



Mother's Application to Relocate Overseas with Her 9 year Old Son Rejected By Family Court

Family Court decides it is in the best interests of the child to remain in Australia with his father.

INTRODUCTION

The case of *Lele & Janacek* [2015] FAMCA 752 was heard in the Brisbane registry of the Family Court of Australia and the orders delivered in Townsville on 11 September 2015. Ms Lele ("the mother") was seeking the court's permission to relocate from Australia to New Zealand with her 9 year old son. Her reasons for the move were that she believed she would have better prospects of employment in New Zealand, which would significantly improve her financial situation. She had family support in New Zealand.

Mr Janacek ("the father") opposed the mother's application.

The case was to prove more complex than first expected as there was a twist on the last day of the trial. The mother had not fully appreciated that her petition to relocate to New Zealand with her son would be opposed by the father. The mother upon realising that there was a possibility her petition could be denied, and soon after her evidence was concluded, altered her position.

The court was told via her lawyer that she had reconsidered her position and made the decision to relocate to New Zealand irrespective of whether the court permitted the child to accompany her or not. She sought no alternative regime of orders for spending time with the child in Australia in the event that relocation was not permitted; she only sought orders permitting her to spend time with the child in New Zealand.

This case therefore threw up two starkly different options:

- (a) either the mother be permitted to relocate from Australia with the child, in which event the child's relationship with the father would substantially be impaired; or
- (b) the child remain in Australia, in consequence of which his relationship with his mother would be substantially impaired.

BACKGROUND

The father was born in 1976 and was 39 years of age. He moved to Australia with his parents around 1980 and completed an apprenticeship before going into business for himself. The mother was born in 1969 and presently 46 years of age. She was born in New Zealand and came to Australia on a working holiday before meeting the father in October 2002.



In December 2002, the couple moved in together first into a rental property before moving in with the father's parents to help save money. In 2004 they moved away from the father's parents to a new home and the father set up a mobile paint and panel business. During their relationship the couple had two separations and on the second occasion the mother went back to New Zealand with the child before moving back to Australia to reconcile. The final separation occurred on 12 May 2012. Since separation both parties continued to live in Australia.

On 15 May 2013 the parties entered into interim consent orders and those orders provided for equal shared parental responsibility for major long-term issues relating to the child. They also provided that the father was to spend time with the child as agreed, or failing agreement, on alternate weekends from after school on Friday until the commencement of school on Monday. Implicitly, the orders provided that the child would otherwise live with the mother. The orders did not provide for any holiday time to be spent by the child with the father in default of agreement, or for any communication regime. The parties had been able to, from time to time, agree holiday times and have implemented a liberal telephone communication regime.

In October 2012 the child commenced seeing a psychologist. The psychologist gave evidence before the court of the child's initial presentation being one of aggression, angry outbursts at home and school, defiance and disobedience, lying, stealing and generally disruptive behaviour. The psychologist identified that the cause of this was the child's anger about his parent's separation. The mother also commenced seeing the same psychologist a month later and was diagnosed as having "mixed anxiety and depressive disorder".

THE ISSUES

During the trial, the Court identified the following as the significant issues in this case, which were likely to substantially bear upon the outcome. They were as follows:

1. What is the nature of the present relationship between each parent and the child?
2. How would the child benefit from a meaningful and optimal relationship with each parent?
3. What benefits would relocating to New Zealand have for the mother, particularly in relation to her financial circumstances and her family support?
4. If the mother and child relocated to New Zealand, would it be reasonably practicable for the father to do so as well, and is he likely to do so?
5. What would be the effect on the father's parenting capacity if he were to remain living permanently in Australia, but the mother and child relocated to New Zealand?
6. What would be the effect on the child of immediate relocation to New Zealand, and particularly, what would be the effect on him of:
 - (a) any diminished relationship with the father;
 - (b) any improvement in the mother's parenting capacity consequent upon her relocating;
 - (c) increased contact with the maternal family.
7. If permitted to relocate with the child to New Zealand, would the mother facilitate a meaningful relationship between the father and child?
8. What would be the effect on the mother's parenting capacity if she were to remain living permanently in Australia?
9. What would be the effect on the child if the mother were to relocate to New Zealand, without him?



In consequence of the mother's changed position on the last day of trial, the court had to consider if the father would facilitate a meaningful relationship between the mother and child if the child were to remain in Australia and the mother move to New Zealand. What capacity did the father have to be the primary care provider for the child?

NATURE OF RELATIONSHIP BETWEEN CHILD AND PARENTS

With the Mother

The mother had always been the primary care giver but the psychologist found that the child had a greater attachment with the father and was less secure with the mother. The psychologist's opinion did not surprise the Family Report writer in this matter. In his first Family Report, he observed that the child tended to "push boundaries and not comply immediately" with the mother's requests. In the course of observing the mother and child whilst preparing his second Family Report, he particularly noted that the mother's interactions with the child "did not reveal evidence of use of praise, encouragement or displays of physical affection." He noted that the mother was not as verbally engaging as the father with the child and she "displayed a quieter interaction style." He said "it was difficult to gauge the level of warmth and empathy (from the mother)". Sometimes the mother had to seek the father's assistance to foster respect and good behaviour from the child toward her.

