



RELOCATING WITH MINOR CHILDREN POST DIVORCE

1 INTRODUCTION

Relocating to another province, or even overseas, is something often considered once a final order of divorce has been granted. Relocating with minor children is somewhat trickier as the relocation of a primary caregiver with his/her child(ren) greatly impairs a caring and concerned non-primary caregiver's care, contact and relationship with his/her children. The Principal Family Court Judge of New Zealand, Boshier P has described relocation cases as "cases that involve two competent and committed parents, one with sound reasons for wishing to relocate, the other with valid reasons for resisting the application".¹

More often than not parties' turn to the court for guidance in respect of relocation disputes as the non-primary caregiver does not want to consent to the proposed relocation.

2 BEST INTEREST OF THE MINOR CHILD(REN)

¹ Boshier P 'Have the Judges been missing the point and allowing relocation too readily?' (2010) 1.2 *Journal of Family Law and Practice* 10.

It has been said that the 'best interests of the child' principle runs like a golden thread through the fabric of law relating to children.² This principle is reiterated in both the Children's Act 38 of 2005 ("*the Act*"), and the Constitution of the Republic of South Africa ("*the Constitution*"). Section 9 of the Children's and Section 28(2) of the Constitution of the Republic of South Africa in essence states that a child's best interests are of paramount importance in every matter concerning the child.

South Africa however has no specific legislation dealing with relocation disputes concerning minor children and as such courts implement the 'best interests of the child' principle as a guiding factor in determining whether or not a relocation order should be granted. The traditional position favoured by our courts has been that it is generally considered to be in the minor child(ren)'s best interest to remain with the custodial parent. The case of *F v F*³ however made it clear that courts must not readily assume that the primary caregiver's proposals are necessarily compatible with the child's welfare.

From the aforementioned it is clear that when a court is faced with the adjudication of a relocation dispute the most important legal issue to be considered by it is whether the relocation is in best interests of the child, but this does not mean that the parent's interests are completely disregarded.

Section 7 of the Act sets out a lengthy list of factors that can provide guidance to courts when determining the best interests of a child. These include (1) the nature of the relationship between the child and parents⁴; (2) the attitude of the parents toward the child and to the exercise of parental responsibilities and rights in respect of that child;⁵ (3) the likely effect on the child of changed circumstances such as separation from either or both parents;⁶ (4) the need for

² *Kaiser v Chamber* 1969 (4) SA 224 (C) at 228 G.

³ *F v F* 2006 3 SA 42 (SCA).

⁴ Section 7(1)(a).

⁵ Section 7(1)(b).

⁶ Section 7(1)(d).

the child to remain in the care of his or her parent, family or extended family and to maintain a connection with his or her culture or tradition;⁷ (5) the child's age, maturity, stage of development, background, physical and emotional security and intellectual, emotional, social and cultural development;⁸ and (6) the need of the child to be brought up within a stable environment.

Although the Children's Act can assist with determining the best interest of a child, it does not set out a criteria that can be used for cases dealing with the issue of relocation, and as such case law also has to be taken into account.⁹ From case law it is clear that our courts are not in agreement in respect of the approach that should be taken when dealing with relocation applications. It is however evident that there are two distinct approaches traditionally followed, namely the pro-relocation approach and the neutral approach.¹⁰

When following the pro-relocation approach, there is a general acceptance or, in some instances, a presumption in favour of the primary caregiver (in most, but not all instances the mother).¹¹ The minor children are subsequently allowed to go with the primary caregiver wherever he or she chooses to live, unless it is necessary to restrain a relocation to prevent harm to the children. The non-relocating parent must prove that the proposed relocation is clearly detrimental to the children, otherwise relocation would be authorised. The pro-relocation approach is based on the premise that the relocation decision should be shown to be reasonable and *bona fide*.

When applying the neutral approach, there is neither a presumption in favour of or against relocation and a court applies a fresh inquiry into each case as it

⁷ Section 7(1)(f).

⁸ Section 7(1)(g)-(h).

⁹ Section 71(1)(k).

¹⁰ Domingo W 'For the Sake of the children': South African Relocation Disputes' *PER* (2011) 14(2) 153.

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arises.¹² In other words, the approach is to accept no presumptive right of either parent to move or not to move.¹³ Relocation disputes are adjudicated on a case by case discretionary basis, and both parents are placed on an equal footing and their interests are balanced fairly against the child(ren)'s best interests. It is often argued that the neutral approach is more in line with the Children's Act and from case law it is clear that we are moving towards a more neutral approach when dealing with relocation disputes.

Seeing as there is no legislative framework providing guidance to courts when adjudicating relocation disputes the court considers various factors to make a determinations. These factors *inter alia* includes (1) the best interest of the child principle, which are of paramount importance; (2) the purpose/motive of the relocation (must be reasonable, genuine, bona fide and not an attempt to frustrate the non-custodial parent's care and contact rights); (3) the interests of the relocating parent, such as their freedom of movement, and that of the non-relocating parent; (4) the relationship the minor child(ren) have with their parents; and (5) the views of the children depending on their age and maturity.

3 CONCLUSION

From the abovementioned it is clear that relocation is not provided for in the Children's Act, and neither has a uniform approach been adopted by courts when adjudicating such disputes. There is an apparent gap in the law which needs to be filled in order to provide certainty and consistency in the way courts deal with relocation disputes. For the sake of the affected minor children greater legal certainty and consistency surrounding relocation disputes are desperately needed.

¹² Domingo W 'For the Sake of the children': South African Relocation Disputes' PER (2011) 14(2) 156

¹³ Domingo W 'For the Sake of the children': South African Relocation Disputes' PER (2011) 14(2) 156

Contact Malan Lourens Viljoen Inc should you want to relocate with your minor children post divorce.

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