

Lives torn asunder

Caroline Overington | *June 09, 2009*

Article from: [The Australian](#)

MOST of what used to be called child custody cases are settled between divorcing parents well before the case gets to the Family Court. Those that aren't typically involve couples who loathe each other with such intensity that they cannot agree on even the smallest matters regarding their children.

They need a judge to decide where the kids will live after divorce, how often they should see the other parent, what surname the children should have and where they should go to school.

Then, too, there are the so-called relocation cases where one parent, usually the mother, wants to move and take the children with her. Sometimes it's because she's escaping an abusive, violent marriage and wants a fresh start. Other times it's because she wants to move to be with her new partner. Sometimes she wants to be nearer to her own mother or to other family members who may be able to help her with the children; or to an area where there is cheaper housing; or where she's likelier to find work.

In almost every case, if she gets permission to go, it will mean her children will be able to spend much less time - sometimes hardly any time - with their father, who naturally enough will fight to stop the relocation.

Not for nothing, then, did former Family Court judge Richard Chisholm describe relocation cases as the "San Andreas fault" of family law. They are cases that lead to rupture and ruin in families.

There was some hope in 2006 that this might change. In July that year the Howard government introduced what is known as the shared parenting amendment to the Family Law Act. The idea behind the amendment was simple: it was in the best interests of children that they had a meaningful relationship with both parents after divorce and that usually meant spending significant time with both parents, during the week, on weekends and during the holidays. On the subject of relocation cases, the amendment was silent. It didn't say that mothers couldn't move with their children after divorce; it didn't say that they were still allowed to move after divorce.

There was a feeling, however, that the amendment would make it more difficult for mothers to relocate after divorce because it was difficult for a child to have a meaningful relationship with their father, if they lived in, say, Colorado, and he lived in Melbourne.

Three years on, it's clear that the law has made it more difficult for parents to relocate after divorce. Two academic studies have independently reached that conclusion, and both agree that an international relocation is harder still. As far as the Shared Parenting Council of Australia is concerned, that's a good thing.

After all, before the law came in, mothers were generally allowed to go wherever they wanted after divorce. They could meet someone on the internet who lived in the US, for example, and as

long as they were the primary carer of the children there was a good chance the Family Court would let her leave the country to pursue that relationship, in the process rupturing whatever relationship they had with their real dad, who most likely loved them very much and was a critically important person in their lives.

That kind of thing is now less likely to happen but it's still not impossible for mothers to leave the country with their children, as fathers are finding out.

In one recent case, known as Bletch and Douglas, a mother was allowed to move with her nine-year-old son to the US after developing a "unique communications skill" that landed her a media profile, a \$450,000 book advance and interest from talk shows. The father, who has fought for years for greater access to his son, was told that he could have access during the school holidays, and make use of emails and webcam. The father could not believe the shared parenting laws would support such an arrangement. He flew to the US and tried to see the boy there, landing himself in trouble with local police.

In another case, known as Bradley and Bradley, a mother was permitted to return to her native Sweden with her two children after her marriage ended. She alleged child abuse. It was never proven and the judge did not accept that it had occurred. He acknowledged the distress the relocation would cause the children's father, saying "communication with the children will be difficult" since they would be living on opposite sides of the world. But he thought the father could stay in touch by email. The judge said the mother would have access to superior child care and affordable accommodation in Sweden. She also would be close to her family. The children would fly out to visit or else the father could visit them in Europe.

Groups such as the Shared Parenting Council were stunned that such decisions were possible under the law.

As lawyer David Alexander told a seminar in March, the laws didn't introduce a specific presumption against relocation. Instead, Alexander explained, the starting point for the court was that a child's best interests were served by having parents who had equal shared parental responsibility after divorce.

But that didn't mean a 50-50 time split was the automatic outcome. It would sometimes mean that the mother was restrained from moving the children too far from the father, but not always. To illustrate, Alexander used several recent cases in which the mother wanted to move the children, but was restrained by the Family Court. In one such case, the mother had in mind a move from Sydney to the NSW Hunter Valley. She thought it would be better for the children to live a rural lifestyle and she'd be able to afford a larger home. The judge restrained her, saying such a move would make it "impractical for the father to spend substantial and significant time with the children".

In another case, two children aged six and three were living with their mother on the south coast of NSW. She moved to a town 144km from the children's father. The court ordered her to return the children, saying they were entitled to significant time with their father and that was best achieved by having them live nearby.

