 cf *Kruger v The Commonwealth* (1997) 190 CLR 1 at 45.

179 s 63F.

are addressed to the orders of a court or only to any legislation relied upon to sustain those orders. Nothing in the language of s 92 (or s 49 of the Self-Government Act) limits the operation of the stated prohibition to legislation, although this has been the usual context in which the provisions have been invoked. In *Gratwick v Johnson*[180] an order made by the Executive Government, pursuant to national security regulations, was found to be a direct interference with the freedom of intercourse amongst the States guaranteed by s 92 of the Constitution and thus invalid. There seems no reason of principle why an order made by a court which infringes the constitutional or statutory prohibition should not suffer the same fate.

158 Support for this view may be derived from the context in which s 92 appears in the Constitution. Whilst some surrounding sections are expressly addressed to the powers of the Parliament[181], or of a State Parliament[182], other provisions are addressed to the Executive Government of the Commonwealth[183] and the States[184]. In such a legislative context, the words of s 92 of the Constitution should not be read as confined to a prohibition on incompatible legislation or executive action. This conclusion is reinforced when covering clause 5 of the *Commonwealth of Australia Constitution Act* 1900 (Imp)[185] is remembered. By that provision the Constitution and all laws made by the Parliament of the Commonwealth under the Constitution "shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". The requirements of s 92 (and of s 49 of the Self-Government Act) were therefore binding on the Western Australian courts in granting the injunction addressed to the mother. They were also binding on the Parliament of Western Australia in enacting FCA 1975. That Act, and the powers of those courts, must necessarily be read so as to conform to s 92 of the Constitution and s 49 of the Self-Government Act to the extent that the language of those provisions is applicable.

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180 (1945) 70 CLR 1.

181 Especially ss 91, 93, 94 and 96. Thus s 92 binds the Commonwealth: *James v The Commonwealth* (1936) 55 CLR 1 at 61; *Cole v Whitfield* (1988) 165 CLR 360 at 396.

182 Section 95 (the Parliament of Western Australia).

183 Especially ss 86, 87 and 89.

184 Section 90.

185 63 and 64 Vict c 12.

159 *Practical burden:* It was submitted[186] that the order of the Family Court of Western Australia did not, in terms, prevent the mother's movement across State borders or anywhere else within Western Australia, as for example on holidays. The only restraint of the injunction was upon a change in the child's principal place of residence from the Perth metropolitan area, as defined. However, the concern of s 92 (and of s 49 of the Self-Government Act) is with the practical burden which the impugned law or judicial order creates[187]. Viewed in this light, there can be no doubt that, given the age of the child, the effect of the injunction upon the mother whilst she remained the custodial parent is to restrain her ability to move out of the Perth metropolitan area and hence out of Western Australia. Specifically, the injunction was granted as a response to the mother's request to be released from her earlier undertaking not to move from that area. Accordingly, as a matter of practical burden, the injunction (and the Western Australian law supporting it) have a necessary effect of limiting the mother's interstate movements or movement to the Northern Territory as she desired. As a matter of practicality, the only way the mother's freedom of movement could be fully restored would be by her surrendering the custody of the child and agreeing to the revocation of the order under which the child was to reside with her. She had made it perfectly plain that she regarded this as an intolerable price.

160 It is not necessary for the operation of s 92 that the burden imposed by the impugned law (or judicial order) should be discriminatory on its face[188]. Here we are concerned with effects. That requires a realistic approach to judging an effect - not one blinkered by the language in which the inhibitory rule is expressed.

161 *Not an impermissible burden*: So far as the mother's appeal is concerned, the issue is whether the practical burden and restriction imposed on her which affected her movements across State borders[189] or from a State into the Northern Territory, is impermissible for the purposes of the Constitution or the Self-Government Act. Whilst it is true that both s 92 of the Constitution and s 49 of the Self-Government Act are expressed in terms of absolute freedom from inhibitory restrictions, the context in which such freedom is promised, as an attribute of an ordered society which protects and vindicates the legitimate legal claims of every individual within

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186 See eg written submissions of the Commonwealth, 2 (par 2.5), 4 (par 2.8).

187 *Cole v Whitfield* (1988) 165 CLR 360 at 399-400; *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 606-607.

188 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 56.

189 *Cole v Whitfield* (1988) 165 CLR 360 at 393; *Gratwick v Johnson* (1945) 70 CLR 1 at 17.

it[190], necessitates a characterisation of the law (or of the court order) which is impugned. Self-evidently, there will be different laws within different jurisdictions of the Commonwealth which impose burdens of various kinds on individuals as they move from one jurisdiction to another. The laws on maximum vehicle speed limits are a case in point. It could not be seriously suggested that such differences of legal obligation contravene either s 92 of the Constitution or, in the case of the Northern Territory, s 49 of the Self-Government Act[191]. Similarly, incarceration by imprisonment imposes, whilst it lasts, virtually an absolute prohibition on transborder movements of the prisoner. Yet it could not be argued that the court order sentencing the prisoner to imprisonment (or the law under which that order is made) runs foul of the absolute freedom guaranteed by s 92 of the Constitution or, in the case of the Northern Territory, s 49 of the Self-Government Act.

162 To differentiate laws or court orders which infringe those prohibitions from those which do not, it is necessary to engage in the familiar task of constitutional characterisation of the law or order which is impugned. If they were addressed to some other purpose and imposed a burden or restriction upon transborder movement only as an incidental effect of the attainment of that purpose[192], no offence to s 92 of the Constitution (nor inconsistency with s 49 of the Self-Government Act in the case of the Northern Territory) may be involved. To decide whether it is, the decision-maker must evaluate the character and purpose of the law or order in question. It is necessary to identify its object and consider whether the means adopted to achieve that object are proportionate and the burden or restriction on interstate movement are no more than incidental and necessary consequences of the law's permissible operation[193].

163 In so far as FCA 1975 authorised the Western Australian courts to impose on the custodial parent conditions as to where a child within the jurisdiction of such courts should reside, the practical burden of that law, and of a judicial order made in reliance upon it, was purely incidental to the attainment of another purpose. That purpose was to safeguard the welfare of the child and to attain its best

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190 See eg *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 346; cf *Kruger v The Commonwealth* (1997) 190 CLR 1 at 128.

191 cf *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 58.

192 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

193 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 59; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 157, 190-196; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 324, 333, 336, 384.

interests[194]. This is a purpose apt to legal regulation in an ordered society and for the protection or vindication of the legitimate interests of persons in that society, including children[195]. The impugned law (and order) do not operate directly on movement across internal borders within Australia, as such. The practical burden which results for the movement of persons across borders within Australia is real. But it is proportionate to the achievement of the object of the law (and order) in question, viz the attainment of the welfare of a child and the protection of the child's best interests.

164 Without exploring fully all of the implications for free movement within Australia to be derived from the very nature of the federal Commonwealth as created by the Constitution[196], our nation is clearly one which is organised to permit not only a very high measure of freedom of movement within its borders but also laws and court orders which indirectly or incidentally have consequences which inhibit, in ways proportionate to the attainment of their objects, totally unrestricted freedom. Completely unlimited freedom would be a form of anarchy[197]. If the mother's argument were no more than that FCA 1975 (and the court orders made under it) should be construed keeping generally in mind the high measure of personal freedom to move throughout the Commonwealth without unjustifiable or unreasonable restrictions, I would agree with her. But to the extent to which she appealed to s 92 of the Australian Constitution, or s 49 of the Self-Government Act, to invalidate the injunction granted in relation to the residence of the child, or the provisions of FCA 1975 under which that injunction was made, I would dismiss her challenge. There is no constitutional invalidity either in the court order or the provisions of FCA 1975 sustaining it. Nor are they inconsistent with s 49 of the Self-Government Act in so far as, incidentally and proportionately to the attainment of their objects, they impose a practical burden on the movement of the mother to the Northern Territory which would alter the residence of the child and disturb the arrangements under which that child enjoys contact with and access to his father.

165 For analogous reasons the father's contention that FCA 1975, s 35 was inconsistent with s 49 of the Self-Government Act, in that it resulted in an impermissible burden on his free movement from the Northern Territory to Western Australia, is without substance. If there was any such burden, it was

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194 *In the Marriage of Crossley,* unreported, 22 December 1980 noted in *In the Marriage of I and I* [1995] FLC ¶92- 604 at 82,024.

195 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 346.

196 cf *Buck v Bavone* (1976) 135 CLR 110 at 137.

197 Thus the arrest of a fugitive offender at a border does not offend s 92 of the Constitution (or s 49 of the Self-Government Act). See *Cole v Whitfield* (1988) 165 CLR 360 at 393; cf *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206.

certainly not imposed by reference to the crossing of borders within the Commonwealth[198]. It was incidental to the attainment of other legitimate and lawful purposes. It resulted in a restriction which was proportionate to the achievement of that objective. That objective was one apt to an ordered society and to the protection or vindication of the legitimate claims of individuals (including children) within such a society[199]. The parties' constitutional arguments therefore have no substance.

The significance of international treaties

166 The mother argued that, because an ambiguity arose concerning the exercise of a discretion by reference to the paramount consideration of the welfare of the child which nonetheless also affected the rights of other members of the child's family, it was permissible to have recourse to applicable principles of international law for the purpose of determining how the statutory powers should be exercised[200]. Upon this footing, the mother invoked several international instruments to which Australia is a party. She did so to advance her argument that her right to freedom of movement was an important one which the law should, wherever possible, uphold and protect[201].

167 The mother's arguments, in this regard, did not pay sufficient attention to the United Nations *Convention on the Rights of the Child*. Although not reflected in the provisions of FCA 1975 at the time of the proceedings between the parties, that Convention includes articles obliging States Parties to ensure that, where the child's parents are separated, the child's right to "maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests" shall be respected[202].

168 I would certainly hold that a judge, exercising jurisdiction of the kind invoked here, may properly inform himself or herself of the general principles of relevant

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198 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 193-195; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 307.

199 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 346.

200 She relied on *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Dietrich v The Queen* (1992) 177 CLR 292 at 306.

201 Relying on International Covenant on Civil and Political Rights Art 12.1. See *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), s 3(1). See also Convention on the Elimination of All Forms of Discrimination against Women, Art 28.

202 Convention on the Rights of the Child, Art 9.3. See also Art 7. See discussion *B and B* [1997] FLC ¶92-755 at 84,182 - 84,183.

international law. This is especially so where those principles are stated in international human rights instruments to which Australia is a party. However, the difficulty in the present case is that any such consideration would not take the judge very far. Certainly, it would not assist in the discharge of the functions assigned by local law, such as FCA 1975. In a sense, the international conventions relevant to this subject merely express the sometimes conflicting principles which are already reflected in Australian law and court decisions: a general recognition of the importance of freedom of movement; an appreciation of the tendency of orders restraining the movement of custodial parents to fall unequally on women; and an acknowledgment that the right of access to the non-custodial parent is not only valuable to that parent but is an important right of the child concerned, to be upheld for that reason in all but exceptional circumstances.