With the Father

The psychologist presented to the court that the child had a secure relationship with the father and this was consistent with the Family Report written. The Report suggested that the father seemed to engage in a far broader spectrum of activities with the child than did the mother. For instance he took the child go-karting and to various car events. The child and father both share a great interest in motor vehicles.

His Honour was satisfied that indeed the child's most secure attachment was with his father, who engaged with the child in a far more interactive way than did the mother.



BENEFIT TO CHILD OF MEANINGFUL/OPTIMAL RELATIONSHIP WITH PARENTS

The Reports submitted to the court gave evidence to the effect that the child would benefit from an optimal relationship with the father, giving consideration to the mother's depression and what was described as a lack of insight into the importance to the child of the father in his life. This case however was looking into the future and focussing on what benefits might be made available to the child from an optimal relationship with the mother if her depression was alleviated, or if she were able to develop a greater insight into the importance of the child/father relationship.

The court was satisfied that the child would benefit from a meaningful relationship with both parents, but was likely to derive greater benefit from an optimal relationship with the father, at least on the mother's present state of psychological health.

BENEFITS TO MOTHER AND EFFECTS ON FATHERS PARENTING CAPACITY IN RELOCATION

The mother primarily relied upon two factors, which she said would benefit her from relocation. The first was improved financial circumstances. The second was improved family support. The mother was adamant that her financial circumstances would improve with relocation to New Zealand. However the mother's evidence did not really establish any dramatic improvement. The court was not persuaded that the mother would have substantially increased financial benefits upon her relocation, although considered it is possible. There was evidence that she would have increased family support; however that support could be significantly adversely affected if the child were to be resentful of relocation against his will. The level of distress caused to the child would be difficult and somewhat impossible to predict. The child had a history of anti-social behaviour arising from the parties' separation, and hence it was quite likely that that would ensue again. According to the court, that necessarily diminishes the value of any increased family support that the mother would have in New Zealand.

The only criticism mounted by the mother against his parenting was that he is a "fun dad" rather than one who does the less exciting aspects of parenting. The question arose as to the effect on the father if the mother were to relocate with the child, in consequence of which his contact with of the child would likely be substantially curtailed.

His Honour noted that there was some generous time offered by the mother for the father but there would be some financial costs impacting it. The Family Report writer gave oral testimony that there was a risk that if the father had less opportunity to be involved with the child, the relationship could fall down because, whether advertently or otherwise, it might begin to deteriorate. Therefore the concern was not so much one of parenting capacity, but rather the vibrancy of the relationship.



EFFECT ON CHILD OF RELOCATION

The court focussed largely upon the effect on the child of the relocation. The father's focus was the likely effect on the child of the diminished relationship with him. For the mother's part, she focussed on the alleged improvement in her parenting capacity, the benefits to the child of increased contact with her family. The father also briefly raised the issue that the child would be confronted with new schooling in New Zealand, at a time of considerable distress for him.

The child would not see his father with anything like the frequency that he presently did if permitted to relocate. The child was highly aware that this would be the consequence of relocation and both the psychologist and report writer voiced opposition to doing so. The child told the writer in the course of interviews that "I wouldn't get to see dad much" if he moved. The psychologist conceded that in her view the child's best interests would see him remain in Australia. Obviously central to her thinking was the effect on his relationship with the father, and the effect of relocation generally. The court was satisfied that the likely net effect of relocation on the child will in the short term be a negative one, and in the medium term difficult to predict. It was found that there was certainly no clearly established benefit which would likely flow to him from relocation.

ORDERS

After the court weighing up the effects of the relocation on the father, the child, the mother and the twist on the final day of the trial, the court determined that it was in the best interests of the child for him to remain with his father. The court made orders covering both situations of the mother relocating or also if the mother did remain in Australia.

(a) Living arrangements for the child

That in the event that the mother lives in New Zealand, the child shall live with the father during school terms and spend time with the mother during school holidays and the first half of the special occasions like Easter and Christmas holidays.

(b) Changeovers

The court made two sets of changeovers over depending on whether the mother relocated to New Zealand or remained in Australia.

(c) Passport and Travel out of the country

That the father hold the child's passport with the passport to be released to the mother when travelling and both parties were required to sign all requisite documentation to enable the child's passport to be renewed at the appropriate time.



JAMES MCCONVILL & ASSOCIATES

LEGAL UPDATE | FAMILY LAW | OCTOBER 2015

CONCLUDING REMARK

In cases where one parent decides to relocate a significant distance from the other parent, the Court must determine what is in the best interest of the child. This case was not a simple one, as on the last day of the trial the mother changed her position and was prepared to leave Australia with or without her child.

Although the mother was the primary care giver, the Court had to consider the existing relationship that the child had with both parents and the distress the child would likely experience by the relocation and separation from the father.

The Court was satisfied that the child had a stronger, more secure bond with the father and it would therefore be in the child's best interests to remain in Australia with his father.