Alexander concluded that there was a "fresh approach to the involvement of both parents in the lives of their children" and it "seems likely that the court will find it easier to deny an application to relocate".

"It's now a relatively simple matter for the non-residential parent to claim that even a short-distance relocation will preclude substantial and significant time (with the child)."

It's not always the case that a mother won't be able to move overseas or interstate.

In *Godfrey and Sanders*, for example, the Family Court allowed a mother to move from Melbourne to Brisbane, over the objections of the father. The court said the shared parenting law promoted a child's right to a meaningful relationship with both parents, but meaningful didn't mean optimal and while it obviously wasn't ideal for the children to be living in one state while their father lived in another, there was still opportunity for them to have a meaningful relationship on school holidays and by email.

That different judges in different states are making difficult decisions under the law is vexing for lawyers, who are finding it difficult to advise their clients. But the case that really has brought confusion about the law is that known as *Rosa and Rosa*, which came before the Family Court last month.

Mr and Mrs Rosa (pseudonyms) were married in Sydney in 2000 and had a daughter in 2002. In early 2007, when the child was five, the couple moved to a remote town in Queensland so the father could take up a job as a mining engineer. Six months later, the marriage ended. (Under law it's irrelevant for the purposes of child custody who ended the marriage, but for the record, the father told the mother it was over, packed up her things and put them out on the deck.)

The mother took their daughter back to Sydney, but the Family Court ordered her to return the child to the remote town where her former husband lived, while the parents fought over where their daughter should be reared. The mother wanted to move her back to Sydney, for good reason. In the remote town, where rents were high and men outnumbered women by a considerable degree, she could afford only to live in a caravan park. She had no family in the area and few friends.

The mother told the court she was isolated and broke, and wanted to go home to Sydney, where she would be able to find a job and would have the support of her own mother.

Federal magistrate John Coker, presiding over the initial hearing, asked the mother whether she would go to Sydney without her daughter. She said she would not, and in fact said she would never leave her daughter.

Coker asked the father if he would go to Sydney, if that was where his daughter was living. He said he would not because he wanted to keep working at his job. Asked whether he could find work elsewhere, the father said that yes, but he enjoyed this job in Queensland and wanted to keep it.

Given that the father would not leave Queensland and the mother would not leave her daughter, Coker decided that the only way the child could have a meaningful relationship with both parents was to have her live with her mother in far north Queensland in a week-about arrangement with her father.

The decision effectively ties the mother to the father's job, which itself presents an interesting conundrum for the future. What, for example, should happen if the father decides to take a new job in another mining town? Will he be allowed to take his daughter with him and, if so, must the mother follow? It seems likely that parliament did not intend to hobble women in this way.

Zoe Rathus is a senior lecturer in law at Griffith University. She is cautious about reading too much into the *Rosa* decision, saying it may not be precedent-setting.

"Playing the devil's advocate here, there are some cases that have gone the other way," she says.

"Whatever has been decided in this particular case, it doesn't mean that every parent in Australia who needs to relocate after a divorce should assume that they won't be able to do it. There is nothing in the (new) law that says that. And another judge might have made a completely different decision in this case." But, she says, the laws "create a complex set of ideas, and it's a set of ideas that crash into each other and there is a great deal of confusion at the coalface of family law about what the new law says and what it actually means, and how it is working, in practice, and it's usually not a good idea for confusion to reign".

The federal Attorney-General's Department is believed to have an appetite for change to the shared parenting law but is proceeding with caution. Before it does anything, it wants to see the results of a review of the law by the Australian Institute of Family Studies, a review that was built into the original law. That report is due in December. Attorney-General Robert McClelland has commissioned his own report, which is due by the end of the year.

The Australian has put questions about the shared parenting law, and the confusion it seems to be creating, to Family Court Chief Justice Diana Bryant.

Her office says there are three points for separating parents to keep in mind.

First, each case will be determined on its unique facts, and judges must consider the best interests of the individual children in each case.

Second, there is no particular pattern that can be relied on to predict a decision and, therefore, it makes no sense to go to court, believing that a particular outcome is certain.

Third, an appeal court may be comprised of judges who will have decided a matter differently at the first hearing and who may indeed believe that the lower court's decision is an awful one, but they can't overturn a decision unless there has been an error of law.