169 Knowledge of the principles of international law may be useful where the amendment of Australia's family law has occurred in ways to bring it into conformity with international law[203]. Awareness of international law may also sometimes assist a judge to exercise the applicable statutory powers in a way conformable with basic principle, given the high measure of compatibility which usually exists between the common law of Australia and international statements of fundamental human rights. But save to the extent that the international principles invoked by each party help to put their controversies into a conceptual context and express the basic values which must be taken into account, I do not consider that examination of the international instruments, or the jurisprudence which has gathered around them, assists to resolve the problems faced here. International law merely reflects, and repeats, the considerations which give rise to those problems. In this case, it does not throw much light on how they should be resolved.

The regime for guardianship

170 The father's appeal against the decision of the Full Court setting aside the primary judge's order for joint guardianship presents several questions. Logically, it is appropriate to deal first with the contention that the Full Court had approached the issue by reference to the wrong legal regime.

171 Although this point was not, apparently, advanced either at trial or in the Full Court, the father's submission is one of law. It was not suggested that raising it now presented any procedural unfairness to the mother. The argument was that FLA 1975, which applied to the child at his birth in the Northern Territory, assigned (relevantly) joint guardianship to the parents of the child which had not been altered when their dispute about the guardianship came to be determined. As it stood at the time of the child's birth, s 63F(1) of FLA 1975 provided:

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203 See eg the incorporation of principles in FLA 1975, s 68F; cf now FCA 1997, s 166.

> "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), each of the parents of a child who has not attained 18 years of age is a guardian of the child, and the parents have the joint custody of the child."

172 The father submitted that the Full Court had ordered that the mother be the "sole guardian" of the child in the mistaken belief that this was the way to restore the "status quo" for the disturbance of which no "valid reason" had been given by the primary judge[204]. In fact, according to the father, the "status quo", before any court order was made, was joint guardianship in accordance with FLA 1975, s 63F(1). To the extent that a differing starting point was provided by State law, in terms of FCA 1975, s 35, it was inconsistent with the provisions of FLA 1975, s 63F(1), a federal law. To the extent of the inconsistency, the provisions of FCA 1975, s 35 were invalid in their application to a case such as the present[205]. Alternatively, they would be read down to avoid any such inconsistency.

173 The father acknowledged that, in accordance with the opening words of FLA 1975, s 63F(1) an order of a court, including the Family Court of Western Australia, might in a case where otherwise that court had jurisdiction, vary the presumptive position established by FLA 1975, s 63F(1). But, in approaching a court for an order, the starting point would be, in the case of an ex-nuptial child born in the Northern Territory[206] (such as the child of these parties), the joint guardianship acquired by birth by operation of the law applicable in the Northern Territory.

174 The mother (supported by the Commonwealth and the State of Western Australia) resisted this argument. She submitted that, upon a true construction of the interrelationship of FLA 1975 and FCA 1975, when the parties and their child moved from the Northern Territory to Western Australia, they came into the different legal regime established by the State Act, FCA 1975. In respect of their dispute as to the custody and guardianship of the child, they were then within the exclusive jurisdiction of the Family Court of Western Australia exercising non-federal jurisdiction under, and in accordance with, FCA 1975. This meant that FLA 1975, s 63F(1) no longer applied to the child, at least once the jurisdiction of the Family Court of Western Australia was properly engaged. In such a case that

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204 (1997) 139 FLR 216 at 235 per Malcolm CJ, Franklyn and Walsh JJ concurring.

205 Under the Australian Constitution, s 109.

206 By virtue of s 60E(3).

Court was bound to apply its own law. This included the law as then stated in FCA 1975, s 35. That section provided, relevantly[207]:

> "Subject to … any order made pursuant to this Division, where the parents of a child who has not attained the age of 18 years were not married at the time of the birth of the child or subsequently, the mother of the child has the custody and guardianship of the child."

175 The question of the applicable guardianship regime is not a simple one to answer. There are arguments for each side.

176 On the one hand, the scheme of the interrelationship between the federal Act (FLA 1975) and the State law (FCA 1975) clearly contemplated a bifurcation of applicable statutory regimes within Australia. Whereas the Parliaments of all other States have referred to the Parliament of the Commonwealth legislative powers with respect to the custody and guardianship of, and access to, children, the Parliament of Western Australia has never done so. Accordingly, within Western Australia, those subject matters remain governed by State law. Part VII of FLA 1975 does not apply to Western Australia. In exercising its non-federal jurisdiction in relation to an ex-nuptial child, the courts of Western Australia are therefore obliged to apply Western Australian law. They secure their jurisdiction over the parties and the child because the child in respect of whom the order is sought was present in the State and the applicant and respondent were each resident in the State[208]. So went the mother's arguments.

177 For the father's proposition it may be said that the provisions of FLA 1975, s 63F(1), as it formerly stood, were open ended in the sense that they applied, by inference, until the child concerned attained 18 years of age or was made subject to any order of a court providing differently. If the status of joint custody or joint guardianship was assigned by federal law, the question arises as to how that status was lost, otherwise than by federal law? Guardianship (and custody) being matters affecting status, it would normally be expected that they would be clear and insusceptible to alteration by the mere physical movement of the child to a jurisdiction outside that to which Pt VII (Children) of FLA 1975 applies, whether Western Australia, another State or overseas.

178 Because each of the provisions in question (FLA 1975, s 63F(1) and FCA 1975, s 35) has been repealed, I am not inclined to delay long over this issue. The better view is that, notwithstanding the bifurcation of Australian law on ex-nuptial children in this context, once FLA 1975, s 63F(1) was attracted to provide for the guardianship of a child subject to its provisions, only federal law could alter the

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207 FCA 1975, s 35 was repealed when FCA 1997 was enacted.

208 FCA 1975, s 27. See also s 4, definition of "child".

arrangements for guardianship so made. By the terms of s 63F(1) a court, including one operating under a law other than FLA 1975, could, by order, change the guardianship arrangement provided by s 63F(1). Thus, the Family Court of Western Australia, otherwise acting within its jurisdiction, would be empowered to do so. But its warrant for effecting the alteration would be the opening words of FLA 1975, s 63F(1), a federal Act. It would not, as such, be the powers otherwise enjoyed by that Court under its own (State) statute. Just as the Roman carried the status of citizenship, so the child, born in the Northern Territory in 1990 carried with him or her, until the age of 18 years or until altered by order of a court, the statutory arrangement for joint guardianship by each of the parents for which FLA 1975, s 63F(1) then provided.

179 Accordingly, the reference by the Full Court to what it saw as the impermissible disturbance of the "status quo" which should "remain" in force was, in this case, incorrect. The *status quo ante* here was, so far as guardianship was concerned, precisely that which the primary judge ordered. He did not "disturb the status quo", as the Full Court suggested. He confirmed it. It "remained unaltered". By his order he continued it, although then under Western Australian law: that order displacing the federal statutory presumption which had operated to that time.

180 This conclusion requires that the father's appeal be allowed. It demonstrates that the suggested foundation for the order of the Full Court was misconceived in the peculiar circumstances of this case.

Revocation of special leave

181 The mother argued that the grant of special leave in favour of the father should be revoked. This proposition was advanced on the footing that the applicable legal regime for guardianship in Western Australia had changed since the decision of the Full Court. In particular, FCA 1975, s 35, as it formerly stood, was not re-enacted in the now applicable Western Australian law, viz FCA 1997[209].

182 For several reasons, this submission should be rejected. First, because FLA 1975, s 63F(1) applied to the case, FCA 1975, s 35 was inapplicable, whatever its provisions otherwise meant. Secondly, the father had other legitimate criticisms of the approach of the Full Court, apart from those addressed to the meaning of FCA 1975, s 35. He is entitled to have those grounds of appeal determined. Thirdly, the issue of the guardianship of the child is one which concerns the status and interests of the child himself and not solely the interests of the father and the mother. I would therefore reject the motion for the revocation of the grant of special leave.

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209 See now FCA 1997, s 69.

Joint guardianship was wrongly disturbed

183 There is a further reason which supports the conclusion which I have already stated that the Full Court erred in disturbing the primary judge's order in favour of joint guardianship. This arises from the justification offered by the Full Court for interfering in the discretionary decision of the primary judge on this issue. In rejecting the mother's appeal against the injunction restraining her from changing the principal place of residence of the child from Perth to the Northern Territory, the Full Court properly reminded themselves of the restraints imposed on the disturbance of discretionary decisions generally[210] and decisions affecting custody and guardianship of children in particular[211]. However, when their Honours turned to the issue of guardianship they appear, with respect, to have proceeded to review the conclusion reached by the primary judge on the merits, rather than approaching the matter in the orthodox way by asking whether an error was shown which would entitle them, in law, to set aside that judge's decision and substitute one of their own.

184 The only suggested error of principle, in the rather brief treatment of the issue of guardianship, was that "no valid reason had been put before [the primary judge] to disturb the status quo so far as guardianship was concerned"[212]. As I have shown, that statement proceeds on a false legal premise, presumably reliant upon the view taken of the operation of FCA 1975, s 35. But, in any case, the reasons display no proper basis for disturbing the primary judge's exercise of discretion. Even if (as the father contested) FCA 1975, s 35 had applied, the "status quo" was that, as a matter of fact, for most of the child's life, the mother had been the primary care-giver, and in recent years the sole custodian and residence parent, but that both parents had acted as guardians. Each parent had shared with the other important decisions relating to the residential arrangements, schooling, healthcare and other matters which guardians conventionally decide in relation to children. To the extent that the Full Court were suggesting an error of fact-finding on the part of the primary judge, their reasons are unconvincing. Yet if that ground of error is knocked away, no other possible justification existed for the disturbance of the primary judge's order for joint guardianship. There was no demonstration that a fresh consideration of the matters provided in FCA 1975[213], relevant to the

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210 *House v The King* (1936) 55 CLR 499 at 504-505 was referred to by the Full Court, (1997) 139 FLR 216 at 227.

211 *Gronow v Gronow* (1979) 144 CLR 513 at 519-520 was referred to by the Full Court, (1997) 139 FLR 216 at 230-231.

212 (1997) 139 FLR 216 at 235.

213 s 39A. See also s 28(2).

welfare of the child, established error on the part of the primary judge which authorised correction by the Full Court.

185 Having shown at least two bases upon which the father's appeal must succeed, it is not necessary to address the further arguments advanced by him about the meaning of FCA 1975, s 35 and its application once the jurisdiction of the Western Australian court was engaged. As that section is now banished to the pages of legal history, where it joins the unloved common law principle governing illegitimate children (which it, in part, reflected), no good purpose would be served by unravelling its meaning. However, for the reasons stated, the father's appeal must succeed.

The injunction and the mother's relocation

186 That brings me to the mother's complaints that the Full Court failed to correct errors of principle in the approach of the primary judge which resulted in the determination that she should have sole custody of the child but under conditions which subjected her to the restrictions of an extremely severe injunction. If she wished to remain the custodial residence parent, that injunction effectively confined her, with the child, to the Perth metropolitan area. It prevented her from making a new life for herself in the Northern Territory, as was her desire.

187 The mother recognised that it was not to the point to submit that the discretion of the primary judge ought to have been exercised in a different way. She accepted the need to establish errors of principle which should have occasioned the intervention of the Full Court and would attract relief from this Court.

188 I do not consider that the references in the reasons of the primary judge[214] and in those of the Full Court[215] to the provision of "permission" to the mother to return to the Northern Territory with her son indicated an erroneous understanding of the decision which had actually to be made. As I have shown, this was the very way in which the parties framed their respective affidavits and presented their arguments. It was unsurprising, therefore, that the judges should also slip into the same language. Notwithstanding this, it would be preferable that such references to "permission" to relocate be avoided. The word has a tendency to distract attention from the jurisdiction actually being exercised. In this case, it concerned the custody and guardianship of the child, residence arrangements and access and contact orders, all of which fell to be decided having regard to the welfare of the child as the paramount consideration[216]. To treat the determination of the

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214 Unreported, Family Court of Western Australia, 24 April 1996 at 23 per Holden J.

215 (1997) 139 FLR 216 at 223.

216 FCA 1975, s 28(2).

residence of the child, and the connected issue of custody, as dependent upon the giving or withholding of "permission" to a parent to relocate his or her residence may divert attention from the child's welfare, to the competing needs and demands of the parents in conflict.

189 The same might be said of the reference to the consideration of the "bona fides" of the parent proposing relocation. Although this is given in a number of decisions as one of the matters to be evaluated[217], for a like reason I am unpersuaded that it is relevant of itself. In the circumstances of the breakdown of a relationship, most applications for relocation will arise from complex reasons. They may have nothing to do with the suitability of a parent, otherwise appropriate, to be the custodian (or residence) parent of the child. However, in this case, the bona fides of the mother was found in her favour, so nothing ultimately turns on the point.

190 The central attack which the mother launched on the reasons of the primary judge for providing the injunction concerned his approach to the question of her relocation, his close analysis of her given reasons for proposing it, and his conclusion that "the welfare of the child would be better promoted by him continuing in [the] situation [in Perth] in the absence of any compelling reasons to the contrary"[218]. The mother argued that these demonstrated an erroneous approach to the question for decision. I agree.

191 First, to impose upon a custodial (or residence) parent the obligation to demonstrate "compelling reasons" to justify relocation of that parent's residence, with consequent relocation of the residence of the child, is not warranted either by the statutory instructions to regard as paramount the welfare of the child[219] or by the practicalities affecting parents. Parents enjoy as much freedom as is compatible with their obligations with regard to the child. The freedom continues, including with respect to their entitlement to live where they choose. At least in the case of a proposed relocation within Australia, the need to demonstrate "compelling reasons" imposes on a custodial parent an unreasonable inhibition. It effectively ties that parent to an obligation of physical proximity to a person with whom, by definition, the personal relationship which gave rise to the birth of the child has finished or at least significantly altered.

192 Whilst a proposal to take a child to a place where it would be exposed to risks and dangers might, in a particular case, warrant a need for "compelling reasons", such seems scarcely applicable for relocation within Australia. In the latter case,

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217 See eg *In the Marriage of Holmes* [1988] FLC ¶91-918 at 76,663.

218 Unreported, Family Court of Western Australia, 24 April 1996 at 24 per Holden J.

219 FCA 1975, s 28(2).

the attention of the decision-maker should ordinarily be to the possibility of formulating different arrangements for access and contact which would meet that child's welfare. If "compelling reasons" were the criterion for relocation, few indeed would be the custodial parents who could meet that standard. The result would be a very serious inhibition upon the freedoms of custodial parents, mostly women, without any commensurate or equivalent inhibition upon the freedoms of movement of non-custodial parents.

193 Secondly, it is important to remember that in Australia, whilst the welfare (or best interests) of the child are, by statute, the "paramount" consideration in the exercise of jurisdiction such as was invoked here, they are not the sole consideration. In this respect, the position in this country is different from that in Canada[220]. It more closely conforms to the language of the Convention on the Rights of the Child[221]. Statutory instructions as to the paramountcy that is to be accorded to the child's welfare or best interests are to be understood as they apply to a child living in Australian society, normally in relationship with both parents and other members of its family. Whilst the legislation considered in this case, and later statutory reforms, give the highest priority to the child's welfare and best interests, that consideration does not expel every other relevant interest from receiving its due weight. In part, this is because (as the English courts recognised long ago) the enjoyment by parents of their freedoms necessarily impinges on the happiness of the child[222]. But, in part, it is also because legislation such as FLA 1975 and FCA 1975 is enacted to take effect within a society of a particular character whose members enjoy a high measure of personal freedom, diminished only to the extent that the law obliges.

194 Thirdly, the mother complained that neither the primary judge nor the Full Court had given any attention to the alternative proposal which she had made for enlarged rights of access to, and contact with, the child by the father during school holidays and at other times if she relocated with the child to the Northern Territory. In part, the explanation for this may have been the concession which the mother made that she would not relocate to the Northern Territory if it meant separation from the child. But, mostly, the reason for the lack of attention to her alternative proposal arose from the conclusion that the arrangements in Perth were "ideal" because they meant regular physical contact with both parents (and an extended family), whereas this would be diminished if the mother relocated. That approach impermissibly restrained the residence choices open to the mother. It illustrates an

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220 *Divorce Act*, RSC 1985 c 3 (2nd Supp), s 16(8).

221 Convention on the Rights of the Child, Art 3.1: "In all actions concerning children, whether undertaken by … courts of law … the best interests of the child shall be a primary consideration."

222 *Poel v Poel* [1970] 1 WLR 1469; *P v P* [1970] 3 All ER 659.

application of the legislation unduly favourable to the interests of the non-residential parent. He is subject to no injunction and he lives where he chooses effectively requiring his former partner to remain close at hand to maximise his contacts with the child of their relationship (and, it must be added, the child's contacts with him). Whilst the last stated consideration is certainly a matter proper to be taken into account, it is not the sole consideration to inform the Court's decision.

195 The mother has therefore established an error of principle in the approach taken by the primary judge. Allowing fully for the legal inhibitions which restrained the Full Court from disturbing a decision as to the residence of the child, that Court ought to have found that the approach, which resulted in the inhibitory injunction of which the mother complained, was affected by error. It was not her obligation to show "compelling reasons" to alter the residence of the child.

196 Any such alteration, with its practical consequences for the access to, and contact with, the father necessarily required a reconsideration of the issue of the residence of the child on the footing that the mother was to relocate to the Northern Territory. It required consideration in that context, of the acceptability of the alternative proposals which she advanced for different, but longer, periods of contact between the child and the father. If this was not judged satisfactory, it possibly necessitated consideration of whether a different regime, devised by the Family Court, would adequately fulfil the child's rights to regular contact with his father although no longer living permanently in close physical proximity. If such arrangements were still judged insufficient for the welfare of the child, that might necessitate, despite the life-long role of the mother as the primary care-giver, reconsideration of the entire issue of custody (or residence) and whether some joint arrangement was not appropriate. But simply to compel the mother, against her wishes, effectively to remain in the Perth metropolitan area, and to oblige her to conform to that requirement by an unlimited injunction, because her reasons for relocation were not regarded as "compelling" amounted to an erroneous exercise of the primary judge's discretion. It ought to have been corrected by the Full Court. The mother's appeal must also be allowed.

The applicable legislation

197 These conclusions require that there be a retrial. A question arises as to the applicable law, given that FCA 1997 came into operation on 26 September 1998.

198 FCA 1997 repealed FCA 1975[223]. However, transitional provisions were enacted[224] which affect these proceedings. By cl 6(2) of Sched 2 to FCA 1997, an

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223 FCA 1997, s 245.

224 By FCA 1997, s 246.

order with respect to the custody of a child or the guardianship of a child which was immediately before the commencement day of the 1997 Act "still awaiting determination", must be determined as if it were an application for the corresponding order or orders under Pt 5 of FCA 1997. Because, in relation to the proceedings at the first trial, the discretions with respect to the custody and guardianship of the child miscarried, those issues are, in my view, to be treated, once the orders are set aside, as "still awaiting determination". Accordingly, on remitter to the Family Court of Western Australia, they would have to be determined in accordance with the new Act. This is unsurprising. It is the course which the father supported and the mother did not contest.

199 Although the father's appeal was confined to a challenge to the order of the Full Court disturbing the decision of the primary judge in relation to guardianship, it is inappropriate simply to restore that decision. It may, like the issue of access, be affected by the outcome of the reconsideration of the issues of parenting and residence under the new Act. There are inconveniences for the parties in having to start afresh under new legislation. However, that is the necessary consequence of the conclusion that the present proceedings miscarried and of the operation of the transitional provisions of FCA 1997 to proceedings remitted for retrial, as these proceedings must be.

Orders

200 I agree in the orders proposed by Gleeson CJ, McHugh and Gummow JJ.

HAYNE J.

AMS v AIF

201 For the reasons given by Gleeson CJ, McHugh and Gummow JJ, I agree that in this appeal (brought by the father) the application to revoke the grant of special leave should be refused, the appeal should be allowed and orders made in the terms their Honours propose.

AIF v AMS

202 The injunction granted by the Family Court of Western Australia ("the State Family Court") restrained the mother from "changing the child's principal place of residence from the Perth metropolitan area". Because an order was made that the mother have sole custody of the child, the effect of the injunction was to prevent her moving her place of residence from Perth (at least for as long as she had custody of the child).

203 The father sought to support the injunction as an order that was made "hav[ing] regard to the welfare of the child as the paramount consideration"[225]. The mother contended that the primary judge's discretion had miscarried and that the Full Court of the Supreme Court of Western Australia should have set aside the order on that basis. She also contended that the order impermissibly burdened free intercourse between the Northern Territory and a State, contrary to s 49 of the *Northern Territory (Self-Government) Act* 1978 (Cth) ("the Self-Government Act"). It is convenient to deal with the discretionary issues separately from the constitutional issues presented by s 49 of the Self-Government Act.

204 The problems that family law legislation deals with are human problems: with all their attendant variety and complexity. And at the end of a court proceeding under such legislation, a judge must make an order - usually an order that says yes or no to some application. "[A] complicated mass of human experience has to be reduced to the simplest possible terms."[226] Because the problems are human problems, because they are as varied and complicated as they are, the legislature speaks in terms more often found in statements of aspiration than legal prescription. It is, then, hardly surprising that the guiding principles prescribed by the legislation for application in cases concerning the guardianship or custody of children or related issues, are principles that seldom, if ever, permit syllogistic reasoning.

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225 *Family Court Act* 1975 (WA), s 28(2).

226 Gibson, "Literary Minds and Judicial Style", (1961) 36 *New York University Law Review* 915 at 916.

205 Further, when considering the reasons given by a judge who has made an order in an application about the guardianship or custody of children, it is necessary to bear steadily in mind that the judge must grapple with the chaotic complexity of real life, make predictions not only of what he or she concludes may happen in future but also of what will be "best" for the child, and do so having regard to what the parties have chosen to contest or emphasise in the course of the hearing.

206 The reasons for judgment of the primary judge in this matter must, therefore, be considered having regard to two matters. First, the father and mother had put forward competing proposals about the orders to be made. Secondly, at the start of the case the primary judge had been told by counsel for the father that "[t]here is really only one issue … and that is where - or, which principal place of residence - will best serve the future welfare of this child". There were said to be three available choices - with the mother in Perth, with the father in Perth, or with the mother in Darwin or elsewhere in the Northern Territory.

207 Soon after being told this, the primary judge asked "if I decide that it is in the child's best interest that the child remain in Perth, what does the mother propose to do?" Counsel then appearing for the mother said that her client proposed to stay in Perth but that her case was that "it's a bona fide wish to move, and that she [the mother] genuinely believes that that is where her's and the child's best interests are served". This, then, is the context in which the reasons for judgment must be placed.

208 In his reasons the primary judge said that, subject to the welfare of the child being the paramount consideration, three questions should be asked: first, whether the application to remove the child is made bona fide, secondly, if the application is made bona fide, can the Court be reasonably satisfied that the custodian will comply with orders for access and other orders made to ensure the continuance of the relationship between the child and the non-custodian and, thirdly, what is the general effect upon the welfare of the child in granting or refusing the application? Having stated these questions (and noted that a custodial parent should be free to order his or her own life without interference from the other party or the Court) the primary judge went on, as he put it, "to examine closely the mother's reasons for wishing to move to Darwin". He considered the reasons proffered by the mother and concluded:

> "For all of the child's life he has had the benefit of considerable contact with each of his parents. Each of them has had considerable input into the child's upbringing. Although the child has always enjoyed a relationship with members of the extended families, since the mother has moved to Perth he has been brought up in an environment of close interaction with members of both extended families. From the point of view of the welfare of the child it seems to me that he has been in as an ideal situation as he could possibly be in given that his parents do not live together. It is my opinion that the welfare

of the child would be better promoted by him continuing in that situation *in the absence of any compelling reasons to the contrary*. Accordingly, the mother's application for a release from her undertaking will be dismissed and an injunction will be made restraining her from removing the child from the Perth Metropolitan area." (Emphasis added)

209 Even given the context to which I have earlier referred, I consider that the reasons of the primary judge reveal error. I accept that the reasons must be understood in the light of the particular course the trial took and, especially, the fact that the matter was presented as whether the child should live in Perth or in Darwin. Read as a whole, however, the reasons show that the primary judge considered the issue to be whether the mother had shown that she had a good (or good enough) reason for wanting to move to Darwin and that, the reason offered not being "compelling", the child should not be denied continuing frequent contact with his father and "an environment of close interaction with members of both extended families". In my view, that approach distorted the inquiry that was required.

210 Both the primary judge and the Full Court assumed that the *Family Court Act* 1975 (WA) ("the 1975 State Act") applied to these proceedings[227]. (It is not necessary to consider the validity of this assumption. If, as I consider to be the case, the discretion of the primary judge miscarried and the appeal to the Full Court should have been allowed, the matter will have to go back for further hearing. Counsel for the mother submitted that, on the further hearing, the 1975 State Act would not apply and the provisions of Pt 5 of the *Family Court Act* 1997 (WA) (which are not materially different from the provisions of Pt VII of the *Family Law Act* 1975 (Cth)) would apply. Counsel for the father did not submit to the contrary.)

211 If the 1975 State Act did apply to the proceedings before the primary judge, it required that the Court have regard to the principles stated in s 28:

"(1) The Court in the exercise of its non-federal jurisdiction shall in so far as those principles are capable of application to the case have regard to the following principles -

(a) the need to preserve and protect the institution of marriage as the union of man and woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society,

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227 The 1975 State Act has since been repealed and replaced by the *Family Court Act* 1997 (WA).

particularly while it is responsible for the care and education of children;

(c) the need to protect the rights of children and to promote their welfare;

(d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage; and

(e) the effect of any order on the stability of the marriage and the welfare of the children of the marriage."

It also required that:

"(2) In the exercise of its non-federal jurisdictions with respect to a child the Court shall have regard to the welfare of the child as the paramount consideration."

Some of those principles had no application to this dispute: the father and mother had never married. But if the 1975 State Act applied, s 28(2) required the Court to have regard to the welfare of the child as the paramount consideration.

212 The reference to the welfare of the child being the paramount consideration should not be misunderstood. It does not mean that the welfare of the child was the *only* consideration to which the Court should have regard. And the command of s 28(2) was not that the Court should apply a precept that, if applied to the facts, would govern the conduct of the parties; it was that the Court should accord a particular place to the welfare of the child in its assessment of what order should be made.

213 Section 36(a) of the 1975 State Act provided for applications "for an order with respect to the custody or guardianship of, access to, or welfare of, a child". The power of a court acting under that provision to make orders for the welfare of a child was very wide. The jurisdiction was, no doubt, similar in many respects to the parens patriae jurisdiction of the Court of Chancery[228]. Nevertheless, it may be doubted that this power permitted the making of any and every kind of order directed to a parent simply because it was thought that the child might benefit as a result. For example, it may be doubted that, based on a finding that a child would

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228 *Secretary, Department of Health and Community Services v J W B and S M B (Marion's Case)* (1992) 175 CLR 218 at 256 per Mason CJ, Dawson, Toohey and Gaudron JJ; *P v P* (1994) 181 CLR 583 at 598 per Mason CJ, Deane, Toohey and Gaudron JJ, 615 per Brennan J, 627 per Dawson J, 632 per McHugh J; *Z P v P S* (1994) 181 CLR 639 at 646-647 per Mason CJ, Toohey and McHugh JJ; *In re X (A Minor)* [1975] Fam 47 at 61 per Sir John Pennycuick.

be better off if a custodial parent had a well paid job, a court could make an order that a parent stay in a particular form of employment rather than change jobs or cease work altogether, or take an educational course that would fit the parent for better paid work than he or she was then undertaking. It is, however, not necessary to explore, let alone attempt to define, the limits of this power.

214 For present purposes, it is sufficient to say that the order that was sought was *not* an order directed to regulating where the mother was to live. It was an order regulating who would have custody of, and access to, the child, and on what terms.

215 To decide whether the exercise of discretion by the primary judge miscarried, it is necessary to identify what are the premises from which the Court was to proceed in deciding what order was to be made. Or to put the matter another way, what were the issues for decision? In particular, was the Court to assume that one parent *will* move his or her principal place of residence; was the Court to assume that this *may* happen; was the Court to decide *whether* it may happen?

216 An important, probably essential, step in the inquiry into who should have custody of, and access to, the child is to identify where the custodial parent intends to live, for that will determine where the child lives and affect what contact the non-custodial parent can be expected to maintain with the child. But that is not to say that it is for the Court to decide where the custodial parent may live: that decision is to be made by the parent.

217 Of course, the decision of a parent who is about to move and who seeks custody may well be affected (often it will be determined) by whether he or she will have custody of the child if that proposed move is carried out. And it 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 whether the mother has shown a "good" or a "compelling" reason for wanting to move.

218 To translate the question into this form - has the mother shown a good, or good enough, reason for wanting to move - focuses attention upon the reasons and motives of the mother. But that is not the proper focus of inquiry. The proper focus is which is better for the child - to be in the custody of the father (in Perth) or to be in the custody of the mother (in Darwin). That, of course, requires attention to what benefits will the child have, and what detriments will the child suffer, from being in the mother's custody in Darwin. If the mother had wished to move to marry and establish a new family in Darwin, or to take up new and better employment or training in Darwin, it may well have been possible to conclude that in all the circumstances the child's welfare would be advanced by his being committed to the mother's custody. The circumstances to be considered would include not only the fact of relocation but also all of the consequences that would

follow - separation from the non-custodial parent, the creation of a new family in which the child would thereafter live (with all the concomitant advantages and disadvantages), the better economic position of the custodial parent, and so on. In that sense, inquiring about why the mother wished to move was relevant but it was only one inquiry among the many that go into deciding the ultimate question. The complexity (and difficulty) of the inquiries required by that question is well illustrated (in a different legislative context) by the decision of the Full Court of the Family Court of Australia in *B and B: Family Law Reform Act 1995*[229]. But as that decision rightly shows, the inquiries are directed to ascertaining what is in the best interests of the child.

219 The complexity and difficulty of the inquiries which must be made is increased when, as was the case here, a parent's wish to move is expressed conditionally - I will go unless I cannot then have custody. It is more complex and difficult because there are then three competing possibilities for consideration. In these circumstances to focus, as the primary judge did in this case, on the reasons for the mother wishing to move, may have wrongly reduced the inquiry to two competing possibilities (of the mother having custody in Darwin or in Perth) but, more importantly, it turned it into an inquiry about whether the mother should be *permitted* to move. By turning it into an inquiry about whether she should be permitted to move, attention was distracted (wrongly) from what would promote the welfare of the child.

220 For these reasons, I agree that the primary judge's discretion miscarried and that orders should be made in the terms proposed by Gleeson CJ, McHugh and Gummow JJ.

221 It is unnecessary in these circumstances to decide the issues presented by the mother's reliance on s 49 of the Self-Government Act and s 92 of the Constitution. It is as well, however, if I say that, for the reasons given by Gleeson CJ, McHugh and Gummow JJ, s 49 is to be given an ambulatory meaning and the question presented by s 49 (and s 92) in a case such as the present is whether an impediment imposed under the 1975 State Act is greater than that reasonably required to achieve the objects of that Act. I agree that custody and guardianship legislation may present a question whether the statute empowers the making of orders that have a practical effect of imposing upon freedom of intercourse an impediment greater than reasonably required to achieve the object of the legislation. But construing the legislation applied in this case in the way I have, I do not consider that any separate question would then arise under s 49 or s 92. A proper exercise of the discretion would not impose an impediment upon freedom of intercourse greater than reasonably required to achieve the object of providing for the guardianship and custody of and access to children. However, as other members

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229 (1997) 21 Fam LR 676.

of the Court point out, when the matter is heard again, the *Family Court Act* 1997 (WA) will apply.

222 I also agree that, for the reasons given by Gleeson CJ, McHugh and Gummow JJ, the mother's reliance on the several international instruments to which we were referred does not assist the resolution of the present matter.

223 CALLINAN J. In this case there is an appeal by the father (the appellant) of an ex-nuptial child from a decision of the Full Court of the Supreme Court of Western Australia awarding the guardianship and custody of the child solely to the child's mother, the respondent to this appeal[230]. There is also an appeal by the mother against an order that she be restrained from changing the child's principal place of residence from the Perth metropolitan area as defined in the *Town Planning and Development Act* 1928 (WA). I would understand that order, as may be taken to be the usual position with respect to such an order, as being subject to any further order.

Facts and proceedings

224 The respondent was born in Geraldton in Western Australia in 1966. The appellant was born in Sydney in New South Wales in 1967. By the mid eighties both parents had moved to Perth and commenced tertiary studies at the University of Western Australia where they met and began a relationship which was broken off in June 1989, and then resumed when the respondent discovered that she was pregnant later in the same month.

225 In September 1989 the appellant was offered a position in the Northern Territory which he accepted. The parties moved to the Northern Territory leaving their furniture and effects stored in Perth. In October 1989 the appellant took up his employment at Cosmo Howley Mine near Adelaide River. In December 1989 the respondent resumed cohabitation with the appellant in married quarters provided by the employer.

226 The child (to whom I refer simply as "J") was born at Darwin Private Hospital on 2 March 1990. He is the only child of the parties.

227 In February 1994 the parties decided to separate and to travel to Perth to visit their families. The appellant was the first to return to the Northern Territory, in March 1994. The respondent and J remained in Perth for an additional two weeks before travelling to the Northern Territory.

228 On 9 April 1994, the respondent and J went to live in Palmerston with assistance from the appellant who moved from Adelaide River to a two bedroom unit at the Cosmo Mine site.

229 Between April and October 1994, with one exception only, the appellant travelled 320 kilometres each weekend to have access to J who was attending a kindergarten at Palmerston.

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230 (1997) 139 FLR 216 per Malcolm CJ, with whom Franklyn and Walsh JJ agreed.

230 In October 1994 the appellant obtained employment in Perth to which he returned and where he began to cohabit with M whom he subsequently married. Two months later the respondent and J also took up residence in Perth.

231 In January 1995 the appellant and M bought a house at Rivervale near Perth. In the same month J began to attend the Riverton Primary School. On 26 February 1995 the respondent told the appellant that she would prefer to return to the Northern Territory. Later she agreed to stay in Perth and obtained accommodation in Perth.

232 By June 1995 the appellant and M had moved into the house they had bought, and had married. In October 1995 the respondent told the appellant that she may have to move to Darwin to attend the Northern Territory University if an application that she had made for a place at Murdoch University in Perth was not successful. Throughout 1995 the appellant continued to have access to J each weekend and during school holidays.

233 In early December 1995 the respondent decided to return to the Northern Territory with J without telling the appellant of her intentions. She then arranged temporary accommodation for herself and J in Darwin. On 21 December 1995 after all of her arrangements for the move had been made the respondent informed the appellant that she would be returning to the Northern Territory with J in January 1996. On the same date the respondent was told that she had been allotted a place in her preferred course at Murdoch University in Perth. On 11 January 1996 the appellant filed an Interim and Final Application to restrain the respondent from removing J from Western Australia and seeking joint guardianship and sole custody of J. Later this application was amended to seek joint guardianship and joint custody of the child upon the basis that he reside permanently with the appellant.

234 On 7 February 1996 the respondent filed a response seeking sole guardianship and sole custody of J and relief from an undertaking she had earlier given in writing not to remove the child from Perth.

235 After some interlocutory proceedings the applications came on for hearing before Holden J, in the Family Court of Western Australia[231]. By a judgment delivered on 24 April 1996 the trial judge made the following orders:

> "1. The applicant [AMS] and the respondent [AIF] have the joint guardianship of the child [J] … born on the 2nd day of March 1990 with

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231 *AMS v AIF* unreported, 24 April 1996. In Western Australia such applications are heard by a judge of the Family Court of Western Australia (*Family Court Act* 1975 (WA) s 36) and appeals lie to the Full Court of the Supreme Court of Western Australia (*Family Court Act* 1975 (WA) s 81(2a)).

sole custody of the said child to the respondent and liberal access to the applicant defined to include:-

(a) during the school term, for two out of every three weekends commencing from Friday after school until Sunday evening;

(b) for one half of all school holiday periods;

(c) further access on important days including Christmas Day, the child's birthday, the father's birthday and Father's [sic] Day;

(d) such further or other access as may be agreed between the parties.

2. The respondent be restrained and an injunction is hereby granted restraining her from changing the child's principal place of residence from the Perth metropolitan area as defined in the Town Planning and Development Act 1928.

3. By consent, the parties attend post trial counselling on a date and time to be fixed by the Director of Court Counselling.

4. All applications filed in these proceedings otherwise be dismissed."

236 The respondent appealed against these orders to the Full Court of the Supreme Court of that State. The appellant also appealed seeking orders for the custody of the child. The Full Court allowed the respondent's appeal in part and relevantly made the following orders:

"1. The Appeal be allowed in part by varying the order of the Chief Judge of the Family Court made 24 April 1996, so that the application by the Respondent (Applicant) [AMS], for an order that the parties have joint guardianship of the Child, [J] born 2 March 1990, be dismissed and that the Appellant (Respondent), [AIF], remain the sole guardian of and have sole custody of the said child with liberal access to the Respondent (Applicant) defined to include;

(a) during the school term for two out of every three weekends commencing from Friday after school until Sunday evening;

(b) for one half of all school holiday periods;

(c) further access on important days including Christmas Day, the child's birthday, the father's birthday and Father's [sic] Day; and

(d) such further or other access as may be agreed between the parties.

2. The Appellant (Respondent) be restrained from changing the Child's principle [sic] place of residence from the Perth metropolitan area as defined in the Town Planning and Development Act 1928.

3. The Cross Appeal be and is hereby dismissed.

…"

The appeals to this Court

237 The appellant's grounds of appeal to this Court are as follows:

1. The Full Court erred in approaching the guardianship dispute between the parties in relation to the child in holding that:-

   (a) s 35 of the *Family Court Act* 1975 (WA)[232] governed the parties so as to confer sole custody and guardianship of the child on the mother; and

   (b) the father had no rights of guardianship notwithstanding that the child had been born to the father in the Northern Territory, and the father had been constituted a guardian of the child pursuant to the provisions of s 63F of the *Family Law Act* 1975 (Cth), as it was prior to the introduction of the *Family Law Reform Act* 1995 (Cth);

when the Full Court should have referred to:-

   (c) s 92 of the Commonwealth Constitution,

   (d) ss 28(3) and 28(1)(c) of the *Family Court Act* 1975 (WA);

   (e) the *Family Law Act* 1975 (Cth); and

   (f) the provisions of the United Nations Convention on the rights of the child as a declared instrument under the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), the *Family Law Act* 1975 (Cth), and the common law which provide:-

   (i) the child has the right to be cared for by each parent and the right to preservation of his family relations;

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232 The *Family Court Act* 1975 (WA) was repealed by the *Family Court Act* 1997 (WA) which came into force on 25 September 1998.

(ii) the child has the right to the protection of the law against arbitrary and unlawful interference with his family;

(iii) each parent has rights and duties to provide direction to the child in exercising his right to freedom of thought, conscience and religion; and

(iv) the principle that both parents have common responsibilities for the upbringing and development of the child is recognised.

2. In the event that s 35 of the *Family Court Act* 1975 (WA) does apply then the Full Court wrongly applied the law when interfering with the discretion of the learned trial judge on the question of guardianship and substituting its own discretion in that:

(a) the choice between joint and sole guardianship is a decision which is within the discretion of the learned trial judge; and

(b) the Full Court did not find that the learned trial judge's order of joint guardianship would be contrary to the best interests of the child; and

(c) the Full Court's conclusion that the supposed legal status quo outweighed those matters considered by the learned trial judge amounts only to a difference of view on the weight to be given to the considerations; and

(d) the Full Court failed to give any consideration to any of the matters listed in s 39A of the [*Family Court Act* 1975 (WA)] and failed to give paramount consideration to the detrimental effects upon the welfare of the child arising from the removal of the involvement of the father in the important decisions concerning the care, welfare and development of the child; and

(e) the Full Court allowed that determination to be influenced by an incorrect perception of the genesis of the father's application to the Court, by the mother's role as primary caregiver, by the marriage of the father and by the arrival of a child to the father's marriage which in each case is an irrelevant matter which has not been demonstrated in the reasons to support the order of sole guardianship.

(f) the Full Court's presumption in favour of the supposed legal status quo is unjust, unreasonable and plainly wrong on the facts in this case (and in any event);

when more correctly there should have been a presumption in favour of the correctness of the learned trial judge's initial decision that joint guardianship was in the best interests of the child.

3. That the learned trial judge wrongly exercised his discretion when determining the question of custody and the Full Court wrongly upheld that determination in that:

    (a) whilst the learned trial judge and the Full Court determined that the welfare of the child was best promoted if he was not relocated from Perth;

    (b) the learned trial judge did not however give any consideration to this detrimental effect on the child if relocated from Perth as proposed by the mother in her future custody proposal, but rather

    (c) the learned trial judge assessed the mother's custody proposal on the basis that the mother was not to be permitted to remove the child from Perth and would continue the past custody arrangement whereas the mother did not propose nor support that arrangement and challenges at law.

4. That the learned trial judge wrongly exercised his discretion when determining the question of custody when ordering in favour of the mother solely on the basis of preserving her role as primary caregiver unless there was a compelling reason to the contrary and the Full Court wrongly upheld the determination in that:

    (a) the presumption by the Full Court and the learned trial judge in favour of the previous caregiving arrangement was an error of law in that an onus was placed on the father to displace that status quo, whereas, the correct consideration under s 39A(b)(iii) of the [*Family Court Act* 1975 (WA)] is an assessment of the desirability of, and the effect of, any change in the existing arrangements for the care of the child as proposed by the parents; and

    (b) on these questions the learned trial judge had already determined that the father was a capable and loving parent and found no evidence of any detriment to the child which would arise from a change of custody to the father; and

    (c) the consideration under s 39A(b)(iii) of the Act does not create a presumption in favour of an existing arrangement which could only be displaced by clear countervailing considerations but rather the future custody proposals must be considered afresh; and

(d) the father's proposal is not an absolute reversal from a sole caregiver but rather a change of degree in that the father had cared for the child for one third of all the days of the year; and

(e) in any event the onus placed on the father by the learned trial judge is unfair and unjust in that the father attempted to obtain independent expert evidence to assist in determining the likely impact on the child from the alternative custody proposals but this was opposed by the mother; and

(f) the learned trial judge and the Full Court failed to demonstrate a distinction between the future custody proposals on this basis and made no other distinction on any other of the considerations listed under s 39A of the Act.

238 The respondent has also appealed (the cross-appeal). All of the grounds of that cross-appeal are directed to the discharge of the injunction restraining any change in the child's principal place of residence from the metropolitan area of Perth. Not all of the extensive grounds need be repeated. They refer to relevant discretionary considerations and include that the Full Court erred in not taking any or any sufficient account of the following matters:

"1. . . .

(d) The principle that a custodial parent has, in general, a legitimate human right to personal choice of place of residence.

(e) That the provisions of the *Family Court Act* 1975 (WA) should be interpreted within the context of international human rights principles and that as a matter of statutory interpretation the Court should apply a rebuttable presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms of which freedom of movement is one such right and freedom.

(f) The principle that a custodial parent and particularly one with sole guardianship should be left to order his or her own life without interference from the other party or from the court, so long as he or she does what may reasonably be expected to be done by him or her for the child in all the circumstances.

. . .

2. That the discretionary power of the Family Court of Western Australia to make an order concerning a child's welfare contained in s 27 of the *Family Court Act* 1975 (WA) must be exercised in accordance with the provisions of the Constitution. In making an order that restrained the Appellant from

> relocating interstate, the Full Court and the Family Court of Western Australia erred by infringing s 92 of the *Constitution*."

239 Because the respondent's cross-appeal raises a constitutional matter, notices under s 78B of the *Judiciary Act* 1903 (Cth) have been given. The "matter" was defined in these terms:

> "The matter concerns the restraint by order of the Family Court of Western Australia of a custodial parent from relocating interstate. It is to be submitted that the discretionary powers contained in the *Family Court Act* 1975 (WA) (and likewise the essentially identical discretionary powers contained in the *Family Law Act* 1975 (Cth)) must be exercised in accordance with the provisions of the *Constitution*. In making an order that effectively restrained the Appellant parent from relocating interstate, it will be argued that the Full Court infringed s 92 of the *Constitution*."

240 The appellant's first contention is that the Full Court made an error of law in treating s 35 of the *Family Court Act* 1975 (WA) as stating a prima facie position, or one that had to be disturbed or displaced before a different order could be made. Section 35 provides as follows:

> "Subject to the *Adoption of Children Act 1896* and any order made pursuant to this Division, where the parents of a child who has not attained the age of 18 years were not married at the time of the birth of the child or subsequently, the mother of the child has the custody and guardianship of the child."

241 The appellant argued that s 35 stated the position in the absence of any order: it did not play a part in governing what order should be made, except to state what the position would be if no order were made.

242 The appellant submitted that by ss 27 and 28 of the *Family Court Act* 1975 (WA) the Family Court of Western Australia was empowered to make orders with respect to the guardianship of this child[233]. In making such an order the Family Court of Western Australia was required to have regard to the welfare of the child as the paramount consideration[234]: the provision of s 35 that the mother of an ex-nuptial child had the custody of the child is expressly stated to be "[s]ubject to … any order made pursuant to this Division". The substance of the appellant's submission was therefore that the Full Court erred in approaching the case from

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233 Section 27 confers the non-federal jurisdiction upon the Family Court of Western Australia. Section 28 sets out relevant principles for its exercise and emphasises the importance of the institution of marriage and the family as the "fundamental group unit of society".

234 *Family Court Act* 1975 (WA) s 28(2).

the standpoint that the respondent was the child's custodian and guardian by force of the Western Australian statute.

243 In my opinion this submission should be rejected. Whilst s 35 may state the position in the absence of any order to the contrary, it is also a clear indication as to what the legislature holds and declares to be the ordinary and natural position with respect to mothers and their children. It accordingly would not be wrong for a court to approach the issues of guardianship and custody upon the basis that good reason needs to be shown why some other order pursuant to the Act should be made; and, in a practical sense it will be for a party (other than a mother) moving for a different order to show why it should be made, in the same sense as, in the ordinary case, the moving party ordinarily carries an onus of making out a case for orders sought[235].

244 In any event I am not satisfied that in deciding the issues of guardianship and custody, the Full Court did treat the appellant as carrying an onus in any conventional sense. It seems to me that both that Court and the primary judge undertook an analysis of the evidence without assigning an onus, either evidentiary or otherwise, to either party and with a view to ascertaining what order would best serve the welfare of the child.

245 The second contention of the appellant raises a question of possible inconsistency between s 35 of the *Family Court Act* 1975 (WA) and s 63F of the *Family Law Act* 1975 (Cth). The argument is put this way.

246 The child was born in the Northern Territory. Section 63F of the *Family Law Act* 1975 (Cth) therefore applied to him (whilst that section had an operation) until an order to the contrary was made by any court anywhere. Section 63F was inserted in the *Family Law Act* 1975 (Cth) by the *Family Law Amendment Act* 1987 (Cth) as part of the new Part VII of the principal Act. It was repealed on 11 June 1996. The provisions currently in force contain no like provision to s 63F. Section 63F provided as follows:

> "(1) 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), each of the parents of a child who has not attained 18 years of age is a guardian of the child, and the parents have the joint custody of the child.

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235 *Briginshaw v Briginshaw* (1938) 60 CLR 336; *In the Marriage of Trnka* (1984) 10 Fam LR 213; *Cross on Evidence*, 5th Aust ed (1996) at par 7010.

(2) An order shall not be made under this Part in relation to the custody or guardianship of, or access to, a child who has attained 18 years of age or is or has been married.

(3) An order made under this Part in relation to the custody or guardianship of, or access to, a child ceases to be in force when the child attains 18 years of age or marries.

(4) The following provisions apply in relation to rights of custody or guardianship of a child, or access to a child, existing under this Act immediately before the adoption of the child:

(a) if the child is adopted by a person who, before the adoption, is not a prescribed adopting parent – those rights cease; or

(b) if the child is adopted by a prescribed adopting parent, where a court granted leave under section 60AA for the adoption proceedings to be commenced – those rights cease; or

(c) if the child is adopted by a prescribed adopting parent and leave was not granted under section 60AA for the adoption proceedings to be commenced – those rights do not cease.

(5) On the death of a parent in whose favour an order has been made under this Part for the custody of a child:

(a) the other parent is entitled to the custody of the child only if the court so orders;

(b) the other parent or another person may make an application to the court for an order placing the child in the custody of the applicant; and

(c) in an application under paragraph (b) by a person who does not, at the time of the application, have the care and control of the child, any person who, at that time, has the care and control of the child is entitled to be a party to the proceedings."

247 The appellant argued that because the child was born in the Northern Territory a jurisdiction governed by the statute, and s 63F was then in force, it applied so long as guardianship might be appropriate for the child and no order of a court to a contrary effect was made anywhere else. The appellant contended that there is or was nothing in the *Family Law Act* 1975 (Cth) to suggest that its provisions were to be applicable only during the time when the child, or his parents or a parent, resided in the Northern Territory.

248 This is a far reaching submission. The section did not say in terms that its application was to depend on any accident of birthplace. The appellant accepted that if the submission be correct both parents of a child born in the Northern Territory would be guardians and custodians of that child no matter where in the world any of them, including the child lived; and presumably no matter what legislation might be applicable to the child in some other country, until an order to a different effect was made by a court anywhere respecting the child's custody and guardianship.

249 The appellant further argued that a narrow construction of s 35 of the *Family Court Act* 1975 (WA) should be adopted because otherwise, in respect of a child coming from the Northern Territory to reside in Western Australia there would be a conflict between s 63F of the *Family Law Act* 1975 (Cth) and s 35 of the *Family Court Act* 1975 (WA). If a different construction were to be adopted then s 109 of the Constitution would operate, so, it was put, to strike down s 35 of the *Family Court Act* 1975 (WA): if the provision for joint guardianship in s 63F were to come to an end as a matter of construction of that section, s 35 would be inconsistent with s 63F and, by reason of s 109 of the Constitution, would be rendered inoperative.

250 One of the purposes of the *Family Law Amendment Act* 1987 (Cth) was to implement the reference of powers from New South Wales, Victoria, South Australia and Tasmania relating to the custody and guardianship of, and access to, children in those States and to apply the *Family Law Act* 1975 (Cth) as amended to the Territories to which the *Family Law Act* 1975 (Cth) applied[236].

251 Relevant provisions of s 60E of the *Family Law Act* 1975 (Cth) inserted by the *Family Law Amendment Act* 1987 (Cth) were:

> "(1) Subject to subsections (4) and (5), this Part extends to New South Wales, Victoria, South Australia and Tasmania.
>
> (2) If:
>
> (a) the Parliament of Queensland or Western Australia refers to the Parliament of the Commonwealth the following matters or matters that include, or are included in, the following matters:
>
> (i) the maintenance of children and the payment of expenses in relation to children or child bearing;
>
> (ii) the custody and guardianship of, and access to, children; or

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236 Explanatory Memorandum, Family Law Amendment Bill 1987 par 1.

(b) Queensland or Western Australia adopts this Part;

then, subject to subsections (4) and (5), this Part also extends to Queensland or Western Australia, as the case may be.

(3) This Part applies in and in relation to the Territories."

252 The express provisions of s 60E of the *Family Law Act* 1975 (Cth) therefore contemplated that the law applying in Western Australia to custody, guardianship and access issues in respect of ex-nuptial children would apply in that State, if, but only if there were a reference or an adoption of the Commonwealth provisions by that State, to the Commonwealth and the Family Court, but the *Family Law Act* 1975 (Cth) would apply to children in the Northern Territory.

253 I do not think that any question of inconsistency truly arises. Section 63F, although on its face apparently unconfined in operation with respect to children, either nuptial or ex-nuptial, has to be read subject to, and as being intended to be within a head of constitutional power or the subject of an appropriate reference by the State to the Commonwealth pursuant to s 51(xxxvii) of the Constitution. There has been no reference. The only Commonwealth constitutional power with respect to children is to be found in s 51(xxii) which is subject to the qualification that Commonwealth legislation concerning the custody and guardianship of infants must be related to divorce and matrimonial causes[237]:

"Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants."

254 It seems to me to be very unlikely that the Commonwealth legislature would have intended s 63F of the *Family Law Act* 1975 (Cth) to have an operation with respect to a subject matter over which it would not ordinarily have any power to legislate without a reference by a State pursuant to s 51(xxxvii) of the Constitution. The Commonwealth in its submissions at least accepts that in order for s 63F to operate upon an ex-nuptial child there had to be some connexion between the child and the Territory, and that this child's connexion with the Northern Territory had entirely ceased at the inception of these proceedings.

255 Section 63(7) of the *Family Law Act* 1975 (Cth) (which was later replaced by s 69K of the *Family Law Reform Act* 1995 (Cth)[238]) recognised the need for a

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237 See *Vitzdamm-Jones v Vitzdamm-Jones* (1981) 148 CLR 383 at 402, 405 per Barwick CJ, 423 per Aickin J, 433 per Wilson J.

238 Section 69K now provides:

(Footnote continues on next page)

demonstrated connexion, certainly so far as the jurisdiction of a Court of a Territory is concerned, between at least one of the parties to the proceedings, and the Territory. It provided as follows:

> "Jurisdiction in relation to a matter arising under this Part in relation to which a proceeding is instituted under this Part is not conferred on a court of a Territory unless at least one of the parties to the proceedings is, on the day of the institution of the proceedings or the day of the transfer of the proceedings to that court, ordinarily resident in the Territory."

256 The very broad definition of "child" in Part VII of the *Family Law Act* 1975 (Cth) is relevantly affected in certain important respects by s 69ZH(2) which states that particular divisions and sections of Part VII have the effect they would have, as if each reference to a child were confined to a reference to a child of a marriage[239]. This restriction on the Act's reach is an acknowledgment of the Constitutional limitations on the Commonwealth's power contained in s 51(xxii) as interpreted by the High Court in earlier cases decided in respect of similar provisions[240].

257 Questions as to the extent of the Commonwealth's power in this respect are now largely academic as a result of the referral of power by every state (except Western Australia) to the Commonwealth: see for example *Commonwealth Powers (Family Law – Children) Act* 1986 (NSW). The New South Wales legislation refers to the Commonwealth matters relating to the "custody and guardianship of, and access to, children" (s 3(1)(b)). "Children" in this context are defined to mean persons under the age of 18 years[241].

258 It is against the background of these referrals by nearly all of the States that the *Family Law Act* 1975 (Cth) is stated to apply to New South Wales, Victoria, Queensland, South Australia and Tasmania[242]. The referrals, however, do not make any express references to "welfare".

> "A court of a Territory must not hear or determine proceedings under this Part unless at least one of the parties to the proceedings is ordinarily resident in the Territory when the proceedings are instituted or are transferred to the court."

239 Prior to the insertion of s 69ZH by the *Family Law Reform Act* 1995 (Cth), s 60F(2) was to similar effect.

240 See for example *R v Cook; Ex parte C* (1985) 156 CLR 249; *Re F; Ex parte F* (1986) 161 CLR 376.

241 *Commonwealth Powers (Family Law – Children) Act* 1986 (NSW) s 3(3).

242 *Family Law Act* 1975 (Cth) s 69ZE.

259 I think that there are reasons why no intention to legislate in respect of ex-nuptial children ordinarily resident or domiciled in Western Australia should too readily be imputed to the Commonwealth.

260 It is doubtful whether this child's parents ever had any plan to reside in the Northern Territory indefinitely, or that they established a different domicile from Western Australia. The child has spent so far about four and a half years of his life there. At the time of the applications to the court the appellant and the respondent were all resident in Western Australia and the appellant domiciled there.

261 I have referred to the domicile and residence of the parties because these were matters which were relevant to the exercise of the parens patriae jurisdiction of the High Court of the United Kingdom and the Supreme Courts of the States. In Western Australia the Supreme Court could always exercise the parens patriae jurisdiction subject to any statutes dealing with children on the grounds of nationality and ordinary residence[243].

262 The classical statement is that of Lord Campbell in *Johnstone v Beattie*[244]:

> "I do not doubt the jurisdiction of the Court of Chancery on this subject, whether the infant be domiciled in England or not. The Lord Chancellor, representing the Sovereign as *parens patriae*, has a clear right to interpose

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243 *Corin v Corin* (1991) 7 SR (WA) 124.

244 (1843) 10 Clark & Finnelly 42 at 119-120 [8 ER 657 at 687]. See also *Descollonges v Descollonges* 183 NYS 2d 943 (1959); *In re P (GE) (An Infant)* [1965] Ch 568 per Lord Denning MR. See also Holdsworth, *A History of English Law*, 2nd ed (1937), vol 6 at 648:

> "The equitable control over infants, and the guardians of infants, arose in its modern form after the abolition of the military tenures, and the court of Wards and Liveries. The equitable jurisdiction was based, it is said, not on any inherent jurisdiction, but upon a special delegation by the crown of its prerogative right, as *parens patriae*, of looking after their interests. In 1696, in the case of *Falkland v Bertie*, it was said, 'In this court there were several things that belonged to the king as *pater patriae*, and fell under the care and direction of this court, as charities, infants, idiots, lunatics, etc. Afterwards such of them as were of profit and advantage to the king were removed to the court of Wards by the statute; but upon the dissolution of that court, came back again to the Chancery.' This view has generally been accepted as the origin of this jurisdiction of the court; and it is true that, after the dissolution of the court of Wards, this jurisdiction of the Chancery developed." (footnotes omitted).

the authority of the Court for the protection of the person and property of all infants resident in England."

263 It is unlikely that against the background of the long history of the exercise of the parens patriae jurisdiction over children essentially based on residence that the Commonwealth would have set out to legislate for the guardianship and custody of ex-nuptial children no matter where they might be resident at any time during infancy[245]. (No question arises in this case as to the operation of the principle in those cases which might attract the diversity jurisdiction[246]).

264 The State of Western Australia has legislated in terms reflecting the usual jurisdictional basis of residence of children. Section 27(5) of the *Family Court Act* 1975 (WA) provides as follows:

"Subject to this Act, the court has non-federal jurisdiction under this Act to make an order containing a provision for the custody of, guardianship of, access to, or welfare of, a child-

(a) if the child in respect of whom the order is sought is then present in the State; and

(b) if the applicant or the respondent in the proceedings in which the order is sought is resident in the State."

265 Section 51(xxii) has no operation in relation to an ex-nuptial child. Nor do I think did s 63F of the *Family Law Act* 1975 (Cth) in the circumstances that existed when it fell to be invoked, if it could be. Neither the child nor his parents was or were resident out of Western Australia. That State has, within its legislative

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245 See *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682-683 per Mason J:

> "The general rule is that the courts will construe a statute in conformity with the common law and will not attribute to it an intention to alter common law principles unless such an intention is manifested according to the true construction of the statute."

See also *Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd* (1999) 162 ALR 382 at 394-395 per Gaudron, Gummow and Callinan JJ. See also Nygh, *Conflict of Laws in Australia*, 6th ed (1995), at 435 who is of the view that the *Family Law Act* 1975 (Cth) does not confer jurisdiction on the Family Court of Australia in respect of ex-nuptial children who are, at the date of institution of proceedings, neither present nor ordinarily resident in a referring State or Territory.

246 Constitution s 75(iv).

competence, legislated to make provision for the guardianship of ex-nuptial children and on a residential basis.

266 The focus is, and always has been, appropriately upon residence, and in particular the residence of the child. Whilst it is settled that a court having jurisdiction to make orders for custody and guardianship of a child may at common law make such orders, even if the child is out of the jurisdiction[247], it has been said that it is "the rarest possible thing for a judge of … the High Court to make a custody order in respect of a child who is out of the jurisdiction"[248].

267 I am inclined therefore to take it as correct, although I need not, and do not decide, that s 63F was intended to operate only in respect of ex-nuptial children over whom the jurisdiction would ordinarily be exercised, that is, children ordinarily resident within that jurisdiction, and not over children resident elsewhere who would both at common law and under specific statutory provision be subject to the jurisdiction of a different court or bound by legislation (without a court order) of a different polity. However I am of the opinion that it was certainly not intended to operate in the present situation in which both parents and the child were resident in Western Australia. Accordingly, in my opinion no question of inconsistency calling for the application of s 109 of the Constitution arises.

268 Both parties seek to rely upon s 49 of the *Northern Territory (Self-Government) Act* 1978 (Cth), the Northern Territory equivalent of s 92 of the Constitution:

> "Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

269 The appellant's submission is that intercourse between the Territory and the States is not in any sense "free" if a person, the appellant, loses a right conferred by a Territory in consequence of having entered into a State. The same submission is put in respect of the child's rights. The lost right is said to be the statutory right to guardianship conferred by s 63F of the *Family Law Act* 1975 (Cth) if the correct view is, contrary to the appellant's first submission, that s 35 of the *Family Court Act* 1975 (WA) comes into operation as soon as, and as a result of the crossing of the border between the Northern Territory and Western Australia by any of the parties or the child. The appellant submits that the statutory deprivation thereby

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247 *Hope v Hope* (1854) 4 De GM & G 328 [43 ER 534]; *R v Sandbach Justices; Ex parte Smith* [1951] 1 KB 62; *Harben v Harben* [1957] 1 WLR 261; [1957] 1 All ER 379.

248 *Harris v Harris* [1949] 2 All ER 318 at 322; *Moses v Stephenson* (1981) 10 NTR 32 at 33.

caused constituted a "burden, hindrance or restriction" within the meaning of *Gratwick v Johnson*[249].

270 This argument does not require lengthy discussion. Even if I were to assume that the appellant had a continuing statutory entitlement to joint guardianship of the child, and the child that entitlement so far as both parents are concerned, I do not think it apt to regard it as a right in any ordinary sense. However it may be characterised, it must always give way to, and be subject to displacement or alteration by order of a court. That a voluntary movement from one jurisdiction to another may subject a parent, or a child to a different statutory regime making provision for the welfare of the child, cannot mean that the appellant or the child has been subjected to a burden, hindrance or imposition. So far as the parents are concerned the birth of children to them will always create obligations. Practically everything a parent thereafter does will be affected or influenced, personally, socially, residentially and familialy by such an event. As much pleasure as the birth may give it will also give rise to what some would describe as burdens[250]. Section 63F should not be regarded as having conferred a right upon a parent or a child but rather as stating what the relationship of the child to his or her parents is to be in the absence of any order to the contrary, or other valid statutory provision.

271 Before dealing with the respondent's argument that Order 2 of the Full Court's order (as with the like order of the primary judge) should be struck down by s 92 of the Constitution it is convenient to dispose of a prior argument that this order, expressed in injunctive language could not be made under the *Family Court Act* 1975 (WA). I do not doubt that it could be. Section 28(3)(a) is expressed in very broad terms:

> "Subject to this Act, in exercising its non-federal jurisdictions with respect to a child the Court may –
>
> (a) make such order in respect of those matters as it thinks proper;"

272 Section 28A(1) should also be noted:

> "The Court in exercising its non-federal jurisdictions under this Act may grant an injunction, either unconditionally or upon such terms and conditions as the Court thinks appropriate, by interlocutory order or otherwise (including an injunction in aid of the enforcement of an order), in any case in

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249 (1945) 70 CLR 1 at 17.

250 "He that hath wife and children hath given hostage to fortune; for they are impediments to great enterprises, either of virtue or mischief" (Bacon, "Of Marriage and the Single Life", *Essays* (1625)).

which it appears to the court, having regard to the principles set out in section 28, to be just or convenient to do so."

273 The words "as it thinks proper" do not mean that the Court can make any order at all. So long as an order is properly directed to the subject matter of the Act authorising it, is within the power or jurisdiction conferred, and is not otherwise invalid (eg on constitutional grounds), it will be maintainable. A court should construe a provision appearing to give virtually untrammelled power in such a way as to confine its operation to one that is within power[251]. That is how s 28(3) should be read here.

274 The respondent in advancing her argument that the order restraining any change of residence of the child, accepted that s 92 did not operate to strike down executive action or orders of a court, but rather the legislative provisions which purport to support or authorise them to the extent necessary to ensure that infringing activities or orders will not be permissible: and in some cases that may mean that the legislative provision may be wholly invalid[252].

275 If the respondent's submission that ss 28(3), 28A and 36A of the *Family Court Act* 1975 (WA) are unconstitutional to the extent that they purport to authorise orders restricting either directly or indirectly personal movement across state borders be correct, it would also require that Pt VII of the *Family Law Act* 1975 (Cth) be similarly read down so that the Family Court would also be precluded from making orders having a like effect. To mount her submission the respondent was also forced to point to indirect effects, because, in terms, the order does not operate in relation to the respondent personally, and indeed makes no reference to interstate movement.

276 The principle which the authorities state is that movement by people between states should be able to take place without regard to state borders[253]. Various formulations have been adopted. Satisfaction of the guarantee of freedom does not require that every form of movement or intercourse must be left unrestricted or unregulated[254]. The freedom of which s 92 speaks must be balanced "against …

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251 cf *Re JJT; Ex parte Victoria Legal Aid* (1998) 72 ALJR 1141 at 1164-1165; 155 ALR 251 at 284-285.

252 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 56-57 per Brennan J.

253 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99 at 117; *Gratwick v Johnson* (1945) 70 CLR 1 at 17; *Cole v Whitfield* (1988) 165 CLR 360 at 393; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 54.

254 *Cole v Whitfield* (1988) 165 CLR 360 at 393; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 56; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 307-308, 333, 366-367, 384, 392, 396.

other interests in an ordered society which must be recognised by the law"[255]. A determination of what (if any) burden might be validly imposed on intercourse or movement depends on the form and circumstances of the intercourse or movement involved[256].

277 It has been held that laws not aimed at intercourse between states but which may place a burden on such intercourse will not be invalid provided that the means adopted to achieve the object of the law are neither inappropriate nor disproportionate[257]. It is right, I think, to say that McHugh J in *Cunliffe*[258] contemplates a somewhat more strict test of a challenged law than the other Justices in that case:

> "But given that emphatic injunction that the freedom of intercourse is absolute, it is a natural, if not necessary, conclusion that the freedom of intercourse guaranteed by s 92 should be impaired only by laws that are necessary for the government of the nation or its constituent parts. A law is necessary in the relevant sense only if there is a real social need for it and the restriction or burden on interstate intercourse is 'no more than is proportionate to the legitimate aim pursued'[259]. Unless the impact of legislation on the freedom of interstate intercourse is so restricted, the freedom of intercourse that s 92 guarantees would be a freedom that was subject to enacted laws. Such a construction would make s 92 superfluous and fail to give effect to the injunction that the freedom is to be absolute. The words 'intercourse among the States … shall be absolutely free' in s 92 should, therefore, be given their ordinary and natural meaning, limited only by the need to accommodate laws that are reasonably necessary for the government of a free society regulated by the rule of law.
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> Obviously, a law that incidentally restricts or burdens interstate intercourse as the consequence of regulating another subject matter will be easier to justify as being consistent with the freedom guaranteed by s 92 than a law that directly restricts or burdens a characteristic of interstate

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255 *Levy v Victoria* (1997) 189 CLR 579 at 607 per Dawson J.

256 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

257 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 58-59 per Brennan J; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 191-196 per Dawson J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 333 per Brennan J, 366 per Dawson J, 384 per Toohey J.

258 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 396.

259 cf *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 283-284.

intercourse. But whether the restriction or burden is direct or indirect, it is inconsistent with the freedom guaranteed by s 92 unless the restriction or burden is reasonably necessary for the government of a free society regulated by the rule of law."

278 The attraction of the test propounded by McHugh J, as I read it, is that, among other things, it places less emphasis on "proportionality" and it appeals to a less uncertain test, of reasonable necessity. It is unnecessary for me to decide whether I would be free to choose McHugh J's test because, by reference to any of the tests, I do not think that the sections of the *Family Court Act* 1975 (WA) under attack (and accordingly the force of the challenged order made under them) are rendered invalid by s 92 whether the argument be that the relevant burden is imposed upon the child or the respondent.

279 First, it is relevant but of course not decisive that the sections make no reference to interstate intercourse. Secondly, they are not aimed at interstate intercourse. The sections are adapted to achieve their object, of ascertaining and ensuring the best interests or welfare of children, the place of residence of whom will almost always be, if not always be, critical to a child's welfare. The laws are not disproportionate or inappropriate, and I would regard them as reasonably necessary to secure or protect the welfare of children ordinarily resident in Western Australia. To the extent that reasonable regulation may also be a test, they satisfy it also[260].

280 The respondent also seeks to invoke international treaties to support the existence of a right to a freedom of movement for a custodial parent[261]. The invocation is sought on the basis that there is a relevant ambiguity in how the statutory powers of the Court should be exercised.

281 In my opinion there is no ambiguity in the provisions which define the applicable principles[262] and accordingly I need not decide in this case whether resort may be had to those treaties in aid of the construction of the state law.

282 The next matter to be decided is whether, in making the orders that the Full Court did, and to the extent that those orders affirmed the ones made by the primary

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260 *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1.

261 International Covenant on Civil and Political Rights (ICCPR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); United Nations Convention on the Rights of the Child (UNROC).

262 See *Family Court Act* 1975 (WA) s 28.

judge, the Full Court and the primary judge made errors of law in exercising the discretions that they did.

283 The respondent presented her case in various ways. At one point she claimed that the error lay in the failure to decide as a first premise whether she or the appellant should have the custody or guardianship of the child. Only after that decision was made, the respondent argued, would it have been appropriate to decide whether any order should have been made respecting the residence of the child. It was the respondent's submission that had the issues been approached in this way the case for the residence of the child with the respondent in the Northern Territory might, or indeed would have borne a different complexion. This submission required the discrete treatment in a particular order of the issues. Alternatively, the respondent argued, had the welfare of the child, his residence and the circumstances of each of the parents been treated as related but non-sequential matters as they should have been, the Full Court and the primary judge might, or would have exercised their discretions differently.

284 These submissions do not have regard to the way in which custody cases are usually, and this one was in fact conducted. 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[263]. 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.

285 This is very much the situation that existed here. Counsel who represented the appellant at the hearing before Holden J opened his case in this way:

> "There is really only one issue in my submission, your Honour, and that is where - - or, which principal place of residence - - will best serve the future welfare of this child.
>
> The - - that issue - - you are presented with three options, effectively, by the parties, in resolving that issue, and those three options are simply: firstly, that the child continues to principally reside with the mother in Perth; secondly, that the child principally resides with the father in Perth; or, thirdly, that the child principally resides with the mother in Darwin, or elsewhere in the Northern Territory. Now that, essentially, is what this case is about. Our submission is, that decision having been made, the parties are likely to be

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263 See Div 4 of Pt VII of the current *Family Law Act* 1975 (Cth) which defines a parenting plan proposed and made by parents (s 63C) and capable of registration and which may be registered in the Court "having regard to the best interests of the child to which [it] relates" (s 63E(3)).

> able to sort out the final details of the arrangements then to be made for the child. That has been the history of the parties' dealings with each other, in the 2 years since separation. They only had to call upon - - not only the court - - but they've only even had to call upon solicitors to try and resolve this issue, of whether the child should be allowed to go to Darwin, or whether he should now take up residence principally with the father. Being able to simply express the issue, belies the gravity of the matter, and the difficulty in weighing it up, and that's, in my submission, evident from the authorities cited by both myself and my friend, and the difficulty in cases where the merits of both parents are finely balanced."

286 No exception was taken to the way in which the matter was put on behalf of the appellant and indeed the respondent's counsel responded to the trial judge's invitation to the respondent to state her proposition:

> "HIS HONOUR: Well, I understand what you're saying. Let me ask: if I decide that it is in the child's best interest that the child remain in Perth, what does the mother propose to do?
>
> MS TURLEY: Your Honour - -
>
> HIS HONOUR: Does she propose to stay in Perth, or go to Darwin?
>
> MS TURLEY: Your Honour, the mother proposes to stay in Perth.
>
> HIS HONOUR: Yes. And all of her reasons for wanting to move to Darwin, are as set out in her affidavit?
>
> MS TURLEY: Yes, your Honour."

287 The parties maintained and repeated these positions throughout the hearing.

288 Accordingly it is not surprising to discover that a substantial part of the reasons of the trial judge are taken up with the relative advantages to the child of residence in Perth or in Darwin.

289 I can discern no error in the way in which the trial judge set out to exercise and exercised his discretion. His Honour first summarised the parties' lives as they affected the child. He next turned to a consideration of the welfare of the child, and understandably referred in this context to the respondent's preparedness to remain in Perth if the Court thought the child should reside there. He then gave careful consideration to each of the matters that the *Family Court Act* 1975 (WA) required him to take into account. His Honour next said:

> "This case involves a contest between two capable, caring and loving parents. They both profess to have nothing but the child's best interests at heart and

no doubt that is true. The unfortunate thing is that they have differing ideas as to what would best fulfil the child's needs and therefore the unenviable task of deciding that matter falls to the Court. In my opinion, there is one very important factor in this case which separates the parties. That factor is that ever since [J] was born the mother has been his primary caregiver."

290 And later he said:

"Given the historical pattern of care for the child, and given the warmth and standard of that care, I cannot see that it would be desirable to now remove the child from the care of his mother unless there was some compelling reason to do so. In my opinion, no such reason, compelling or otherwise, exists. Whilst the mother has been administering this care to the detriment of her own personal position, the father has been able to continue working, to continue pursuing his career, to acquire property and commence a family. For him to now say that the result is that he can provide a better environment for the child is, in my view, unfortunate. It has been suggested, somewhat critically, that the mother has said some unkind things about the father during the course of these proceedings. To the extent that that is so one can understand how she may feel.

For the reasons expressed above, in my opinion, the best interests of the child [J] would be best served by him remaining in the custody of his mother."

291 The possible residence of the child in Darwin was then given extensive consideration. It had to be. It was highly relevant to the child's "education and upbringing" an expression used in s 39A(1) of the *Family Court Act* 1975 (WA). His Honour discussed the advantages and disadvantages attaching to residence of the child in either of Perth or Darwin. He did not disregard the aspirations of the respondent to order her own life. He acknowledged those aspirations in this unexceptionable passage:

"In considering the last matter and subject to the welfare of the child being the paramount consideration, a custodial parent and particularly one with sole guardianship of a child should be free to order his or her own life without interference from the other party or the Court[264]. Whilst these are the general principles, the fact remains as was stated by the Full Court in *I & I*[265] that each case is different and must be approached from the point of view of its own particular facts, bearing in mind the paramountcy of the child's welfare."

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264 See *Fragomeli and Fragomeli* [1993] FLC 92-393 and *I and I* [1995] FLC 92-604.

265 [1995] FLC 92-604.

292 In the end the primary judge thought the welfare of the child would be better served by his residence in Perth:

> "For all of the child's life he has had the benefit of considerable contact with each of his parents. Each of them has had considerable input into the child's upbringing. Although the child has always enjoyed a relationship with members of the extended families, since the mother has moved to Perth he has been brought up in an environment of close interaction with members of both extended families. From the point of view of the welfare of the child it seems to me that he has been in as an ideal situation as he could possibly be in given that his parents do not live together. It is my opinion that the welfare of the child would be better promoted by him continuing in that situation in the absence of any compelling reasons to the contrary. Accordingly, the mother's application for a release from her undertaking will be dismissed and an injunction will be made restraining her from removing the child from the Perth Metropolitan area."

293 I do not take his Honour there in using the word "compelling" to be saying more than that in this case there would need to be strong, indeed compelling reasons, for an order which would allow the child to reside other than in Perth. His Honour was not purporting to state any general legal principle. In many cases the happiness of the parents and the extent to which the wishes and hopes of each of them are being fulfilled will be capable of having an impact upon the welfare of children. However the relevance that a parent's desire to live in a particular place will have must depend upon the circumstances of the case and is susceptible of no statement of general principle.

294 The Full Court could detect no error in his Honour's approach to the issues which led to the making of the order with respect to residence that he did and nor can I. The relevant legislation does not require that a judge consider any factor in any particular order. Sometimes it may be convenient to deal with some matters ahead of others, but the only critical requirement is that whatever approach is adopted it be the one best adapted to the case in hand to the ascertainment of the welfare of the child.

295 This case was, like so many of these cases, one in which each parent was honestly striving to secure the best interests of the child. Because each was well intentioned, and suitable as a guardian and custodian, the trial judge was obliged to make some very difficult choices indeed. What is important is that a court have proper regard to all of the relevant matters in order to determine how and where the best interests or welfare of the child will be served. It cannot be inappropriate in determining that matter to consider the legitimate aspirations and desires of those who wish to have the custody and guardianship of the child. This the trial judge anxiously did and has not been shown to be in error in so doing, either in the Full Court or here.

296 I would dismiss both appeals and make no orders as to costs.